

# Annual Report 2021/22

October 2022



The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

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# Annual Report 2021/22

October 2022



# About the Committee

The Committee was established on 26 May 2021. Its remit can be found at [www.senedd.wales/SeneddLJC](http://www.senedd.wales/SeneddLJC)

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Current Committee membership:



**Committee Chair:**  
**Huw Irranca-Davies MS**  
Welsh Labour



**Rhys ab Owen MS**  
Plaid Cymru



**Alun Davies MS**  
Welsh Labour



**James Evans MS**  
Welsh Conservatives

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The following Members were also members of the Committee during 2021/22.



**Jayne Bryant MS**  
Welsh Labour



**Peter Fox MS**  
Welsh Conservatives

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# 1. Introduction

The Legislation, Justice and Constitution Committee has a broad remit covering a wide range of areas. This annual report is intended to provide an overview of the work undertaken by the Committee since its establishment and up to the end of the summer recess 2022.

**1.** The Committee was established on 26 May 2021<sup>1</sup> to carry out the functions of the responsible committee set out in Standing Order 21 and Standing Order 26C, and to consider any other matter relating to: legislation within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation, devolution, the constitution (including Wales's constitutional future), justice, and external affairs, including (but not restricted to) changes to the devolution settlement, and intergovernmental relations.

**2.** In practice, this means that our work covers the following areas:

- the scrutiny of subordinate legislation in accordance with Standing Orders 21.2, 21.3 and 21.7(i);
- the scrutiny of Bills under Standing Order 26 within the policy remit of the Committee;
- the scrutiny of all other Bills introduced to the Senedd but focusing on specific non-policy matters;
- the scrutiny of consolidation Bills under Standing Order 26C;
- the scrutiny of legislative consent memoranda in accordance with Standing Order 29 and statutory instrument consent memoranda in accordance with Standing Order 30A;

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<sup>1</sup> Following a resolution in Plenary on 23 June 2021, the Interim Subordinate Legislation Committee became the Legislation, Justice and Constitution Committee.

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- the scrutiny of UK Government subordinate legislation making provision in devolved areas and written statements laid in accordance with Standing Order 30C;
- the scrutiny of Orders in Council under Standing Orders 25, 27.6A or 27.7B;
- considering the impact of UK Government Bills and UK Parliament Acts on devolution and Senedd law-making;
- the scrutiny of intergovernmental relationships;
- the scrutiny of international agreements;
- oversight scrutiny of common frameworks;
- scrutiny of the governance and implementation of UK-EU agreements, such as the Withdrawal Agreement and the Trade and Cooperation Agreement and;
- representing the Senedd on the Interparliamentary Forum and as an observer on the Parliamentary Partnership Assembly set up under the Trade and Cooperation Agreement;
- scrutiny of justice-related matters within our remit including budget scrutiny;
- policy inquiries in accordance with the Committee remit agreed by plenary;
- interparliamentary working to share knowledge and expertise with other parliaments in the UK.

**3.** Much of this scrutiny is subject to timetables and deadlines set either by the Senedd's **Standing Orders** or the Business Committee. As a result, our ability to be proactive within our broad remit is limited and our flexibility to act quickly is often dependent on our legislative workload. Therefore, at the start of the Sixth Senedd we decided to consider (in private) papers which monitored developments and provided updates to ensure we could take action on key issues arising within this broad remit when needed. After each meeting these papers were published as **monitoring reports**.

**4.** We have also **contributed** to the Business Committee's review of committee remits, highlighting the breadth of our responsibilities but recognising the interconnected nature of many of the subjects we cover.

- 5.** We would like to place on record our thanks to the Counsel General and Minister for the Constitution, Mick Antoniw MS (the Counsel General), for his willingness to appear before us and answer our questions on a regular basis.
- 6.** The following chapters highlight the work we have done in the first year of the Senedd, focusing on our findings and concerns, scrutiny successes and a forward look.

## 2. Legislative activity

### Scrutiny of subordinate legislation

#### Background

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- 7.** In Wales, the Welsh Ministers make subordinate legislation using powers given to them in enabling acts such as Senedd Acts, Assembly Measures and Acts of the UK Parliament. Subordinate legislation is also often referred to as delegated legislation, because the power to make subordinate legislation is delegated by the enabling Act. Subordinate legislation is also referred to as secondary legislation.
- 8.** The majority of Welsh subordinate legislation is **laid** before the Senedd and takes the form of regulations or orders (types of statutory instrument).
- 9.** Our role is to consider and report to the Senedd on subordinate legislation against criteria set out in:
- Standing Order 21.2 – we must consider and report on these matters. Matters reported under Standing Order 21.2 are known as technical reporting points covering such issues as whether the Welsh Ministers have the power to make the subordinate legislation in question, the clarity of the drafting and whether the drafting appears to be defective.
  - Standing Order 21.3 – we may consider and report on these matters. Matters reported under Standing Order 21.3 are known as merits reporting points covering such issues as points that are of political or legal importance or give rise to issues of public policy likely to be of interest to the Senedd.

#### Scrutiny in the past year

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- 10.** In July 2021, the **Welsh Government's first legislative programme for the Sixth Senedd** made it clear that, in this Senedd, a programme of regulation-making would take place to implement primary legislation passed in previous Seneddau. At the time, the Counsel General **said**:

*"This term, we must now take forward the implementing secondary legislation, without which the Acts cannot have their intended effect [and] we'll bring forward a substantial package of implementing legislation for major Acts passed in the last Senedd."*

**11.** To date, we have scrutinised subordinate legislation which implements (in full or in part) the **Renting Homes (Wales) Act 2016**, the **Curriculum and Assessment (Wales) Act 2021**, and the **Local Government and Elections (Wales) Act 2021**.

**12.** Some of the subordinate legislation we have considered has also related to the Covid-19 pandemic although to a lesser extent than our predecessor Committee scrutinised between 2020 and 2021, reflecting the overall nature of the pandemic in society.

**13.** Between May 2021 and July 2022 we reported on 234 items of subordinate legislation. (including 127 subject to the negative procedure, 23 to the made affirmative, and 52 to the draft affirmative). This compares to 111 items of subordinate legislation in the same period of the Fifth Senedd.

**14.** 49 of the items of subordinate legislation considered were laid before the Senedd in breach of the 21 day rule, meaning that the legislation came into effect less than 21 days after it had been laid. Almost all instruments related to the Covid-19 pandemic. Such breaches are notified to the Llywydd and to the Committee in accordance with section 11A(4) of the *Statutory Instruments Act 1946* (the 1946 Act). See, for example, **SL(6)013 - The Coronavirus Act 2020 (Residential Tenancies: Extension of Period of Protection from Eviction) (No. 2) (Wales) Regulations 2021**.

**15.** Furthermore, 11 of these 49 items also came into force before being laid. Such instances are also notified to the Llywydd and the Committee in accordance with section 4(1) of the 1946 Act. See, for example, **SL(6)095 - The Health Protection (Coronavirus, International Travel) (Wales) (Amendment) (No. 14) Regulations 2021**.

### **Case study: Scrutiny of regulations made under the Renting Homes (Wales) Act 2016**

As part of our scrutiny of all subordinate legislation laid before the Senedd, we scrutinised 15 sets of regulations made under the Renting Homes (Wales) Act 2016 (the 2016 Act), implementing new renting homes rules in Wales

We report only on the grounds set out in Standing Orders 21.2 and 21.3.

Although Standing Order 21.3(ii) refers to “public policy”, we do not scrutinise policy. This does not mean we ignore important policy changes introduced by subordinate legislation – we regularly note important policy changes either by noting them as reporting points under Standing Order 21.3(ii) or simply by including them in the Background and Purpose section of our reports. However, we neither support nor criticise policy. Policy scrutiny is a matter for the relevant Senedd policy committees. Furthermore, ultimately any piece of subordinate legislation

laid before the Senedd may (depending on the procedure) be annulled or not approved by the Senedd.

Against that background, below are some examples of reporting points we raised in respect of regulations that implement the 2016 Act.

### **The Renting Homes (Safeguarding Property in Abandoned Dwellings) (Wales) Regulations 2022**

Under Standing Order 21.3(ii), we probed the approach of these Regulations to pets/animals that have been abandoned in rented properties. The Regulations make no express provision for pets or animals, instead treating them in the same way as any other property abandoned in rented properties. We asked whether the Regulations should make express provision for pets/animals that had been abandoned.

The Welsh Government response noted that the issue was raised during initial consultation on the Regulations. As regards the Regulations themselves, the Welsh Government considered that they were flexible enough to deal adequately with any pets or animals left at a property. However, the Welsh Government also said it would add clarification to its guidance “so that expectations are clear on this matter”.

