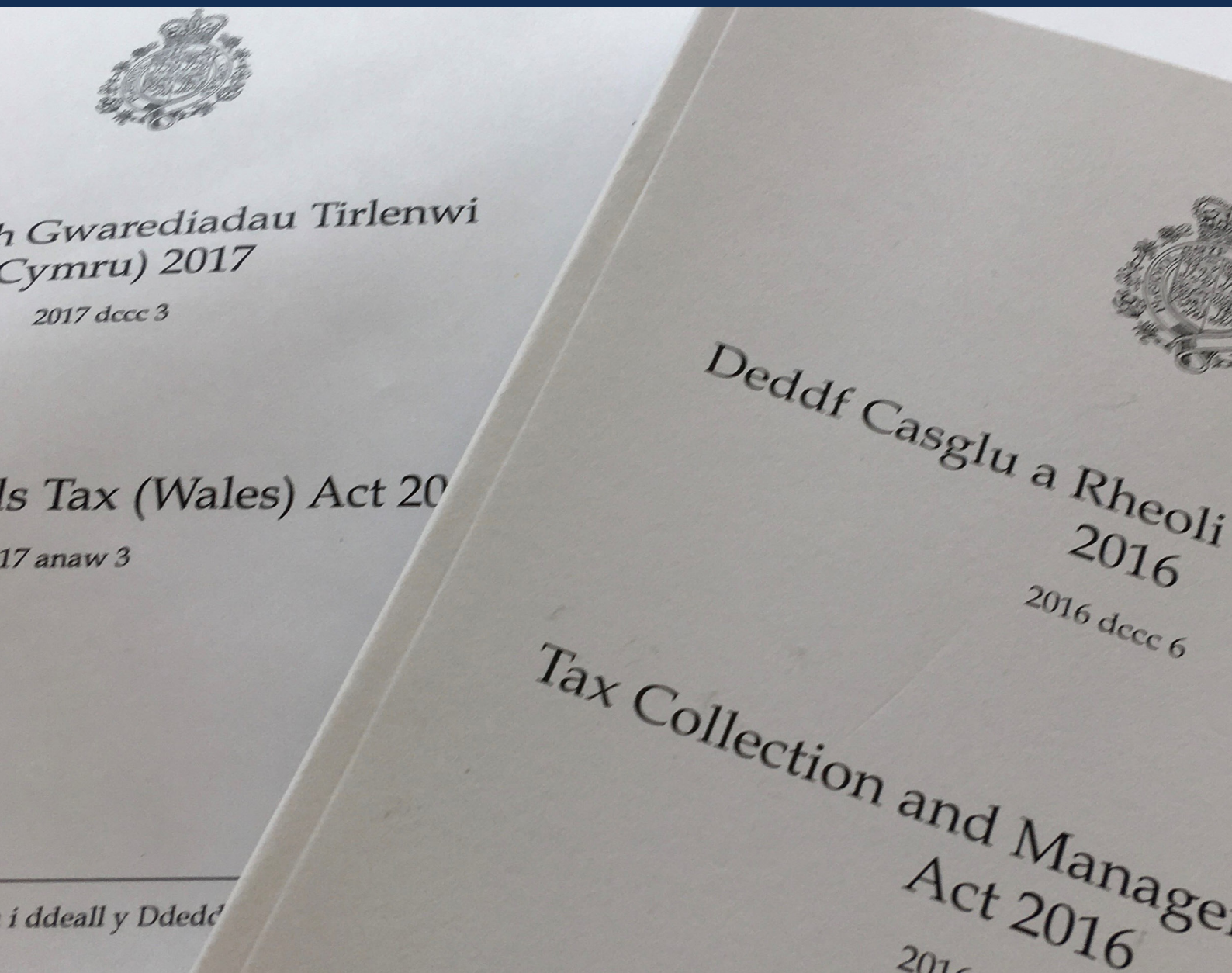


Welsh Tax Acts etc. (Power to Modify) Bill

Committee Stage 1 Report

April 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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Committee Stage 1 Report

April 2022



About the Committee

The Committee was established on 23 June 2021. Its remit can be found at:
www.senedd.wales/SeneddFinance

Current Committee membership:



Committee Chair:
Peredur Owen Griffiths MS
Plaid Cymru



Peter Fox MS
Welsh Conservatives



Mike Hedges MS
Welsh Labour



Rhianon Passmore MS
Welsh Labour

The following Members attended as a substitutes during the scrutiny of the Bill.



Alun Davies MS
Welsh Labour



Jack Sargeant MS
Welsh Labour



Carolyn Thomas MS
Welsh Labour

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Conclusions and Recommendations

Recommendation 1. The Committee recommends that the Senedd, taking into account the recommendations in this report, agrees the general principles of the Welsh Tax Acts etc. (Power to Modify) Bill. Peter Fox MS does not support this recommendation.Page 30

Conclusion 1. The Committee regrets the lack of specific examples provided by the Welsh Government relating to how the regulation-making power delegated by this Bill would be used to amend the Welsh Tax Acts in practice.Page 46

Recommendation 2. The Committee recommends that, prior to the debate on the general principles of the Bill, the Welsh Government provides examples of the specific circumstances in which it envisages the regulation-making power in section 1(1) being used to amend each part of the Tax Collection and Management (Wales) Act 2016 (other than Part 2), the Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.Page 46

Recommendation 3. The Committee recommends that the Welsh Government reviews the wording of section 1(1), to ensure that the limitations placed on Welsh Ministers that any modifications are ‘necessary or appropriate’ is meaningful, and that examples are provided to illustrate how this condition limits the delegated power in practice.Page 46

Recommendation 4. The Committee recommends that the Welsh Government commits to including details of any consultation, or sets out detailed reasoning for not doing so, in the Explanatory Memorandum accompanying any future regulations made under section 1(1) of the Bill.Page 46

Recommendation 5. The Committee recommends that the Bill be amended so that the effect of section 2(1)(c), in respect of regulations made for the purpose set out in section 1(1)(c), is limited to no earlier than the effective date of the change to the predecessor tax.Page 56

Recommendation 6. The Committee recommends that the Bill be amended:

- so that the effect of section 2(1)(c), in respect of regulations made for any of the purposes set out in section 1(1)(b) and (d), is limited to no earlier than the date of an announcement;
- to specify that the date of that announcement is the date Welsh Ministers lay a written statement before the Senedd;

- to require Welsh Ministers to bring forward an oral statement at the first plenary session after an announcement is made. Page 56

Recommendation 7. The Committee recommends that the Bill be amended to require the policy statement on the use of the power to make regulations with retrospective effect in section 3 to be laid before and approved by the Senedd, including any subsequent changes. The motion to approve the policy statement (and any subsequent changes) should not be moved until a responsible committee has reported..... Page 57

Recommendation 8. The Committee recommends that the Minister considers amending the Bill to include a minimum time period for scrutiny by the Senedd of regulations made under section 1(1)..... Page 67

Recommendation 9. The Committee recommends that the Bill be amended to place a duty on the Welsh Government to undertake a review of the operation and effect of the Act:

- two years after receiving Royal Assent; and
- on every fifth anniversary of receiving Royal Assent,

with the findings of those reviews to be laid before the Senedd. Page 71

Recommendation 10. The Committee recommends that the Bill be amended to stipulate that the statutory reviews of the operation and effect of the Act by the Welsh Government include an assessment of the following:

- the nature and effectiveness of any regulations made under section 1(1) of the Act;
- the Act's impact on taxpayers and devolved Welsh taxes;
- the continuing appropriateness of the regulation-making powers conferred on Welsh Ministers by the Act and the Welsh Tax Acts; and
- alternative legislative mechanisms for making changes to the Welsh Tax Acts and regulations made under them. Page 71

Conclusion 2. The Committee is disappointed with the lack of financial information presented in the Regulatory Impact Assessment. While it accepts the difficulty in seeking to quantify the costs of future unknown changes to the Welsh Tax Acts, the nature of the Bill has resulted in the Committee being unable to draw any meaningful conclusions on the financial implications of it. Page 76

Recommendation 11. The Committee recommends that the Welsh Government commits to providing full and robust Regulatory Impact Assessments for any future regulations made under the power proposed in the Bill..... Page 76

1. Introduction

1. On 13 December 2021, the Minister for Finance and Local Government (the Minister), Rebecca Evans MS, introduced the Welsh Tax Acts etc. (Power to Modify) Bill (the Bill)¹ and accompanying Explanatory Memorandum (EM).² The Minister made a statement on the Bill in Plenary on 14 December 2021.³
2. At its meeting on 30 November 2021, the Senedd's Business Committee agreed to refer the Bill to the Finance Committee (the Committee) for consideration of its general principles (Stage 1), in accordance with Standing Orders 26.9. The Business Committee agreed that the Committee should report to the Senedd by 8 April 2022.⁴
3. On 7 December 2021, the Committee appointed Charlotte Barbour⁵ as its expert adviser on the Bill.

Terms of reference

4. The Committee agreed the following terms of reference for its Stage 1 scrutiny of the Bill:

"To consider:

- *the general principles of the Bill and the need for legislation;*
- *the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum);*
- *any potential barriers to the implementation of these provisions and whether the Bill takes account of them;*
- *whether there are any unintended consequences arising from the Bill;*
- *the appropriateness of section 3 (Policy statement: regulations under section 1 that have retrospective effect) and the draft policy statement published alongside the Bill; and*

¹ Welsh Tax Act etc. (Power to Modify) Bill (as introduced)

² Explanatory Memorandum

³ Statement by the Minister for Finance and Local Government: [The Welsh Tax Acts etc. \(Power to Modify\) Bill](#)

⁴ Business Committee: [Timetable for consideration of the Welsh Tax Acts etc. \(Power to Modify\) Bill](#)

⁵ Charlotte Barbour is Director of Regulatory Authorisations for the Institute of Chartered Accountants of Scotland

- *the financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).*

Alongside the terms of reference, respondents may wish to consider:

- *whether the Bill's approach to modifying tax legislation has been adopted in other countries and its effectiveness; and*
- *the strengths and weaknesses of alternative approaches to modifying tax legislation."*

The Committee's approach

5. The Committee took oral evidence from a number of witnesses. The schedule of oral evidence sessions is attached at Annex A. The Committee also issued a public consultation which invited anyone with an interest in the Bill's provisions to submit written evidence to inform the Committee's work. A list of the seven consultation responses is attached at Annex B.

6. The Committee would like to thank all those who have contributed to its work. The Committee is also extremely grateful to its Expert Adviser, Charlotte Barbour, for her advice and guidance during its consideration of this complex subject area.

Other Committees' consideration of the Bill

7. The Senedd's Legislation, Justice and Constitution Committee (LJC Committee) took evidence from the Minister on the appropriateness of the provisions in the Bill that grant powers to make subordinate legislation on 14 February 2022.⁶ It reported on its conclusions in April 2022.

⁶ Legislation, Justice and Constitution Committee, RoP, 14 February 2022

2. Background and policy context

Devolved taxes

8. Part 2 of the Wales Act 2014⁷ devolved new tax powers to Wales and enabled the Senedd to legislate in respect of areas to which Stamp Duty Land Tax (SDLT) and Landfill Tax previously applied. In April 2018, these UK taxes (the “predecessor taxes”) were replaced in Wales by Land Transaction Tax (LTT)⁸ and Landfill Disposals Tax (LDT)⁹ respectively. The Act also legislated for the partial devolution of income tax to Wales.¹⁰ The Welsh Rates of Income tax (WRIT) subsequently came into operation in April 2019.

9. The Welsh Revenue Authority (WRA) was established by the Tax Collection and Management (Wales) Act 2016.¹¹ The WRA assumed responsibility for managing and collecting LTT and LDT in Wales from April 2018. However, responsibility for collecting WRIT remains with HMRC.

10. The Bill under consideration is relevant to two specific taxes which are devolved to Wales (LTT and LDT). It does not relate to WRIT, which is only a rate setting power. Therefore, the Bill is primarily concerned with making future changes to the following legislation:

- Tax Collection and Management (Wales) Act 2016 (TCM Act);
- Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 (LTT Act);
- Landfill Disposals Tax (Wales) Act 2017 (LDT Act).

11. The TCM Act, LTT Act and LDT Act are collectively defined in the Bill¹² (and referred to in this Report) as the “Welsh Tax Acts”.

⁷ Wales Act 2014

⁸ Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017

⁹ Landfill Disposals Tax (Wales) Act 2017

¹⁰ This was subject to a referendum requirement that was later removed by section 17 of the Wales Act 2017

¹¹ Tax Collection and Management (Wales) Act 2016

¹² Welsh Tax Acts etc. (Power to Modify) Bill, Section 1(3)

Existing legislative procedures to modifying primary tax legislation

12. The Welsh Ministers have a range of existing regulation-making powers in the Welsh Tax Acts to amend those Acts in specific policy areas, such as, for example, reliefs and partnerships¹³ in the LTT Act and tax credits in the LDT Act.¹⁴

13. In particular, the Welsh Government uses regulation-making powers in the LTT Act and LDT Act in order to make changes to tax rates and bands for LTT and tax rates for LDT. Such changes can be made with immediate effect by those regulations following provisional affirmative procedures¹⁵, which require the Senedd to approve changes in tax rates or bands within 28 days of the regulations being made in order for the changes to remain in place.

Modifying UK tax legislation

14. The main legislative process used to amend UK tax law is the Finance Bill. It is, generally, an annual vehicle to enact measures in connection with a range of taxes (including, for example, renewal of income tax) and therefore constitutes a regular, primary legislative process by which tax changes can be proposed by the UK Government and made by the UK Parliament.

15. If the UK Government wishes to impose any tax measure with immediate effect, it may do so by seeking a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968 (the PCT Act).¹⁶ Such a resolution gives temporary legal effect to the relevant tax provision, which must then be given permanent effect by an Act of Parliament (typically the next Finance Act) within set timescales prescribed by the PCT Act.

16. The Finance Bill is introduced in Parliament following the UK Budget and usually receives Royal Assent within 4-5 months.

17. Separately, the Treasury is able to make changes to SLDT legislation with immediate but temporary effect for a maximum of 18 months using a regulation-making power in section 109 of the Finance Act 2003 (subject to approval of the House of Commons within 28 days of those regulations being made, excluding certain periods in which Parliament is not sitting).¹⁷ To be given permanent effect, the changes may subsequently be included in a Finance Bill.

¹³ Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017, sections 30(6) and 41

¹⁴ Landfill Disposals Tax (Wales) Act 2017, section 54

¹⁵ Landfill Disposals Tax (Wales) Act 2017, section 95 and Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017, section 25(2)

¹⁶ Provisional Collection of Taxes Act 1968

¹⁷ Finance Act 2003, section 109

Scottish Devolved Taxes Legislation Working Group

18. The Scottish Government and Scottish Parliament have established a Devolved Taxes Legislation Working Group¹⁸ to take forward relevant recommendations of the Budget Process Review Group¹⁹, which included a recommendation:

*"...to explore options for alternative legislative processes for devolved taxes legislation, particularly where tax measures need to be introduced quickly or where minor amendments are needed to existing primary legislation."*²⁰

19. In February 2020, the Working Group published its interim report²¹ setting out the challenges and opportunities of alternative options for devolved tax legislation in Scotland. The report outlined the merits of the following legislative processes:

- a more expansive use of secondary powers for tax legislation;
- Finance Bill - adopt a similar approach to the UK Finance Bill, allowing tax measures to be introduced quickly and minor amendments to be made to existing primary legislation. This would require consideration of the need for a regular primary legislation slot for tax matters, when and how to manage that slot within the budget cycle, and whether the current Budget Bill should be changed so that it become a Finance Bill;
- Tax Bill - contain provisions to allow for corrections or changes to existing tax legislation to be made (but not changes to the rates and bands of taxes which can already be dealt with under existing subordinate legislation). A Tax Bill would not necessarily be predicated on the Budget and therefore could be introduced at another point in the year, or less frequently.

20. No conclusion has yet been reached in Scotland. However, the Scottish Government's programme of work in its Framework for Tax 2021 includes:

¹⁸ Scottish Government and Scottish Parliament: [Devolved Taxes Legislation Working Group](#)

¹⁹ Scottish Government and Scottish Parliament: [Budget Process Review Group](#)

²⁰ Scottish Government and Scottish Parliament: [Budget Process Review Group Final Report, June 2017, Recommendation 50](#)

²¹ Scottish Government and Scottish Parliament: [Devolved Taxes Legislation Working Group, Interim Report, February 2020](#)

*"working with the Scottish Parliament to re-establish the Devolved Taxes Legislation working group to progress work to ensure a robust legislative framework for tax is in place."*²²

Pre-legislative consultation

21. In July 2020, the then Minister for Finance and Trefnydd, Rebecca Evans MS, published a written statement on the Welsh Government's consultation 'Tax Devolution in Wales - Enabling changes to the Welsh Tax Acts'. The Minister announced that the Welsh Government needed to consider whether it has the tools to ensure it can make changes to the Welsh Tax Acts at short notice in the following circumstances:

- to stop avoidance or evasion of the devolved Welsh taxes;
- to comply with international obligations;
- in situations of exceptional need, such as in response to a tribunal or higher courts decision, or in response to national emergencies such as COVID-19; and
- in specific circumstances where Welsh Ministers consider it expedient in the public interest to do so. In particular, in response to tax policy changes made by the UK government to 'predecessor' taxes.²³

22. The Minister further noted:

*"A key aim of the legislative proposal is to provide Welsh ministers with powers to be able to respond to the UK Budget in a timely, proportionate and agile way in order to protect Welsh revenues."*²⁴

23. The consultation document²⁵ outlined the Welsh Government's legislative proposal, which comprised the following three regulation-making powers to change the Welsh Tax Acts.

