

Report on the Environmental Protection (Single-use Plastic Products) (Wales) Bill

October 2022



1. Introduction

On 20 September 2022 Julie James MS, the Minister for Climate Change (the Minister) introduced the Environmental Protection (Single-use Plastic Products) (Wales) Bill (the Bill)¹, and an accompanying Explanatory Memorandum (the EM)². The Minister also issued a Statement of Policy Intent for Subordinate Legislation to accompany the Bill.³

1. The Senedd's Business Committee did not refer the Bill to a responsible Committee for consideration of the general principles. The Business Committee's report, laid in accordance with Standing Order 26.10A, states:

*"The Welsh Government has requested an expedited timetable for Senedd scrutiny of this Bill on the basis that: there is an urgent need to implement a ban in Wales on the most commonly littered single use plastics, and to keep up with equivalent bans in the rest of the UK; and, due to its intention to use the Bill as a practical example to support its case in relation to the UK Internal Market Act in the Supreme Court."*⁴

2. The Business Committee report also states:

"On the basis of the scrutiny that the Climate Change, Environment and Infrastructure Committee has been able to conduct in the time available to it, and given the specific circumstances pertaining to the Bill, Business

¹ Environmental Protection (Single-use Plastic Products) (Wales) Bill, as introduced

² Environmental Protection (Single-use Plastic Products) (Wales) Bill, Explanatory Memorandum, September 2022

³ Welsh Government, Environmental Protection (Single-use Plastic Products) (Wales) Bill: Statement of policy intent for secondary legislation, September 2022

⁴ Business Committee, Timetable for consideration: The Environmental Protection (Single-use Plastic Products) (Wales) Bill, 4 October 2022

Committee agreed on 27 September 2022 not to refer the Bill to a responsible Committee for scrutiny of its general principles.”⁵

The purpose of the Bill

3. The Bill will make it an offence for a person to supply or offer to supply (including for free), certain commonly littered and unnecessary single-use plastic products listed in Schedule 1 to the Bill, to a consumer in Wales. The EM notes that the Bill includes a regulation-making power to enable Welsh Ministers to add or remove a single-use plastic product to the list of products in the Bill that are subject to the offence of supply (or offer of supply).⁶

4. The EM also notes that the Bill proposes:

- That the offence is a summary offence and so is triable in the Magistrates’ Court. If a person is found guilty of the offence, the Court may impose an unlimited fine.
- A requirement on the Welsh Ministers to report under section 79(2) of the 2006 Act on the consideration they have given to whether to exercise the regulation making power to add further products to the list of prohibited single-use plastic products in Schedule 1 to the Bill that are subject to the offence of supply (or offer to supply) and to make any proposed amendment to the exemptions listed in Schedule 1 to the Bill.
- That a local authority or a person authorised by the local authority shall be responsible for enforcing offences under the Bill.
- To provide powers of entry, investigation and to make test purchases for authorised officers of a local authority to enable them to investigate whether an offence has been committed.
- To make it an offence to intentionally obstruct an authorised officer of a local authority who is exercising their enforcement functions under the Bill.
- A power to enable regulations to be made by the Welsh Ministers to provide for civil sanctions to be made in respect of criminal offences created by the Bill.⁷

⁵ Business Committee, Timetable for consideration: The Environmental Protection (Single-use Plastic Products) (Wales) Bill, 4 October 2022

⁶ EM, paragraph 1

⁷ EM, paragraph 3.1.2

Background to the Bill

Policy purpose behind the Bill

5. The EM sets out the policy background to the Bill and states that:

*"Tackling the negative impacts from plastic pollution on our environment, wildlife, health and wellbeing is a key priority for Welsh Ministers and a Programme for Government commitment."*⁸

6. Chapter 3 of the EM and the regulatory impact assessment⁹ set out the policy issues in detail.

The United Kingdom Internal Market Act 2020

7. The *United Kingdom Internal Market Act 2020* ("UKIMA") established the market access principles for the UK internal market, which includes the mutual recognition principle for goods. This principle provides that goods which have been produced in, or imported into, one part of the UK, and which can be sold¹⁰ there without contravening any legislative restriction, should be able to be supplied in any other part of the UK. To give effect to this principle, section 2(3) of UKIMA disapplies any legislative restrictions that would otherwise apply to the sale of those goods in that other part of the UK.

8. This principle can be explained by use of a hypothetical example: if businesses in England are permitted to sell green chairs, those chairs can be lawfully sold in Wales even if there is a law banning the sale of green chairs in Wales.

9. The provisions of the Bill which seek to prohibit the supply¹¹ of certain plastic carrier bags and oxo-degradable plastics have the potential to engage the mutual recognition principle for goods. For example, in England, legislation prohibits the supply of various single-use plastics¹² but there are no restrictions on carrier bags or oxo-degradable plastics. This means that the Bill engages the mutual recognition principle because it purports to prohibit in Wales the supply of goods (carrier bags and oxo-degradable plastics) which are permitted in England.

⁸ EM, paragraph 3.1.1

⁹ EM, Part 2

¹⁰ In UKIMA, "sale" includes providing something free of charge

¹¹ In UKIMA, "supply" includes sale, providing it free of charge and/or offering to do either of those things

¹² The Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020

10. However, the effect of UKIMA is that those provisions of the Bill are of no effect so far as they seek to prevent businesses in England, Scotland or Northern Ireland from supplying carrier bags or oxo-degradable plastics to individuals or businesses in Wales. The prohibition is disapplied.

11. Despite this, the Bill's EM and impact assessments do not include information about the potential impacts that UKIMA could have on the practical effect of the legislation.

UKIMA legal challenge, the Welsh Government's legislative programme and the timetable

12. When the Bill was first announced as part of the Welsh Government's legislative programme for 2022-23, the First Minister outlined his intention to use the Bill as a test case as part of the Welsh Government's continuing legal challenge to UKIMA.¹³

13. The challenge began in 2021 when, on 19 January, the Welsh Government applied for permission to apply for judicial review in connection with the interpretation of provisions of UKIMA and their effect on legislation of the Senedd enacted in accordance with the provisions of the *Government of Wales Act 2006* (the 2006 Act).

