Welsh Parliament
Senedd Research

25 years of Welsh law-making

June 2024

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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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Foreword

The story of law-making in Wales is one of giving new life to a medieval notion.

'Cyfraith Hywel' – the system of law practised in Wales and named after Hywel Dda (Hywel the Good) King of 'Y Deheubarth' - endured until the mid-1500s. It was not until the creation of the then National Assembly in 1999 that the concept of Welsh law was revived, and the focus of the following chapters made possible.

Contemporary Welsh law is as dynamic as it is distinct. The past 25-years have been defined by pioneering legislation from recycling to organ donation, groundbreaking laws to introduce votes at 16, electoral reform designed to create a stronger, more representative Senedd, and a breadth of emergency regulations in response to a global health pandemic.

As Wales and the wider world around us continues to change, so too does our unique body of law. The significant transfer of powers from Westminster to Wales following the 2011 referendum represented a key milestone for Welsh law, so too the UK's departure from the European Union and the recently passed Senedd Cymru (Members and Elections) Bill which allows for the election of 96 Senedd Members following the 2026 Election.

All these key developments and more are captured in this special publication to mark 25 years of law-making in Wales. As a member of the First Assembly in 1999 I have experienced the journey first-hand both inside and outside government, from the Llywydd's Chair as well as the opposition benches. I hope that whilst turning the pages of these varied and insightful chapters, readers too will be able to experience that journey for themselves.

I am as Llywydd grateful to Senedd Research for producing this anniversary edition, as well as for their continued dedication and expertise, without which our Senedd's work making laws which serve the people of Wales would not be possible.

Rt Hon Elin Jones MS
Llywydd

About the photo:

Looking through the banister of the Pierhead staircase.

Making laws in Wales: from executive devolution to a reserved powers model

Josh Hayman

The way laws are made in Wales has changed more in the last 25 years than in any other part of the United Kingdom.

From the Assembly's start as an institution making only secondary legislation, the Senedd has evolved into a fully-fledged legislature, passing primary legislation and setting Welsh taxes.

This article explores the different periods of law-making in the Senedd's history and how it's developed over the last quarter of a century.

1999-2007: Executive devolution

The National Assembly for Wales was initially established as an executive body, with no division between government and legislature. It was able to make secondary legislation with powers granted to it under Acts of the UK Parliament.

Secondary (or subordinate) legislation is law created by Ministers (or other bodies) under powers given to them by a piece of primary legislation (such as an Act). The initial powers of the Assembly to make legislation were set out in a series of **Transfer of Functions Orders** (moving functions from UK Ministers) and in subsequent Acts passed by the UK Parliament.

This type of devolution limited the ability of the Assembly to make policy decisions, as it would need to first identify a relevant power. However, this did not stop the Assembly from making some significant changes to Welsh public policy in the period of 1999-2007.

The **National Curriculum (Key Stage 2 Assessment Arrangements) (Wales) Order 2004** changed the way school pupils in their last year at primary school were assessed. It scrapped SATS tests, instead allowing teachers to assess pupils' abilities.

The Assembly also passed **the Homeless Persons (Priority Need) (Wales) Order 2001.** The Order broadened eligibility for priority housing to those aged 16 and 17, persons fleeing domestic violence and persons homeless after leaving the armed forces.

2007-18: Primary law-making powers

Law-making in Wales was transformed by the **Government of Wales Act 2006,** which provided for the Assembly and the Welsh Government to be separated in law (the Assembly had **resolved for a de facto separation** in 2002). A form of primary law-making power, known as Assembly Measures, were introduced for the first time.

The Assembly could pass Measures in **20 policy areas,** called 'fields'. Fields were divided into 'matters'. Each 'matter' was added on a piecemeal basis. This was done by making a Legislative Competence Order (LCO) which had to be passed by the Assembly and both Houses of Parliament.

The **NHS Redress (Wales) Measure 2008** was the first piece of primary legislation to be passed by the Assembly. The Measure gave powers to the Welsh Ministers to require the NHS to consider settling lower value clinical negligence claims without recourse to formal legal proceedings.