1. **Power 1. Regulations made subject to the provisional affirmative procedure:**
Proposed changes to have immediate, but temporary legal effect, with their permanent effect subject to approval by the Senedd following the standard period of scrutiny for provisional affirmative regulations (a period of not more than 28 days from the making of the regulations). The Welsh Government anticipated using this

²² Scottish Government: Framework for Tax, 2021

²³ Written statement: [Consultation Document: Tax Devolution – enabling changes to the Welsh Tax Acts](#)

²⁴ Written statement: [Consultation Document: Tax Devolution – enabling changes to the Welsh Tax Acts](#)

²⁵ Welsh Government: [Consultation Document: Tax Devolution – enabling changes to Welsh Tax Acts](#)

power to address relatively small aspects of the Welsh Tax Acts that would impact a small number of taxpayers, in the following circumstances:

- to stop avoidance or evasion of the devolved Welsh taxes;
- to comply with international obligations;
- in situations of exceptional need, such as in response to a tribunal or higher courts decision, or in response to national emergencies such as COVID-19.

2. **Power 2. Regulations made subject to the ‘super’ provisional affirmative procedure:**

Proposed changes to have immediate, but temporary legal effect, with their permanent effect subject to approval by the Senedd following an extended scrutiny period to allow for evidence sessions (a ‘super’ provisional affirmative procedure). The Welsh Government anticipated using this power in specific circumstances where Welsh Ministers considered it expedient in the public interest to do so, in particular, to respond to tax policy changes made by the UK Government to ‘predecessor’ taxes, which impacts on the Welsh Government’s overall resources. To ensure the power would only have been used where it was expedient in the public interest, the Welsh Government proposed a Senedd ‘lock’, which would effectively mean that the Welsh Ministers could only have used the power if the Senedd agreed to unlock the power for the Welsh Ministers to exercise. This approach is broadly based on the Emergency Bill process.

3. **Power 3. Amending the effect of the regulations made subject to the provisional and ‘super’ provisional affirmative procedures:**

A power to make draft affirmative regulations to amend the rules created by the use of power 1 or power 2. This would have allowed the Welsh Ministers to subsequently identify further changes needed to ensure full effect of the tax policy change, including making changes in response to points identified during scrutiny or to address feedback from stakeholders.

24. The Welsh Government received eight responses to its consultation, from four individuals requesting anonymity and four umbrella organisations representing their associated affiliations and members:

- Chartered Institute of Taxation (CIOT) and Low Income Taxation Reform Group;
- Institute of Chartered Accountants in England and Wales (ICAEW);

- Cardiff University;
- North and Mid Wales Association of Local Councils.²⁶

25. In its summary of responses to the consultation, the Welsh Government noted that the CIOT, ICAEW and Cardiff University agreed that the principle of using regulation-making powers was appropriate to give effect to changes to the Welsh Tax Acts. However, two organisations highlighted that the “default position is that tax legislation should be in primary legislation except in exceptional circumstances, and subject to proper democratic scrutiny by parliament” and that secondary legislation “should ideally be used only for administrative matters, and also for the setting of rates”.²⁷

26. The Bill under consideration contains substantial changes to the original proposals set out in the Welsh Government’s pre-legislative consultation. In particular, the Bill proposes one regulation-making power to be conferred on the Welsh Ministers, exercisable for any of four “purposes” (which are summarised in paragraph 30 of this Report). The concept of a Senedd “lock” does not feature in the Bill.

Legislative competence

27. The Welsh Government is satisfied that the Bill is within the legislative competence of the Senedd. The EM states:

“The Senedd has the legislative competence to make the provisions in the Welsh Tax Acts etc. (Power to Modify) Bill pursuant to Part 4 of the Government of Wales Act 2006 (“GOWA 2006”) as amended by the Wales Act 2017.”²⁸

28. The Llywydd issued a statement on 13 December 2021 that, in her opinion, the provisions of the Bill would be within the legislative competence of the Senedd.²⁹

²⁶ Welsh Government consultation: [Enabling changes to the Welsh Tax Acts - Summary of responses, December 2020](#).

²⁷ Welsh Government consultation: [Enabling changes to the Welsh Tax Acts - Summary of responses, December 2020](#).

²⁸ [Explanatory Memorandum](#), paragraph 2.1

²⁹ [Presiding Officer’s Statement on Legislative Competence](#), 13 December 2021

3. General principles, the need for legislation and the approach taken in the Bill

General principles

30. Subject to its successful passage through the Senedd, the Bill will provide the Welsh Ministers with a regulation-making power enabling them to modify the Welsh Tax Acts (and regulations made under them) for one or more of the following purposes:

- to ensure the devolved Welsh taxes³⁰ are not imposed where to do so would be incompatible with any international obligations;
- to protect against tax avoidance in relation to the devolved Welsh taxes;
- to respond to changes made by the UK Government to 'predecessor' taxes which affect, or may affect the amount paid into the Welsh Consolidated Fund; and
- to respond to decisions of the courts/tribunals which affect or may affect the operation of the Welsh Tax Acts, or any regulations made under them.

The need for legislation

31. The EM states that the intended purpose of the Bill is:

*"to enable changes to be made to the Welsh Tax Acts by regulations where the Welsh Ministers consider that such changes are necessary or appropriate and where they are required to have effect immediately or shortly thereafter."*³¹

32. Justifying the need for the Bill, the Minister told the Committee:

*"...the vulnerability, really, of the Welsh Ministers in respect of being able to respond appropriately to tax policy changes made by the UK Government is quite clear, and Welsh Ministers should be in a position to provide near immediate responses to certain external events through the use of made affirmative regulations, and, where necessary, in some cases, retrospectively too."*³²

³⁰ 'devolved Welsh taxes' in the context of this Bill means Landfill Disposals Tax and Land Transaction Tax

³¹ Explanatory Memorandum, paragraph 3.2

³² Finance Committee, RoP, 22 December 2021, paragraph 167

33. When asked why the Bill is being introduced now, given that the TCM Act was enacted in 2016, the Minister explained:

*"It's clear that seeking new regulation-making powers should be only done through robust consideration and scrutiny, and I think that we've had experience now with these existing pieces of legislation, which have helped us consider what additional tools might be necessary."*³³

34. The Minister indicated that the power would only be used "to respond to specified external circumstances" and she did not "anticipate the powers being used regularly".³⁴

35. If the Bill is not passed, the Minister said the Welsh Government would have to look at other ways of responding to external events, such as the Senedd's emergency bill procedure, adding:

*"I think the emergency Bills, obviously, they've only been used rarely and in exceptional circumstances, and they provide limited opportunity for scrutiny. And one of the things that is at the heart of this Bill is respecting the Senedd and respecting the importance of scrutiny. So, an emergency Bill wouldn't be the optimal way in which to respond to those four types of external events. And I think the powers within the Bill are more user-friendly and more flexible than the emergency mechanisms that the Senedd does have."*³⁵

Future devolved taxes

36. The Minister stated that the regulation-making power would be extended to any future devolved Welsh taxes.³⁶ The Minister's official indicated that this would be achieved by amending the Bill to add a new tax Act to the list of Welsh Tax Acts and, in the case of a Welsh tax without a UK equivalent tax, excluding the third purpose of responding to a change to a predecessor tax in section 1(1)(c).³⁷

37. The Welsh Government's summary of responses to its pre-legislative consultation highlighted that, while the CIOT accepted that the proposals provided "a balance between the competing needs of speed, scrutiny and responsiveness at this point in the development of Welsh devolved taxes", it also argued that "the introduction of new devolved taxes in Wales with

³³ Finance Committee, RoP, 22 December 2021, paragraph 195

³⁴ Finance Committee, RoP, 22 December 2021, paragraph 171

³⁵ Finance Committee, RoP, 22 December 2021, paragraph 173

³⁶ Finance Committee, RoP, 22 December 2021, paragraph 234

³⁷ Finance Committee, RoP, 22 December 2021, paragraph 235

a consequential expansion of the tax base could mean the principle of using regulatory powers rather than primary legislation becomes inappropriate”.³⁸

The approach taken in the Bill

38. The Bill can be categorised as an enabling Bill (or “skeleton” Bill), as the Bill itself does not implement changes to the Welsh Tax Acts (or regulations made under them). Instead the Bill proposes to delegate a power to the Welsh Ministers to be used in certain circumstances in the future.

Delegated legislation

39. The increasing prevalence of government ministers seeking to make substantive changes to the law by secondary legislation, and therefore without the detailed scrutiny by a legislature that may be afforded to such provisions included in a Bill, has recently attracted increased focus (and criticism) in the UK Parliament.

40. In November 2021, the Secondary Legislation Scrutiny Committee of the House of Lords published a report titled “Government by Diktat: A call to return power to Parliament”³⁹, which highlighted that, in relation to skeleton legislation, too little policy on the face of a Bill amounts to Parliament, in effect, “signing a legislative blank cheque”.

41. The report noted that UK Parliamentary Committees wrote to the UK Government in September 2020 saying, in reference to a “growing tendency” for the Government to introduce Bills in which broad delegated powers are sought in lieu of policy detail:

*“Parliament is being asked to pass legislation without knowing how the powers conferred may be exercised by ministers and so without knowing what impact the legislation may have on members of the public affected by it.”*⁴⁰

42. In evidence to this Committee, Sir Paul Silk also expressed a general concern with “the growth in the use of secondary (or ‘delegated’) legislation”, suggesting that “legislatures should remain sceptical and vigilant when Governments propose any enhancement of their own powers to make legislation without full scrutiny by the legislature”. He warned that:

³⁸ Welsh Government consultation: [Enabling changes to the Welsh Tax Acts - Summary of responses, December 2020, paragraphs 3.3-3.4](#)

³⁹ UK Parliament, Secondary Legislation Scrutiny Committee (HoL): [Government by Diktat: A call to return power to Parliament, November 2021](#)

⁴⁰ UK Parliament, Secondary Legislation Scrutiny Committee (HoL): [Government by Diktat: A call to return power to Parliament, November 2021, paragraph 31](#)

*"Governments naturally want as few obstacles in their way and will often favour secondary legislative routes if possible. It is the job of the legislature to ensure that appropriate checks are kept in place and that it does not surrender its legislative role."*⁴¹

43. He expressed concerns that this Bill is another example of the executive "taking over functions that I think properly belong to the legislature" and in the "particularly contentious" area of taxation.⁴²

44. These views were shared by Professor Emyr Lewis, who suggested:

*"There is also the core question of whether, as a matter of principle, the legislature should allow its own primary legislation to be amended by Ministers. In other words, where does the boundary lie between the territory where the legislature exercises its sovereign power (for want of a better phrase) over its own laws on an exclusive basis, and the territory where the executive can also exercise power?"*⁴³

45. Professor Emyr Lewis made reference to a recent debate on skeleton Bills in the House of Lords, in which many members highlighted "the better the scrutiny, the better the legislation, and delegated legislation usually received far less scrutiny and democratic attention than do Acts".⁴⁴

46. Sir Paul Silk also noted concerns expressed by the Senedd's LJC Committee about the use of delegated law-making powers⁴⁵ for Welsh Ministers and highlighted the major review of delegated legislation⁴⁶ launched by the Hansard Society for Parliamentary Government. Though this review only covers Westminster law-making, he emphasised that many of the concerns identified apply equally to devolved Welsh legislation:

"Applicable in Wales – and of relevance to the Bill before the Committee –are concerns about the blurring of the boundary between what should go in primary legislation and what should go in delegated legislation; the way in which secondary powers can be used in the future in unexpected ways that the legislature did not anticipate at the time it granted them; the undesirability of powers that enable Ministers to amend or repeal primary

⁴¹ Written evidence: [WTA.02 Sir Paul Silk](#)

⁴² Finance Committee, RoP, 11 February 2022, paragraph 8

⁴³ Written evidence: [WTA.01 Professor Emyr Lewis, Aberystwyth University](#)

⁴⁴ Written evidence: [WTA.01 Professor Emyr Lewis, Aberystwyth University](#)

⁴⁵ Welsh Parliament, Research article - [Legislative consent in the Sixth Senedd: the story so far](#), 13 December 2021

⁴⁶ Hansard Society: [Delegated Legislation Review](#)

legislation by secondary legislation; the truncated consideration of secondary legislation by the legislature (just a 15 minute debate in plenary in the Senedd is usual); and the inability of the legislature to amend secondary legislation.”⁴⁷

Alternative approaches

Primary legislation

47. In its written evidence, the CIOT noted that its “starting point is that tax law should be set out in primary legislation particularly in so far as it relates to the exercise of tax powers setting out what is subject to tax and imposing burdens on taxpayers”. It further emphasised:

“Secondary legislation should ideally be used only for administrative matters. This is to ensure proper scrutiny of legislation that results in the imposition of some kind of burden (compliance or financial) on taxpayers.”⁴⁸

48. The CIOT explained that the rationale for setting tax law through primary legislation is that it is “subject to more scrutiny and debate” and “it’s possible to end up not just in a binary way accepting or rejecting a proposal, but it’s possible to amend it”. It also emphasised that primary legislation provides an “in-built process under which as many stakeholders and those affected are able to contribute, whereas other mechanisms tend to be much more focused on the essence in terms of time”.⁴⁹

49. However, the CIOT suggested that there is currently a good case for a mechanism to enable amendments to be made in the manner set out in the Bill. This was predicated on the basis that the “powers provide a reasonable balance between the competing needs of speed, scrutiny and responsiveness at this point in the development of Welsh devolved taxes”.⁵⁰

50. The Chartered Institute of Public Finance and Accountancy (CIPFA), the Association of Chartered Certified Accountants (ACCA) and the ICAEW all agreed with the principle that it is preferable to amend tax legislation through primary legislation.⁵¹

51. The ICAEW suggested that delegating potentially wide-ranging powers to the Executive to change the Welsh tax system requires careful consideration, concluding that the Senedd

⁴⁷ Written evidence: [WTA 02 Sir Paul Silk](#)

⁴⁸ Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

⁴⁹ Finance Committee, RoP, 2 February 2022, paragraphs 15 and 17

⁵⁰ Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

⁵¹ Finance Committee, RoP, 2 February 2022, paragraphs 94, 96 and 99

ultimately needs “to retain the responsibility to be able to review and to amend and to approve tax-raising powers”.⁵²

52. Professor Emyr Lewis expressed concerns about legislating in the manner proposed in relation to taxation:

*“It is part of the constitutional structure of the United Kingdom that the Crown doesn't have the power to raise taxes on the people without the permission of the Parliament. It has been so since the Bill of Rights in the seventeenth century, and that hasn't changed. And it appears to me that what is requested in this Bill, whilst some aspects of it make common sense in terms of complexity and making things easier, much of this prospective legislation takes us to a point that is contrary to that principle that the source of important decisions with regard to taxation is the legislature, and not the Government.”*⁵³

53. Sir Paul Silk shared these concerns, noting that the Bill will give Welsh Ministers powers that impose devolved taxes through secondary legislation, or that modify or impose penalties, which “would normally be reserved for primary legislation”. He suggested that the Committee should:

*“...try to imagine the most extreme scenarios in which the powers proposed in the Bill might be used, and only agree to those powers if the Committee is satisfied that secondary legislation is appropriate in those scenarios.”*⁵⁴

54. He concluded that “the Committee may feel that primary legislation passed expeditiously is preferable to the secondary route for which the Bill provides”.⁵⁵

55. Sir Paul Silk subsequently drew attention to the Senedd’s existing procedures for emergency bills:

“It allows them all to be done in one day in the Senedd, but it doesn't require them to be done in one day in the Senedd. It's quite flexible, your Standing Order 26.95. So, personally, I think that would be preferable. I'm not sure that in all circumstances that are envisaged under the current Bill—there wouldn't even necessarily need to be emergency Bills. There undoubtedly would be

⁵² Finance Committee, RoP, 2 February 2022, paragraph 163

⁵³ Finance Committee, RoP, 11 February 2022, paragraph 11

⁵⁴ Written evidence: [WTA.02 Sir Paul Silk](#)

⁵⁵ Written evidence: [WTA.02 Sir Paul Silk](#)

circumstances when emergency Bills would be necessary when things were done in London that affected adversely the tax take in Wales. But the procedures are there, under the normal legislative processes, so that secondary legislation would not, I would have thought, be necessary."⁵⁶

56. Furthermore, he stressed that the Senedd's consideration of primary legislation not only benefits members of the legislature but also stakeholders "because it's a transparent and open process", whereas consultation between the Executive and stakeholders "is not as transparent".⁵⁷

