

# **The Welsh Government's Legislative Consent Memorandum on the Protection from Sex-based Harassment in Public Bill**

June 2023



# 1. Background

## **The Protection from Sex-based Harassment in Public Bill**

1. The Protection from Sex-based Harassment in Public Bill<sup>1</sup> (the Bill) was introduced into the House of Commons and had its first reading on 15 June 2022. It is a Private Members' Bill, introduced by the Rt Hon. Greg Clark MP.

2. The Explanatory Notes to the Bill as introduced state:

*"Section 4A of the Public Order Act 1986 makes it an offence to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting, if both the intention and the effect of the behaviour or the display is to cause another person harassment, alarm or distress. A person convicted under this offence is liable to imprisonment for up to six months, a fine not exceeding level 5 on the standard scale, or both.*

*This Bill provides that if a person commits an offence under section 4A of the Public Order Act 1986 and carried out the conduct in question because of the sex of the person to whom they intended to cause harassment, alarm or distress, then that person is guilty of an offence, whose maximum sentence is, on summary conviction, imprisonment for a term not exceeding the general limit in a magistrates' court, a fine or both, or, on conviction on indictment, imprisonment for up to two years, a fine or both."*<sup>2</sup>

3. The long title to the Bill states that it makes:

*"...provision about causing intentional harassment, alarm or distress to a person in public where the behaviour is done because of that person's sex; and for connected purposes."*

4. The Bill on introduction to the UK Parliament did not apply to Wales.

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<sup>1</sup> [The Protection from Sex-based Harassment in Public Bill](#), as introduced (Bill 20)

<sup>2</sup> [The Protection from Sex-based Harassment in Public Bill, Explanatory Notes](#), December 2022, paragraphs 1 and 2. The Explanatory Notes have been provided by the Home Office with the consent of Rt Hon. Greg Clark.

5. At the time we agreed our report, second reading in the House of Lords was scheduled to take place on 16 June 2023.

## **The Welsh Government's Legislative Consent Memorandum**

6. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

7. On 17 April 2023, Jane Hutt MS, Minister for Social Justice and Chief Whip (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.<sup>3</sup>

8. The Business Committee agreed that the Legislation, Justice and Constitution Committee, and the Equality and Social Justice Committee, should report on the Memorandum by 18 May 2023.<sup>4</sup> This date was subsequently extended to 8 June 2023.<sup>5</sup>

### **Provision for which the Senedd's consent is required**

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9. As noted above, in paragraph 4, the Bill as introduced to the House of Commons in June 2022 did not apply to Wales.

10. In the Memorandum the Minister states that, as a result of an amendment agreed to on 22 February 2023 during the Commons' Committee Stage, the new offence provided for in the Bill now applies to England and Wales.<sup>6</sup>

11. At paragraph 2 of the Memorandum the Minister therefore notes that all references to provisions in the Bill reflect the Bill as agreed at Commons Report Stage (HL Bill 125).

12. The Welsh Government's assessment is that the following provisions in the Bill require Senedd consent, as set out in paragraphs 17 to 22 of the Memorandum:

- clause 1 (Intentional harassment, alarm or distress on account of sex)

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<sup>3</sup> Welsh Government, Legislative Consent Memorandum, April 2023

<sup>4</sup> Business Committee, Timetable for consideration: Legislative Consent Memorandum on the Protection from Sex-based Harassment in Public Bill, April 2023

<sup>5</sup> Business Committee, Revised timetable for consideration: Legislative Consent Memorandum on the Protection from Sex-based Harassment in Public Bill, May 2023

<sup>6</sup> Memorandum, paragraph 16. See also paragraph 18.

- clause 3 (Consequential amendments)
- clause 4(3) and (4) (Extent, commencement and short title)

**13.** Specifically in relation to clause 4, the Minister states:

*“Clause 4 confirms the extent, commencement and short title. Clauses 4(3) and (4) grants a power to the Secretary of State alone to make regulations to commence the Bill and enables different days to be appointed for different purposes. Clause 4 (except clauses 4(3) and (4)) is a non-operative clause and has no legal effect outside of confirming the extent and title, and as such, the Welsh Government considers a legislative consent memorandum is not required to be laid for the purpose of SO 29.*

*However, it is the Welsh Government's view that consent is required for clauses 4(3) and (4) as it makes provision in relation to Wales within the legislative competence of the Senedd.”<sup>7</sup>*

**14.** As regards the regulation-making power in clause 4 which will enable the Secretary of State to commence the provisions in clauses 1 and 3 of the Bill, the Minister states:

*“The Home Office has offered a Memorandum of Understanding [MoU] for the use of the commencement powers in Clause 4 (only insofar as it relates to the commencement of clauses 1 and 3), whereby the UK Government and the Devolved Governments agree to a timetable for the Secretary of State to make regulations to commence the relevant provisions in the Bill. In this context, while this is a devolved area, the Welsh Government is content for the Bill to make provision for Wales and for the Secretary of State to retain the commencement powers.*