14. The Welsh Government's application for permission was refused by the Divisional Court, and their appeal of this decision to the Court of Appeal was unsuccessful. The Court of Appeal upheld the earlier decision of the High Court that the case was brought prematurely, saying that only when there is specific Senedd legislation whose potential effect is said to be diminished by the Act can the Court make a decision.

15. The Welsh Government sought permission for an appeal to the highest court in the UK, the Supreme Court.¹⁴ The Supreme Court did not express a view on the merits of the case but simply refused permission to appeal.

Proposals for Welsh Government amendments at Stage 2

16. On 20 September 2022, the Minister wrote to the Chair of the Climate Change, Environment and Infrastructure (CCEI) Committee to set out that, amongst other things, it is the Welsh Ministers' intention to propose amendments at Stage 2, including introducing a criminal offence by way of amendment to section 5 of the Bill:

¹³ Plenary, 5 July 2022, Record of Proceedings (RoP), [114]

¹⁴ Legislation, Justice and Constitution (LJC) Committee, 14 March 2022, RoP, [84]

"A change to section 5 to ensure that the offence "offering to supply" a single-use plastic product cannot be interpreted such as to capture actions that we did not intend to capture. In particular, these changes clarify that this offence may only be committed on premises in Wales. In doing this, we also want to take the opportunity to make it clearer that a person who is outside Wales would commit an offence if they "supply" a prohibited single-use plastic product to a consumer who is in Wales (for example through an online or mail order sale)."¹⁵

17. The Minister provided the proposed amendments she intends to bring forward. There are two scenarios in which an offence may be committed under the proposed amendments: a. supplying a prohibited single-use plastic product to a consumer who is in Wales, including by delivering the product to a consumer who is in Wales; or b. offering, on premises in Wales, to supply a prohibited single-use plastic product to a consumer.

18. The 2006 Act requires, amongst other things, provisions in a Senedd Act to apply only in relation to Wales. That test concerns whether a Senedd Act will have practical application or effect other than in relation to Wales – i.e. in this context, if criminal offences are sufficiently linked to Wales. It does not mean that a Senedd Act can affect only people in Wales.

The Committee's remit

19. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

20. In our scrutiny of Bills introduced in the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;

¹⁵ Letter from the Minister for Climate Change to the Climate Change, Environment and Infrastructure Committee, 20 September 2022

- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter we consider relevant to the quality of legislation.

21. We took evidence from the Minister on 3 October 2022.¹⁶ Directly after the meeting, we wrote to the Business Committee seeking clarification on the reasons advanced by the Welsh Government for seeking an expedited process on 12 July, 20 and 27 September 2022, and the reasons for the Business Committee’s decision to accept an expedited process.

¹⁶ LJC Committee, 3 October 2022

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.¹⁷

General

22. We considered this Bill under the reserved powers model of legislative competence, as set out in section 108A of the 2006 Act.

23. In her statement on legislative competence, the Llywydd, Elin Jones MS, stated that:

*"...in accordance with section 110(3) of the Government of Wales Act 2006, it is my view that the Bill would be within the legislative competence of the Senedd."*¹⁸

24. When the Minister gave evidence to us on 3 October 2022 she confirmed that she was satisfied that the Bill was within the Senedd's legislative competence.¹⁹ In addition, the Minister, along with her officials, confirmed that proposed Stage 2 amendments notified to the CCEI Committee were also within competence.²⁰

Human rights

25. One of the requirements which must be met for a Bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act and requires all provisions of a Bill to comply with the ECHR (the Convention rights).

26. We asked the Minister what assessment had been made of the human rights implications of the Bill. The Minister told us she was satisfied that the Bill is compatible with the Convention rights, "very specifically with articles 6 and 8, and article 1 of protocol 1." The Minister also said:

¹⁷ EM, paragraph 2

¹⁸ Presiding Officer's Statement on Legislative Competence, 20 September 2022

¹⁹ LJC Committee, 3 October 2022, RoP [6]

²⁰ LJC Committee, 3 October 2022, RoP [77-97]

*"We think it achieves a fair and proportionate balance between the protection of the rights of those affected by the Bill and the effectiveness of the enforcement of the proposed regime."*²¹

27. Section 10 of the Bill allows a justice of the peace to issue a warrant authorising a local authority to enter a person's home, by force if necessary, in order to ascertain whether an offence has been committed. We asked the Minister what assessment has been made of whether or not this provision is compliant with human rights legislation. The Minister confirmed that this provision was associated with a criminal sanction and that the Bill was "making a criminal offence".²² The Minister's official added:

*"...section 9 is the power of entry for commercial premises, essentially. The Bill is aimed at supply in the course of a business, but we recognise that some businesses can operate from domestic premises too, so section 10 is a separate power of entry for those premises. There does have to be a warrant issued by a Justice of the Peace, and they themselves will be a section 6 Human Rights Act 1998 public authority, so when the Justice of the Peace is considering a warrant application, they have to assess that as being proportionate and necessary with convention rights as well. So, it's only really allowing entry to dwellings, as I say, with a warrant where a Justice of the Peace is satisfied as to the matters in section 10, and they are that it is reasonable to believe an offence has been committed and that it really is necessary to enter those premises in order to investigate that."*²³

Our view

28. We note the evidence in relation to matters of legislative competence from the Minister. We also note the Llywydd's statement that, in her view, the provisions in the Bill would be within the legislative competence of the Senedd.

29. With regards to any potential human rights implications of the Bill, we note that the Minister is satisfied that, as a whole, the Bill is compatible with the Convention rights.