Under Standing Order 21.3(ii), we also asked the Welsh Government to clarify certain property law issues. For example, when (in accordance with the Regulations) a landlord sells property that has been abandoned in a rented dwelling, we asked the Welsh Government to clarify how title in the abandoned property transfers from the original owner to the buyer of the abandoned property?

The Welsh Government helpfully responded by referring to provisions of the *Torts (Interference with Goods) Act 1977*, which enables an “involuntary bailee” (in this case, the landlord) to sell the abandoned property, subject to certain conditions.

### **The Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022**

Under Standing Order 21.2(v), we reported our concern that these Regulations were misleading as regards the amount of compensation that landlords would have to pay, in particular the period in respect of which landlords are liable to pay compensation when they do not provide certain contract-holders with a written statement of the contract. Again, we noted the clear position in the 2016 Act which we considered was not as clearly reflected in the Regulations.

The Welsh Government response said that the Regulations, read with the 2016 Act, were clear. However, it also acknowledged that the Regulations could have been clearer and, therefore, the Regulations would be amended “to put the matter beyond doubt”.

### **The Renting Homes (Model Written Statements of Contract) (Wales) Regulations 2022**

Under Standing Order 21.2(v), we reported that it was unclear where a particular model written statement provided for the actual term of the contract to be set out. The term of a contract is fundamental, and we believed that a model written statement (prepared by the Welsh Ministers) should provide a clear space for the term of the contract to be included.

The Welsh Government response said that the term of the contract could be included in several places in the model written statement. However, it accepted that the model could be clearer and that an amendment would be made when it next becomes necessary to amend the Regulations.

Under Standing Order 21.3(ii), we noted that the Explanatory Memorandum to these Regulations referred to the Regulatory Impact Assessment carried out for the 2016 Act. We asked the Welsh Government to confirm whether that RIA (which was over 5 years old) was still a good basis for the ‘costs and benefits’ conclusions set out in the Explanatory Memorandum to the Regulations.

The Welsh Government response said it was satisfied that the “rationale for identifying the costs and benefits of producing model written statements set out in the Regulatory Impact Assessment (RIA) that accompanied the 2016 Act, remains sound” and that the “method used to calculate the costs and benefits remains the appropriate one”. The response also noted that, given the significant amount of time that had elapsed since the 2016 Act RIA, the calculations carried out in 2022 had been revised to reflect current costs.

### **The Renting Homes (Wales) Act 2016 (Consequential Amendments) Regulations 2022**

Under various Standing Orders within 21.2 and 21.3, we raised 35 reporting points on these Regulations as they were originally laid. This was a very significant number of reporting points. While the Welsh Government did not agree with a handful of our reporting points, it acknowledged there were multiple issues with the Regulations, which led to the Welsh Government withdrawing the original Regulations and replacing them with new Regulations.

## Conclusions

These examples demonstrate the scrutiny we carry out on subordinate legislation laid before the Senedd. We believe this scrutiny is an important aspect of ensuring that we have good law in Wales, in particular law that is clear and accessible.

The Welsh Government does not always agree with our reporting points. Where there are issues of particular concern, we may pursue them further with a letter to the Welsh Government. For example, we wrote to the Welsh Government in February 2022 regarding some of its responses to the reporting points we raised on renting homes subordinate legislation. Our letter can be found [here](#) and the Welsh Government's response to our letter can be found [here](#). We believe this exchange produced helpful results and brought some much-needed clarity to the renting homes regime in Wales.

At all times, we are mindful that we have no veto over subordinate legislation (only the Senedd can annul or not approve subordinate legislation) and we cannot declare subordinate legislation to be unlawful (that is a matter for the courts). Our job is to scrutinise within the relevant Standing Orders.

With regard to many points we raise, the Welsh Government accepts or acknowledges that there are issues which require action, such as: (i) withdrawing a piece of subordinate legislation and re-drafting it before re-laying,<sup>2</sup> (ii) amending a piece of subordinate legislation at a later date, or (iii) updating guidance to clarify any particular matter.

We believe that we and the Welsh Government both share the same goal that subordinate legislation in Wales should be as clear and accessible as possible.

## Scrutiny of Bills

### Background

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**16.** As part of our overall remit, we consider any matter relating to legislation. Our standard scrutiny of Bills, in line with our remit, focuses on a number of specific issues:

- matters relating to legislative competence, including compatibility with human rights;
- the need for the legislation;

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<sup>2</sup> Provided the subordinate legislation is still in draft form. If the legislation has been made so that it is no longer in draft form, it cannot simply be withdrawn (rather, it must be amended or revoked by new legislation).

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- 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;
- the need for consolidation (if applicable) and other matters related to the accessibility of the statute book;
- the overall quality of the legislation.

## Scrutiny in the past year

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**17.** To date we have completed our scrutiny of two bills which have been introduced to the Senedd by the Welsh Government – the **Tertiary Education and Research (Wales) Bill** and the **Welsh Tax Acts etc. (Power to Modify) Bill**.

**18.** We made 40 recommendations in respect of these two Bills. Significant themes and issues already appearing during our scrutiny of Bills include:

- our belief that the scrutiny procedures attached to some delegated powers need to be more robust because they do not provide Members of the Senedd with sufficient opportunities for scrutiny;
- our belief that the balance of the legislation is tilted too much in favour of executive power which marginalises the democratic mandate of the Senedd;
- delegated powers which are included for reasons of flexibility and future-proofing, which, as a matter of good law-making, we do not consider appropriate when the current government has no intention of using those powers;
- concerns about uninformative explanations from the Welsh Government regarding potential human rights implications which is unhelpful and inhibits effective legislative scrutiny, while also being disappointing in the context of the Senedd aiming to ensure that Welsh law upholds human rights protections.

**19.** A further two Bills were introduced to the Senedd during the summer term. We have recently begun our consideration of the **Social Partnership and Public Procurement (Wales) Bill**. As per our agreed remit, we are also the responsible committee for Consolidation Bills, the first of which – the **Historic Environment (Wales) Bill** - has recently been introduced to the Senedd. We expect to report on both these Bills in the autumn term.

## UK Government Bills making provision for Wales in devolved areas (Legislative Consent Memoranda)

### Background

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**20.** As part of our overall remit, we consider any matter relating to legislation. One aspect of this broad responsibility is to consider all legislative consent memoranda laid before the Senedd by the Welsh Government for UK Government Bills that make provision in relation to Wales for any purpose within the legislative competence of the Senedd (or which modify the Senedd's legislative competence).

### Scrutiny in the past year

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**21.** Our work programme has been dominated by the scrutiny of legislative consent memoranda and supplementary legislative consent memoranda. Since May 2021 we have considered 44 legislative consent memoranda and supplementary legislative consent memoranda relating to 21 UK Bills, and produced 30 reports.

**22.** During the whole of the Fifth Senedd, our predecessor considered 48 legislative consent memoranda and supplementary legislative consent memoranda relating to 32 UK Bills, and produced 33 reports.

**23.** The number of legislative consent memoranda we consider or reports we publish does not, however, represent the full picture; for example, legislative consent memoranda laid by the Welsh Government in the first seven months of the Sixth Senedd cover significantly more clauses and schedules than were contained in legislative consent memoranda in the first year of the Fifth Senedd.<sup>3</sup>

**24.** This demonstrates a significant increase of primary legislation in devolved areas being made by the UK Parliament rather than by the Senedd.

**25.** In the course of our scrutiny, the Welsh Government has provided information on the **principles** it follows to guide its decision-making in relation to including provisions in UK Government Bills and its separate **guidance** to its staff on the inclusion of concurrent powers in such Bills. The first two principles are:

*"1. We follow the principle that primary legislation in devolved areas should be enacted by the Senedd. However, it is necessarily the case that there are,*

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<sup>3</sup> Senedd Research, [Legislative Consent in the Sixth Senedd so far](#), 13 December 2021

*and will continue to be, circumstances in which it is sensible and advantageous if provision which would be within the Senedd's legislative competence is sought for Wales in UK Parliament Bills, with the consent of the Senedd. Such provision will not infrequently include conferring new delegated powers on the Welsh Ministers.*

*2. Taking provision in a UK Bill can enable pragmatic solutions to be reached in a timely fashion, while simultaneously respecting the legislative competence of the Senedd through the legislative consent process. It can be a matter of practical good government for such provisions to be included in a UK Bill."*

**26.** The Queen's Speech took place on Tuesday 10 May 2022, outlining the UK Government's proposed legislation for the next parliamentary session, and included 38 UK bills. While not all of these will impact Wales, many will. **The Welsh Government has said** it expects to be asked for consent on at least 12 UK bills. The Secretary of State for Wales **said** separately that 27 UK bills are likely to extend and apply in Wales.