Other Measures passed by the Assembly include the **Welsh Language (Wales) Measure 2011,** which established the Welsh Language Commissioner and enabled the development of Welsh Language Standards; the **Rights of Children and Young Persons (Wales) Measure 2011,** which incorporated the UN Convention on the Rights of the Child into Welsh law; and Measures to establish the Assembly's **Remuneration Board** and **Standards Commissioner.**

In 2011, following a referendum, the Assembly gained full primary law-making powers across **20 subjects.** The LCO procedure disappeared. The Assembly could now pass Assembly Bills without any role for the UK Parliament during the legislative process. At the end of the process, the Bill is given Royal Assent by the monarch and becomes an Act.

With these new powers, the Assembly got to work on some of the most significant pieces of legislation passed during devolution. 29 Acts were passed between 2011 and 2016, including:

The **National Assembly for Wales (Official Languages) Act 2012** was the first to receive Royal Assent.

The **Human Transplantation (Wales) Act 2013** introduced an opt-out system of organ and tissue donation in Wales.

The **Well-being of Future Generations (Wales) Act 2015** established the Future Generations Commissioner for Wales and placed a duty on public authorities to ensure the needs of the present population are met without compromising the needs of future generations.

The **Tax Collection and Management (Wales) Act 2016** set out the legal framework necessary for the collection and management of devolved taxes in Wales.

2018-now: A reserved powers model of devolution

The most recent reform to the legislative powers of the Senedd occurred in April 2018. Up until that point, the Senedd operated on a conferred powers model. This meant the Senedd could only legislate in defined areas. Anything not listed as a "subject" wasn't within the Senedd's "legislative competence" (its remit for legislating).

In April 2018, the model was changed to a **reserved powers model**. Under this model, presumption is reversed. All areas are within legislative competence unless they are "reserved" to the UK Parliament. There are also some **general restrictions**, with everything else being within the Senedd's legislative competence.

This move to reserved powers was a key recommendation made by both the **Richard Commission** and the **Silk Commission** and was delivered through the **Wales Act 2017.** The model was intended to create "**greater certainty**" as to what is and isn't devolved, leading to fewer referrals to the Supreme Court, and would therefore help create a devolution settlement "**more workable for those who have to operate within it**". In reality, **disagreements over competence have remained** between the UK and Welsh governments.

In this period, the Senedd has passed some landmark pieces of legislation, including:

The **Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020** removed the defence of reasonable punishment for parents (or those acting in loco parentis) charged with "common assault" of a child.

The **Senedd and Elections (Wales) Act 2020** renamed the National Assembly for Wales as Senedd Cymru – Welsh Parliament, lowered the minimum voting age for Senedd and local government elections to 16, and expanded the franchise to include qualifying foreign nationals.

The **Social Partnership and Public Procurement (Wales) Act 2023** places a statutory duty on some public bodies to consider socially responsible public procurement. The Act also requires them to seek consensus or compromise with their recognised trade unions when setting their well-being objectives under the Well-being of Future Generations (Wales) Act 2015.

A process, not an event

Over 25 years of devolution, the Senedd's ability to pass laws has changed and evolved many times. The reserved powers model introduced in 2018 is supposed to produce a "**clearer and more stable and long-lasting devolution settlement for Wales**". But this has not stopped the conversation about Wales' constitutional future.

The **Independent Commission on the Constitutional Future of Wales,** established by the Welsh Government as part of its previous **Co-operation Agreement with Plaid Cymru,** has called for further devolution in areas such as policing, justice and rail services.

The UK's withdrawal from the EU in 2020 has also had a significant impact on law-making in Wales and across the UK. Our Leaving the European Union article looks at this in more detail.