30. We also acknowledge the Minister's comments in relation to section 10 of the Bill.

²¹ LJC Committee, 3 October 2022, RoP [11]

²² LJC Committee, 3 October 2022, RoP [58]

²³ LJC Committee, 3 October 2022, RoP [59]

3. Observations on the Bill

The purpose of the Bill, the Senedd timetable and the UKIMA legal challenge

31. We asked the Minister why it is appropriate to use an expedited legislative process in order to help the Welsh Government's legal challenge to UKIMA.²⁴ The Minister said

*"...I'm speaking to you today from the National Botanic Garden of Wales, where I'm in the middle of the biodiversity conference and launching the outcome of the deep-dive. If you were listening to the people here, you would be very convinced that not only do we need to do this fast, we should have done it already, and the faster we can get these harmful items out of our environment, out of our marine environment and out of our land and freshwater environments, the better. So, it's expedited because it's important to get these items out of our environment with the best speed that we can manage."*²⁵

32. The Minister added:

*"So, on UKIMA, we think that UKIMA does not bite on this Bill. We think that the provisions of the Bill are entirely within the legislative competence of the Senedd. It's not our intention—. It's not for me to decide this as well, ... , I should say, but it's obviously the Counsel General's opinion, but it's not my understanding that the Counsel General is planning to refer this proactively to the Supreme Court, assuming it gets through the Senedd and we get to that stage. Obviously, if the UK attorney general does that, then we will react accordingly. It's our position that this Bill is entirely within our competence, and that UKIMA is not capable of changing the devolved competence of the Senedd."*²⁶

²⁴ Unfortunately, the Business Committee's report required by Standing Order 26.10A was not published until 4 October and we were not therefore able to take it into account when questioning the Minister.

²⁵ LJC Committee, 3 October 2022, RoP [16]

²⁶ LJC Committee, 3 October 2022, RoP [18]

33. As highlighted earlier in the report, when the Bill was first announced as part of the Welsh Government's legislative programme for 2022-23, the First Minister outlined his intention to use the Bill as a test case as part of the Welsh Government's continuing legal challenge to UKIMA.

34. Given the Minister's remarks regarding her reasoning for an expedited scrutiny process in the Senedd, we asked her when the emphasis moved from the First Minister stating that an expedited process was needed so the Bill could be used as a challenge to the practical impacts of UKIMA, to the Minister's position that it is important to act quickly. The Minister told us:

*"I'm not sure, to be honest—you'll have to ask the First Minister what the reasoning was for that. I'm very clear that the reason for the expedition here is that we do not want to fall behind the Scottish and English Governments, in particular. We certainly don't want a situation where people are trying to dump single-use plastics on Wales because they're banned everywhere else in the United Kingdom. So, from my point of view, the expedition of this Bill is to do with making sure that we are at the forefront of this legislation, that we don't have products in Wales that are permitted anywhere else, and, frankly, that climate and nature emergencies are so extreme that we need to get this sorted out and out of our supply chains as fast as humanly possible."*²⁷

35. We suggested to the Minister that it was clear from what she told us that the argument for an expedited process has changed from that which was originally given to the Business Committee. We asked her if she was aware of when the new argument was put in front of the Business Committee, or indeed whether it has been, or whether the reliance on the go-ahead for an expedited procedure still rests on that legal challenge. The Minister said:

"I wasn't at the Business Committee, ... , as I'm sure you realise, so I'm not too sure myself, I'm sorry, about what quite was taken into account there. But we have consistently made the argument that the reason that we need to do this in this expedited way is because we want to ensure that we get this single-use plastic banned as fast as possible. We don't want to fall behind the other UK nations that are also introducing their own, or have already introduced their own bans, although our ban is slightly more extensive than theirs. And we certainly don't want to have any chance of there being supplies of single-use plastics dumped in Wales, because we're tail-end

²⁷ LJC Committee, 3 October 2022, RoP [20]

Charlie—that would be absolutely catastrophic—and therefore, we need to get this onto the statute book as fast as possible.

Obviously, the UK Internal Market Act 2020 judgment, as I'm sure that the committee is very well aware, probably more aware than I am, effectively shelved the question of the competence issue because it didn't have a specific example in front of it. And I believe, at that time, the First Minister and the Counsel General made statements to the Senedd about the possibility of this Bill being the actual live example that might bring it back into the court's competence. But my understanding is, and in my conversations with the Counsel General this has been the case—that our view is that this does not engage UKIMA, because the constitution of Wales can't be impliedly repealed by a route that doesn't specifically say that it's changing the devolution settlement. So, our view is that this is within the devolution settlement for Wales, therefore it's clearly within our competence, and we plan to legislate for it.

...But I am very clear that we think that UKIMA does not bite on this Bill, because it's within our competence—clearly within our competence—and the need for expedition is to make sure that we do not fall behind the UK nations and that we do not have any possibility of being the last bastion of these products in the UK. And then, as I say, because I'm down here at the biodiversity conference, you've only got to listen to the people talking about the problems in our marine environment, in our freshwater rivers and so on, for you to get a fire into your belly to get these things out of the market as fast as humanly possible. So, I really do think that there is a time imperative for this that is overriding everything else.”²⁸

36. Following our meeting the issue was raised with the Counsel General in plenary and he said:

“...there are two aspects to this. One, of course, is that we want to expedite for all the reasons that have been outlined in terms of the importance of the single-use plastics Bill, getting that through, and of course in terms of the timescale within the World Trade Organization time limit that's been set. So, all those things exist and are perfectly valid.

²⁸ LJC Committee, 3 October 2022, RoP [33-35]

But there is also a very valid role that I'm still keeping under very close consideration in respect of our challenge to the internal market Act. One of the difficulties I have in terms of making a very clear position and a very clear decision as to precisely what steps we will take is that my option to refer doesn't arise until the legislation has actually been passed. There may be the issue to consider as to whether, in fact, UK Government would choose to refer this. There may also be the alternative in fact that, within perhaps the not-too-distant future, there'll be a change of Government and we'll have the abolition of the internal market Act, which would save us an awful lot of trouble and inconvenience.