**27.** As at the end of July 2022, legislative consent memoranda have now been laid for six of the 12 UK bills (two of which are carry over Bills from the previous UK Parliamentary session):

- **Animal Welfare (Kept Animals) Bill** (carry over Bill);
- **Online Safety Bill** (carry over Bill);
- **Procurement Bill**;
- **Trade (Australia and New Zealand) Bill**;
- **UK Infrastructure Bank Bill**;
- **Schools Bill**

**28.** Many of the bills included in the Queen's Speech, including the Procurement Bill, will repeal and replace EU legislation.

**29.** We recognise that not all legislative consent memoranda are the same. We have identified three broad categories based on our scrutiny:

- instances where there may be sufficient and appropriate reasons for the UK Government to be permitted by the Senedd to legislate in devolved areas;

- instances where the current UK Government is, and has been, seeking to legislate in devolved areas against the wishes of the Welsh Government;
- memoranda that reflect the Welsh Government's approach to allow the UK Government to take forward legislation on its behalf, where we believe the Senedd should be legislating.

**30.** Only on rare occasions will we recommend that consent be granted or denied for a UK Government Bill. Ultimately, that decision is a matter for the Senedd as a whole.

**31.** During our consideration of legislative consent memoranda for UK Government Bills we have made 73 recommendations. Significant themes and issues include:

- our concern about the extent to which the UK Government is now seeking to legislate in devolved areas, which prevents Senedd Members from considering evidence from stakeholders and tabling amendments to test, challenge and influence legislation affecting Wales;
- poorly drafted, incomplete or inaccurate legislative consent memoranda meaning the Senedd is placed at a disadvantage when trying to undertake its vital scrutiny;
- timeliness (or lack thereof) of legislative consent memoranda being laid before the Senedd;
- concurrent powers leading to an effective impact on devolved competence;
- Henry VIII powers to amend the *Government of Wales Act 2006*;
- reliance on non-binding intergovernmental agreements rather than securing amendments to the face of the UK Bills,
- lack of transparency regarding how UK Bills may interact with international obligations, common frameworks and other post-Brexit arrangements.

**32.** Our general scrutiny has highlighted how the Welsh Government has applied and interpreted its guiding principles for legislating through UK Government Bills.

- In correspondence dated **20 April 2022**, the Counsel General told us:

*"We approach legislation in terms of maximising the outcomes for the people of Wales in line with our priorities. So we decide how best to do that via both Senedd and UK Parliament legislation, taking account of the priorities and*

*capacity of our own legislative programme and also the potential opportunities – and risks – arising from the UK Government's legislative programme.*

*If we only delivered our priorities through Senedd legislation, rather than pursuing a wider set of priorities through both legislative programmes, then we would end up delivering less for the people of Wales."*

- **In a statement on 13 May 2022** after the Queen's Speech, the Counsel General said "primary legislation in devolved areas should normally be enacted by the Senedd." However, in the Welsh Government's original document containing the corresponding principle, the word "normally" does not appear. The Counsel General suggested that this was just a matter of drafting and re-affirmed his continued commitment that legislation should be enacted within Wales.<sup>4</sup>
- In that statement, he also added that "we will consider using a UK Bill where the law could be changed more quickly than we could achieve such change through our own legislative programme, or where it is sensible for the regulatory regime to be in step across England and Wales." When questioned on using a UK Government Bill to get legislation through quickly, he told us:

*"as far as I'm aware, I think every experience I have is that those circumstances have only arisen where legislation has already been initiated and we have to deal with it in one way or another, either through the LCM process or through negotiations and so on ...*

*... The reality is, though, that if they [UK Government] are legislating and there's an opportunity there, that they are doing something in England and they have said, 'This is only going to apply to England', would it be reasonable or unreasonable to turn around and say, 'Well, actually, we haven't got this on our agenda, we don't want to divert resources from other parts of our programme, and we do not have an objection if that became England and Wales'."*<sup>5</sup>

- In correspondence dated **4 August 2022**, the Counsel General, in response to a question which asked if "... the Welsh Government will, in effect, allocate resources to

<sup>4</sup> LJC Committee, RoP..[66], 20 June 2022

<sup>5</sup> LJC Committee, RoP..[70-71], 20 June 2022

a set number of Bills and then take opportunities presented to it to use UK Bills to deliver other, previously unidentified (or not prioritised) legislative objectives?" said:

*"Yes, insofar as our legislative programme is designed to deliver the ambitions of the Programme for Government, so we inevitably seek to ensure capacity is in place to support that work. Our principles set out that where UK legislation would be appropriate for Wales but there is no time to bring forward similar in the Senedd we would consider utilising a UK Bill. This is a practical position, ensuring that we deliver for the people of Wales and make best use of the resource and opportunities available. As noted above, however, it is not the case that the Welsh Government commonly approaches the UK Government to actively seek devolved provisions to be contained in UK Bills."*<sup>6</sup>

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## Intergovernmental agreements

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**33.** Our predecessor Committee concluded in its **legacy report** that we should continue to monitor the use of intergovernmental agreements between the Welsh and UK Governments associated with the UK Government Bills for which the Senedd's consent is sought (conclusion 9). We considered an **academic paper** on these issues in June 2022.

**34.** Conclusion 10 of our predecessor Committee's legacy report suggested that we 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.

**35.** On **19 July 2022**, we wrote to the Counsel General asking that the relevant information be published in line with the Inter-Institutional Relations Agreement (see Chapter 3). In response, on **5 September 2022**, the Counsel General said he will ensure this information is provided.

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## Welsh Government's capacity to legislate

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**36.** As part of our work to scrutinise the Welsh Government's legislative activities we agreed to undertake work on the Welsh Government's capacity to legislate, principally in response to the

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<sup>6</sup> See also the Counsel General's letter of **17 June 2022**

Welsh Government's use of UK Government Bills to legislate in devolved areas and frequent references to resources as part of the reasoning for that approach.<sup>7</sup>

**37.** At our meeting on 29 November 2021 the Counsel General drew to our attention the current "scale of the legislative demands" on the Welsh Government in relation to: its own-legislative work programme, including its programme for improving the accessibility of Welsh law; legislating for Brexit; legislating for Covid; and responding to the UK Government's legislative programme. The Counsel General also drew our attention to the high skilled nature of expertise needed to deliver on these demands.<sup>8</sup> As a result we **requested further information** from the Welsh Government on the capacity to legislate as part of our budget scrutiny and made three recommendations on this issue in our subsequent **response to the budget**. The Welsh Government provided some **general observations** and a **response** to our recommendations.

## **Welsh Government consent for UK Government made subordinate legislation**

### **Background**

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**38.** Our remit includes the consideration of subordinate legislation made by the UK Government in devolved areas. This includes:

- The scrutiny of Welsh Government statutory instrument consent memoranda; such memoranda concern subordinate legislation made by UK Ministers that amend primary legislation which makes provision within the legislative competence of the Senedd and which requires the Senedd's consent (Standing Order 30A).
- The consideration of Welsh Government written statements notifying the Senedd that it has consented to the making of statutory instruments by UK Ministers in devolved areas under the *European Union (Withdrawal Act) 2018* (Standing Order 30C).

**39.** In addition to the work we undertake in accordance with Standing Orders, the consideration of Welsh Government notifications stating that it intends to consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales.

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<sup>7</sup> For example: evidence from the Minister for Climate Change, Julie James MS, **RoP [17, 48-49]**, 12 July 2021; evidence from the Counsel General, **RoP** [multiple references], 20 September 2021 and correspondence from the Minister for Climate Change on **16 November 2021** and **4 January 2022**.

<sup>8</sup> LJC Committee, **RoP [18, 34 and 94]**, 29 November 2021

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Such notifications are given to the Committee in accordance with the commitment from the First Minister, given in November 2021, which we highlighted in **our report on the Inter-Institutional Relations Agreement** (see paragraphs 72 and 73).

### **Scrutiny in the past year**

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**40.** The number of UK Government statutory instruments the Welsh Government has consented to (and notified us of) is as follows:

- SO30A statutory instrument consent memoranda = 0
- SO30C notifications = 11
- all other consent notifications = 28

**41.** We consider consent notifications concerning the UK Government exercising a delegated legislative power in a devolved area in relation to Wales in Chapter 3.

## **Complexity of making law for Wales**

### **Background**

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**42.** Making and scrutinising laws in the Sixth Senedd is complex. The introduction of the reserved powers model and the UK's departure from the EU have redrawn the scope of devolved powers. Meanwhile, the UK Government has legislated extensively in devolved areas and has entered into new international obligations with which the Welsh Government must comply.

**43.** We have taken on and developed new approaches to scrutiny to take these complexities into account. However, it has at times been difficult to understand their cumulative implications.

### **Scrutiny in the past year**

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**44.** To inform our work on this issue we invited a number of experts to an event on 13 June 2022 to discuss:

- the impact of the UK's withdrawal from the EU on the complexity of the legal landscape in Wales, and in the UK more broadly, and
- the impact of the UK Government legislating in devolved areas on the accessibility of law in Wales.