57. Addressing the approach taken in the Bill to modifying primary tax legislation, the Minister acknowledged that it "is relatively rare" but "that shouldn't be a reason for not adopting an innovative and agile process that's right for Wales".⁵⁸

58. The Minister stated that such a regulation-making power already exists in relation to SDLT legislation:

*"...section 109 of the Finance Act 2003 provides HM Treasury with a bespoke power to make regulations with immediate but temporary changes to stamp duty land tax legislation, and regulations made under that section are subject to the provisional affirmative procedure, which is similar to the Senedd made affirmative procedure, meaning that they have to be approved by the House of Commons within 28 sitting days in order to have permanent effect. The regulations do, however, have a sunset clause of 18 months, meaning that to give longer, permanent effect, the legislation in the regulations would need to be included within a future finance Bill from the UK Government."*⁵⁹

59. The Minister also likened the proposed approach to the UK Government's ability to propose changes to UK taxes prior to scrutiny by the Parliament, through the Provisional Collection of Taxes Act 1968.⁶⁰

60. Defending the extent of the delegated power proposed in the Bill, the Minister said:

"Yes, I do think it's appropriate, and that's because the scope of the power within the Bill has been deliberately constrained by the inclusion of the four

⁵⁶ Finance Committee, RoP, 11 February 2022, paragraph 36

⁵⁷ Finance Committee, RoP, 11 February 2022, paragraph 13

⁵⁸ Finance Committee, RoP, 22 December 2021, paragraph 177

⁵⁹ Finance Committee, RoP, 22 December 2021, paragraph 177

⁶⁰ Finance Committee, RoP, 22 December 2021, paragraph 177

purpose tests, and that sets out absolute clarity, I think, in terms of the circumstances in which the power may be used."⁶¹

61. The Minister argued that the power afforded by the Bill provides equal or greater opportunities for scrutiny when compared to an expedited bill process:

*"For draft affirmative regulations, the debate can't take place until the committee has reported or the statutory instrument has been laid for 20 days, whichever is earlier. Standing Orders do, however, allow for a longer period than 20 days, so there is some flexibility in that mechanism so that we could consider on a case-by-case basis what's appropriate for scrutiny, reflecting on the complexity of the regulations and, of course, on the impact on taxpayers. The made affirmative procedure will be only used in cases of urgency, and here it's proposed that there should be a maximum scrutiny period of 60 days. So, I think that we've sought to build in appropriate mechanisms there for scrutiny."*⁶²

62. In a subsequent letter to the LJC Committee, the Minister said the 20 and 60 day scrutiny periods provide a flexible mechanism so that Ministers and the Senedd can consider an appropriate time for scrutiny, with the Senedd's Business Committee able to propose alternative timetables. She added:

*"My intention is not to reduce the period of scrutiny, but rather to emphasise that I am looking to provide longer than, necessarily, the minimum period permitted by Standing Orders, and future Ministers will be advised to follow the same approach."*⁶³

63. When asked why the Minister felt an emergency Bill approach would offer less scrutiny than the proposed regulation-making power in this Bill, particularly as it could attract whatever scrutiny period may be required and have the benefit of the Senedd being able to amend the proposed drafting, she argued:

*"An emergency Bill can be passed as quickly as in one day within the Senedd, so that I don't think allows for the same level of scrutiny."*⁶⁴

⁶¹ Finance Committee, RoP, 22 December 2021, paragraph 175

⁶² Finance Committee, RoP, 16 February 2022, paragraph 18

⁶³ Letter from the Minister for Finance and Local Government to the Legislation, Justice and Constitution Committee, 11 March 2022

⁶⁴ Finance Committee, RoP, 16 February 2022, paragraph 20

64. Furthermore, her official highlighted that an emergency or expedited Bill could lead to time constraints:

*"...we have a determination period for the Llywydd beforehand and an intimation period afterwards for the UK Secretary of State for Wales to challenge the Act if they choose to. That, without agreement necessarily in terms of agreeing a shorter period, can add up to eight weeks to the period for a Bill before you even get to the scrutiny issues and the debate on the Bill and the line-by-line analysis of the legislation."*⁶⁵

65. Responding to criticisms that the Bill contravenes the principle that the source of important decisions relating to taxation is the legislature and not the government, the Minister said:

*"I think that we have built real safeguards into this Bill, and, ultimately, it will be the Senedd that has the overall say on whether or not the regulations remain in place. We've built in safeguards then for the taxpayers, should the Senedd decide not to approve the regulations. So, we've sought to strike a balance."*⁶⁶

66. The Minister emphasised that Welsh Ministers already have powers to amend tax legislation through regulations:

*"There is already precedent here, in the sense that the Senedd has already given approval to legislation that allows Welsh Ministers to decide who is taxed and how much they are taxed, by allowing regulations to be made to determine the levels of the rates and bands of land transaction tax."*⁶⁷

67. Consequently, the Minister suggested that the Senedd has "already agreed" to such an approach and what is being proposed is an appropriate mechanism for unexpected external events.⁶⁸

⁶⁵ Finance Committee, RoP, 16 February 2022, paragraph 21

⁶⁶ Finance Committee, RoP, 16 February 2022, paragraph 14

⁶⁷ Finance Committee, RoP, 16 February 2022, paragraph 14

⁶⁸ Finance Committee, RoP, 16 February 2022, paragraph 14

Legislative budget process

68. The previous Finance Committee held an inquiry into a legislative budget process⁶⁹ and subsequently concluded that “there should be annual legislation to pass the Welsh Government budget”. It also concluded:

“... that a legislative budget process will better reflect the maturity of the Senedd and the principle of equitable balance of control between the legislature and the executive. Making these changes will strengthen the role of both the Welsh Government and the Senedd following the devolution of fiscal powers.”⁷⁰

69. The Welsh Government’s pre-legislative consultation briefly considered the option of introducing a legislative budget process to facilitate changes to the Welsh Tax Acts through primary legislation. This could involve an annual “budget and finance” Bill that would include the Welsh Government’s expenditure and taxation proposals, and provide a mechanism to make changes to the Welsh Tax Acts if such changes were considered necessary. However, the consultation document indicated that “Welsh Ministers do not consider it proportionate at the present time to have an annual (or less frequent) Finance Bill”.⁷¹

70. The CIOT’s written evidence recognised the challenges in introducing primary legislation to implement tax changes via an annual Welsh finance Bill “as currently the volume of legislative change required is probably insufficient to justify an annual finance bill process in Wales”. It further noted:

“There are however good reasons to keep this option under review. The legislative process should reflect the significance of the devolved tax system in raising revenue in Wales. The case for an annual Welsh finance bill will strengthen if devolved taxes provide an increased share of revenues to fund wider policy areas dealt with by the Welsh Parliament.”⁷²

71. Sir Paul Silk acknowledged the limited number of taxes currently devolved, adding:

“So, whether an annual finance Bill is a wise use of time in present circumstances, I’m not sure. And, of course, it wouldn’t allow the Senedd, which is the purpose of this Bill, to react urgently to circumstances that arise

⁶⁹ Finance Committee (Fifth Senedd): [Inquiry into a legislative budget process, August 2020](#)

⁷⁰ Finance Committee (Fifth Senedd): [Inquiry into a legislative budget process, August 2020, Conclusions 1 and 4](#)

⁷¹ Welsh Government: [Consultation document – Enabling changes to the Welsh Tax Acts, page 41](#)

⁷² Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

*that adversely affect its tax take and so on. So, I'm not sure the finance Bill route would be sensible in these circumstances."*⁷³

72. However, the ICAEW suggested that the Welsh Government should consider having the capability to adopt a finance Bill:

*"While we appreciate that at present such a procedure may not be considered to be necessary because annual changes are likely to be few in number, nevertheless we think that consideration should be given to having the capability to adopt an annual Finance Bill procedure. This would ensure that any changes could be enacted by way of primary legislation."*⁷⁴

73. Dr Sara Closs-Davies was also supportive of a finance Bill, noting:

*"Covid-19 is a recent example of how external forces can create uncertainty to the economy and society and as a result, changes to the tax system and public services. An annual Finance Bill would be a useful legislative tool to allow the Welsh Government to react to external factors, review and make appropriate changes on an annual basis to protect tax revenues and funding of public services."*⁷⁵

74. While acknowledging that devolved tax powers are currently limited, Dr Sara Closs-Davies highlighted that an annual finance Bill would "help provide certainty and clarity to taxpayers and tax practitioners if it were implemented and communicated effectively". She also emphasised that:

*"...an annual Finance Bill could potentially reduce compliance costs to taxpayers as it reduces the amount of time and money spent on searching for information and guidance from other multiple sources, as the Finance Bill would be the main point of reference."*⁷⁶

75. Nevertheless, she noted that "considering the limited level of devolved tax powers in Wales, the cost and resources involved in creating and implementing an annual Welsh Finance Bill might be unjustified and inefficient at the current time".⁷⁷

⁷³ Finance Committee, RoP, 11 February 2022, paragraph 40

⁷⁴ Written evidence: [WTA 05 Institute of Chartered Accountants in England and Wales](#)

⁷⁵ Written evidence: [WTA 06 Dr Sara Closs-Davies, Bangor University](#)

⁷⁶ Written evidence: [WTA 06 Dr Sara Closs-Davies, Bangor University](#)

⁷⁷ Written evidence: [WTA 06 Dr Sara Closs-Davies, Bangor University](#)

76. In response to the suggestion that the Bill highlights the need for a legislative budget process to enable changes to Welsh Tax Acts to be made through primary legislation, the Minister said:

*"I don't consider the timing is right to introduce an annual primary legislative route, such as a budget or finance Bill, through which changes to Welsh tax Acts can be made. A key consideration for the Welsh tax Acts specifically is the volume of secondary legislation that these Acts have so far generated, so landfill disposal tax and land transaction tax; that level of legislation isn't significant. However, as we develop more devolved taxes, hopefully in future having powers for example for a vacant land tax being devolved... either those that have predecessor taxes or new Welsh taxes, the case I think for an annual finance Bill may strengthen, but it's still my view that at the moment, the case isn't made."*⁷⁸

77. Even with an annual finance Bill process, the Minister argued that the power in the Bill would still be necessary to respond to external events that do not coincide with the finance Bill cycle, highlighting the delay caused by the UK approach "where changes to respond to avoidance activity often have to be made as part of a finance Bill".⁷⁹

Provisional resolution

78. Professor Emyr Lewis proposed a 'provisional resolution' mechanism as an alternative to, or in conjunction with, the use of secondary legislation.⁸⁰ During oral evidence, he clarified that this mechanism would be similar to the process followed in the UK Parliament under the PCT Act:

*"In the Westminster Parliament in London, if the Chancellor declares that he wants to change the taxation in his budget, he says, 'We will bring forward primary legislation in order to change the tax'. That legislation is the Finance Bill. In order to enable those changes to happen immediately, under the Provisional Collection of Taxes Act 1968, the Westminster Parliament can vote through a ways and means motion—that's what they call it—to enable those changes to happen immediately."*⁸¹

⁷⁸ Finance Committee, RoP, 22 December 2021, paragraph 180

⁷⁹ Finance Committee, RoP, 22 December 2021, paragraph 180

⁸⁰ Written evidence: [WTA.01 Professor Emyr Lewis, Aberystwyth University](#)

⁸¹ Finance Committee, RoP, 11 February 2022, paragraph 112

79. The Minister explained that a provisional resolution mechanism was ruled out because it would require primary legislation following the passing of a resolution to subsequently provide permanent effect to the temporary measures, and there is no equivalent (finance Bill) mechanism in Wales.⁸²

Committee view

80. Tax devolution is a relatively recent development, with the Wales Act 2014⁸³ conferring powers on the Senedd to introduce the first Welsh taxes in nearly 800 years. Fiscal devolution has meant that approximately 18 per cent⁸⁴ of the Welsh Government's spending is now funded from tax revenue, increasing the accountability of the Welsh Government to the people of Wales. As the system of devolved tax collection and management in Wales matures, it is important for the Senedd to be satisfied that any developments are appropriate for Wales and in line with best parliamentary practice and democratic principles. The Senedd should not delegate further powers to the Welsh Government to amend Welsh tax law unless those powers are necessary and accompanied by appropriate safeguards to preserve the role and scrutiny function of the Senedd.

81. Without exception, the Committee fully recognises that Welsh Ministers need the ability to respond to external events in order to protect the overall resources available to the Welsh Government. However, central to the Committee's consideration of the Bill's general principles is whether the legislative mechanism proposed by the Welsh Government in this Bill is the best way to achieve this.

82. The Committee has heard a range of views and thanks all those who informed scrutiny of this Bill. While acknowledging that Welsh revenues may be vulnerable to external circumstances, fundamental concerns have been raised about the constitutional implications of providing Welsh Ministers with a delegated power to amend primary legislation, particularly in relation to tax and the imposition of duties and penalties on citizens. Evidence focused on the key principle that tax law should be set out in primary legislation, ensuring that it is subject to close consideration and debate and to help provide certainty for taxpayers and tax practitioners. The Committee notes that the Welsh Government's own Tax policy framework states that taxes should "be clear, stable and simple".⁸⁵

⁸² Finance Committee, RoP, 16 February 2022, paragraph 29

⁸³ [Wales Act 2014](#)

⁸⁴ WRIT - 11 per cent (£2.5 billion); Non-Domestic Rates - 5 per cent (£1 billion); LTT and LDT - 2 per cent (402 million) (Source: [Welsh Government's Draft Budget 2022-23, paragraph 1.17](#))

⁸⁵ [Welsh Government, Tax policy framework](#)

83. The Minister has suggested there is precedent to the approach proposed in the Bill as the Senedd has previously granted powers to Welsh Ministers to amend tax legislation through regulations (highlighting for example the setting of rates and bands for Land Transaction Tax). However, we believe there is an important distinction between the decision about the amount taxpayers are charged and more structural changes to elements of tax law, particularly those that could potentially change the balance of powers and responsibilities between the Government and the taxpayer. Moreover, the decisions of previous Seneddau do not necessarily amount to justification for a proposed approach to a law under consideration by the current Senedd.

84. While noting that some stakeholders felt the current volume of legislative change required (given the small number of devolved taxes) is probably insufficient to justify an annual finance Bill process, the Committee is pleased that so many supported the principle of such an approach as devolved Welsh taxes grow.

85. It is disappointing that the Minister justified discounting a provisional resolution mechanism during the development of this Bill on the basis of a lack of an annual finance bill process in Wales. A provisional resolution mechanism, in conjunction with primary legislation to provide permanent effect, could operate at any time of the year, giving Welsh Ministers the ability to respond rapidly, respecting the primacy of the Senedd and ensuring detailed scrutiny by the Senedd.

86. The Committee notes the Welsh Government's intention to extend this Bill to future Welsh devolved taxes and is concerned that such an approach will undermine calls for a legislative budget process in the future. We also acknowledge the CIOT's view that the introduction of new taxes and expansion of the tax base could mean the principle of using regulation-making powers rather than primary legislation becomes inappropriate. Rather than anticipating that future taxes will be added to this power, the Committee believes that the Welsh Government should give serious consideration to the next Welsh devolved tax being designed so as to fit within an annual finance Bill process. Notwithstanding the support for the general principles from the majority of Committee members, we will be sceptical of any further attempts to expand the scope of the power proposed in the Bill given our reservations with the approach generally.

87. The Committee firmly believes that a finance Bill, supported by a provisional resolution mechanism, would be a far superior, more accessible and transparent way to amend tax legislation. It would also respect the constitutional principle of the supremacy of the legislature (the Senedd) over the executive (the Welsh Government). We also believe that the Welsh

Government should develop a longer-term package of legislative measures to deliver its proposals relating to tax in future that would be more in line with its own tax policy framework. We therefore fully intend to maintain focus on the need to implement a legislative budget approach as the Welsh tax devolution journey continues, to ensure that the Senedd's democratic mandate is not marginalised.

88. The Committee notes that the Minister does not anticipate using the power regularly and welcomes her intention to provide longer scrutiny than the minimum period permitted in Standing Orders. Nevertheless, the Committee is acutely aware that the current Minister's intentions and assurances are not binding on her successor, and that future governments may not be as respectful to the Senedd in terms of using the power sparingly and allowing greater time for scrutiny.

89. Having listened carefully to both sides of the argument, on balance, the majority of the Committee supports the general principles of the Bill. In doing so, we are clear that our support is predicated on the recommendations we make throughout this report to protect taxpayers, improve scrutiny and ensure the objectives of the legislation are being delivered in line with expectations.

90. Peter Fox MS does not support the general principles of the Bill for the following reasons:

- it facilitates a legislative framework that does not respect the primacy of the legislature, relegating the Senedd's legislative role to a simple "accept or reject" vote on regulations and allowing the Welsh Government to pass legislative proposals relating to taxation with less scrutiny and greater ease;
- a primary legislative approach is favoured, such as an expedited or emergency Bill, to provide the Senedd with the opportunity to amend the legislation and influence its final form.

Recommendation 1. The Committee recommends that the Senedd, taking into account the recommendations in this report, agrees the general principles of the Welsh Tax Acts etc. (Power to Modify) Bill. Peter Fox MS does not support this recommendation.