*So, I suppose really what I'm saying is that all those options are there and the reasons for the expedition are there, but they are twofold. It's just that, in terms of the precise step forward that we take once the legislation is passed, it is a matter for me to consider at that time and I will of course make a statement at that stage."*²⁹

37. He added:

*"...our position remains completely clear that we do not believe the internal market Act overrides our own devolved powers and responsibilities. We had hoped much, much earlier that that would have been clarified and that the Supreme Court would have taken the option, or the opportunity, to clarify that. It hasn't rejected our arguments; it just basically has said that it needs to consider them when it has a practical example for them. When that practical example comes, we need to be ready to actually do that and to deliver that. But that will be a consideration I'll make in due course, once the legislation has been passed. And I will, of course, make sure that there is a proper statement and debate in this Chamber."*³⁰

38. We also asked the Minister if she was concerned about the lack of scrutiny. The Minister told us:

"We have engaged with a wide range of stakeholders through the development of the policies that fed into this Bill. This has been under discussion for some considerable time. We've also undertaken targeted

²⁹ Plenary, 5 October 2022, RoP [114-116]

³⁰ Plenary, 5 October 2022, RoP [120]

engagement with key stakeholders, industry, retail representatives to explore all the feedback we've got to refine the proposals in the Bill. We are working closely with anyone impacted by the proposed changes to manage the implementation phase for them to be able to swap to more environmentally friendly products...

...to support the scrutiny process, on 15 August we published the draft Bill that enabled this committee, other committees and interested stakeholders an opportunity to see the proposed scope and direction of the Bill. The Climate Change, Environment and Infrastructure Committee also had an opportunity to consult, themselves, on the proposal, and I wrote to the Chair of that committee at introduction, to set out some minor changes we intend to propose to the Bill at Stage 2, which have arisen because we'd already published the draft Bill and we didn't want to change it as we went into this stage for the various committees."³¹

39. The Scottish Government introduced similar restrictions on single-use plastics in Scotland using powers under section 140 of the *Environmental Protection Act 1990* (the 1990 Act). The UK Government used the same powers to make regulations for England. We asked the Minister why the Welsh Government found it necessary to introduce a Bill when they could also have made regulations under the 1990 Act. The Minister told us:

"...we think it's very important that this is set out in primary legislation, and specifically, ... , we are very keen to be able to keep this up to date. So, in our consultation responses... around 60 different products were put forward by people across Wales as possible inclusions on the list of banned single-use products. So, I'm very keen that the Bill allows us a power to add in products once we've got the right evidential base for that and we're satisfied about the impact on the manufacturers and the suppliers, and so on. So, actually, it's very important for me that it isn't just a list of what's going to be banned right now, but it's a vehicle by which we can keep this legislation up to date, and as the technology moves and as the environmental impacts of this stuff become more widely known for each individual product, then we'll be able to add it in. And I think that's actually one of the fundamentally most important parts of the Bill."³²

³¹ LJC Committee, 3 October 2022, RoP [22-23]

³² LJC Committee, 3 October 2022, RoP [25]

Potential impact of UKIMA

40. This Bill restricts the supply of single-use carrier bags and oxo-degradable plastics. In England, there is no such restriction. Under the terms of UKIMA, therefore, the supply of single-use carrier bags and oxo-degradable plastics produced in, or imported into, England will not be prohibited in Wales. We therefore asked the Minister about the implications for the Bill. The Minister said:

*"...we take a slightly more robust view of that, basically. So, we're saying that neither UKIMA, as we do call it, or the exemption bite, because the Bill deals with non-reserved matters within the Senedd's competence, but we're clear and consistent that our view is that the internal market Act cannot limit the Senedd's competence to legislate on matters that are devolved. The Counsel General's challenge to the UK internal market Act rests on the argument that the Government of Wales Act 2006 is a constitutional statute and cannot be impliedly repealed by other Acts; it has to be specifically repealed if it's going to be repealed. That's our position. There's no doubt at all that this Bill is capable of providing the contextual example that the court spoke about when it deferred the judgment on that, but my understanding, in my conversation with the Counsel General so far, and Nick has just confirmed it and I'm sure he'll add to this as well, is that, at this point in time, our Counsel General does not intend to refer the matter to the Supreme Court itself; we're just going to let the legislation go through the Senedd in the normal way and, assuming it passes, then we will put it up for the King's consent and it will then be our law. Of course, the Attorney-General could refer it in from the English side—it will be interesting to see whether they do that or not, I suppose. We'll see, but it's not our attention to do that, as I understand it. I do emphasise to the committee that's not my decision; that's a decision for the Counsel General."*³³

41. The Minister's official added:

"As you say, it is open to the Counsel General to refer the Bill, as it is with any other Bill that the Senedd passes. He has to take that decision within four weeks of the Bill being passed, and the reason that that's the appropriate time to take the decision is, until then, you don't know what the final content of the Bill is. But, as the Minister said, the Counsel General did say, at

³³ LJC Committee, 3 October 2022, RoP [61]

*introduction, that he's not currently minded to refer the Bill, and that's because he's taken the view, as has the Llywydd, that it's within competence, that these are matters that we can legislate about and that we can ban the supply of these items into Wales. I think the question was whether it's possible for a court to take a different interpretation. It may be that the UK Government takes a different interpretation and, as the Minister says, it's then open to the Attorney-General to refer the Bill, and the issues would be have to be considered by the court. But we're clear, in our view, that we think we can do this."*³⁴

42. The Bill's Explanatory Memorandum and regulatory impact assessment do not include information about the potential impacts that UKIMA could have on the practical effect of this Bill. We asked the Minister if she was concerned that this could lead to individuals and businesses being unaware of the full extent of the law in Wales. The Minister told us

*"...I think it's fine. We take a very robust view that the internal market Act does not bite. So, having taken that view, it would be very odd to put it in our explanatory memorandum, wouldn't it? We just take the view that it's not relevant. It doesn't bite, it doesn't affect our competence, and therefore we're not taking it into account. It would be very self-contradictory to then set out some 'what ifs', if you like. So, I'm very confident that that's the right thing to do, and, as I say, more generally, we will be putting out a big public information campaign about this, and, anyway, we've been working with all of our various stakeholders, and you can imagine them, and there will be advice available through Business Wales and various other things, not only that you should stop supplying the products banned under this Bill, but how to get alternative suppliers and all the rest of it, and, actually, and I think very importantly for the businesses, how to market the fact that you're not using these products. Because actually it's very marketable."*³⁵