**45.** We published a **summary of the discussion**, and key conclusions include:

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- Wales is no longer subject to the more stable, rules-based system of the EU; instead, we are concerned principally by matters of legislative competence and there is a greater reliance on non-legislative intergovernmental agreements and processes.
- Leaving the EU has meant there are now less stable expectations, with reduced predictability, about where laws should be made for Wales. Trends are emerging. However, it is not clear whether these trends are bound up with the process of leaving the EU or will come to represent a longer-term shift.
- Although the UK Government and the Welsh Government have very different policy approaches to divergence from the EU, in practice the UK Government is passing extensive legislation in devolved areas. This risks the development of an incoherent approach to alignment and divergence in the law in Wales.
- There needs to be a change in approach to scrutiny in response to this increasing complexity. Participants suggested that this period of change offered an opportunity to reframe scrutiny processes, but recognised that this would be challenging in the context of limited parliamentary resources.
- Participants recognised that the complexity of the devolution settlement and the constitutional landscape outside the EU posed problems for the accessibility of the law. Although complexity is to an extent inevitable, participants generally felt that the situation had worsened.

## Conclusions

### Findings and concerns

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**46.** The breadth of our remit is challenging, not least because of the volume of legislation we expected to scrutinise in the first year.

**47.** Certainly, the volume of subordinate legislation we have scrutinised under Standing Order 21 has seen an increase compared to the first year of the Fifth Senedd, attributable to the Welsh Government's desire to fully implement primary legislation passed in previous Seneddau and, in part, to further Covid measures.

**48.** What we had not expected, during the first year of the Sixth Senedd, was to have spent so much time reporting on the Welsh Government's legislative consent memoranda for UK Government Bills and expressing concern at the extent to which the UK Government is legislating in devolved areas, notably in circumstances where it is with the support of the Welsh

Government and where we believe the Senedd should be legislating. We have therefore spent a significant amount of time reporting on legislation being made in the UK Parliament which we have no real scope to influence or shape. As such, legislative scrutiny on important matters within devolved areas is being performed in that legislature, rather than the Senedd, with Senedd Members effectively only being provided with an ‘all or nothing’ decision when voting on the legislation by means of a legislative consent motion. This has proved frustrating. We would much prefer to have contributed to the improvement of legislation being made in the Senedd, as a means of delivering the best possible solutions for communities across Wales – a role for which Senedd Members are elected.

**49.** This also highlights one of the problems with the legislative consent process: there is no role for the Senedd to influence the Welsh Government’s decision on whether it should pursue provisions in a UK Government Bill in the first place.

**50.** We raised many of our issues of concern during an end of year scrutiny session with the Counsel General on **20 June 2022** and in subsequent correspondence.<sup>9</sup>

**51.** We recognise that in some cases it is appropriate to use UK Government Bills to legislate in devolved areas. However, in our view some of the comments we highlight in paragraph 32 above are inconsistent with, and contradict, the Welsh Government’s first sentence of its guiding principle that primary legislation in devolved areas should be enacted by the Senedd.

**52.** We note the second sentence of the first guiding principle; in our view it effectively provides a catch-all exemption from the first sentence given that it makes reference to “circumstances in which it is sensible and advantageous” to use a UK Government Bill, without context provided about to whom that phrase applies and who therefore makes that judgement. Arguably, it has the effect of rendering the first sentence of little value as a core principle on which the Welsh Government is basing its approach. Our experience suggests that the use of UK Government Bills to deliver new law in devolved areas for Wales is extending beyond the list of examples provided in point 3 of the principles. Additionally, point 4 of the principles (which states, “it would be most unwise for the Welsh Government to adopt a self-denying ordinance in such circumstances”) also has the effect of de-valuing the first sentence of the first guiding principle.

**53.** As we state above, we believe that some of the devolved provisions contained in UK Government Bills should have been the subject of Bills introduced into the Senedd by the Welsh Government (for example in relation to the environment, leasehold reform and building safety).

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<sup>9</sup> See letters of **30 June 2022** and **4 August 2022**.

Given that the Counsel General's comments that resources and capacity are not an issue in deciding whether to use a UK Government Bill to legislate in a devolved area,<sup>10</sup> we see no reason why the Welsh Government and UK Government cannot legislate in parallel. This would still allow for co-operation between governments (where deemed appropriate) and also for the Senedd to undertake its legislative scrutiny role.

**54.** We have also noted that the Welsh Government has sometimes suggested that the reason for using a UK Government Bill is because the UK Government will have been able to introduce legislation to the UK Parliament far sooner than the Senedd's timetable would allow.<sup>11</sup> In our report on the Welsh Government's Legislative Consent Memorandum on the Leasehold Reform (Ground Rent) Bill, we said:

*"Decisions regarding when to introduce legislation for scrutiny in the Senedd are a matter for the Welsh Government and once a Bill is introduced, a timetable for scrutiny will be set by the Business Committee in accordance with Standing Order 26. We consider it inappropriate for the Welsh Government to use arguments relating to the Senedd's timetable for scrutiny to justify using a UK Government Bill to legislate in a devolved area."*<sup>12</sup>

**55.** We reiterate that view and will be drawing it to the attention of the Business Committee.

**56.** We are concerned that the continued use of UK Government Bills for legislating in devolved areas, in certain policy areas, could become routine and established practice. This is particularly in light of the Counsel General's references to "pursuing a wider set of priorities through both legislative programmes", "using a UK Bill where the law could be changed more quickly" and where an opportunity to legislate on an England and Wales basis arises and the Welsh Government does not object to doing so. Moreover, in his letter to us of 4 August 2022, the Counsel General indicates that if the UK Government is legislating on a matter that is outside of the Welsh Government's legislative programme but within in a devolved area, then there are circumstances in which it is appropriate to use a UK Government Bill. This raises further important questions which we will continue to address.

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<sup>10</sup> LJC Committee, [RoP \[41-54\]](#), 20 June 2022

<sup>11</sup> See for example: Welsh Government, [Legislative Consent Memorandum Leasehold Reform \(Ground Rent\) Bill](#), paragraph 84; Welsh Government, [Legislative Consent Memorandum Procurement Bill](#), 9 June 2022, paragraph 118; [Letter from the Counsel General](#), 4 August 2022

<sup>12</sup> LJC Committee, [Welsh Government's Legislative Consent Memorandum on the Leasehold Reform \(Ground Rent\) Bill](#), December 2021, paragraph 67

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**57.** Overall, we are therefore concerned that too much legislation in devolved areas is being made in the UK Parliament following behind the scenes conversations between the UK and Welsh Governments, bypassing the Senedd's legislative scrutiny functions.

**58.** Ultimately, it does not matter whether the Welsh Government willingly seeks devolved provisions in UK Government Bills or the UK Government includes provision in a Bill in a devolved area without any consultation because the effect is the same: the creation of a post-devolution democratic deficit.<sup>13</sup>

**59.** If this approach continues, which would appear to be the case, there is a danger that it could undermine the Senedd as a legislature and the underlying principles of devolution.

**60.** In the first year of the Senedd, given the limited number of its own Bills introduced, we have only been in a position to report on two Welsh Government Bills. As a consequence, it is difficult to draw broad conclusions about the Welsh Government's approach to legislating through the use of primary legislation. We did express a range of concerns about the second Bill – the Welsh Tax Acts etc. (Power to Modify) Bill – and we consider those below.

**61.** As we said in our report on the Welsh Tax Acts etc. (Power to Modify) Bill, we found it to be profoundly disappointing that the second piece of primary legislation introduced by the Welsh Government in the Sixth Senedd was an enabling Bill. As such it leaves significant policy development and implementation to be determined by subordinate legislation, meaning the Senedd and its elected Members will face voting on such matters on an 'all or nothing' basis, because subordinate legislation is not subject to line-by-line scrutiny and is not amendable.<sup>14</sup>

**62.** Moreover, we were concerned with the Welsh Government's approach to making law on matters of taxation. We concluded that the Bill "not only represents poor legislative practice but is constitutionally flawed" and that, in principle, primary legislation (rather than subordinate legislation) should be used to amend the Welsh Tax Acts, achieved, for example, through a finance Bill, annual or otherwise, or a special purpose Bill, subject to an expedited procedure.<sup>15</sup>

**63.** In our report we also stated that it would not be constitutionally appropriate for the Welsh Ministers to hold a power that could be used to change existing regulation-making powers delegated to the Welsh Ministers by the Senedd and recommended that the Bill be amended to

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<sup>13</sup> See discussion in LJC Committee, [RoP \[56-58\]](#), 20 June 2022 and [Letter from the Counsel General](#), 4 August 2022, response to question 8

<sup>14</sup> LJC Committee, [Report on the Welsh Tax Acts etc. \(Power to Modify\) Bill](#), April 2022, paragraphs 87-88

<sup>15</sup> LJC Committee, [Report on the Welsh Tax Acts etc. \(Power to Modify\) Bill](#), April 2022, paragraphs 90-113 and conclusion 2

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remove that power.<sup>16</sup> The Minister for Finance and Local Government, Rebecca Evans MS, did not accept this recommendation, suggesting it would be “overly restrictive”.<sup>17</sup> We remain of the view that it is an exceptionally broad power that is not constitutionally appropriate for the Welsh Ministers to hold. We will therefore continue to monitor future Welsh Government Bills and, should similar powers be included to those contained in the *Welsh Tax Acts etc. (Power to Modify) Act 2022*, draw them to the attention of the Senedd.