4. Regulation-making power

91. Section 1 of the Bill provides Welsh Ministers with a regulation-making power to enable them to modify the Welsh Tax Acts (and regulations made under them) for one or more of the following purposes (known collectively as the “purpose tests”):

- to ensure the devolved Welsh taxes are not imposed where to do so would be incompatible with international obligations;
- to protect against tax avoidance in relation to the devolved Welsh taxes;
- to respond to changes made by the UK Government to predecessor taxes which affect, or may affect, the amounts paid into the Welsh Consolidated Fund; and
- to respond to decisions of the courts/tribunals which affect, or may affect, the operation of the Welsh Tax Acts, or any regulations made under them.

92. The EM accompanying the Bill states:

“The purposes are limited to ensure that use of the power is restricted, recognising the balance between providing the Welsh Ministers with ability to respond to external events in a flexible and agile way, and the importance of Senedd scrutiny of Welsh Ministers’ actions.”⁸⁶

93. Elaborating on the purpose tests, the Minister said they have “been identified as the most likely future external events that might impact on our devolved tax revenues” and “it’s certainly possible that they will occur”. In the event that an external situation were to arise that is not captured by any of the purpose tests, the Welsh Government would need to consider other legislative mechanisms, such as emergency or expedited Bill, if an urgent response is required.⁸⁷

94. While the CIOT considered the proposed use of the power in the circumstances described to be reasonable, it noted “quite a wide discretion particularly in relation to the undefined term ‘tax avoidance’”. It stressed “it will be essential that the case for using the power in these circumstances is robust, based on evidence and subject to scrutiny”.⁸⁸

⁸⁶ Explanatory Memorandum, paragraph 3.18

⁸⁷ Finance Committee, RoP, 22 December 2021, paragraphs 185-186

⁸⁸ Written evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group

95. With the exception of incompatibility with international obligations, the ICAEW felt it was “entirely reasonable for the Welsh Government to have powers to be able to react quickly” in relation to the remaining three purposes.⁸⁹

96. No contributors recommended additional purposes for potential incorporation into the Bill.

Scope of the regulation-making power

97. Section 2(3) of the Bill provides that regulations under section 1 may not modify:

- the provisions of Part 2 of the TCM Act (which relates to the establishment, organisation and main functions of the WRA);
- regulations specifying tax bands and tax rates for LTT and tax rates for LDT.

98. Consequently, the Bill proposes to confer a power on the Welsh Ministers to amend any other provision in the Welsh Tax Acts or regulations made under those Acts.

99. The Minister explained the reasons for the exclusions:

“I wouldn't envisage that there would be an external event that would lead to changes and amendments in the functions of the WRA. We'd expect that, if it were to take place, to be part of more routine policy changes. So, that is one of the exclusions. And then the second relates to the setting of rates and bands for the current devolved taxes. I think the system that we have at the moment is working well, so I would propose that that would be an exclusion as well. And, again, this is an area where we're interested in committee's views as to whether there are other areas that you believe should be excluded.”⁹⁰

100. The LJC Committee subsequently sought information from the Minister on the particular circumstances in which she envisaged that regulations made under section 1 may need to modify each of the parts of the TCM Act not excluded from the Bill. In response, the Minister said:

“It is not feasible at this stage to anticipate every potential future circumstance which may give rise to an amendment to the Tax Collection and Management (Wales) Act 2016 (TCMA), however I have been careful to

⁸⁹ Finance Committee, RoP, 2 February 2022, paragraph 109

⁹⁰ Finance Committee, RoP, 16 February 2022, paragraph 47

exclude any potential amendment to the operation of the WRA in Part 2, because that is something that quite rightly ought to be reserved to primary legislation."⁹¹

The purpose tests

Incompatibility with international obligations (section 1(1)(a) of the Bill)

Purpose (a) – the Welsh Ministers may wish to make changes at short notice in order to ensure that the devolved taxes are not imposed where this would result in non-compliance with certain international obligations such as, for example, where a new trade deal or double taxation agreement is concluded with another country which has implications for the devolved taxes.⁹²

101. The ICAEW questioned the appropriateness of this proposed purpose given the current devolved taxes it would apply to, while recognising that this could change if other taxes are devolved in the future.⁹³

102. The Minister told the Committee that the inclusion of this purpose is justified “because Welsh devolved taxes do form part of a small number of taxes that actually operate in that UK environment”.⁹⁴

103. The Minister’s official provided an example to illustrate why the purpose is required:

*“There is an example in the stamp duty land tax where previously—and in land transaction tax, in fact—as part of the membership of the EU, the UK Government and our Government were required to provide the same treatment to EU charities as existed for UK charities.”*⁹⁵

104. Although the Minister’s official went on to explain that this particular obligation no longer exists as the UK is no longer a member of the EU, he emphasised that the power may be needed as the UK Government negotiates new treaties with countries around the world.⁹⁶

105. Furthermore, the Minister suggested that “there might be inward investment consequences for us by not choosing to comply with international taxation obligations, in the

⁹¹ Letter from the Minister for Finance and Local Government to the Legislation, Justice and Constitution Committee, 11 March 2022

⁹² Explanatory Memorandum, paragraph 3.17

⁹³ Finance Committee, RoP, 2 February 2022, paragraph 109

⁹⁴ Finance Committee, RoP, 16 February 2022, paragraph 42

⁹⁵ Finance Committee, RoP, 16 February 2022, paragraph 43

⁹⁶ Finance Committee, RoP, 16 February 2022, paragraph 43

sense that Wales could be less attractive than England if we were not to respond quickly in this particular area as well".⁹⁷

Protection against tax avoidance (section 1(1)(b) of the Bill)

Purpose (b) – the Welsh Ministers may make legislative changes to protect against avoidance activity that can then be stopped with immediate effect. This includes cases where the Welsh Revenue Authority and/or the Welsh Government consider that increased clarity in the legislation will put beyond doubt the intended application of the legislative provisions, and potentially benefit taxpayers by stopping the promotion of avoidance opportunities that do not actually exist. Such action has been taken by the UK government to protect tax regimes and taxpayers in the past and the Welsh Ministers wish to be able to take similar action.⁹⁸

106. The CIOT highlighted the interaction between the new power in the Bill to tackle tax avoidance and the existing power to counteract artificial tax avoidance arrangements under the General Anti-Avoidance Rule (GAAR)⁹⁹, and noted the Welsh Government's intention to use the power to close down any perceived opportunities for avoidance before they become widely exploited. It further commented:

*"We recognise the value of acting swiftly to close down artificial tax avoidance arrangements thereby helping to protect taxpayers who may otherwise participate in avoidance schemes without the full facts and knowledge of the law. We note also the SDLT experience where there has been a history of mass marketed avoidance schemes subsequently addressed through primary legislation although this has taken time."*¹⁰⁰

107. The ICAEW (and similarly the CIPFA¹⁰¹) noted that "many promoters of tax avoidance schemes appear to operate outside of any oversight (whether by a professional body or otherwise) and appear impervious to changes designed to stop their activities" and suggested:

*"While it is right that measures should be aimed at the taxpayer, the Welsh Government should consider whether it has the necessary powers to tackle the promoters of egregious tax avoidance schemes."*¹⁰²

⁹⁷ Finance Committee, RoP, 16 February 2022, paragraph 44

⁹⁸ Explanatory Memorandum, paragraph 3.17

⁹⁹ Tax Collection and Management (Wales) Act 2016, Part 3A

¹⁰⁰ Written evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group

¹⁰¹ Written evidence: WTA 07 Chartered Institute of Public Finance and Accountancy

¹⁰² Written evidence: WTA 05 Institute of Chartered Accountants in England and Wales

108. Justifying the need to confer a power on Welsh Ministers to protect against tax avoidance in addition to the GAAR, the Minister explained:

*"...the general anti-avoidance rule is an important anti-avoidance tool available to the WRA to counteract instances of tax avoidance. However, it can only be used after the fact, where a specific avoidance scheme has been used to gain a tax advantage, so it doesn't prevent future taxpayers from exploiting the same avoidance opportunity in the future, whether intentionally or not. So, the new power would enable Welsh Ministers to change the law and close down any perceived opportunities for avoidance before they could become widely exploited."*¹⁰³

109. She added that halting the marketing of avoidance schemes by making changes to the legislation also "protects taxpayers from taking part in avoidance schemes that can result in them paying the tax owed and also the fees for the advice and services as well".¹⁰⁴

110. The WRA told the Committee that the existing GAAR "is an effective deterrent at present" in supporting its tax avoidance activities:

*"...avoidance isn't a risk that we currently see within the two devolved taxes. That's not to say that circumstances in the future won't change. Things may arise that require us to take action. But the GAAR is an important tool to have as and when required. But in practice, powers such as the GAAR, they'll be required in very few cases, I think it's important to note, because there are often other more appropriate ways of ensuring compliance and addressing any suspected cases."*¹⁰⁵

111. To ensure the GAAR remains an effective tool, the WRA said it is "conceivable that any adverse court decisions in the future that affect GAAR itself could give rise to a potential need to make legislative changes at pace".¹⁰⁶

112. When asked whether the WRA has encountered any particular situations where the use of power proposed in the Bill to protect against tax avoidance would have been beneficial to the WRA or Welsh taxpayers, the WRA noted that "this scenario has not yet arisen".¹⁰⁷

¹⁰³ Finance Committee, RoP, 22 December 2021, paragraph 211

¹⁰⁴ Finance Committee, RoP, 22 December 2021, paragraph 212

¹⁰⁵ Finance Committee, RoP, 2 February 2022, paragraph 237

¹⁰⁶ Finance Committee, RoP, 2 February 2022, paragraph 239

¹⁰⁷ Finance Committee, RoP, 2 February 2022, paragraph 242

113. Given the lack of evidence supporting the need for a specific power to protect against tax avoidance, the Committee sought clarification from the Minister on its inclusion in the Bill:

*"...we take tax avoidance very seriously and there is the possibility of circumstances changing in the future and things might arise that might require us to respond quickly. And this Bill would offer us the opportunity to do that. So, whilst the WRA hasn't identified anything up to this point, as I say, we are still quite early on in our journey of Welsh taxes, ... things are moving all of the time and there might be circumstances that we would want to respond to rapidly in the way that the UK Government is also able to."*¹⁰⁸

Meaning of 'tax avoidance'

114. Witnesses raised a range of issues with the term 'tax avoidance' in the Bill.

115. Dr Sara Closs-Davies suggested that the term needs to be defined in the Bill as it has a broad meaning, is "problematic" and "continues to be a bone of contention in academia and practice". Consequently, she felt it was important that "taxpayers and practitioners are given clear guidance and understanding as to what constitutes tax avoidance in the context of this proposed Bill to minimise uncertainty and unexpected sanctioning".¹⁰⁹

116. However, she also warned against being too prescriptive "as this could lead to too much detail, complexity and obscurity, in addition to the creation of new tax avoidance schemes and further tax planning opportunities".¹¹⁰

117. This was also reflected in the CIOT's evidence:

*"The definitions of tax avoidance in UK legislation have tended to be very wide; anything that might bring about a lower tax result than something else could potentially be tax avoidance. I think it's very difficult to come up with a definition that exactly separates the wheat from the chaff, that guarantees that it's only really proper abuse that it's targeting and there's no way innocent individuals could be caught in the crossfire. I think you just have to accept that's a risk and try and mitigate it with the way the Government reacts, because any tighter definitions are untried in a statutory context."*¹¹¹

¹⁰⁸ Finance Committee, RoP, 16 February 2022, paragraph 99

¹⁰⁹ Written evidence: [WTA 06 Dr. Sara Closs-Davies, Bangor University](#)

¹¹⁰ Written evidence: [WTA 06 Dr. Sara Closs-Davies, Bangor University](#)

¹¹¹ Finance Committee, RoP, 2 February 2022, paragraph 41

118. The ICAEW felt that defining tax avoidance would be futile and suggested that the term ‘tax avoidance’ could be linked back to the GAAR “so that, effectively, the trigger was arrangements that effectively would fall foul of the general anti-abuse rule”.¹¹²

119. Responding to concerns that the term ‘tax avoidance’ in the Bill is too wide-ranging, the Minister’s official indicated that formulating a definition of tax avoidance was difficult. He stated:

*“The conclusion is it’s an elephant test: you know it when you see it. And, unfortunately, that’s where we have to be with this particular power, because we don’t know what we’ll encounter in the future, and therefore the wider definition, I think, is desirable in this particular circumstance...”*¹¹³

120. When asked whether the term in the Bill should be linked to the existing GAAR, the Minister’s official explained that the power in the Bill “is possibly wider than the very precise definition of avoidance and the types of things that would need to be triggered for the GAAR to be used”. He continued:

*“The GAAR is triggered in two cases. It acts as a deterrent. That, I think, is possibly deniable, but I would consider it to be undeniable that it acts as a deterrent, and that is a good thing for it to do. But it then has to have a tax case for actually the tools in the GAAR to be used, to use it to challenge a taxpayer. The taxpayer needs to have entered into the avoidance activity. So, until the taxpayer’s entered into the avoidance activity, the GAAR, to some extent, is sat there as a tool to be used after the avoidance. I think, here, what we’re looking at is the Minister being able to use the power in order to stop people entering into the avoidance activity in the first place if the deterrent isn’t working.”*¹¹⁴

121. Commenting on the Minister’s view that the aim of the tax avoidance power in the Bill “is to enable ministers to nip prospective avoidance activity in the bud by closing potential loopholes quickly, so that questions of artificiality do not even arise”, Professor Emyr Lewis emphasised:

“If the purpose were drafted as simply a loophole-closing provision, that would be fine (assuming that it is agreed to be in principle acceptable to enable Ministers by regulations to close loopholes in primary legislation), but

¹¹² Finance Committee, RoP, 2 February 2022, paragraphs 174 and 133

¹¹³ Finance Committee, RoP, 16 February 2022, paragraph 55

¹¹⁴ Finance Committee, RoP, 16 February 2022, paragraphs 57 and 63

the drafting is much broader than that. It enables any amendments to be made to protect against tax avoidance.”¹¹⁵

122. Professor Emyr Lewis further highlighted issues with the extent of the proposed power in the Bill regarding tax avoidance:

“There is nothing in the Bill, for instance, which would prevent Ministers from amending Section 81H...[of the Tax Collection and Management (Wales) Act 2016]...so that the burden of proof is reversed, requiring the taxpayer to demonstrate that an arrangement is not artificial and that an adjustment is not reasonable. Another possibility is that the power could be used to amend the definition of artificiality. It is suggested that these are issues which would be better dealt with by the Senedd.”¹¹⁶

123. Consequently, he recommended that the Bill should “limit the range of changes that could be made” under the anti-avoidance purpose “rather than trying to formulate a new definition”.¹¹⁷

124. In a letter to the LJC Committee, the Minister acknowledged that the power could technically be used to amend elements of the GAAR. However, she suggested that it is “difficult to see how the conditions for exercising the power would be met for changes to the GAAR as a result of the avoidance activity it is designed to target” and also “appears unlikely that an amendment to the GAAR provisions themselves would be necessitated as a result of UK budget changes”. The Minister added:

“Where the new power could be used, potentially, is in response to a court decision that found the GAAR legislation to be ‘defective’ in some manner or supported an interpretation of the GAAR provisions that changed its application beyond what was intended by Senedd, for example taking an unexpected approach to what is meant by ‘artificial’. The impact of the decision could make the GAAR less effective, potentially impacting on the WRA’s ability to tackle other ongoing avoidance cases.

It is also possible that a court decision could render the GAAR ‘too’ effective, capturing more transactions than intended. In both scenarios, the ability to

¹¹⁵ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹¹⁶ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹¹⁷ Finance Committee, RoP, 11 February 2022, paragraph 72

make a swift amendment to the GAAR itself to enable it to operate effectively as intended is an important safeguard.”¹¹⁸

125. The Minister indicated that she is “open to considering whether it would be appropriate for there to be additional restrictions in regards to the ability to make changes to the GAAR”.