³⁴ LJC Committee, 3 October 2022, RoP [62]

³⁵ LJC Committee, 3 October 2022, RoP [71]

Section 1 – Key concepts: “plastic product”, “single-use” and “plastic; Section 2 – Prohibited single-use plastic products; Section 3 – Prohibited single-use plastic products: power to amend

43. Section 1 defines key concepts for the purposes of the Bill covering “plastic product”, “single-use” and “plastic”.

44. Section 2 introduces Schedule 1 which lists those products that are single-use plastic products for the purpose of the Bill. Section 3 of the Bill provides the Welsh Ministers with a Henry VIII regulation-making power to amend Schedule 1 by:

- adding or removing a product in column 1 of the Table in the Schedule,
- adding or removing an exemption relating to a product in column 2 of the Table in the Schedule, and
- making other amendments in accordance with the section.

45. Amending regulations will be subject to the draft affirmative procedure.

46. During an appearance before the CCEI Committee on 29 September 2022, the Minister’s attention was drawn to the concerns of some stakeholders that the current definition of ‘single-use’ is open to interpretation and could provide loopholes allowing people, perhaps, to circumvent some of the restrictions in the Bill.³⁶ In responding to this point and explaining the definitions used in the Bill, the Minister said:

“We will be putting comprehensive guidance out to help businesses, consumers and local authorities understand the various legal definitions in the Bill. We’ll develop that collaboratively and we’ll undertake it in advance of the legislation coming into effect so that everybody is very clear.

(...)

I don’t know if you want me to immediately address, Chair, the issue about the loophole we’re familiar with. So, it’s commonplace in Bills for ‘open to interpretation’. It’s often a trade-off between ease of understanding and absolute certainty. We understand that the point that’s been made to use is about multipack products—so, the text is being interpreted in such a way as

³⁶ Climate Change, Environment and Infrastructure (CCEI) Committee, 29 September 2022, RoP. [190]

to conclude that a pack of say 50 forks is not a single-use fork but a 50-uses thing. We don't think that's a sensible interpretation at all. We don't think the courts would go with that as a sensible interpretation, but we're very happy to consider the matter ahead of Stage 2..."³⁷

47. We asked the Minister why it is an appropriate approach to rely on guidance concerning the interpretation of key terms and provisions of the Bill rather than including clearer language in the Bill. Repeating the points made to CCEI Committee, the Minister told us:

"Legislative drafting is, as you know, a trade-off between ease of understanding and absolute certainty. So, we all think we know what we mean by 'single-use plastic', but there will be some room for doubt. So, the guidance will be very, very clear in terms of what we think are examples of single-use plastics. The one I was using in the committee the other day was that, if you're selling single-use forks but you're selling them in a packet of 50, the argument that therefore it is not single-use because it's obviously got 50 uses in it is not going to bite, because we're going to say that each individual product in that multipack is caught. (...)

...there will be tests in the guidance: is the purpose of producing this product that it is thrown away after use? The fact that, if you were a bit more frugal you might take it home and wash it is neither here nor there, the point is is the thing produced in order to be a single-use plastic. (...) So, the guidance will assist local authorities and suppliers, and, indeed, retail outlets, and especially those in hospitality, because that's what we're talking about for a lot of these products, to understand more about what we mean by the definition than is possible to put on the face of the Bill without making it ridiculously cumbersome.

And we also are very keen with this Bill to futureproof it, so... we've given ourselves the power to add-in additional plastic items and a reporting facility under the Government of Wales Act, and the idea of that is that, as this agenda changes, and as more and more things become available in recyclable products, then we'll be able to take the non-recyclable ones out of the market... I was very keen to see a measure in the Bill that made Welsh Ministers consider each year whether or not they were going to add

³⁷ CCEI Committee, 29 September 2022, RoP [196-197]

something into the list and what the evidential base for that is. So, we will have to report on whether or not we've added something in and why."³⁸

48. The Minister also confirmed that any guidance arising would be subject to the scrutiny of the Senedd and subject to consultation with stakeholders³⁹ including manufacturers and producers.⁴⁰ The Minister told us:

*"...in particular, we've worked very hard with the Welsh Local Government Association and our trading standards partners to make sure that their understanding of what is banned and our understanding of what is banned is the same; that we issue guidance in conjunction with them and co-produced with them, so that it's fit for purpose; and that we have the same attitude to slightly more tricky issues like the multipacks and so on, in each part of Wales as each local authority takes up its enforcement role. (...) we are expecting—just like the single-use carrier bags—that there'll be an implementation phase of training and education, where we basically approach businesses and say, 'Are you aware that you shouldn't be supplying this stuff any more? Please don't'—guidance and so on. And then, we'll have very few prosecutions, because actually, there'll be a small phase of just making people understand and then actually, they'll come on board. And that's what happened with the single-use carrier bags and we're very much learning from that how that legislation worked and putting it into practice here."*⁴¹

Enforcement

49. Section 7(1) of the Bill provides that a local authority may:

- investigate complaints in respect of alleged offences under section 5 (Offence of supplying prohibited single-use plastic products) in its area,
- bring prosecutions in respect of offences under section 5 of the Bill in its area, and
- take other steps with a view to reducing the incidence of such offences in its area.

³⁸ LJC Committee, 3 October 2022, RoP [44–[46]

³⁹ LJC Committee, 3 October 2022, RoP [48–49]

⁴⁰ LJC Committee, 3 October 2022, RoP [52–53]

⁴¹ LJC Committee, 3 October 2022, RoP [51]

50. Section 7(2) provides that any reference in the Bill to an authorised officer of a local authority is to any person authorised by the local authority.

51. On the issue of enforcement, the Minister told us:

"We will absolutely be co-producing this guidance with the WLGA, and we will be taking as much advice from the trading standards officers on the ground as we are from our other experts in terms of enforcement ... So, there'll be a period of non-enforcement, where we're doing learning engagement, understanding, just explaining to people, basically, 'Do you know you're no longer allowed to supply these products? Could you stop, please? Here are alternative suppliers', and so on. You'd have to be a pretty obtuse business somewhere in Wales not to know this is coming. We've been talking about it for a good long while now, and it's not the only place in the UK.