*A copy of the Memorandum of Understanding with the UK Government on the use of the commencement powers within clause 4 of the Bill will be made available to the Legislation, Justice and Constitution Committee.”<sup>8</sup>*

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<sup>7</sup> Memorandum, paragraphs 21 and 22

<sup>8</sup> Memorandum, paragraphs 24 and 25

**15.** Annex A of the Explanatory Notes to the Bill as agreed at Commons' Report Stage details the UK Government's assessment of the territorial extent and application of the Bill. Its opinion is that the legislative consent process would be engaged, in relation to Wales, for clauses 1, 3 and 4.<sup>9</sup>

### **The Welsh Government's position**

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**16.** At paragraph 8 of the Memorandum the Minister states that she wrote to the UK Minister for Safeguarding in August 2022 and gave support for the creation of an offence for sex-based harassment in public.

**17.** At paragraph 11 of the Memorandum, the Minister states:

*"In the absence of any obvious legislative vehicle in the Senedd's legislative programme to create such an offence, I have agreed that it is right for Wales to be included in this legislation, to ensure that people in Wales are not left in a position where they could be considered less safe from the risks of street and public sex-based harassment."*

**18.** The Minister considers the Bill's provisions to be "sensible and important" and it is therefore "considered sensible and equitable to take an England and Wales approach".<sup>10</sup>

**19.** At paragraph 27 of the Memorandum the Minister adds:

*"The Welsh Government recognises the benefit in taking this UK Bill forward so the provisions will apply at the same time across the UK. There is no comparable Senedd Bill planned in the short or medium term and, if the Bill proceeded without Wales or on different timescales, there is a risk of a regulatory gap between the Bill coming into force in the rest of the UK and a comparable Senedd Bill coming into force. Therefore, I consider utilising the UK Bill to provide a pragmatic and efficient opportunity to ensure equal protection from sex-based harassment in public in Wales."*

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<sup>9</sup> [The Protection from Sex-based Harassment in Public Bill, Explanatory Notes](#), April 2023, Annex A. The Explanatory Notes have been provided by the Home Office with the consent of Lord Wolfson of Tredegar, the Peer in charge of the Bill.

<sup>10</sup> Memorandum, paragraph 26

**20.** The Minister recommends the Senedd provides consent to the inclusion of the relevant provisions in the Bill.<sup>11</sup>

### **Reports from committees in the UK Parliament**

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**21.** On 26 April 2023, the Delegated Powers and Regulatory Reform Committee in the House of Lords published its report on the Bill, concluding “There is nothing in this Bill which we would wish to draw to the attention of the House”.<sup>12</sup>

## **2. Committee consideration**

**22.** We considered the Memorandum at our meeting on 2 May 2023.<sup>13</sup> We wrote to the Minister on 3 May 2023<sup>14</sup>, and received a response on 9 May 2023<sup>15</sup>. We agreed our report on 5 June 2023<sup>16</sup>.

### **Our view**

**23.** As confirmed by the Minister in paragraph 9 of the Memorandum, the Welsh Government's Programme for Government<sup>17</sup> makes a commitment to “Strengthen the Violence against Women, Domestic Abuse and Sexual Violence Strategy to include a focus on violence against women in the street and workplace as well as the home”.

**24.** We note that the Minister wrote to the UK Government in August 2022 to state support for the creation of an offence for sex-based harassment in public.

**25.** While we acknowledge that the Bill which is the subject of the Memorandum is a Private Members' Bill, and therefore would not have been subject to formal intergovernmental discussion before its introduction to the UK Parliament, we are unclear as to why the Welsh Government has not brought forward its own legislation on this matter given the clear commitment in its Programme for Government.

**26.** We also note the Minister's statement that there is not an “obvious legislative vehicle in the Senedd's legislative programme to create such an offence” and her

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<sup>11</sup> Memorandum, paragraph 29

<sup>12</sup> House of Lords' [Delegated Powers and Regulatory Reform Committee, HL Paper 182, 32nd Report of Session 2022-23](#), published 26 April 2023

<sup>13</sup> [Legislation, Justice and Constitution Committee](#), 2 May 2023

<sup>14</sup> [Letter to the Minister for Social Justice and Chief Whip](#), 3 May 2023

<sup>15</sup> [Letter from the Minister for Social Justice and Chief Whip](#), 9 May 2023

<sup>16</sup> [Legislation, Justice and Constitution Committee](#), 5 June 2023

<sup>17</sup> Welsh Government, [Programme for Government](#), December 2021

concerns that, without the extension of the offence to Wales, “people in Wales would be left less protected and worse off”.<sup>18</sup>

**27.** The Welsh Government will be aware of our view<sup>19</sup> that, where new legislative opportunities are identified by both the Welsh Government and the UK Government, our respective parliaments could legislate in parallel. This would still allow for co-operation between governments and would not lead to inconsistencies for citizens or in the law of England and Wales (if that is the desired effect).