**64.** In our view, the Welsh Government missed an opportunity to bring forward a legislative approach that would have enabled it to get its business through on matters of taxation, while at the same time respecting the democratic mandate and legislative supremacy of the Senedd.

## Successes

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**65.** Our scrutiny of legislative consent memoranda and Welsh Government legislation has resulted in improvements to processes, as well as changes to the legislation itself and we consider some of these below.

**66.** In expressing our concerns about the time it has taken for the Welsh Government to lay some legislative consent memoranda, we note more recent practice where the Welsh Ministers have been notifying the Llywydd and Committees when legislative consent memoranda are not laid in the usual two week period.<sup>18</sup> There are sometimes understandable reasons for the delay and we therefore welcome the adoption of this approach.

**67.** As regards our recommendations to amend Bills, we achieved some limited success.

**68.** On the Tertiary Education and Research (Wales) Bill, of the 10 recommendations which sought changes to the Bill, the Minister for Education and the Welsh Language, Jeremy Miles MS accepted three in full. For example, we concluded that the Bill should be amended to the effect that regulations made under section 78(1)(c) and 78(2) are subject to the affirmative scrutiny procedure, and the Minister agreed. We also recommended that changes were made to the explanatory notes to the Bill to aid the reader of the legislation, and we welcome the Minister’s agreement to act on this recommendation.

**69.** On the Welsh Tax Acts etc. (Power to Modify) Bill, of the 12 recommendations that sought changes to the Bill, the Minister for Finance and Local Government accepted one in full and a

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<sup>16</sup> LJC Committee, Report on the Welsh Tax Acts etc. (Power to Modify) Bill, April 2022, paragraphs 244-246 and recommendation 11

<sup>17</sup> ~~Letter from the Minister for Finance and Local Government~~, 11 May 2022

<sup>18</sup> See Standing Order 29.2

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further four in part or in principle. For example, whilst we concluded that law having retrospective effect should be made using primary legislation, the Minister's amendment to constrain the exercise of the regulation-making power did improve the Bill. We also welcome the Minister's amendments requiring the Welsh Government to report on the operation of the *Welsh Tax Acts etc. (Power to Modify) Act 2022* and to include a sunset provision, albeit subject to longer timeframes than we had recommended.

**70.** As our case study shows, our reports on individual statutory instruments have led to the identification of the need for corrections to be made, which has sometimes led to the withdrawal and re-laying of regulations. This highlights the importance of our scrutiny of these regulations, particularly as they make up a significant percentage of the statute book and therefore the law that impacts on the daily lives of our citizens.

## **Forward look**

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**71.** We will continue with our robust scrutiny of legislative consent memoranda for UK Government Bills and 'made in Wales' legislation. We will in particular:

- monitor the Welsh Government's reasoning for breaches of the 21 day rule;
- in light of our scrutiny of the *Welsh Tax Acts etc. (Power to Modify) Bill*, monitor the use of skeleton Bills which delegate extensive powers to the Welsh Ministers and therefore tilt the balance of power too much towards the executive;
- monitor the implementation of the *Welsh Tax Acts etc. (Power to Modify) Act 2022*;
- develop our own principles (or similar) which we will use to hold the Welsh Government to account when it seeks to use a UK Government Bill to legislate in a devolved area;
- continue to monitor the Welsh Government's approach to using UK Government Bills to legislate in a devolved area, including further scrutiny of the matters raised in the Counsel General's letter of 4 August 2022;
- continue to consider how our work can contribute to explaining and highlighting the increasing complexities of the law in Wales and what if any measures can be taken to improve its accessibility;
- monitor the use of intergovernmental agreements;

- undertake an evidence session with the Welsh Government on its capacity to legislate;
- consider the outcome of the Business Committee's review into the legislative consent process;<sup>19</sup>
- use our experiences from our first year of operation, and the key issues raised by experts at our event on 13 June 2022, to help inform our scrutiny of the complex way in which law is being made in Wales.

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<sup>19</sup> Business Committee, 28 September 2021, minutes

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## 3. Constitutional issues and external affairs

### Inter-Institutional Relations Agreement

#### Background

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**72.** A new **Inter-Institutional Relations Agreement between Senedd Cymru and the Welsh Government** was agreed separately by the Committee and the First Minister in November 2021 and included in **our report** noted in **plenary on 15 December 2021**. The agreement represents the agreed position of the Senedd and the Welsh Government on the information that the Welsh Government will provide to the Senedd with regard to its participation in formal, ministerial-level intergovernmental meetings, agreements, concordats, and memorandums of understanding.

**73.** The First Minister **also told us** in November 2021 that the Welsh Government would write to us and other relevant committees to inform us when it intends to consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales, explaining the rationale for the intention to consent. He also said that, where time allows, it will provide an opportunity for the Senedd to express a view before consent is formally given. This commitment is referenced in **our report on the Interinstitutional Relations Agreement**.

#### Notification of Welsh Government participation at ministerial-level intergovernmental meetings

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**74.** Since we were established as a Committee, we have been informed of the Welsh Government's participation at 28 ministerial-level intergovernmental meetings. We received prior notice of 25 of these meetings being held, and of the items for discussion.

#### Notification of Welsh Government consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales

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**75.** During the same time period, the Welsh Government has notified us of its intention to consent to the UK Government's making of 28 items of delegated legislation in devolved areas.

**76.** Of these 28 items of legislation, we received prior notice of the Welsh Government's intention to consent to 22. However, we received 8 of these notices within 3 business days of the legislation being laid in the UK Parliament.



## Intergovernmental relations

**77.** The UK and devolved governments reached agreement on the **intergovernmental relations review** in January 2022. Details of the new intergovernmental structures, how governments will cooperate across a range of key areas of shared responsibility and the process for resolving disputes is contained in a **Senedd Research article**. In particular an Interministerial Standing Committee (IMSC) with oversight of cross-cutting issues has been set up, together with interministerial groups at portfolio level.

**78.** We **took evidence** from the Counsel General on the conclusion of the review in March 2022, exploring issues including:

- ensuring the effective application of new principles for intergovernmental working;
- progress in implementing the outcomes of the review;
- how the IMSC will carry out oversight of the UK internal market and common frameworks;
- how new intergovernmental structures will provide for Welsh Government engagement in international and UK-EU relations.

**79.** The Welsh Government reports to the Senedd on participation in formal intergovernmental structures through the **Inter-Institutional Relations Agreement** (see the previous section of this chapter).

**80.** The first two meetings of the IMSC were held on 23 March and 29 June.

**81.** On **20 July 2022** we wrote to the Rt Hon Greg Clark MP, Secretary of State for Levelling Up, Housing and Communities, noting how it has become increasingly concerned that the agreement of the new intergovernmental structures does not appear to have resulted in better intergovernmental working in areas such as co-operation on the development of UK Government Bills in devolved areas. The Secretary of State replied on **30 August 2022**.

## Common Frameworks

**82.** The **UK and devolved governments agreed** to develop common frameworks in 2017 on working together in some policy areas previously governed at EU level.

**83.** 21 of the 26 planned **common frameworks** relating to Wales were published by the time of the dissolution of the Northern Ireland Assembly at the end of March 2022.

**84.** Senedd committees have been carrying out **scrutiny of common frameworks** within their remits, alongside parliaments across the UK. We have provided oversight of the common frameworks programme as a whole and **secured commitments on the transparency of the programme** from the Counsel General.

**85.** As part of its oversight scrutiny role of common frameworks programme, we have been considering issues including:

- the openness and transparency of the development and operation of common frameworks;
- the quality and clarity of common framework documents;
- the impact of common frameworks on how law and policy for Wales can be made and the exercise of devolved competence;
- the implications of UK legislation (such as the *United Kingdom Internal Market Act 2020* and the *Subsidy Control Act 2022*) for common frameworks;
- how common frameworks provide for Welsh Government engagement in the negotiation and implementation of international and UK-EU obligations.