So, I don't think it will be a big revelation to people that this stuff is coming. But, nevertheless, we will have that period of working with them, and the trading standards officers are very keen on that themselves. They don't want to be prosecuting people for no good reason who just broke the law by mistake. So, we anticipate that the people who are prosecuted under the Act will be those who are deliberately flouting the law, not people who've strayed into it by accident... But obviously we'll work with our stakeholders about developing communications around the Bill, including the provision of information to suit businesses, consumers and local authorities. There'll be a public information campaign about it, and why we're doing it and the damage to the environment that goes alongside these single-use plastics.

*So, I think it will be very important to keep the guidance under review, and to make sure that it's a practical, working document fit for purpose, and we can only do that if we do it in conjunction with the enforcement bodies, which are the local authorities."*⁴²

Our view

52. There are a number of issues we would like to have pursued with the Minister in correspondence but the limited time available for scrutiny has meant this has not been possible.

⁴² LJC Committee, 3 October 2022, RoP [66-68]

As a result, many of our recommendations request this information to be provided during the Stage 1 debate on the Bill's general principles.

Expedited scrutiny: bypassing Stage 1 of the Senedd's legislative process

53. We note that the Business Committee agreed to bypass Stage 1 scrutiny of the Bill on 27 September 2022 in accordance with Standing Order 26.9.

54. As a matter of principle, we believe that Bills introduced to the Senedd benefit from all relevant committees having the opportunity to scrutinise them in detail and, as part of that process, enabling stakeholders to engage with Senedd committees over a reasonable period of time. This process helps the legislature to identify areas where proposed new law could be improved, to assist the Welsh Government deliver the best legislation possible: the more thorough the scrutiny, the better legislation. Nevertheless, we accept that there may be occasions when an expedited process is appropriate.

55. We note the Business Committee's report under Standing Order 26.10A, and the subsequent comments of the Counsel General in plenary, which contained information which did not come across clearly in our session with the Minister.

56. We have serious reservations that omitting a Stage 1 process has a negative effect on the legislative scrutiny of this Bill.

57. The suggestion that the process of law-making should be bypassed to potentially facilitate the pursuit of a legal challenge by the Welsh Government, whatever the merits or intentions of that challenge, is unwelcome and risks undermining the functions of this legislature. We hope that such arguments are not proposed by the Welsh Government in future.

58. When asked if she was concerned about the lack of scrutiny, the Minister pointed to the engagement undertaken with stakeholders and the publication of a draft Bill during the summer recess to aid work being undertaken by CCEI Committee. However, we note that the EM and regulatory impact assessment for the Bill were not made available and therefore could not be considered by stakeholders. In addition, we would highlight that consultation and engagement undertaken by the Welsh Government is different to that undertaken by Senedd Committees. The role of Committees is to undertake detailed scrutiny of the way a Bill is drafted in order to deliver its policy objectives, rather to comment on the broader policy principles underpinning a piece of legislation.

59. On the issue of expediting the legislation because of the need to get it on the statute book quickly, we are not convinced by the arguments put forward by the Minister, for the reasons we set out below.

60. Acts of the Senedd should be effective in achieving their policy objectives. In our view, other than in exceptional circumstances, that should require full scrutiny by the Senedd of Bills over a reasonable period of time, rather than curtailed scrutiny and an over-reliance on government assurances that the legislation is sound. Indeed, on the same day the Bill was introduced, the Minister wrote to the CCEI Committee highlighting amendments that it was proposing at Stage 2. The fact that these amendments concern existing text suggests that the introduction of the Bill was rushed and also that there may be further issues that have not been fully thought through.

61. In our view, there is a danger that curtailed scrutiny could lead to unintended consequences and that potentially, the Bill could not be as effective in delivering its full and intended policy objectives, and therefore fully benefit the Welsh environment. We consider this point further in our discussion below on the impact of UKIMA.

62. We are also not convinced that the Welsh Government has acted as quickly as it could have done. In March 2020, during the Fifth Senedd, the Welsh Government announced that plastic straws, cutlery and polystyrene food and drink containers were to be banned in Wales as part of wider measures to make Wales the world's top recycling nation, noting that a consultation on the proposals would take place with restrictions due to come into force in the first half of 2021.⁴³ The Explanatory Memorandum notes, "A 12-week public consultation on our initial proposals for subordinate legislation was undertaken from 30 July 2020 to 22 October 2020".⁴⁴ It also notes that:

*"Introducing this legislation is the first step in delivering our **Programme for Government** commitment, published June 2021, to abolish the use of more commonly littered SUP products in Wales. It also contributes to our wider vision of establishing a circular economy in Wales, as set out in our strategy **Beyond Recycling**, and by implementing a number of actions including in our **Litter & Fly-tipping Prevention Plan** aimed at addressing single-use products in Wales."⁴⁵*

⁴³ Welsh Government, Single use plastics to be banned in Wales, 18 March 2020

⁴⁴ EM, paragraph 4.1.1

⁴⁵ EM, paragraph 3.5.2

63. The Programme for Government published in June 2021 says that the Welsh Government will “legislate to abolish the use of more commonly littered, single use plastics”, although no mention is made of whether this will be by means of a Bill or subordinate legislation.

64. We note that the Welsh Government undertook a consultation in 2020 on proposals for reducing single-use plastics in Wales. We also note that in England and Scotland (as we raised with the Minister) regulations were introduced to ban some single-use plastics, coming into force in April 2020 and June 2022 respectively.⁴⁶ When we asked the Minister why subordinate legislation was not being used in Wales, she highlighted the importance of setting out the policy in primary legislation and being able to keep it up to date.