Responding to changes to predecessor taxes (section 1(1)(c) of the Bill)

Purpose (c) – the Welsh Ministers may make changes in response to changes made by the UK government to predecessor UK taxes which will affect the Welsh block grant adjustment and therefore the revenues available for essential public services.¹¹⁹

126. The CIPFA acknowledged the nature of changes that have previously been made to the SDLT regime and supported the Welsh Government having the tools to response to such changes.¹²⁰

127. The ICAEW shared this view:

“...the fact is we are pretty beholden to a lot of the changes at the UK level in relation to SDLT, and I think that does give us a problem in terms of operation of the tax. So, I think, at a very fundamental level, we do need powers to react quickly to those changes.”¹²¹

128. Sir Paul Silk also understood the desire of the Welsh Government to be able to respond rapidly to changes to predecessor taxes, acknowledging that such changes “may be taken at short notice, can come into immediate effect and could be extensive”.¹²²

129. Professor Emyr Lewis agreed that the policy need for a mechanism enabling the Welsh Government to act quickly to changes in predecessor taxes is clear, as is the desire “for the change to have effect from the same date as the UK change, and if that date is in the past for the legislation to be retrospective to that extent”.¹²³

¹¹⁸ Letter from the Minister for Finance and Local Government to the Legislation, Justice and Constitution Committee, 11 March 2022

¹¹⁹ Explanatory Memorandum, paragraph 3.17

¹²⁰ Finance Committee, RoP, 2 February 2022, paragraph 94

¹²¹ Finance Committee, RoP, 2 February 2022, paragraph 96

¹²² Written evidence: WTA 02 Sir Paul Silk

¹²³ Written evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University

130. However, he noted that the power proposed in the Bill would allow the Welsh Ministers to introduce a new rate of tax and argued that a “decision to do so is arguably a significant policy decision which would need Senedd approval up front rather than after the event”.¹²⁴

Responding to decisions of courts/tribunals (section 1(1)(d) of the Bill)

Purpose (d) – the Welsh Ministers may make changes if a court or tribunal decision identified an issue that Welsh Ministers considered could benefit from legislative change (including decisions relating to the UK predecessor taxes, other taxes, or other laws that affect the devolved taxes), or to provide greater clarification of the law.¹²⁵

131. As in the case of the anti-avoidance purpose, Professor Emyr Lewis highlighted that this is a very broadly drawn provision, allowing the Welsh Government to change the Welsh Tax Acts in response to an external challenge to the way in which it operates. He suggested that regulations made in connection with this purpose could “respond to a decision of a court of law, including undoing the effect of that decision”. He emphasised:

*“The difficulty with this purpose in the Bill is that it is so very broad. It could in theory apply to any provision in the Welsh Tax Acts, apart from those that set up and govern the WRA.”*¹²⁶

132. The ACCA supported this view, commenting that the purpose was “almost a catch-all for anything that happens within this particular field”.¹²⁷

133. The Minister said that “the provision is deliberately broad to capture all eventualities, because we can’t predict at this point the future scenarios where the provision might be used”.¹²⁸

134. In relation to its operation of the devolved tax regime, the WRA told the Committee that it has not needed to respond to the decision of any tribunals to date.¹²⁹

135. The CIOT considered whether there might be a case for extending this purpose to also include “change in interpretation by HMRC in relation to a predecessor tax that leads to a need to clarify the interpretation of a provision in the devolved taxes”. However, the CIOT noted that

¹²⁴ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹²⁵ [Explanatory Memorandum](#), paragraph 3.17

¹²⁶ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹²⁷ Finance Committee, RoP, 2 February 2022, paragraph 139

¹²⁸ Finance Committee, RoP, 16 February 2022, paragraph 93

¹²⁹ Finance Committee, RoP, 2 February paragraph 263

"on balance such changes are more appropriately addressed through existing powers or where necessary through primary legislation".¹³⁰

136. The EM states that, in respect of all the purposes for which regulations can be made, the regulation-making power will not be used to achieve routine policy changes to the devolved taxes.¹³¹

137. However, Professor Emyr Lewis noted that, as in the case of the anti-avoidance purpose, the drafting of the Bill does not reflect this approach. He commented:

*"Rather it gives the Welsh Ministers the power, should they choose to do so, to achieve routine policy changes, significant or otherwise, and to overturn decisions made in a court of law. In other words, the power to decide who legislates about what, who makes the decision whether a matter should be dealt with by primary or secondary legislation, lies with the Government."*¹³²

138. Professor Emyr Lewis elaborated on this issue during oral evidence:

*"If you take as an example that the WRA used its powers, and it has quite far-reaching powers, to enter someone's property or business premises to take away documentation—there are processes that enable them to do that without notice—and let's say that the person concerned, the taxpayer, alleges that the steps had been taken in a way that wasn't done in accordance with the legislation, so they take the WRA to the courts and they win their case, and Welsh Ministers say, 'Well, we don't like that. We believe that the WRA should have stronger powers so that this type of case doesn't arise in future.' So, they then amend the tax collection legislation, the main legislation, to strengthen the powers of the WRA to enter people's homes or premises to take away their property. Now, the WRA has received those powers that impact upon the privacy and autonomy of the individual—all sorts of related principles—because the Senedd, which has been democratically elected, has decided that it is appropriate that the authority receives these powers following open consultation, as Paul has said. Is it correct then that the Welsh Government, without necessarily having to consult, can increase those powers simply because they had lost a court case on that point?"*¹³³

¹³⁰ Written evidence: [WTA 03.Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

¹³¹ [Explanatory Memorandum](#), paragraph 3.3

¹³² Written evidence: [WTA 01.Professor Emyr Lewis, Aberystwyth University](#)

¹³³ Finance Committee, RoP, 11 February 2022, paragraph 25

139. He noted that “unlike the proposals in the original policy consultation, there will be no up-front ‘Senedd lock’ (covered in detail in chapter 7 – Procedure for regulations) that would act as a constraint to prevent the powers being used too broadly and would ensure that the decision about who legislates in such a case is made by the Senedd”.¹³⁴

140. While acknowledging that the new power could theoretically be used to negate a court’s decision, the Minister’s official argued that there are safeguards in the Bill that would prevent the Welsh Ministers from using the power in these circumstances. She indicated that Welsh Ministers would need to satisfy one of the four purpose tests and consider the use of the power to be “necessary or appropriate”. She suggested that the requirement for the Welsh Government to bring forward a statement of policy in relation to the use of retrospective legislation, the provision preventing the imposition of retrospective penalties and scrutiny by the Senedd offered further safeguards.¹³⁵

141. The Minister’s official also noted that the legislation would be required to comply with European Convention on Human Rights principles and highlighted the possibility of challenging the validity of regulations by judicial review.¹³⁶

Use of the term ‘necessary or appropriate’

142. As well as explaining that changes to the Welsh Tax Acts using the proposed power would be limited to the circumstances set out in the four purpose tests, the Minister suggested that the Bill additionally limits ministerial discretion by requiring ministers “to be satisfied that the changes are necessary or appropriate to achieve one of those four purposes”.¹³⁷

143. The Committee questioned whether the term ‘necessary or appropriate’ could be strengthened to ‘necessary and appropriate’ to trigger the use of the power by the Welsh Ministers. The Minister’s official explained:

“So, the ‘necessary’ is the highest bar, and, if you get over that bar, then if you had a test that was ‘necessary and appropriate’ you wouldn’t actually need the ‘appropriate’. And, I think, the point that we’re trying to make with this is that we consider the wording, as it is drafted now, to give us a wider flexibility in terms of the test that we need to pass.”¹³⁸

¹³⁴ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹³⁵ Finance Committee, RoP, 16 February 2022, paragraph 78

¹³⁶ Finance Committee, RoP, 16 February 2022, paragraph 79

¹³⁷ Finance Committee, RoP, 22 December 2021, paragraph 188

¹³⁸ Finance Committee, RoP, 16 February 2022, paragraph 88

144. Subsequently, in a letter to the LJC Committee, the Minister reiterated her view that ‘necessary or appropriate’ places “sufficient restraints upon the use of the power, whilst also permitting a certain degree of flexibility”. She went on to say:

*“I would not say that the “necessary test” is always satisfied when considering which regulations to make, because section 1(1) states that the regulations must either be necessary or appropriate, thereby providing Welsh Ministers with alternative tests to choose from depending upon the circumstances.”*¹³⁹

Stakeholder engagement

145. The CIOT considered the advantages of seeking specific Welsh Government commitments to raising the intended use of the power through a dedicated stakeholder forum before proceeding to the formal stages or, where this is not possible due to forestalling or sensitivities, explicitly noting the restraints in the Explanatory Memorandum accompanying any regulations made under the proposed power in the Bill when introducing the proposed change to the Senedd.¹⁴⁰ However, the CIOT noted that the EM accompanying the Bill states:

*“...subject to the risk of forestalling, consideration will be given on a case by case basis to engaging informally, and in confidence, with key stakeholders, before and during the drafting of regulations to establish whether the legislation will achieve its objective.”*¹⁴¹

146. The CIOT felt that “consideration might be given to publishing the nature of any informal consultation after the regulations come into force in the interests of transparency”.¹⁴²

147. To aid transparency and comprehensibility of the law, particularly where regulations made under the power in the Bill are very complex or are due to come into force at short notice, the CIOT emphasised that “it should be the norm to publish (ideally simultaneously) a consolidated version of the law as amended”.¹⁴³

148. The Minister indicated that she would have to consider how to engage informally and confidentially with key stakeholders “before and during the drafting of regulations to explore whether what we’re proposing will meet its intent”. She added:

¹³⁹ Letter from the Minister for Finance and Local Government to the Legislation, Justice and Constitution Committee, 11 March 2022

¹⁴⁰ Written evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group

¹⁴¹ Explanatory Memorandum, paragraph 4.15

¹⁴² Written evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group

¹⁴³ Written evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group

*"...depending, though, on the nature of the change proposed, the primary consideration would be the confidential nature of those discussions, because obviously, we'd want to avoid forestalling and so on, so we'd have to consider carefully, on the basis of what kind of regulations we were bringing forward, who we would consult with and when. Obviously, we have this ongoing discussion and we'd have to think about the appropriate bodies and individuals to engage with at that point."*¹⁴⁴

Committee view

149. The Committee has found it challenging to form conclusions on the proposed purpose tests. This is because the Welsh Government is seeking additional tools to address hypothetical scenarios, without providing evidence of particular circumstances in which the power has been needed to date or specific examples of how the power would be used in future.

150. The principle of needing to respond rapidly to changes to predecessor taxes is widely supported. However, the Committee notes the concerns expressed that the nature and scope of such a response using the power in the Bill as drafted could be substantial and involve significant changes in policy that would be better approved by the Senedd in advance.

151. The Minister told the Committee that "the scope of the power within the Bill has been deliberately constrained by the inclusion of the four purpose tests, and that sets out absolute clarity, I think, in terms of the circumstances in which the power may be used". Although a number of witnesses generally recognised the need for the four purposes, some stakeholders raised serious concerns about the breadth of aspects of the proposed power as set out in the Bill, advising that it could be open to abuse. In particular, we heard that the proposed use of the power in relation to the "anti-avoidance" and "decisions of courts and tribunals" purposes is too wide-ranging and that the Bill should more narrowly define the types of change that may be made under those purposes.

152. This was illustrated in the evidence presented by Professor Emyr Lewis, which highlighted that the provisions in the Bill would not, for example, prevent Welsh Ministers from amending the existing anti-avoidance provisions in Part 3A of the TCM Act to reverse the burden of proof and require a taxpayer to demonstrate that avoidance arrangements are not "artificial" and that an adjustment is not reasonable. Nor, for example, does the Bill prevent the Welsh Ministers from using the power to make other changes to the GAAR, such as amending the definition of "artificiality" to the potential detriment of taxpayers. The Minister told the Committee that these

¹⁴⁴ Finance Committee, RoP, 16 February 2022, paragraph 137

purposes are deliberately broad in order to capture all eventualities. The Committee does not doubt the Minister's sincerity, but this provides us with little comfort about how the power may be used by future administrations.

153. While the Committee accepts the potential need to respond to external events in relation to the four purposes, we cannot ignore the concerns raised regarding the broadness of the proposed power or the potential for it to be used in the future in ways that the current Welsh Government does not intend, or in ways that the Senedd may not have anticipated.

154. During scrutiny, the Minister invited the views of both the Finance Committee and the LJC Committee on which parts of the Welsh Tax Acts should be excluded from the scope of the regulation-making power. The LJC Committee subsequently wrote to the Minister requesting information on the particular circumstances in which it is envisaged that the regulation-making power may need to modify each of the parts of the TCM Act not excluded from the Bill (Parts 1 and 3 – 10). In response, the Minister said "it is not feasible at this stage to anticipate every potential future circumstance which may give rise to an amendment to the Tax Collection and Management (Wales) Act 2016".

155. The Committee is disappointed that the Minister has made no attempt to demonstrate how the power could be used to modify important parts of the TCM Act. This makes our scrutiny of this enabling power extremely challenging and provides no evidence to guide us in forming a view on the appropriateness of the Bill's current scope. We therefore call on the Minister to provide examples to illustrate how this regulation-making power will be used in order to inform Members' considerations during the Bill's legislative passage through the Senedd.

156. Throughout scrutiny, the Minister has regularly sought to reassure the Committee that the regulation-making power is limited to the four purpose tests and that its use is further constrained by the wording in section 1(1) requiring the Welsh Ministers to consider that modifications are 'necessary or appropriate' in relation to those four purpose tests. The Minister maintains that 'necessary' constricts Welsh Ministers, while 'appropriate' provides them with flexibility to act outside of this parameter. However, the Committee doubts whether the wording 'necessary or appropriate' amounts to any meaningful limitation on use of the power. In particular, if Welsh Ministers can legislate if it is felt 'appropriate', then the 'necessary' test becomes irrelevant. Consequently, the Committee questions the value of retaining the words 'if they consider that the modifications are necessary or appropriate' in the Bill.

157. The opinions and insights of stakeholders are incredibly valuable in the development of legislation, particularly when making rapid changes to tax law (or any other law). The Bill's

approach to amending the Welsh Tax Acts by regulations rather than through primary legislation removes the opportunity for the Senedd to engage with stakeholders during the legislative process or to consider individual amendments at the various amending stages.

158. The Committee welcomes the Minister's commitment to undertake informal engagement with key stakeholders in order to test the development of its legislative proposals, subject to sensitivities and risks of forestalling. However, the Committee is concerned that such engagement will be confidential and therefore supports calls for the Welsh Government to publish the nature of any consultation in the interest of transparency and to aid scrutiny.

Conclusion 1. The Committee regrets the lack of specific examples provided by the Welsh Government relating to how the regulation-making power delegated by this Bill would be used to amend the Welsh Tax Acts in practice.

Recommendation 2. The Committee recommends that, prior to the debate on the general principles of the Bill, the Welsh Government provides examples of the specific circumstances in which it envisages the regulation-making power in section 1(1) being used to amend each part of the Tax Collection and Management (Wales) Act 2016 (other than Part 2), the Land Transaction Tax and Anti-Avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.

Recommendation 3. The Committee recommends that the Welsh Government reviews the wording of section 1(1), to ensure that the limitations placed on Welsh Ministers that any modifications are 'necessary or appropriate' is meaningful, and that examples are provided to illustrate how this condition limits the delegated power in practice.

Recommendation 4. The Committee recommends that the Welsh Government commits to including details of any consultation, or sets out detailed reasoning for not doing so, in the Explanatory Memorandum accompanying any future regulations made under section 1(1) of the Bill.

5. Retrospective effect

159. Section 2(1) of the Bill provides that regulations made under section 1(1) may (among other things) impose devolved Welsh taxes, impose and/or extend a liability to a penalty and may also have retrospective effect. However, a new penalty or an extension to an existing penalty may not be imposed retrospectively.

160. The EM notes:

*"The Welsh Ministers consider it is necessary for there to be the potential to make legislative changes retrospectively, where considered necessary, on a case by case basis."*¹⁴⁵

161. The EM sets out the Welsh Government's current policy that regulations with retrospective effect will "normally be limited to cases where the impact of the regulations is to confer a benefit to Welsh taxpayers". However, the EM also states:

*"...where liabilities are increased by retrospection, and taxpayers could have reasonably expected retrospective changes to be introduced, the Welsh Ministers may make regulations that increase a taxpayer's liability. For example, where tax avoidance is identified, Ministers may announce that the scheme will be closed down through future regulations from the date of that announcement."*¹⁴⁶

162. The EM provides some examples of when regulations with retrospective effect may be proposed:

- where a change is made by the UK Government that has immediate effect and provides a tax, and therefore commercial, advantage to entities liable to the predecessor tax;
- where a change is made by the UK Government that has immediate effect and raises significant amounts of tax by a predecessor tax and that will have a material effect on the block grant adjustment;
- where avoidance activity is undertaken;

¹⁴⁵ Explanatory Memorandum, paragraph 3.20

¹⁴⁶ Explanatory Memorandum, paragraph 3.26

- where a court decision means the legislation is found to not operate as intended by the Welsh Government and Senedd when it was enacted.¹⁴⁷

163. Section 3 of the Bill places a duty on Welsh Ministers to publish a policy statement on the use of the power to make regulations with retrospective effect (policy statement). The policy statement must be published before the end of the period of three months beginning with the date of Royal Assent. Welsh Ministers are permitted to revise the policy statement at any time and are required to publish any revised policy statement.

164. The Minister provided a draft policy statement shortly after introduction of the Bill. In addition to the examples provided in the EM of when regulations with retrospective effect may be considered necessary, the draft policy statement includes a further example:

*"where regulations have been made using powers in the Act (either by draft or made affirmative procedure) and the Welsh Ministers wish to amend the effect of the regulations, so that the changes have effect from the same date that the original regulations had effect."*¹⁴⁸

165. The draft policy statement also proposed that:

*"Changes to tax legislation will normally take effect no earlier than the date the regulations are made. However, a change which takes effect from a date earlier than the date of making will also be possible for regulations made using the Act [section 2(1)(c)], although this is intended to be used in exceptional circumstances only."*¹⁴⁹

Appropriateness of making changes to tax laws retrospectively

166. Witnesses voiced concerns about the proposal to give Welsh Ministers the power to apply tax law retrospectively and the uncertainty this may create.