## **Operation of the United Kingdom Internal Market Act 2020**

**86.** The *United Kingdom Internal Market Act 2020* (UKIMA) includes provisions:

- setting out general principles of mutual recognition and non-discrimination that will apply to the sale of goods and the provision of services in the United Kingdom;
- introducing a system for the recognition of professional qualifications that will apply across the United Kingdom;
- implementing the Protocol on Ireland-Northern Ireland;
- giving UK Ministers new spending powers in devolved areas;
- reserving powers related to subsidy control.

**87.** The Fifth Senedd **did not provide its consent** to the then United Kingdom Internal Market Bill.

**88.** The Welsh Government applied to the Court Appeal for judicial review in connection with the interpretation of the UKIMA and its effect on legislation passed by the Senedd. The Court of

Appeal **dismissed the appeal** in February 2022, not least because the court was reluctant to test the issues in abstract, i.e. without actual Senedd legislation to consider. The **Welsh Government's Legislative Statement** on 5 July 2022 indicated that the Welsh Government will seek to bring forward a Single Use Plastics Bill through an expedited process to support its ongoing legal challenge to the UKIMA.

**89.** In May and June 2022, we saw two practical examples of the provisions of the UKIMA in operation, and the associated scrutiny issues arising from it. These were the exemption for single use plastics from the scope of the UKIMA and the Genetic Technology (Precision Breeding) Bill. Both examples raise issues of interest in relation to the practical operation of the UKIMA and we pursued these in **evidence** and **correspondence** with the Counsel General.

## UK-EU relations

### Background

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**90.** The Committee is responsible for external affairs, including the governance of UK-EU relations, which encompasses the Withdrawal Agreement and the Trade and Cooperation Agreement (TCA). Together, these two treaties establish the basis for future UK-EU cooperation and govern future UK-EU agreements. Further information about these treaties is available in this **Senedd Research briefing series**.

### Responsibilities

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**91.** The Senedd and the Welsh Government are responsible for the implementation of UK-EU obligations in devolved areas, and must comply with them. Many of the areas covered fall within devolved areas, such as fisheries, animal and plant health, higher education, economic development, climate change and the environment.

**92.** There is no single Welsh Government Minister responsible for EU-related matters (**see this Senedd Research Article** for more information). At some TCA meetings, the Welsh Government is represented by the Minister for Economy, Vaughan Gething MS, whose **portfolio** includes trade and coordination of TCA matters.

### Governance

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**93.** Post-Brexit governance structures create **over 30 new UK-EU joint forums** where implementation is discussed and related decisions are made. The UK and EU each have delegations to these meetings. The Welsh Government and Senedd have observer status at meetings.

## UK-EU Parliamentary Partnership Assembly

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**94.** The TCA provides an option to establish a **Parliamentary Partnership Assembly (PPA)** for parliamentary cooperation between the European Parliament and the UK Parliament.

**95.** The first meeting of the PPA took place in May 2022. The Senedd was represented by Alun Davies MS (one of our members), and Sam Kurtz MS (a member of the Economy, Trade and Rural Affairs Committee). They attended as observers.

## Summary of Committee activity short

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**96.** Since our establishment, we have monitored UK-EU developments, including compliance with UK-EU agreements.

**97.** In addition to Brexit-related legislation, we have considered a number of key issues on different aspects of UK-EU governance. This has included mapping the new responsibilities of the Welsh Government, the Northern Ireland Protocol, alignment and divergence, retained EU law (REUL) and the operation of the TCA's institutional framework.

**98.** We have **noted** the challenge of navigating the new system and requested more transparency from the Welsh Government. We have explored with the Welsh Government how it should keep the Senedd informed of its involvement at UK-EU meetings and following an exchange of correspondence in **January** and **March** 2022, the First Minister said in his March, letter that he is committed to providing information proactively on intergovernmental meetings and is happy to explore how more information on the government's involvement in TCA structures can be provided.

**99.** The Committee has sought advice from expert stakeholders, including **from Professor Catherine Barnard** on the impact of alignment and divergence under the TCA.

**100.** In June 2022, we also **provided a submission** to the House of Commons European Scrutiny Committee's inquiry: **The UK's EU representation: what has changed and how is it working?**

## International agreements

### Background

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**101.** In 2019, the Senedd became the first devolved parliament to establish a dedicated scrutiny process for international agreements. More information is available in this **Senedd Research article**.

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**102.** We are responsible for the scrutiny of **non-trade international agreements** in the Sixth Senedd. We **report regularly** to the Senedd and share our findings with the House of Lords **International Agreements Committee**.

**103.** Our consideration of international agreements takes into account:

- whether it engaged the Senedd's competence, and/or
- whether there were potential policy implications for Wales.

**104.** The First Minister has **acknowledged** that the devolved governments are required to implement and observe international agreements irrespective of the implications on devolved competence or for Welsh bodies.

### **Summary of Committee activity**

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**105.** We coordinate the scrutiny of non-trade international agreements and considers all agreements laid in the UK Parliament under the process established by the **Constitutional Reform and Governance Act 2010** (CRaG Act 2010).

**106.** Since we were formed as a Committee and until our final meeting in July 2022, we have considered 29 agreements. We have taken further action on 13 agreements and have reported 14 agreements for information only.

**107.** International agreements considered to date

- intersect with devolved and reserved areas to different degrees;
- cover different types of international cooperation in the following fields: education, energy, marine, security, defence, judicial cooperation, diplomacy, social security coordination, transport, labour and human rights.

**108.** Where we have agreed to take further action, this typically includes:

- writing to the Welsh Government to request more information,
- drawing the agreement to the attention of other Senedd committees, and
- sharing its findings with the House of Lords International Agreements Committee.

**109.** The responses received by the Welsh Government include information on:

- its level of involvement in international agreements negotiation and implementation;

- whether it had prior knowledge that an agreement is concluded;
- where Memoranda of Understanding are in place between the four governments for certain categories of international agreements;
- the relationships between international agreements and domestic mechanisms,
- the Welsh Government's approach to specific international obligations;
- where it holds a different view to the UK Government.

## Interparliamentary working

**110.** A re-constituted **Interparliamentary Forum** met for the first time on 25 February 2022 at the House of Lords and agreed revised terms of reference. The Forum will aim:

- to scrutinise inter-governmental relations including agreeing a joint annual report on addressing common scrutiny challenges;
- to consider the operation of international agreements including the Withdrawal Agreement, the Trade and Cooperation Agreement, and the Ireland/Northern Ireland Protocol;
- to consider issues related to the UK internal market;
- to consider the impact of the new constitutional arrangements on the legislative process including the use of secondary powers and the legislative consent process.

**111.** The Forum issued **a joint statement** in which it recognised that the Forum provides a start for dialogue and cooperation between Parliaments. The Senedd is represented by the Chair of this Committee (or another Committee member if the Chair is unable to attend) and by the Chair of (or representative from) the Climate Change, Environment and Infrastructure Committee. The next meeting is likely to take place in October 2022 in Cardiff.

**112.** Since the start of the Sixth Senedd we have met with a number of committees from the House of Commons and House of Lords, including the House of Lords Constitution Committee, the House of Commons Public Administration and Constitutional Affairs Committee and the House of Commons Procedure Committee. We also met with the Speaker of the House of Lords, Lord McFall.

**113.** At these meetings members have discussed a range of issues related to interparliamentary working, intergovernmental relations and the scrutiny of new intergovernmental structures and issues related to the legislative process including legislative consent and subordinate legislation.

## Conclusions

### Findings and concerns

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**114.** The first year of the operation of the **Inter-Institutional Relationship Agreement** in the Sixth Senedd has shown the benefits of our Committee being provided with the topics of discussion at intergovernmental meetings.

**115.** However, we and other Senedd committees are not always provided with sufficient notice of these meetings being held. For 13 of the 28 meetings referred to at paragraph 74 we received fewer than three business days' notice of them being held (including the three meetings where no notice was given). We note that some of these meetings were called at short notice and are generally outside of the control of the Welsh Government. However, sometimes **reasons for the short notice are not given** by the Welsh Government.

**116.** We aim to inform the discussions at IMSC meetings if time allows. For example, after **the First Minister told us on 18 March** that the first meeting of the IMSC would take place on 23 March, **we wrote to the First Minister on 22 March** to share our observations on the items for discussion. After the meeting, **the First Minister told us** that our letter was noted by the Chair of the IMSC, the then Secretary of State for Levelling Up, the Rt Hon Michael Gove MP. He also told us that he drew the Secretary of State's attention to the matters we raised in our letter.

**117.** We have also noted that other relevant Senedd committees are not always given notice of meetings which include discussion items likely to fall within their remits. Ahead of the second IMSC, held on 29 June, **we wrote to the Welsh Government** to say that there would be benefit in it copying the relevant Senedd committees into future correspondence on such inter-ministerial meetings. In response to our letter, the **Counsel General said** that future correspondence on such meetings will be copied to all Senedd committees where agenda items (and subsequent meeting updates) are likely to fall within their remits.