**Recommendation 1.** The Minister should clarify why the Welsh Government has not brought forward its own Bill to create a new offence about the intentional harassment, alarm or distress to a person in public where the behaviour is done because of that person's sex and, in doing so, should explain if the Welsh Government has any concerns about the Senedd's legislative competence to pass its own legislation on this matter.

**28.** We note the Welsh Government's assessment of the provisions within the Bill that require the consent of the Senedd, as set out in the Memorandum.

**Conclusion 1.** We agree with the Minister's assessment that clause 1, clause 3 and clause 4(3) and (4) of the Bill fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29, and therefore require the consent of the Senedd.

**29.** We note the Minister's view that clause 4(1), (2), (5) and (6) are not relevant provisions for the purpose of Standing Order 29. We further note that the UK Government considers that the entirety of clause 4 does engage the legislative consent process. While we acknowledge the Minister's view that clause 4(1), (2), (5) and (6) are “non-operative”, to the extent that they make provision which relates to clauses 1 and 3, we are of the view that they do fall within a purpose within the legislative competence of the Senedd.

**Conclusion 2.** We consider that the Senedd's consent should be sought for the whole of clause 4 of the Bill.

**30.** As highlighted above in paragraph 22, we wrote to the Minister on 3 May noting that we had not yet received a copy of the MoU referred to in paragraphs

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<sup>18</sup> Memorandum, paragraphs 10 and 11

<sup>19</sup> See for example the Legislation, Justice and Constitution Committee's report on [The Welsh Government's Legislative Consent Memoranda on the Procurement Bill](#)

24 and 25 of the Memorandum and referenced above at paragraph 14 of this report.

**31.** At the point that we wrote to the Minister, our reporting deadline on the Memorandum was set at 18 May. As such, we asked to receive a copy of the MoU by 10 May.

**32.** In response, the Minister highlighted that the Business Committee had set a revised reporting deadline of 8 June, and told us “Officials are currently working on the wording of the MoU to ensure the Welsh Government is able to agree to a timetable for the Secretary of State to make regulations to commence the relevant provisions in the Bill. This will be made available to you at the earliest opportunity and in advance of the revised deadline.”<sup>20</sup>

**33.** The MoU<sup>21</sup> was signed on 1 June and sent to us on 2 June, meaning we were able to consider it before finalising our report.

**34.** We note that, under the terms of the MoU, the Secretary of State has agreed to:

- write to the Welsh Ministers to propose a commencement date before exercising the power to make the statutory instrument that appoints the commencement date;
- provide the Welsh Ministers with a “reasonable time to respond” to the proposed commencement date.

**35.** Under the terms of the MoU, the date to be proposed by the Secretary of State is to be the same date in both England and Wales.

**36.** We also note that the Welsh Ministers have agreed to respond within a “reasonable time”, and either agree with the proposed date or propose an alternative date.

**37.** Under the terms of the MoU, if the Welsh Ministers propose an alternative date and the Secretary of State does not agree with it, we note that officials from both governments will “seek to agree a suitable commencement date”.

**Conclusion 3.** Given that the Welsh Government has entered into an agreement with the UK Government on the exercise of the commencement powers in a Bill

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<sup>20</sup> Letter from the Minister for Social Justice and Chief Whip, 9 May 2023

<sup>21</sup> [Memorandum of Understanding Between The Welsh Ministers And The Secretary of State for the Home Department, 1 June 2023](#)



which is the subject of the legislative consent process, we welcome the Minister's commitment to provide the Senedd with a copy of the agreement before Members of the Senedd are asked to make a decision on whether to give legislative consent to the Bill.

**38.** There are a number of questions which arise from the terms of the MoU as agreed by the Minister which we believe the Minister should address before the relevant legislative consent debate in the Senedd.

**Recommendation 2.** The Minister should confirm if the Welsh Government sought a power on the face of the Bill for the Welsh Ministers to commence clauses 1 and 3 of the Bill as they apply in Wales before agreeing to enter into a Memorandum of Understanding with the UK Government. If the Minister did not seek such a power, she should explain the reason for not doing so.

**Recommendation 3.** The Minister should confirm if any discussions have taken place and/or what is the Welsh Government's understanding of what is meant by "reasonable time" which appears in the terms of the Memorandum of Understanding.

**Recommendation 4.** Should the Welsh Ministers propose an alternative commencement date to the one proposed by the Secretary of State, the Minister should confirm whether, when and how a formal dispute resolution process will be engaged should Welsh Government and UK Government officials be unable to agree a suitable commencement date.

**Recommendation 5.** The Minister should explain what action the Welsh Government would take should the Secretary of State decide not to propose a commencement date for clauses 1 and 3 of the Bill.