167. The CIOT accepted the need for "retrospection to correct an obvious anomaly that is harming taxpayers or to correct deficiencies that emerge". However, it also noted that retrospective effect in the Bill "is not limited in its effect to the date of a prior announcement",

¹⁴⁷ Explanatory Memorandum, paragraph 3.25

¹⁴⁸ Welsh Government: Draft statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc. (Power to Modify) Act 20XX

¹⁴⁹ Welsh Government: Draft statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc. (Power to Modify) Act 20XX

suggesting that legislating retrospectively should give “due weight to taxpayers’ legitimate expectations” and be “used with extreme care and justified in detail”.¹⁵⁰

168. The ICAEW and CIPFA suggested that regulations should not introduce tax changes prior to the date of announcement and that this needs to be clarified in the policy statement. Furthermore, if it is the Welsh Government’s intention to introduce a tax change from a date prior to the date it was announced, then the ICAEW felt “there should be a formal confirmation that such an approach would be wholly exceptional and that it would be accompanied by a detailed and compelling justification for such a procedure”.¹⁵¹

169. The ACCA noted that “the retrospective legislative approach is the solution of last resort and should be considered when all other options have been exhausted”.¹⁵² It also felt that limiting retrospective changes to no further back than the date of an announcement would give taxpayers and tax practitioners adequate notice about the change and provide certainty within the tax system. Whereas retrospective legislation that “goes back into the past and actually looks at a previous action or a previous measure” would undermine the integrity and transparency of the tax system.¹⁵³

170. Professor Emyr Lewis stressed that a fundamental component of the Rule of Law is that the law should be certain, adding:

*“If the law can be changed retrospectively, then it means that something which was lawful at the time it was done can be made unlawful, and someone can suffer consequences which they would not have expected to suffer. That makes for uncertainty in the law.”*¹⁵⁴

171. While acknowledging that changing the law retrospectively has happened in Westminster, he told the Committee that clear conditions were attached to the change:

“In the first instance, the intention to do this is announced clearly on the floor of Parliament in Westminster, so that a taxpayer who would go on to try to avoid tax would know that they were doing that at their own risk. And the

¹⁵⁰ Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

¹⁵¹ Written evidence: [WTA 05 Institute of Chartered Accountants in England and Wales](#) and [WTA 07 Chartered Institute of Public Finance and Accountancy](#)

¹⁵² Written evidence: [WTA 04 Association of Chartered Certified Accountants UK](#)

¹⁵³ Finance Committee, RoP, 2 February 2022, paragraph 144

¹⁵⁴ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

second is that this tends to happen through primary legislation rather than secondary legislation.”¹⁵⁵

172. The importance of legal certainty was also echoed by Sir Paul Silk:

“Retrospectivity in any legislation, including primary legislation, has always rightly been regarded with great caution, not least because a cardinal principle of law (as reflected in section 1(2)(d) of the Legislation (Wales) Act 2019) is that law should be certain in its effect.”¹⁵⁶

173. Dr Sara Closs-Davies suggested that the use of the power to make legislative changes retrospectively “needs to be weighed against the costs to the taxpayer and public services if retrospective changes were not made”. She emphasised that “great care and attention is needed to justify making retrospective changes, and such changes should be subject to limited circumstances so as to not create instability and uncertainty within the tax system”.¹⁵⁷

174. Dr Sara Closs-Davies advocated the inclusion of provisions in the Bill requiring Welsh Ministers to give advance notice of proposed changes in order to raise awareness and allow the opportunity to explain and justify the need for retrospective changes to key stakeholders.¹⁵⁸

175. Addressing stakeholders’ concerns that the ability to change Welsh Tax Acts retrospectively will create uncertainty, the Minister said she would usually expect the power to legislate retrospectively “to be limited to cases where the impact would be to confer benefit on Welsh taxpayers”.¹⁵⁹

176. On the Welsh Government’s intention to legislate retrospectively to mitigate tax avoidance, by announcing that a scheme will be shut down through future regulations from the date of that announcement, the Minister explained:

“...although it is an unusual approach, I think that within the field of tax, particularly, it is appropriate. I think that it has been recognised elsewhere that tax is special and tax is different and can be treated as such, and I think that there are ways in which we can confer benefits on taxpayers quickly but also protect Welsh Government revenues as a result.”¹⁶⁰

¹⁵⁵ Finance Committee, RoP, 11 February 2022, paragraph 90

¹⁵⁶ Written evidence: [WTA 02 Sir Paul Silk](#)

¹⁵⁷ Written evidence: [WTA 06 Dr Sara Closs-Davies, Bangor University](#)

¹⁵⁸ Written evidence: [WTA 06 Dr Sara Closs-Davies, Bangor University](#)

¹⁵⁹ Finance Committee, RoP, 16 February 2022, paragraph 111

¹⁶⁰ Finance Committee, RoP, 16 February 2022, paragraph 112

177. The Minister indicated that she was prepared to explore “whether it’s appropriate to restrict the ability to legislate retrospectively back only as far as the date of an announcement in relation to a decision”, in response to the concerns raised.¹⁶¹

Protecting against tax avoidance

178. Professor Emyr Lewis expressed significant concerns with the Bill’s proposal to permit Welsh Ministers to legislate retrospectively for the purposes of protecting against tax avoidance.

179. He highlighted that, if carefully handled, the power to make retrospective changes can be a useful tool to deal with aggressive tax avoidance posing significant risk to public funds. However, he advised that the potential for unfairness and oppressive behaviour “makes it another area where the closest democratic scrutiny is essential” along with the “utmost clarity about the kind of circumstances in which it will be used”. Consequently, he felt that the power to legislate retrospectively needed to be limited:

“Set out legally binding limits on the use of the power to legislate retrospectively – e.g. in the case of anti-avoidance, no further back than the date on which the Government announced in the Senedd its intention to legislate; in the case of responding to a UK Government tax change, no further back than the effective date of that change.”¹⁶²

Responding to decisions of courts/tribunals

180. Professor Emyr Lewis also identified that the use of the power to legislate retrospectively in the case of decisions made by the courts/tribunals presents serious potential challenges to the Rule of Law:

“What would be the point of challenging or defending proceedings brought in connection with devolved taxes if the Welsh Ministers were capable through regulations of not only overturning the court’s decision for the future, but also invalidating that decision by changing the law in the past?”¹⁶³

181. He stressed that “such an assault on the Rule of Law is unlikely to be regarded by the Courts as reasonable” and regulations would “be open to challenge by judicial review on the grounds that they are unreasonable”. He suggested that:

¹⁶¹ Finance Committee, RoP, 16 February 2022, paragraph 113

¹⁶² Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹⁶³ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

*"Rather than leave it to chance, however, it would be preferable (if legislating retrospectively for this purpose is to be permitted at all) that it were made clear on the [face] of the Act that this cannot be done with effect from a date which is before the date of the Government announcing that it will change the law in the light of the relevant court or tribunal decision."*¹⁶⁴

182. Furthermore, he emphasised that the announcement should be a public statement on the floor of the Senedd.¹⁶⁵

183. Responding to these concerns, the Minister's official said there "is a wealth of case law that gives governments quite a wide margin of appreciation in terms of tax cases", suggesting that the courts "have always considered the balance, really, between the rights of the taxpayer and the public policy that the government is trying to pursue". She added:

*"I think also they've considered whether the policy that the government is intending to bring in is devoid of reasonable foundation, and I think that they've said that just because it's retrospective, that doesn't mean that it's devoid of reasonable foundation."*¹⁶⁶

Procedures for legislating retrospectively

184. With the exception of complying with international obligations, Professor Emyr Lewis argued that retrospective legislation "should be made, or at least approved, on the floor of the Senedd".¹⁶⁷

185. Sir Paul Silk supported this view, indicating that he is "not aware of any provision in Westminster legislation that gives Ministers power to impose taxation or modify or impose penalties in respect of taxation retrospectively by secondary legislation". His written evidence concluded that "the Senedd may thus be being asked in this Bill to agree to a further ratchet away from best parliamentary practice"¹⁶⁸ and he subsequently told the Committee that "this would be a first for the Senedd, but not a first that I think the Senedd should be particularly proud of".¹⁶⁹

186. When asked to respond to these concerns, the Minister said "I think we're creating a tool that is potentially necessary". She referred to the Welsh Government's desire to bring forward

¹⁶⁴ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹⁶⁵ Finance Committee, RoP, 11 February 2022, paragraph 100

¹⁶⁶ Finance Committee, RoP, 16 February 2022, paragraphs 141-142

¹⁶⁷ Finance Committee, RoP, 11 February 2022, paragraph 96

¹⁶⁸ Written evidence: [WTA 02 Sir Paul Silk](#)

¹⁶⁹ Finance Committee, RoP, 11 February 2022, paragraph 98

regulations conferring a benefit on Welsh taxpayers or shutting down an avoidance scheme at the earliest opportunity and suggested that the four purpose tests “very much” limit the decisions that Ministers can take.¹⁷⁰

European Convention on Human Rights

187. Professor Emyr Lewis gave prominence to the potential risks of regulations made under the power proposed in the Bill contravening Convention rights, including those related to property, stating that “it is a very, very uncomfortable position for a legislature to be in to be increasing the burden on people in a retrospective manner”. He argued that, without clear messaging from the Government in terms of legislating from the date of the announcement onwards, the retrospective use of the regulation-making power could be reviewed by the courts.¹⁷¹

188. While indicated that the Bill itself will not engage Convention rights, the Minister accepted that future exercise of the Bill’s power “may well give rise to convention rights”, particularly in relation to making regulations with retrospective effect. She expanded further on this issue:

“...it is well recognised in the context of tax that there may be justification for making retrospective legislation in order to ensure fairness within the tax system and to prevent the abuse of the rules. In relation to potential breaches of article 1 of protocol 1, the courts have been known to give considerable margin of appreciation to national authorities who, when legislating retrospectively, attempt to strike a fair balance between the general public interest and the protection of individual rights. So, I think that does provide us with some comfort in terms of where we are in that regard.”¹⁷²

189. The Minister confirmed that detailed legal scrutiny will be required on a case-by case basis and the Welsh Government’s analysis will be included in any EM accompanying future regulations.¹⁷³

Policy statement

190. The draft policy statement was largely welcomed by stakeholders, aside from the concerns expressed about the potential for introducing tax changes with effect from a date prior to the date of the relevant announcement.

¹⁷⁰ Finance Committee, RoP, 16 February 2022, paragraphs 122 and 129

¹⁷¹ Finance Committee, RoP, 11 February 2022, paragraph 91

¹⁷² Finance Committee, RoP, 22 December 2021, paragraph 219

¹⁷³ Finance Committee, RoP, 22 December 2021, paragraph 220

191. The ACCA acknowledged the difficulties involved in producing such a statement but suggested that a number of questions remain:

*"There are terms in there around case-by-case basis, depending on particular circumstances, and then the examples of situations where it might be used now. I appreciate the fact that a statement, to be workable, needs to be this length, but it does then create: where would you go to find out actually what some of those areas also mean? Because I think people would interpret that in a number of different ways."*¹⁷⁴

192. Though it "seems perfectly reasonable", Sir Paul Silk also felt it still allowed "a degree of discretion to Ministers that might be thought undesirable in the case of any retrospective legislation, and particularly in taxation legislation", adding:

*"For example, the draft statement several times uses the words 'likely' and 'possible' – these envisage that there may also be unlikely circumstances where procedures proposed are not, in fact, possible. Once again, the Committee might want to contemplate the most extreme circumstances in which the power could be used."*¹⁷⁵

193. The Minister acknowledged that making retrospective tax legislation would be new territory for the Welsh Government but highlighted the making of retrospective tax legislation at the UK level in relation to tax avoidance and referred to a "number of statements and protocols issued by the UK Government". She told the Committee that the policy statement will "give taxpayers and their advisers clarity on when and how we intend to use the power provided in the Bill retrospectively".¹⁷⁶

194. Sir Paul Silk and the ACCA supported the Senedd having a statutory role in approving the policy statement and any subsequent changes proposed by the Welsh Government.¹⁷⁷

195. The Minister indicated that she did not intend to seek the Senedd's approval in relation to the policy statement, adding:

"The Bill, if approved, provides Welsh Ministers with the ability to use the power to make the regulations that have retrospective effect and the

¹⁷⁴ Finance Committee, RoP, 2 February 2022, paragraph 157

¹⁷⁵ Written evidence: [WTA 02 Sir Paul Silk](#)

¹⁷⁶ Finance Committee, RoP, 22 December 2021, paragraph 223

¹⁷⁷ Finance Committee, RoP, 2 February 2022, paragraph 157 and 11 February 2022, paragraph 103

statement is a policy statement on how we would use the power, given by the Senedd, to make that retrospective legislation."¹⁷⁸

196. The Minister said the policy statement is intended "to give security to the public and the Senedd that the power to make regulations with retrospective effect won't be abused" and to "ensure that we are open about the basis upon which we would use those powers". She went on to say that:

*"... the appropriate and important point for the Senedd to have its say is at that point of voting on the regulations in respect of approving them or rejecting them. I think that that is the powerful moment for the Senedd to exercise its authority on it."*¹⁷⁹

Committee view

197. The appropriateness of the provision in section 2(1)(c) permitting regulations made under section 1(1) to have retrospective effect has been a key feature of the Committee's scrutiny. There is a consensus among stakeholders that legislating retrospectively overturns a key principle that there should be certainty in the design of the tax system. While there is also an acceptance from some stakeholders that governments may need to deviate from that core principle of certainty in order to mitigate the risks to public funds, the Committee agrees with stakeholders that great care and a compelling case is required to legislate retrospectively. The circumstances in which this occurs should be exceptional.

198. The Committee accepts the potential need for Welsh Ministers to make legislative changes with retrospective effect in relation to the four purposes i.e. before the relevant regulations are made. Issuing a clear warning to taxpayers and tax practitioners that the Welsh Government will legislate retrospectively is crucial, however, with many witnesses suggesting that changes should not take effect from a date earlier than the date of an announcement. The Committee has carefully considered the evidence presented on this issue and believes that limitations must be placed on the Welsh Government's ability to legislate retrospectively.

199. The Committee recognises that it may be necessary to legislate retrospectively to a date earlier than the date of an announcement in order to comply with international obligations. We also accept the need to ensure that a response to changes in predecessor taxes can apply in Wales from the same point in time as those changes in the UK. However, we consider that the retrospective effect of any regulations brought forward to protect against tax avoidance or to

¹⁷⁸ Finance Committee, RoP, 22 December 2021, paragraph 224

¹⁷⁹ Finance Committee, RoP, 16 February 2022, paragraph 148

respond to decisions of a court or tribunal must be limited on the face of the Bill to no earlier than the date of the announcement. The Committee considers that this approach would strike the most appropriate balance between the Welsh Government's policy intention to respond quickly (and exceptionally on a retrospective basis) to urgent external events, and the protection of the individual rights of taxpayers.

200. We agree with witnesses that such an announcement should be made on the floor of the Senedd but accept that such an approach would constrain the Welsh Government's ability to respond rapidly when the Senedd is in recess, as it would require the Senedd to be recalled. Therefore, we propose that an announcement should be made in the format of a written statement, followed by an oral statement in Plenary at the earliest opportunity.

201. Stakeholders largely supported the provision requiring Welsh Ministers to publish a policy statement on the use of the power to make regulations with retrospective effect, and the Committee agrees that this is an appropriate and important provision. Some concerns were also expressed that the draft policy statement published alongside the introduction of the Bill is open to interpretation and highlights a degree of discretion. Given the particular importance of scrutiny of legislation with retrospective effect, we do not feel it is appropriate that the Bill allows the Welsh Ministers to simply publish and revise the policy statement at any time, without the Senedd's formal approval. In our view, including a mechanism for the Senedd to approve the policy statement and any changes proposed to it is an important safeguard. Additionally, the circumstances in which Welsh Ministers may use the proposed power retrospectively is central to the decision as to whether the Senedd should grant the power at all.

Recommendation 5. The Committee recommends that the Bill be amended so that the effect of section 2(1)(c), in respect of regulations made for the purpose set out in section 1(1)(c), is limited to no earlier than the effective date of the change to the predecessor tax.

Recommendation 6. The Committee recommends that the Bill be amended:

- so that the effect of section 2(1)(c), in respect of regulations made for any of the purposes set out in section 1(1)(b) and (d), is limited to no earlier than the date of an announcement;
- to specify that the date of that announcement is the date Welsh Ministers lay a written statement before the Senedd;
- to require Welsh Ministers to bring forward an oral statement at the first plenary session after an announcement is made.

Recommendation 7. The Committee recommends that the Bill be amended to require the policy statement on the use of the power to make regulations with retrospective effect in section 3 to be laid before and approved by the Senedd, including any subsequent changes. The motion to approve the policy statement (and any subsequent changes) should not be moved until a responsible committee has reported.

6. Penalties

202. Section 2 of the Bill provides that changes to the Welsh Tax Acts (or regulations made under them) by regulations made under section 1(1) may include imposing or extending liability to penalties.