**118.** However, we are concerned at the often short notice periods we receive ahead of meetings being held, and ahead of the Welsh Ministers' consenting to UK regulations in devolved areas. Such short notice does not allow us and other committees to provide effective input to meetings, or an informed view on whether the Welsh Government should give its consent to the making of items of subordinate legislation by the UK Government.

**119.** On this latter point, although the First Minister has told us that “where time allows” the Welsh Government would provide an opportunity for the Senedd to express a view before consent to regulations is formally given, the correspondence we receive on these matters can often lack clarity. For example, it does not explain whether there are time restrictions surrounding particular items of subordinate legislation, which means it is not always clear whether in advising of the Welsh Government’s intention to consent, this represents an opportunity for committees to provide a view.<sup>20</sup>

**120.** As our letter to the UK Government in July 2022 shows (see paragraph 81), we are concerned that the agreement of the new intergovernmental structures does not appear to have resulted in the reduction of disputes or facilitated better intergovernmental working in areas such as the development of legislation.

**121.** As common frameworks have been published for scrutiny, we have been concerned at the limited openness and transparency of their operation. A critical example for us is the fact that the Climate Change, Environment and Infrastructure Committee was not notified of an exclusion from the *United Kingdom Internal Market Act 2020* for single use plastics being granted to the Welsh Government until it had **raised the question in correspondence**.

## Successes

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**122.** We are pleased during the course of our scrutiny to have secured observer status on the PPA. We have **pressed for representatives** of devolved legislatures to be able to make direct representations in future meetings of the PPA, as we believe that Members in the devolved nations can add to the collective knowledge on important matters such as climate and environmental policy, based not only on their experiences but those of their constituents. Our submission to the House of Commons European Scrutiny Committee inquiry (see paragraph 100 above) also made this point.

**123.** We are also pleased to have secured greater transparency around the Welsh Government’s involvement in the TCA governance structures. Not only will this enable us to better hold the government to account for its activities, but it also provides a sounder basis for explaining the challenges faced in Wales during our engagement with UK parliamentary committees.

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<sup>20</sup> For example, **the Minister for Economy wrote to the Committee on 10 June 2022** to explain that “I give my consent” for the Secretary of State to make The Official Controls (Extension of Transitional Periods) (Amendment) Regulations 2022, and that he understood that the regulations “will be laid” on 8 June 2022.

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**124.** Our scrutiny of international agreements has led to successes in two aspects. During our consideration of matters relating to international agreements through our scrutiny of post-Brexit primary legislation, we received a commitment from the Welsh Government that, where UK Government Bills that are the subject of Welsh Government legislative consent memoranda interconnect with domestic and/or international arrangements, the Welsh Government will make this clear and provide details in the relevant memorandum.

**125.** We have also obtained more information during our consideration of individual international agreements which is not otherwise provided to the Senedd. This includes detailed information from the First Minister on the importance of international obligations, the Welsh Government's approach and its expectations. This has enhanced the Senedd's understanding of the impact of international obligations and has ensured the information is now in the public domain.

**126.** The role of Senedd committees is therefore crucial in monitoring the implementation and operation of international agreements, and in identifying their impact on Wales.

**127.** We recognise the importance of building relationships with as many parliamentary committees as possible. While the Inter Parliamentary Forum has not met as frequently as we would have liked because of the pandemic, it is clear that there is a desire for the Forum to start anew and to play an active role in providing opportunities to discuss issues of mutual interest and concern.

## **Forward look**

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**128.** We will continue to progress our scrutiny of broader constitutional matters and areas related to external affairs, including by:

- monitoring the Welsh Government's adoption and implementation of the Inter-Institutional Relations Agreement;
- seeking greater clarity from the Welsh Government about the opportunities that exist for committees to express a view on whether the Welsh Government should consent to the UK Government exercising a delegated legislative power in a devolved area in relation to Wales;
- continuing to monitor the implementation of the new intergovernmental structures and to raise any matters of concern with the Welsh and UK Governments as appropriate;

- monitoring the future impact of the UK Government's **Retained EU Law (Revocation and Reform) Bill**;
- continuing to make representations to secure a more active role for the devolved legislatures in UK-EU relations governance, including with regard to observer status at the PPA;
- continuing to monitor external affairs to assess the impact of, and compliance with, post-Brexit arrangements, including new international obligations and UK-EU treaties;
- continuing to build productive relationships with parliamentary committees across the UK.

## 4. Scrutiny of justice

### Background

**129.** Mindful of the recommendation of the **Commission on Justice in Wales** that the Senedd should take a more proactive role in the scrutiny of the operation of the justice system in Wales, over the last year we have continued to build on the work of our predecessor Committee.

**130.** Our formal evidence sessions over the last year include those with the Counsel General, **the President of Welsh Tribunals, Lord Thomas of Cwmgiedd**, former Chair of the Commission on Justice in Wales and **members of the Law Council of Wales**. Below we outline the key themes we have identified over the course of our scrutiny.

### Leadership and accountability on justice matters

**131.** At the start of this Senedd, we saw the Welsh Government **re-establish its Cabinet Sub-Committee on Justice** to progress recommendations to it made by the Commission on Justice in Wales, and to further the agenda through discussion with the UK Government.

**132.** In May 2022, we noted the Welsh Government's publication of the paper **Delivering Justice for Wales** and its associated work programme. The paper confirmed the Welsh Government's support for the devolution of justice, and the Welsh Government and the Ministry of Justice's agreement to review all the recommendations of the Commission on Justice in Wales that do not require devolution of justice, with a view to identifying recommendations to be taken forward in partnership.

**133.** We have heard calls for specific improvements: in his oral evidence in **November 2021**, Lord Thomas told us that it would be useful to develop all-Wales justice coordination bodies on family and criminal justice, and that there should be closer co-ordination between justice and other parts of the Welsh Government. Our Chair raised these calls for action with the Counsel General in response to his **statement on Delivering Justice for Wales**. In response, the Counsel General said that all-Wales justice coordination bodies were either "in development, established or operating", and that ongoing co-ordination was happening in those areas which were open to intervention.

**134.** As part of Senedd committees' scrutiny of the Welsh Government's draft budget for 2022-23 **we wrote** to the Counsel General to set out our views on the proposed allocations for justice-related spending, which included a series of recommendations.

**135. In response**, the Counsel General committed to:

- produce an annual report highlighting progress in delivering the justice work programme;
- explore ways to improve the level of information provided about spending on justice.

**136.** He also noted our recommendation that the justice work programme should include measurable actions and specific programmes for delivery that are fully costed. While the work programme accompanying the **Delivering Justice for Wales** paper does include reference to costed programmes of work, the programme as a whole is not costed.

**137.** In July 2022, our Chair **set out in Plenary** what we believe the Welsh Government's priorities should be for its draft budget for 2023-24. Our call for spending on justice to be disaggregated in the future was reiterated, as well as our interest in how the Welsh Government will explore the ways it can improve the information it provides on this spending.

### **Data on crime and justice**

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**138.** In January 2022, the Counsel General **shared with us the latest examples of the crime and justice dashboards** under development by the Welsh Government, which take data from a variety of sources, including the Ministry of Justice, the Home Office, HM Prison and Probation Service, the Higher Education Statistics Agency, the Youth Justice Board for England and Wales and the Youth Custody Service. The Counsel General **told us** that the Welsh Government was working to publish the dashboards formally.

### **Supporting the legal sector and access to justice**

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**139.** In his evidence in November 2021, Lord Thomas expressed his views on the importance of the legal sector to the economy, access to legal advice, and of a modernised legal profession.

**140.** Between December 2021 and January 2022, on our behalf, the Senedd's Citizen Engagement Team gathered the views of legal practitioners and litigants in person from across Wales. The team held a series of focus groups and one-to-one interviews and we produced a **summary of the key themes which arose in those discussions** in June 2022. We wrote in July 2022 to the **Welsh Government** and the **Lord Chancellor** to highlight the key themes which arose, and we received a welcome **response** from the Counsel General in September 2022. The themes which arose included:

- the challenges of recruiting and retaining staff;

- the limited availability of legal aid, especially in rural areas;
- the location of courts in Wales as a barrier for access to justice;
- the accessibility of Welsh law.

**141.** We also took evidence from the Law Council of Wales in **May 2022**. The Law Council was established in May 2021 following a **discussion paper** and **recommendation by the Commission on Justice in Wales**. The **Thomas Commission described** its proposals for a Law Council of Wales as a response to calls for “greater cooperation, coordination and communication in the field of law”.