65. It is unclear to us why it has taken around two years since the close of the consultation in October 2020 for the Welsh Government to introduce this legislation. We would contend that instead of seeking to expedite the Bill’s progress through the Senedd, and reducing the opportunities for valuable scrutiny, the Welsh Government should have expedited the Bill’s development ahead of its introduction. In this regard, we also highlight our July 2021 report,⁴⁷ and those of our predecessor Committee,⁴⁸ expressing concern at the Welsh Government’s use of the UK Government’s Environment Bill to deliver policy in a devolved area.

66. While we welcome the use of a Bill to deliver the policy objective, we wish to comment on the Minister’s suggestion that one of the benefits of the Bill over regulations is that it is “a vehicle by which we can keep this legislation up to date” (because the Bill includes a regulation-making power in section 3 for the Welsh Ministers to add or remove types of single-use plastics to the list set out in Schedule 1). However, introducing regulations under the 1990 Act in the first instance would not prevent the introduction of a Bill at a later date to ban further types of polluting single-use plastics (following, as the Minister highlighted, the necessary evidential base) and to consolidate the existing legislation. It is also worth highlighting that introducing regulations under the 1990 Act in the first instance would not prevent the banning of additional single-use plastics through regulations.

⁴⁶ EM, paragraphs 3.9.1-3.9.5

⁴⁷ Legislation, Justice and Constitution Committee, **The Welsh Government’s Legislative Consent Memorandum on the Environment Bill**, July 2021

⁴⁸ Legislation, Justice and Constitution Committee, **The Welsh Government’s Legislative Consent Memorandum on the Environment Bill**, July 2020; Legislation, Justice and Constitution Committee, **The Welsh Government’s Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Environment Bill**, February 2021

67. We also believe that if the Welsh Government wishes to implement primary legislation urgently, it must do so in the most transparent way – a way all in which Members of the Senedd are able to consider and vote on its appropriateness at the outset. The Senedd's Emergency Bill procedure (under Standing Orders 26.95–26.104) provides this option for the Welsh Government. We consider that the question of whether this Bill was so urgent that it needed to be expedited through the Senedd would have been better considered by the whole Senedd rather than it being left for the Business Committee to decide.

68. We also note the correspondence from the CCEI Committee to the Business Committee, which stated:

"As I said in my letter of 11 July, a decision by the Business Committee to bypass committee scrutiny would deny stakeholders and the public the only opportunity for them to be consulted on the detailed provisions in the Bill. The CCEI Committee's work, outside the formal Bill scrutiny process, was necessary to avoid a scrutiny deficit. I believe we have succeeded in our aim. However, this approach should not in any way be considered equivalent to, and certainly not an adequate replacement for, formal Stage 1 Committee scrutiny."

69. We agree with this view and welcome the fact that the CCEI Committee was able to undertake work during the summer recess in order to facilitate some scrutiny of the Bill prior to the Stage 1 debate on its general principles.

70. We also note the references made by both the Counsel General and the Minister⁴⁹ to the requirements of the World Trade Organization treaty on technical barriers to trade. We are unclear as to why this is not referenced in the EM given it has implications for the commencement of the Bill's provisions.

Conclusion 1. We are not persuaded that it was appropriate for the Welsh Government to seek to bypass Stage 1 scrutiny of the Bill.

71. We therefore make the following recommendations.

Recommendation 1. During the Stage 1 debate, the Minister should explain why a Bill was not introduced early in the first year of the Sixth Senedd.

⁴⁹ CCEI Committee, 29 September 2022, RoP [208]

Recommendation 2. During the Stage 1 debate, the Minister should explain what the consequences would have been for the Welsh environment if the Bill had been subject to the Senedd's normal Stage 1 scrutiny process and full legislative scrutiny.

Recommendation 3. During the Stage 1 debate, given her view that the legislation is needed urgently, the Minister should explain why she did not request the use of the Senedd's Emergency Bill procedure.

Recommendation 4. During the Stage 1 debate, given her view that the *United Kingdom Internal Market Act 2020* "does not bite on the Bill", the Minister should explain why it was advanced as an argument to expedite scrutiny of the Bill.

Recommendation 5. During the Stage 1 debate, the Minister should state clearly when she intends to commence all provisions of the Bill so that it is fully operational.

Recommendation 6. During the Stage 1 debate, the Minister should confirm how the World Trade Organisation treaty on technical barriers to trade will impact on the commencement and implementation of the Bill's provisions.

Potential impact of UKIMA

72. In plenary on 5 October 2022, the Counsel General said "we do not believe the internal market Act overrides our own devolved powers and responsibilities."

73. We accept that UKIMA cannot limit the Senedd's competence to legislate on matters that are devolved and within its legislative competence. However, our concern is that once law is made by the Senedd, UKIMA can impact on how effective that law is because of the market access principles it introduces across the UK.

74. Although the Senedd can legislate to ban single-use carrier bags and oxo-degradable plastics as is proposed in the Bill, that ban could be rendered ineffective because those products could be made available in Wales by non-Welsh producers from, for example, England where they are not banned. To illustrate this point, we include a case study at Box 1.

Box 1: Oxo-degradable plastic case study

The regulatory impact assessment accompanying the Bill identifies that the provisions in the Bill on oxo-degradable plastics would ban the supply of mulch film to agricultural and horticultural producers in Wales. This film is used by businesses for weed control, moisture retention and overall to improve crop yield.

The regulatory impact assessment sets out the costs, risks and benefits of such a ban on supply but does not mention the *United Kingdom Internal Market Act 2020*.

Welsh producers

If the Bill was passed as drafted, then it would be an offence for a Welsh producer or a company importing mulch film directly to Wales from outside the UK to supply oxo-degradable mulch film in Wales. The Bill's regulatory impact assessment states that the Welsh Government had not identified any mulch film producers in Wales.

Producers elsewhere in the UK

Oxo-degradable plastics have not been banned in Scotland, England and Northern Ireland. As such mulch film can continue to be supplied legally in these countries.

The mutual recognition principle enshrined in the *United Kingdom Internal Market Act 2020* means that producers or importers of mulch film in Scotland, England and Northern Ireland automatically have the right to sell their product in Wales provided they meet the legal standards set for these products in the country they are produced.