203. Sir Paul Silk noted that the Bill will give Ministers the power to make regulations that impose LDT or LTT, or that modify or impose penalties, which would normally be reserved for primary legislation.¹⁸⁰

204. When asked what safeguards could be implemented to protect taxpayers, Sir Paul Silk suggested that:

*"...the safeguards would have to be, by the nature of this Bill, in the secondary legislation, and that gets back to the concern that both Emyr and I have expressed about whether there is adequate scrutiny—would be adequate scrutiny—of those safeguards if the secondary legislation route is used."*¹⁸¹

205. The ICAEW also expressed the view that the power to make or extend a penalty "should only be made by way of primary legislation through a Finance Bill type process" and requested "clarification of the circumstances when this provision might apply and what safeguards will be in place to protect taxpayers".¹⁸²

206. In oral evidence, the ICAEW stated:

*"I think penalties are a very high bar in terms of a tax system. You need to have proper justification for it and you need to be able to always justify why a penalty would be imposed. And I think that's even more important in terms of the ability to effectively apply one by way of regulation."*¹⁸³

207. The ICAEW expanded on its concerns:

"Looking at the provisions here in the Bill, it's not at all clear. Regulations may impose or extend a liability to a penalty—that's all it says. What does that mean? How would it apply? And how would that interact with the fact that

¹⁸⁰ Written evidence: [WTA 02 Sir Paul Silk](#)

¹⁸¹ Finance Committee, RoP, 11 February 2022, paragraph 46

¹⁸² Written evidence: [WTA 05 Institute of Chartered Accountants in England and Wales](#)

¹⁸³ Finance Committee, RoP, 2 February 2022, paragraph 147

we've already got—. I haven't got the 2016 Act in front of me, but I think it's got 60 or 70 clauses or provisions in relation to penalties and the application of penalties. So, what is this here going to do that's different to what we've already got in our primary legislation? It's not at all clear."¹⁸⁴

208. When questioned on the appropriateness of imposing penalties by way of a regulation-making power, the Minister referred the Committee to safeguards in the Bill:

"You see that the Bill already provides that penalties can't be imposed with retrospective effect, and then we have section 5 in the Bill, which seeks to protect taxpayers. So, if taxpayers had been required to pay and the regulations were subsequently overturned, obviously we'd have situations in place where they would be reimbursed for that. So, we've put in place some quite strong safeguards, I think, for taxpayers, within the legislation."¹⁸⁵

209. The LJC Committee subsequently pressed the Minister on the circumstances in which she could foresee an urgent need to make regulations imposing new, or extending existing, penalties. In response, the Minister stated:

"It is foreseeable that court decisions, for example, could impact on the interpretation of penalty provisions, or the process of applying penalties, in a way which made them less effective or led to unintended consequences. In that respect, I consider it is prudent to retain the ability to make changes to those penalty provisions at speed should the need arise. I do, however, recognise that changes to penalty regimes are relatively rare. Furthermore, for the power in this Bill to be used in this way the situation being addressed would need to meet one of the four purpose tests set out in the Bill, in addition to the Welsh Ministers being satisfied that such amendments are necessary or appropriate."¹⁸⁶

Committee view

210. The Committee notes the concerns expressed by stakeholders regarding the making or extending of penalties by way of regulations and whether this approach would allow for adequate scrutiny. Furthermore, the Committee is disappointed that the Minister has not provided a clear justification for its inclusion in the Bill.

¹⁸⁴ Finance Committee, RoP, 2 February 2022, paragraph 170

¹⁸⁵ Finance Committee, RoP, 16 February 2022, paragraph 101

¹⁸⁶ Letter from the Minister for Finance and Local Government to the Legislation, Justice and Constitution Committee, 11 March 2022

211. While the Committee remains to be fully convinced of the need for Welsh Ministers to have the regulation-making power to impose penalties as proposed in the Bill, the majority of Members accept, on balance, the potential need for its use in the future and take comfort from the refund protection for taxpayers set out in section 5(4) in the event of failed regulations seeking to impose or extend liabilities penalties.

212. Peter Fox MS does not support the making or extending of penalties by way of regulations.

7. Procedure for regulations

213. Section 4 of the Bill specifies the Senedd approval procedures for regulations made under section 1(1). It permits Welsh Ministers to make regulations following either the:

- draft affirmative procedure – regulations may only come into force once the Senedd has approved the making of them; or
- made affirmative procedure – where Welsh Ministers are of the opinion that changes are required urgently, regulations may have provisional effect immediately but must receive the Senedd’s approval within a maximum period of 60 days (excluding periods of dissolution or where the Senedd is in recess for more than 4 days) to have permanent effect.¹⁸⁷

214. The EM states that Welsh Ministers will use the draft affirmative procedure “where there is less immediacy required and there is time for the Senedd to approve the regulations before they are made”, with the made affirmative procedure being used when changes are needed “to have effect immediately or shortly thereafter”.¹⁸⁸

215. Sir Paul Silk acknowledged that the draft affirmative procedure proposed in the Bill “does at least ensure Senedd approval before regulations are made”. However, he stressed that use of the made affirmative procedure to dispense with the Senedd’s prior approval in urgent cases “is one that should be used wholly exceptionally” and suggested that the formulation in section 4(2)(b) “still allows the Government considerable latitude”.¹⁸⁹

216. During oral evidence, Sir Paul Silk referred to the made affirmative procedure being “historically, very, very unusual” prior to the coronavirus epidemic. He added:

“Made affirmatives in the public health emergency made sense. I’d be very cautious about made affirmatives, because, by definition, they’re made before they’re approved by elected Members. When there is an absolute emergency, as there clearly was during coronavirus, then there is a justification for them. But the justification needs to be made in each case, and allowing this in these circumstances, I hope that Members will at least put the Welsh Government

¹⁸⁷ Explanatory Memorandum, paragraphs 3.27-3.29

¹⁸⁸ Explanatory Memorandum, paragraphs 3.27-3.28

¹⁸⁹ Written evidence: WTA 02 Sir Paul Silk

through the machine a little bit to see whether they really can justify the inclusion of made affirmative procedures in this Bill."¹⁹⁰

217. The CIOT noted that the made affirmative procedure "may limit scrutiny and therefore the opportunity to identify unintended consequences of the measure", suggesting that it would be "helpful to explore in what circumstances ministers envisage they may consider invoking this procedure".¹⁹¹

218. The CIOT expanded on the need for further information regarding the use of the made affirmative procedure:

*"So, I think the key thing is that, from the first time they use them, they should set out very clearly what the bad things are that would happen if they didn't act quickly and why they've chosen the particular route they've chosen and what their fears would have been about taking the other route on that occasion. I think that's the only thing one can reasonably say."*¹⁹²

219. The ICAEW said it would expect the made affirmative procedure to only be "exercised in extremis" and if used "a clear and compelling justification is made for it".¹⁹³

220. The Committee sought to understand the rationale for including a maximum 60-day scrutiny period for made affirmative regulations and questioned how Welsh Ministers will assess which procedure will be used to make regulations. In response, the Minister said:

*"Welsh Ministers will propose a timescale for both procedures before the vote that reflects the date by which the regulations need to come into force, the complexity of the issues involved, the length of time needed to provide suitable scrutiny, and the desire for early certainty to be provided to taxpayers. I'm very mindful at all times of the need to strike that balance between the need for the vote on the regulations to occur quickly, to provide certainty for taxpayers, and also, then, the importance of the scrutiny."*¹⁹⁴

221. The Minister went on to say that the proposed timeframe had been informed by the time between the publication of the UK finance Bill and Royal Assent, of around four months (including periods of recess). However, she considered a maximum of 60 days to be "sufficient

¹⁹⁰ Finance Committee, RoP, 11 February 2022, paragraphs 107-108

¹⁹¹ Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

¹⁹² Finance Committee, RoP, 2 February 2022, paragraph 76

¹⁹³ Written evidence: [WTA 05 Institute of Chartered Accountants in England and Wales](#)

¹⁹⁴ Finance Committee, RoP, 22 December 2021, paragraph 228

for scrutiny" given the likelihood of regulations relating to a "small number of specific issues, unlike the finance Bill, which addresses issues potentially in all of the UK's taxes".¹⁹⁵

222. While recognising the different legislative context, the Minister said:

*"...the made affirmative regulations have effects similar to the UK Government's use of resolutions under the Provisional Collection of Taxes Act 1968, which enable changes to be brought into force immediately and scrutinised and voted on subsequently. So, we're seeking a similar kind of power."*¹⁹⁶

223. However, Professor Emyr Lewis questioned whether this is an appropriate comparison to the proposals in the Bill, pointing out that:

*"...The mechanism in the [Provisional Collection of Taxes] Act is a power of the House of Commons, not of the UK Government, and is a piece of legal glue enabling changes announced by the Chancellor of the Exchequer to come into force quickly. It also ensures that taxes do not lapse. It [the Act] does not give the Chancellor or any other Minister the power to make changes to primary legislation through regulations, let alone ones which have retrospective effect. In other words, it respects the primacy of Parliament over legislation relating to tax."*¹⁹⁷

224. In terms of the legislative procedure used for regulations making retrospective changes to the Welsh Tax Acts, Sir Paul Silk suggested that:

*"The Committee may in particular want to press the Welsh Government as to whether the "urgent" procedure could ever be justified where the regulations are to have retrospective effect, and to propose that such regulations should always be by way of draft affirmative procedure."*¹⁹⁸

225. The Minister did not consider that any of the purpose tests should be excluded from the made affirmative procedure as they "have been specifically designed to capture scenarios where we might need to respond at pace".¹⁹⁹

¹⁹⁵ Finance Committee, RoP, 22 December 2021, paragraph 229

¹⁹⁶ Finance Committee, RoP, 22 December 2021, paragraph 229

¹⁹⁷ Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

¹⁹⁸ Written evidence: [WTA 02 Sir Paul Silk](#)

¹⁹⁹ Finance Committee, RoP, 16 February 2022, paragraph 144

Senedd lock

226. The Welsh Government's pre-legislative consultation proposed the inclusion of a Senedd lock to restrict Welsh Ministers from exercising one of the proposed powers consulted on unless the Senedd agreed to unlock its use. The Minister explained the rationale for initially proposing the lock:

*"...the original policy set out three separate powers, which were very wide in scope, and allowed Welsh Ministers to amend any element of the Welsh tax Acts for whatever reason they saw fit. It was felt that the wide scope of these powers did require a constraint, so the Senedd lock was suggested as a way of exercising that constraint. The lock would require a Senedd vote to unlock the use of the power to make the regulations, and that would mean that the general principles of the regulations would be scrutinised before they were made or laid."*²⁰⁰

227. When bringing forward the Bill, the Minister told the Committee the Senedd lock had been discounted as the decision was taken "to reduce the scope of the power to the four purposes in order to provide the constraint that the lock was intended to provide", and suggested that "there's no uncertainty now, or subjectivity as to how the power may be used".²⁰¹

228. To respect the "democratic primacy over the decision about who gets to legislate", Professor Emyr Lewis suggested that the Senedd lock should be reintroduced "either in all cases, or at least in the case of the broadly-defined powers and/or where the use of retrospective powers would impose an additional burden or liability on citizens".²⁰²

229. The ICAEW advocated the inclusion of a lock mechanism:

*"We're looking here at wide powers of, if you like, the administration to make changes to the democratically passed primary legislation, and that is a high bar that needs to be met to apply this, and I think it is important that there are sufficient safeguards... so I think that some sort of lock mechanism, if you like, would be at least—. It is very important that we have sufficient democratic scrutiny..."*²⁰³

²⁰⁰ Finance Committee, RoP, 22 December 2021, paragraph 182

²⁰¹ Finance Committee, RoP, 22 December 2021, paragraph 182

²⁰² Written evidence: [WTA 01 Professor Emyr Lewis, Aberystwyth University](#)

²⁰³ Finance Committee, RoP, 2 February 2022, paragraph 122

230. The CIPFA also supported the use of a lock as an essential safeguard, if it provides proper and effective scrutiny.²⁰⁴

231. However, the CIOT felt the reintroduction of a lock to restrict the use of the power in the Bill would “defeat the object of enabling the Welsh Government to react quickly”.²⁰⁵

232. Sir Paul Silk said the removal of the lock and the introduction of the four purpose tests in the Bill is “certainly an improvement from the original position that the Government adopted”. On the proposal to reintroduce a lock, he commented:

*“...the devil will be in the detail of seeing what was in that lock, but I can't quite see how that lock would do anything different from the affirmative resolutions that the [Senedd] would need to pass in any case. So, you would be imagining, I guess, a lock that said, 'Well, before you can introduce legislation you must have an affirmative resolution in the Senedd, but, when that piece of legislation is introduced, then there must be another affirmative resolution in the Senedd to approve it.' It would be an extra step, but I'm not quite sure what benefit it would bring.”*²⁰⁶

233. The Minister maintained her position that a lock was no longer proportionate given the introduction of the four purpose tests. She also argued that a lock would not involve scrutiny of the regulations themselves, only the decision on whether or not to allow Ministers to bring regulations forward. Furthermore, she identified procedural restrictions as a lock would only allow the introduction of regulations at certain times of the year “unless it was proposed that we recalled the Senedd during recess to address the question of whether or not a lock should be released”.²⁰⁷

Regulations ceasing to have effect

234. Section 5 of the Bill sets out what happens where regulations made under the made affirmative procedure cease to have effect as a result of:

- failing to obtain the Senedd's approval; or
- the Senedd vote not taking place within the required timeframe.

²⁰⁴ Finance Committee, RoP, 2 February 2022, paragraph 124

²⁰⁵ Finance Committee, RoP, 2 February 2022, paragraph 71

²⁰⁶ Finance Committee, RoP, 11 February 2022, paragraph 33

²⁰⁷ Finance Committee, RoP, 16 February 2022, paragraphs 31, 34 and 36

235. The EM states:

*"The failed regulations will have effect during the period from the date upon which they come into force until they are rejected. Any new tax liability or increased tax liability imposed by the failed regulations will be treated as if it never existed, and any withdrawal or reduction of an entitlement to a tax credit in respect of landfill disposals tax will also be treated as if it never arose. Similarly, any liability to a penalty or to an increased amount of a penalty which occurred as a result of the failed regulations and which was incurred whilst the failed regulations were still in force, will be treated as if it never arose."*²⁰⁸

236. Section 5 also makes provision for situations where actions may have been carried out in reliance of the failed regulations, for example, where inspections of premises or examination of documents have taken place during the period when the regulations were in force. In such circumstances, any actions taken remain valid, despite the failed regulations.²⁰⁹

237. The EM notes that the intention of section 5 is to:

*"...ensure that the risk of using the made affirmative procedure is to be borne by the Welsh Government alone and not by Welsh taxpayers, who are to be protected against challenges relating to anything done, or not done, in reliance on the failed regulations during the period that the failed regulations were in force."*²¹⁰

Committee view

238. The Committee accepts the need to include both draft affirmative and made affirmative procedures in the Bill in respect of the four purposes. However, we heard evidence that made affirmative regulations are historically very unusual and agree with witnesses that the made affirmative procedure must be used only in exceptional circumstances. We will expect the Welsh Government to put forward a compelling case to justify the need to dispense with prior scrutiny and approval if making regulations on that basis in the future, especially if those regulations are to have retrospective effect.

239. The Committee is content with the rationale for including a scrutiny period of up to 60 days for made affirmative regulation to take permanent effect and acknowledges the ability of

²⁰⁸ Explanatory Memorandum, paragraph 3.31

²⁰⁹ Explanatory Memorandum, paragraph 3.32

²¹⁰ Explanatory Memorandum, paragraph 3.33

the Senedd's Business Committee to propose alternatives to the scrutiny timetable suggested by the Welsh Government, within that 60-day period.

240. We received mixed views in relation to the reintroduction of the Senedd lock that was previously proposed in the Welsh Government's pre-legislative consultation. Some witnesses supported its reintroduction to respect the Senedd's democratic primacy as the legislature. In particular, it was suggested that consideration should be given to requiring a Senedd lock in relation to the more broadly defined purposes (concerning anti-avoidance and responding to decisions of courts and tribunals), or in the case of regulations which have retrospective effect and impose additional burdens or liabilities on taxpayers. However, other witnesses recognised that the extra step involved in including a Senedd lock may prevent the Welsh Government from reacting quickly enough to external events.

241. Given our concerns surrounding the broad nature of the regulation-making power and the proposed ability to change Welsh Tax Acts retrospectively, the Committee sees the value in strengthening the approval procedures to ensure adequate time for scrutiny of regulations made under section 1(1) of the Bill. In particular, the Minister should guarantee a minimum time period for scrutiny of regulations seeking to protect against tax avoidance, to respond to decisions of courts and tribunals, or to make changes with retrospective effect.

242. The Committee is content with the provisions relating to failed regulations in section 5 of the Bill.

Recommendation 8. The Committee recommends that the Minister considers amending the Bill to include a minimum time period for scrutiny by the Senedd of regulations made under section 1(1).