**142.** Lord Lloyd-Jones, President of the Law Council noted that they were making progress in setting up the council, although its nature imposes **some limitations on its functioning**. He also set out the initial projects of work the executive committee to the Law Council had decided to undertake, including work to:

- establish a baseline university curriculum in Welsh law;
- undertake scoping work on public education and understanding of Welsh law;
- explore the issues of retention of legal talent in Wales, and legal technology;
- consider the viability of a national dispute resolution centre in Wales.

**143.** The Counsel General **told us in June** that the establishment of the Law Council has been a “very important step forward” to explore the needs of the legal profession in Wales, and “will gradually grow into the issues around the legal economy.”

**144.** On the issue of civil justice and courts, **Lord Thomas told us** in November 2021 that a “proper civil court” was needed in Wales as the Cardiff Civil Justice Centre was “substandard”. In June, **the Counsel General also said** that “failure of the Ministry of Justice to improve the court facilities in Wales, certainly the Cardiff civil justice centre, is a scandal”.

## **The Welsh Tribunals**

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**145.** In December, the Law Commission published its **report recommending reform of the Welsh Tribunals**. Lord Thomas **told us** that reform of the Welsh Tribunals was “helping to create a nascent justice institution”.

**146.** As part of the **Delivering Justice for Wales** paper, the Welsh Government set out its response to the Law Commission’s project on the Welsh Tribunals, supporting the central

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recommendations and confirming that it would engage with stakeholders on the proposals before bringing forward primary legislation.

**147.** We explored the project underpinning the Law Commission's report with **the President of Welsh Tribunals** in November 2021, as well as exploring his **third annual report**.

**148.** We also sought the President's view on the impact of the pandemic on access to justice in the Welsh Tribunals. We gained an understanding of how the tribunals conducted hearings remotely, and although there were benefits of doing so, how there was "no substitute" for face-to-face hearings to achieve the best possible results in some types of tribunals.

## Conclusions

### Findings and concerns

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**149.** As we have said earlier, the breadth of our remit is challenging and with a large proportion of our time being taken up with the consideration of legislative matters, our scope to be proactive in scrutinising justice issues has been limited. We recognise that there are significant challenges facing citizens in Wales related to the operation of the justice system and that these issues deserve detailed analysis and scrutiny.

**150.** Therefore, although our broad remit has restricted our ability to consider this area of our work to the extent we would have hoped, we have taken evidence from a number of individuals on matters in relation to justice in Wales. We have also noted with interest other Senedd Committees' scrutiny of the justice system in Wales, including the Equality and Social Justice Committee's work on the issue of **women's experiences of the criminal justice system**.

**151.** We welcome the steps the Welsh Government has taken this year to respond positively to the Commission on Justice in Wales's recommendations, and support its continued joint working with the Ministry of Justice to identify recommendations it can take forward in partnership. We also see the establishment of the Law Council of Wales as a key driver for cooperation, coordination and communication in the field of law, and look forward to see how its work progresses.

**152.** Although progress is being made, it is evident from the engagement we undertook with legal practitioners that there is still much to do to respond to the challenges currently faced by the legal sector, and the barriers faced by those seeking access to justice.

**153.** The concerns raised by Lord Thomas and the Counsel General at the state of court facilities in Wales are also troubling, especially as those concerns are longstanding.

## Successes

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**154.** We have benefitted from excellent engagement with the Counsel General on justice matters within his portfolio throughout the year. The commitments he has made to this Committee to increase transparency on delivering the justice work programme, and on the Welsh Government's spending on justice, are very welcome.

## Forward look

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**155.** We look forward to seeing continued progress in the development of the justice system in Wales, by:

- monitoring the Welsh Government's progress within the annual reports on its justice work programme;
- exploring the Ministry of Justice's progress in responding to the Commission on Justice in Wales's recommendation during a future evidence session;
- seeing the Law Council of Wales's initial outputs from its various workstreams to support the legal sector;
- exploring the work of the outgoing President of Welsh Tribunals outlined in his final annual report;
- explore interparliamentary working with committees on justice matters;
- monitoring the Welsh Government's progress towards its aim for the devolution of justice.

## Annex A: List of oral evidence sessions.

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed on the [\*\*Committee's website\*\*](#).

Date	Purpose	Name and Organisation
<b>20 September 2021</b>	<b>General scrutiny session</b>	<b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution  <b>Christopher Warner,</b> Deputy Director, Constitutional Affairs & Inter-Governmental Relations, Welsh Government  <b>James Gerard,</b> Deputy Director, Justice and Constitutional Affairs, Welsh Government
<b>1 November 2021</b>	<b>The President of Welsh Tribunals Third Annual Report</b>	<b>Sir Wyn Williams,</b> President of Welsh Tribunals  <b>Rhian Davies Rees,</b> Head of the Welsh Tribunals Unit
<b>22 November 2021</b>	<b>The Commission on Justice in Wales report</b>	<b>Lord Thomas of Cwmgiedd,</b> Former Chair of the Commission on Justice in Wales
<b>29 November 2021</b>	<b>Codes of Welsh law programme and proposals for the accessibility of Welsh law</b>	<b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution  <b>Claire Fife,</b> Policy Advisor to the Counsel General, Welsh Government  <b>Dylan Hughes,</b> First Legislative Counsel, Welsh Government
<b>6 December 2021</b>	<b>Tertiary Education and Research (Wales) Bill: Stage 1 scrutiny</b>	<b>Jeremy Miles MS,</b> Minister for Education and Welsh Language  <b>Cath Wyatt,</b> Bill Manager, Welsh Government



Date	Purpose	Name and Organisation
		<b>Grace Martins,</b> Lawyer, Welsh Government
<b>17 January 2022</b>	<b>Scrutiny session on the Welsh Government's work on justice, the implementation of the Thomas Commission and the Welsh Government's draft budget for 2022-23</b>	<b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution <b>James Gerard,</b> Deputy Director, Justice Policy, Welsh Government
<b>31 January 2022</b>	<b>Scrutiny session in relation to common frameworks and retained EU law.</b>	<b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution <b>Rob Parry,</b> Deputy Director European Transition Legislation, Welsh Government <b>Paul Harrington,</b> Head of Intergovernmental Relations, European Transition, Welsh Government
<b>14 February 2022</b>	<b>Welsh Tax Acts etc. (Power to Modify) Bill: Stage 1 scrutiny</b>	<b>Rebecca Evans MS,</b> Minister for Finance and Local Government <b>Andrew Hewitt,</b> Welsh Treasury <b>Anna Adams,</b> Welsh Treasury <b>Lynsey Edwards,</b> Legal Services, Welsh Government
<b>14 March 2022</b>	<b>Scrutiny session in relation to the Intergovernmental Relations Review and the Welsh Government's approach to legislating</b>	<b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution <b>Piers Bisson,</b> Director: European Transition, Welsh Government <b>Adam Turbervill,</b> Senior Lawyer, Welsh Government

Date	Purpose	Name and Organisation
9 May 2022	Matters in relation to justice in Wales	<p><b>Lord Lloyd-Jones,</b> President of the Law Council of Wales</p> <p><b>Professor Emyr Lewis,</b> Vice President of the Law Council of Wales</p> <p><b>Dr Nerys Llewelyn Jones,</b> member of the Executive Committee of the Law Council of Wales</p>
20 June 2022	General scrutiny session	<p><b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution</p> <p><b>Piers Bisson,</b> Director, European Transition, Constitution and Justice, Welsh Government</p> <p><b>Adam Turbervill,</b> Senior Lawyer, Legal Services, Welsh Government</p> <p><b>Robert Parry,</b> Deputy Director, Constitution and Welsh Tribunals, Welsh Government</p>
11 July 2022	Historic Environment (Wales) Bill: Stage 1 scrutiny	<p><b>Mick Antoniw MS,</b> Counsel General and Minister for the Constitution</p> <p><b>Dylan Hughes,</b> First Legislative Counsel, Welsh Government</p> <p><b>Dr James George,</b> Senior Legislative Counsel, Welsh Government</p>

## Annex B: Interparliamentary working

Members of the Committee have participated in meetings with the following parliamentary committees and other parliamentary bodies.

Date	Committee / Parliamentary body
<b>21 October 2021</b>	House of Lords Constitution Committee
<b>25 February 2022</b>	Interparliamentary Forum
<b>7 March 2022</b>	House of Commons Public Administration and Constitutional Affairs Committee
<b>30 March 2022</b>	Lord Speaker
<b>12 – 13 May 2022</b>	UK-EU Parliamentary Partnership Assembly
<b>18 May 2022</b>	House of Commons Procedure Committee
<b>16 June 2022</b>	House of Commons Public Administration and Constitutional Affairs Committee House of Commons Welsh Affairs Committee House of Lords Common Frameworks Scrutiny Committee House of Lords International Agreements Committee House of Lords Constitution Committee House of Lords Secondary Legislation Scrutiny Committee House of Lords European Affairs Committee