UKIMA effect on the Bill

In this example, given that the regulatory impact assessment says no Welsh producers were found, unless Welsh horticultural or agricultural producers import mulch film directly into Wales from outside the UK, the ban on oxo-degradable plastics would have little practical effect in Wales. Welsh businesses will still be able to buy mulch film from elsewhere in the UK as suppliers in England, Scotland and Northern Ireland would be able to continue to supply to them.

75. Furthermore, when we asked why the EM and regulatory impact assessment do not include information about the potential impacts that UKIMA could have on the practical effect of this Bill, she said "it would be very odd" to include it given their view of UKIMA, stating:

"We just take the view that it's not relevant. It doesn't bite, it doesn't affect our competence, and therefore we're not taking it into account. It would be very self-contradictory to then set out some 'what ifs', if you like. So, I'm very confident that that's the right thing to do..."

76. We disagree with the Minister about not including this information in the EM and regulatory impact assessment because:

- one of the reasons for expediting the Bill included in the Business Committee report is due to the Welsh Government's intention to use the Bill as a practical example to support its case in relation to the UKIMA in the Supreme Court;
- the Counsel General has acknowledged that he is still keeping under very close consideration the Welsh Government's challenge to UKIMA.

77. By not acknowledging the potential impact of UKIMA on the practical effect and enforcement of this Bill, we are concerned there is a danger that people and businesses affected in Wales are not being provided with accurate information about the effect of this legislation. This could result in individuals and businesses being unaware of, or misled about, the full extent of the law as it applies in Wales. In addition, it is possible that there are difficulties and uncertainty about what provisions can be enforced by local authority trading standards. We are also concerned that uncertainty in enforcing the Bill is being passed onto local authorities.

78. These matters could have been explored in greater depth had Stage 1 scrutiny not been expedited.

Recommendation 7. During the Stage 1 debate, the Minister should confirm whether the case study on oxo-degradable plastic is accurate and if not, why not.

Recommendation 8. No later than 10 working days after the Stage 1 debate, the Minister should write to us and the Climate Change, Environment and Infrastructure Committee, providing her detailed assessment of our case study on oxo-degradable plastic including any implications for enforcement of the law arising from the Bill.

Recommendation 9. During the Stage 1 debate, the Minister should explain how local authorities will be able to take enforcement action in relation to all prohibited items in the Bill, even if they are supplied from other parts of the UK, including, in particular, single-use carrier bags and oxo-degradable plastics.

Recommendation 10. No later than 10 working days after the Stage 1 debate, the Minister should write to us and the Climate Change, Environment and Infrastructure Committee providing detailed information explaining how local authorities will be able to take enforcement action in relation to all prohibited items in the Bill, even if they are supplied from other parts of the UK, including, in particular, single-use carrier bags and oxo-degradable plastics.

Recommendation 11. During the Stage 1 debate, the Minister should, if UKIMA "does not bite on the Bill" and the Bill is within the Senedd's legislative competence, (and following the

Counsel General's comments in plenary on 5 October) explain the grounds on which the Welsh Government *could* make a legal challenge in relation to UKIMA and via which legal avenue.

Provisions in the Bill and the rule of law

79. One of the underlying principles of the rule of law is certainty. We therefore do not share the Minister's view that legislation should be "open to interpretation" or that it is "a trade-off between ease of understanding and absolute certainty". We certainly do not believe there should be room for doubt particularly where the Minister is of the view that "we all think we know what we mean by 'single-use plastic'".

80. As such we believe that it there should be better, more precise definitions in the Bill, rather than seeking to provide clarity through guidance. The rule of law necessitates a distinction between non-statutory guidance and requirements imposed by law. Although the Minister referred to "statutory guidance", the Bill does not currently reflect this position. Although guidance may influence behaviour, ultimately the interpretation of the Bill would be left to the courts. The introduction of overly flexible definitions in the Bill may result in ambiguity and challenge. We are therefore concerned for local authorities when enforcing the provisions in the Bill, given that they should not apply or enforce guidance as if it were the law.

81. Duties imposed on people require legal certainty – those subject to the duties will need to ensure that they have the necessary information to interpret and understand how they can comply with the law.

82. We also note the Minister's comment that any guidance arising would be subject to the scrutiny of the Senedd and subject to consultation with stakeholders. However, again, no such requirement is included in the Bill.

Recommendation 12. The Minister should re-visit the definitions in section 1 of the Bill, with a view to tabling amendments that contain more complete definitions, which reduce the scope for loopholes to be exploited and provide greater certainty for those enforcing the Bill.

Recommendation 13. The Minister should table amendments to the Bill to provide that there is a duty in the Bill to provide guidance, that the duty includes consultation with stakeholders, and that the guidance should be subject to scrutiny by the Senedd.

83. We note the inclusion of Henry VIII powers in section 3 that would allow the list of prohibited single-use plastic products to be changed by regulations and welcome the use of the affirmative procedure to make them.

84. However, we believe be that before making such regulations, the Welsh Ministers should be subject to a duty to consult.

Recommendation 14. The Minister should table an amendment to the Bill to provide a duty to consult stakeholders including manufacturers and producers before making regulations under section 3.

85. As our discussion with the Minister and officials about the proposed amendments to section 5 indicated,⁵⁰ matters related to the offence of supplying prohibited single-use plastic products are complex.

Recommendation 15. During the Stage 1 debate, the Minister should explain the reasons for providing that a person outside Wales commits an offence where they supply a prohibited single-use plastic product to a consumer who is in Wales.

Recommendation 16. During the Stage 1 debate, the Minister should explain how section 5 of the Bill will be enforced as regards single-use carrier bags and oxo-degradable plastics.

86. Many of our recommendations require information to be provided during the Stage 1 debate and this may mean that responses are not as detailed as is necessary for the purposes of facilitating later amending stages of the legislative process.

Recommendation 17. The Minister should ensure that detailed responses in relation to the substance of each recommendation are included in her response to this report, which should be provided no later than 10 working days after the Stage 1 debate.

⁵⁰ LJC Committee, 3 October 2022, RoP [77-97]