8. Post-legislative review

243. The EM accompanying the Bill states the following in relation to a post-legislative review:

*"The Bill provides powers for future use through secondary legislation as and when required. This means that nothing will be implemented when the Bill receives Royal Assent or is commenced. However, the effect of this Bill and associated regulations may be assessed in a number of ways. Although it is possible to set a specific timescale for review, this would need to take into consideration that the powers may not have been utilised, or may have been utilised very infrequently by the time of the review."*²¹¹

244. Stakeholders stressed the importance of reviewing the legislation's effectiveness.

245. The CIOT noted:

*"A lack of scrutiny places more weight on the importance of effective and routine post-legislative review of whether substantive measures are achieving their objectives at an acceptable cost, and the Senedd should hold the Welsh government to account accordingly."*²¹²

246. This was echoed by Dr Sara Closs-Davies, who emphasised:

*"In the event that this Bill is approved, it is strongly advised that its operation and application to all applicable scenarios, over time, is reviewed for its effectiveness and efficiency at systematic intervals."*²¹³

247. The ICAEW also felt there needs to be proper review and oversight of the use of the power and its continuing appropriateness.²¹⁴

248. The Minister agreed that the legislation should be reviewed. In terms of the trigger for a review, the Minister said:

"I think, with this piece of legislation, a review after the legislation has been used a number of times, or different parts of the legislation or those four

²¹¹ Explanatory Memorandum, paragraph 11.1

²¹² Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

²¹³ Written evidence: [WTA 06 Dr. Sara Closs-Davies, Bangor University](#)

²¹⁴ Finance Committee, RoP, 2 February 2022, paragraph 166

purpose tests have been used at different times, I think that would be a useful time to review it."²¹⁵

Sunset provision

249. The CIOT suggested that consideration should be given to the inclusion of a "legislative sunset clause or mandatory reauthorisation" to ensure changes to legislation made by the proposed power in the Bill remain appropriate.²¹⁶

250. Elaborating on the introduction of a sunset provision, the CIOT said:

*"...it would be an option to grant these new powers, but only for a limited period, subject to a possible renewal. And then at the time of renewal, you, as the legislators, would have the opportunity to see how things have worked out before you granted that renewal. I think this is something we quite often call for—a sunset clause—with things that are responses to currently perceived needs, just so that you don't get things remaining on the statute book ad infinitum, adding more complexity without the need ever having been reviewed."*²¹⁷

251. The ACCA also supported the use of a sunset clause to improve the transparency for taxpayers and to provide an opportunity to "undertake impact assessments and justify whether something is needed or needs to be extended".²¹⁸

252. While acknowledging that a sunset provision is "a good device where you're not sure whether something is being used well or not" and can be desirable, Sir Paul Silk felt that legislation should be "right in the first place".²¹⁹

253. Professor Emyr Lewis supported this view, adding:

*"In terms of the regulations, it doesn't make sense to me to have a sunset clause in those, because the intention of the regulations is to change primary legislation. If you change the main legislation and you say, 'Well, this change will come to an end in two years', then what happens in two years? Do we go back to the previous situation?"*²²⁰

²¹⁵ Finance Committee, RoP, 16 February 2022, paragraph 181

²¹⁶ Written evidence: [WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#)

²¹⁷ Finance Committee, RoP, 2 February 2022, paragraph 26

²¹⁸ Finance Committee, RoP, 2 February 2022, paragraph 117

²¹⁹ Finance Committee, RoP, 11 February 2022, paragraph 59

²²⁰ Finance Committee, RoP, 11 February 2022, paragraph 62

254. The Minister rejected the idea of a sunset clause on the basis that any regulations made under the Bill would fall away when the Bill ceased to have effect.²²¹

255. The Minister's official went on to explain:

*"I think in the UK it's a different scenario because sunset clauses that are made under the Finance Acts are, essentially, absorbed or mopped up, for want of a better phrase, by an annual finance Bill. So, there's always a vehicle that will ensure that those provisions remain in force, whereas we don't have similar provision."*²²²

Committee view

256. The Committee strongly believes that the inclusion of a robust post-implementation review is best practice and helps to ensure the objectives of legislation are being delivered in line with expectations and that value for money has been achieved. The Committee has previously recommended that such a review is included in all Bills as standard practice.²²³

257. As previously mentioned in this report, tax devolution is a relatively recent development in Wales and, as the Welsh tax system matures, it is important for the Senedd to be satisfied that any developments are proportionate and in line with best parliamentary practice and democratic principles. The Committee therefore believes that further work needs to take place on the oversight of taxation powers by the Senedd, and in particular the continuing appropriateness of Welsh Ministers having the power to make such significant decisions regarding taxation by regulations. Given the nature of this enabling Bill and uncertainties relating to the use of the power it delegates, it will be crucial to assess how the legislation operates in practice as well as its impact on taxpayers and the devolved taxes.

258. The Committee welcomes the Minister's willingness to review the legislation and proposes that a requirement is placed on Welsh Ministers to conduct a statutory review on the face of the Bill. We note the Minister's preference for a review to be triggered once the power has been used a number of times or in relation to a number of purposes. However, as it is unclear how frequently the power will be used, linking the review to such parameters may prevent a review being triggered at all.

²²¹ Finance Committee, RoP, 16 February 2022, paragraph 164

²²² Finance Committee, RoP, 16 February 2022, paragraph 166

²²³ Finance Committee, Financial implications of the Tertiary Education and Research (Wales) Bill, March 2022, Recommendation 10

259. Therefore, we suggest that reviews should take place as soon as possible after every fifth anniversary of the Bill receiving Royal Assent. In addition, we believe an initial statutory review of the Bill should take place two years following Royal Assent to allow the conclusions of that review to be scrutinised before the end of the Sixth Senedd.

260. The Committee considers these statutory review points to be minimum requirements, which should not prevent the Welsh Government (or the Senedd) from undertaking a review of the legislation at any other time.

261. The Committee notes that some stakeholders favoured the inclusion of a sunset provision or mandatory reauthorisation to ensure the legislation remains appropriate. However, we acknowledge the Minister's objection to this proposal. On balance, the Committee is not minded to pursue a sunset provision (whether applying to the Bill itself or to regulations made under section 1(1)) due to concerns that doing so may create further uncertainty within the Welsh tax system. However, this conclusion assumes that the Minister will formally commit to a statutory review of the legislation in line with the Committee's recommendations in this Report.

Recommendation 9. The Committee recommends that the Bill be amended to place a duty on the Welsh Government to undertake a review of the operation and effect of the Act:

- two years after receiving Royal Assent; and
- on every fifth anniversary of receiving Royal Assent,

with the findings of those reviews to be laid before the Senedd.

Recommendation 10. The Committee recommends that the Bill be amended to stipulate that the statutory reviews of the operation and effect of the Act by the Welsh Government include an assessment of the following:

- the nature and effectiveness of any regulations made under section 1(1) of the Act;
- the Act's impact on taxpayers and devolved Welsh taxes;
- the continuing appropriateness of the regulation-making powers conferred on Welsh Ministers by the Act and the Welsh Tax Acts; and
- alternative legislative mechanisms for making changes to the Welsh Tax Acts and regulations made under them.

9. Financial implications

262. The Regulatory Impact Assessment (RIA) notes that there are no ‘direct’ costs as a result of the Bill and costs will only arise as and when any secondary legislation is prepared. Furthermore, the RIA states:

*"The future administrative costs incurred through secondary legislation are unknown, as it is not possible to quantify the volume and nature of potential future changes required to the Welsh Tax Acts, which Welsh Ministers may respond to using the power provided by the Bill. The level of uncertainty is such that attempting to provide costs will generate figures that are potentially misleading and/or a range of costs that is too wide to add real value."*²²⁴

263. Consequently, the RIA highlights that both indirect costs and total benefits are unknown.²²⁵

264. The RIA further emphasises:

*"A separate impact assessment, including estimated costings, would be completed when the powers provided by the Bill are used to make regulations to effect changes to the Welsh Tax Acts."*²²⁶

265. The previous Finance Committee conducted an inquiry into the financial estimates accompanying legislation in 2017. In its report, the Committee recommended "that the Welsh Government commits to providing as full a picture of the costs of subordinate legislation as possible when proposing primary legislation".²²⁷

266. The previous Welsh Government accepted this recommendation, stating:

*"The revised guidance in the Legislation Handbook on [Senedd] Bills already makes it clear that the RIA for a Bill should, as far as is practicable, include the costs and benefits of any associated subordinate legislation."*²²⁸

267. Addressing the extra costs arising from the use of secondary legislation, the Minister told the Committee:

²²⁴ Explanatory Memorandum, pages 19–20

²²⁵ Explanatory Memorandum, page 19

²²⁶ Explanatory Memorandum, page 19

²²⁷ Finance Committee (Fifth Senedd): Inquiry into the financial estimates accompanying legislation, October 2017.

²²⁸ Letter from the Cabinet Secretary for Finance, 19 December 2017.

*"...I think it's difficult at this point to say what the costs might be, because some changes might be very simple and could be absorbed within the general operating costs of the WRA, whereas it might be the case that, in future, system changes might be necessary or some more fundamental changes might be necessary to the way in which the WRA deals with some of these taxes. It would be more difficult to say in that case, but generally speaking they operate and respond very quickly and are able to do so within the core budget that they have."*²²⁹

268. When asked whether the reluctance to provide a detailed explanation of costs is due to the costs being too minor to merit consideration, the Minister referred to not knowing "precisely to what external events we will be responding and what the necessary response might be", describing the costs as "nebulous at the moment".²³⁰

269. The Committee also explored the cost implications of any made affirmative regulations being overturned by the Senedd:

*"Again, I suppose this would depend on the specific intervention that we were making. We would have to explore that closer to the time in terms of being able to provide the Senedd with more information about what the costs would be of intervening and not intervening. Also, in terms of providing those refunds, if you like, to taxpayers impacted by any retrospectively applied decisions that then were overturned by the Senedd, we would obviously look to reimburse those taxpayers and allow them to reclaim any penalties [correction: any tax] in relation to rule changes that were now under failed regulations. Obviously, there would be a small cost to the WRA in processing that claim, although again I would anticipate that that would be met from their current funding in most cases. But until an actual change is known that's failed to achieve Senedd approval, it's difficult to estimate the full costs."*²³¹

270. In terms of foreseeing any issues with additional costs that could not be absorbed within the existing budget, the WRA said:

"[The Welsh Government] know what it costs us to do certain things, and we could explain in a way that's transparent and say, 'If you want us to do this,

²²⁹ Finance Committee, RoP, 22 December 2021, paragraph 238

²³⁰ Finance Committee, RoP, 22 December 2021, paragraphs 240 and 242

²³¹ Finance Committee, RoP, 22 December 2021, paragraph 246

*it's going to cost that to do it.' It's a very rational, sensible, open relationship that we have. So, from where I'm sitting, that's something that we could, on a case-by-case basis, live with."*²³²

271. The WRA indicated that the Bill could also give rise to potential savings:

*"In some cases, the amendments may actually prove beneficial to us in terms of the marginal cost savings. So, for example, if the changes that arise from this Bill are, for example, to close down an avoidance scheme, that in itself might then reduce the amount of resources and time that we would need to put in place to actually chase and challenge those types of avoidance schemes. So, I think there are those other benefits here."*²³³

Changes to LTT

272. In July 2020, the Welsh Government published a written statement announcing immediate changes to LTT tax rates and thresholds in response to the UK Government's changes to SDLT during the COVID-19 pandemic. The then Minister for Finance and Trefnydd noted:

*"I have therefore decided that the starting threshold for land transaction tax main residential rates will be set at £250,000 from 27 July. This new threshold is £70,000 higher than our current starting threshold for residential property transactions and will mean that only around 20% of those liable to the main LTT rates will pay any tax at all."*²³⁴

273. The Minister told the Committee that making this immediate change to LTT rates and thresholds "cost very little".²³⁵

274. The Committee subsequently wrote to the Minister seeking a breakdown of the actual costs associated with implementing the Land Transaction Tax (Temporary Variation of Rates and Bands for Residential Property Transactions) (Wales) Regulations 2020, as the only recent example of the Welsh Government implementing tax changes at pace.²³⁶

275. The Minister's response indicated costs to the WRA of around £1,200 arising from the regulations, including a small fee to the IT supplier. This did not include a "minimal cost" to

²³² Finance Committee, 2 February 2022, paragraph 231

²³³ Finance Committee, 2 February 2022, paragraph 227

²³⁴ Welsh Government: Written Statement: Temporary Changes to the Land Transaction Tax Rates and Thresholds, 14 July 2020

²³⁵ Finance Committee, RoP, 22 December 2021, paragraph 244

²³⁶ Finance Committee: Letter to the Minister for Finance and Local Government, 10 January 2022

revert to the original LTT rates or “the cost of staff time on the WRA communications and guidance updates as this was absorbed into business as usual activity”.²³⁷

276. The Minister’s letter also indicated that:

*“The requirement to make changes to tax rates was anticipated in the design of the WRA tax management system, and systems built with the functionality that makes such changes relatively straightforward. This helped keep the costs low for the July 2020 changes.”*²³⁸

Committee view

277. While acknowledging the uncertainty associated with the volume and nature of potential changes to the Welsh Tax Acts, the Committee has been unable to assess the financial implications of the Bill based on the lack of information in the RIA and the very limited evidence received on costs, which the Minister describes as “nebulous”.

278. On a number of occasions, the previous Finance Committee has called on the Welsh Government to include its best estimate of the costs associated with secondary legislation alongside the relevant primary legislation. The RIA for this Bill identifies unknown expenditure for secondary legislation, with no attempt to provide costs for fear of potentially misleading or failing to add any value. However, providing no information at all on potential costs makes financial scrutiny of this Bill virtually impossible.

279. The Minister’s assessment is that the cost of simple changes will be relatively constrained, with the caveat that more complex changes may attract greater costs if fundamental system or operational changes are required. The evidence suggests that the likely effect of provisions in the Bill, should they be utilised to effect significant changes to the Welsh Tax Acts would be to increase expenditure payable out of the Welsh Consolidated Fund. Although the Minister has indicated that some costs are likely to be absorbed within the WRA’s existing budget, the expenditure associated with other costs may not.

280. Even when examining the actual costs of implementing the July 2020 LTT regulations, the Minister’s letter excludes a detailed breakdown, with further references to costs being absorbed within the WRA’s business as usual activity. The Committee is not privy to the capacity of the WRA’s budget to absorb costs and notes that Welsh Ministers may feasibly bring forward regulations impacting on the WRA more frequently as a result of the power proposed in the Bill.

²³⁷ Welsh Government: [Letter to the Chair of the Finance Committee, 24 January 2022](#)

²³⁸ Welsh Government: [Letter to the Chair of the Finance Committee, 24 January 2022](#)

Conclusion 2. The Committee is disappointed with the lack of financial information presented in the Regulatory Impact Assessment. While it accepts the difficulty in seeking to quantify the costs of future unknown changes to the Welsh Tax Acts, the nature of the Bill has resulted in the Committee being unable to draw any meaningful conclusions on the financial implications of it.

Recommendation 11. The Committee recommends that the Welsh Government commits to providing full and robust Regulatory Impact Assessments for any future regulations made under the power proposed in the Bill.

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	Name and Organisation
22 December 2021	<p>Rebecca Evans MS, Minister for Finance and Local Government</p> <p>Anna Adams, Deputy Director, Tax Strategy and Intergovernmental Relations Division, Welsh Government</p> <p>Andrew Hewitt, Head of Tax Legislation, Welsh Government</p> <p>Lynsey Edwards, Lawyer, Welsh Government</p>
2 February 2022	<p>John Cullinane, Director of Public Policy, Chartered Institute of Taxation</p> <p>Lakshmi Narain Chair of the Chartered Institute of Taxation's Welsh Technical Committee</p>
2 February 2022	<p>Frank Haskew, Head of Tax, Institute of Chartered Accountants in England and Wales</p> <p>Richard Lloyd-Bithell, Head of Policy, Technical and Strategic Engagement, Association of Chartered Certified Accountants UK</p> <p>Glenn Collins, Head of Policy, Technical and Strategic Engagement, Association of Chartered Certified Accountants UK</p>
2 February 2022	<p>Dyfed Alsop, Chief Executive, Welsh Revenue Authority</p> <p>Sam Cairns, Chief Operating Officer, Welsh Revenue Authority</p> <p>Dave Matthews, Head of Policy, Welsh Revenue Authority</p>

Date	Name and Organisation
11 February 2022	Sir Paul Silk Professor Emyr Lewis, Aberystwyth Law School, Aberystwyth University
16 February 2022	Rebecca Evans MS, Minister for Finance and Local Government Anna Adams, Deputy Director, Tax Strategy and Intergovernmental Relations Division Welsh Government Andrew Hewitt, Head of Tax Legislation, Welsh Government Lynsey Edwards, Lawyer, Welsh Government

Annex B: List of written evidence

The following people and organisations provided written evidence to the Committee. All Consultation responses and additional written information can be viewed on the [Committee's website](#).

Reference	Organisation
WTA 01	Professor Emyr Lewis, Aberystwyth University
WTA 02	Sir Paul Silk
WTA 03	Chartered Institute of Taxation and Low Incomes Tax Reform Group
WTA 04	Association of Chartered Certified Accountants UK
WTA 05	Institute of Chartered Accountants in England and Wales
WTA 06	Dr Sara Closs-Davies, Bangor University
WTA 07	Chartered Institute of Public Finance and Accountancy