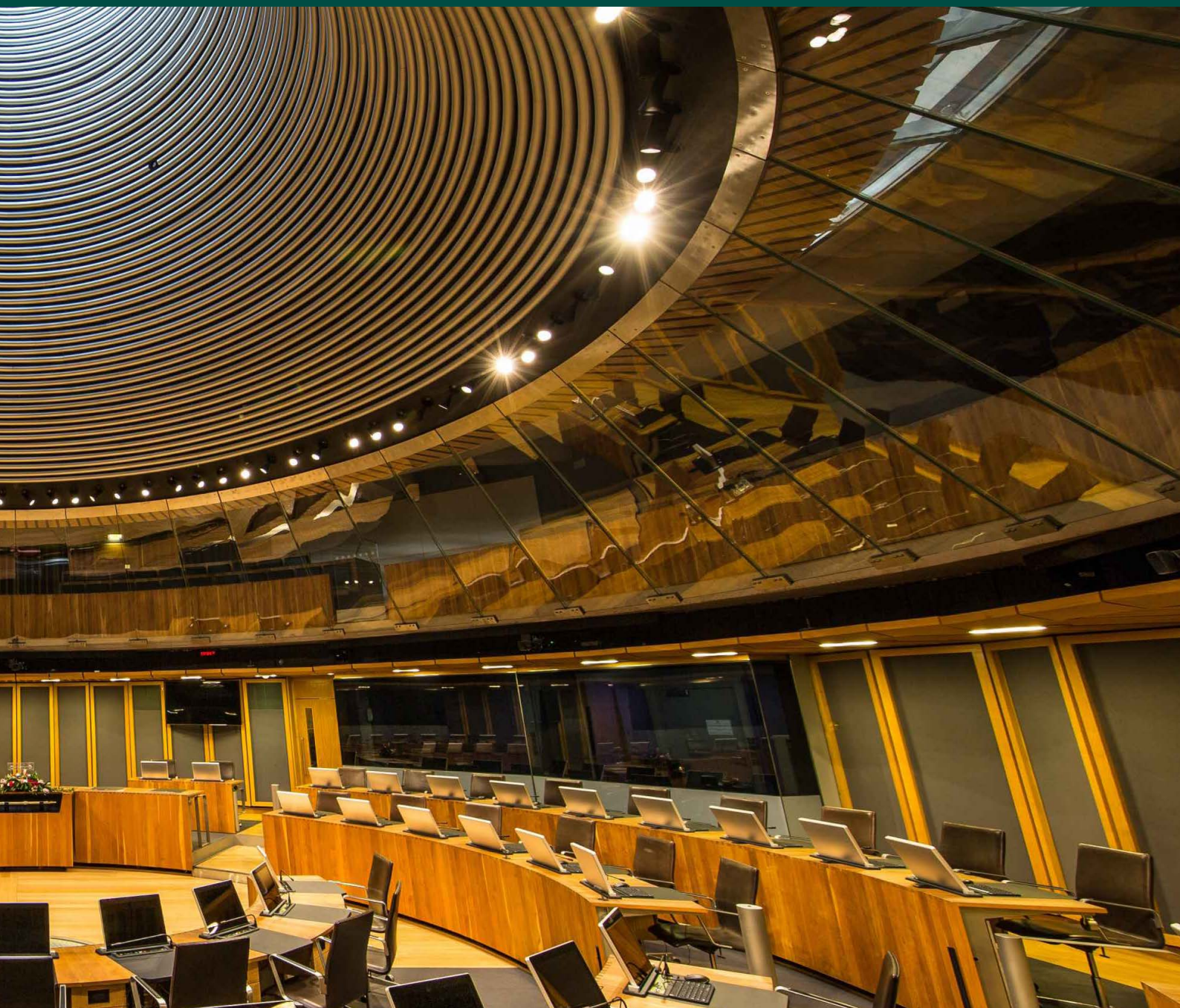
It's clear Ron Davies' now famous description of devolution as a "process, not an event" has defined the Senedd's first 25 years.

About the photo:

The Senedd chamber from inside looking up to the light outside.

What is Welsh law and how should it be defined?

Josh Hayman



Wales has operated within a joint legal jurisdiction with England for nearly 500 years. For centuries, this has worked with relative ease but as the law of Wales and England has increasingly diverged over the 25 years of devolution, there have been growing calls for there to be recognition of a body of Welsh law or for a separate or distinct Welsh legal jurisdiction.

This article explores the arguments made for and against any change, and considers how Welsh law can be defined.

England and Wales: an anomaly of history?

Wales' legal history with England can be **traced back** to the late 13th century. Reforms in the **16th century** marked a significant step in this process, as the Laws in Wales Acts 1535 and 1542 extended English law to Wales. While there remained some points of difference between England and Wales after these reforms, the **abolition of the Court of Great Sessions** in 1830 made governance and justice in Wales consistent with that of England.

This differs from the situation in Scotland and Northern Ireland, where each territory has its own legal jurisdiction. It is the courts of these countries which enforce the laws made for them by their legislatures.

Is there such a thing as Welsh law?

This unique historical context means that, in this single legal jurisdiction, **some have argued that there can be no such thing as "Welsh law"** and that there is only one body of law: the law of England and Wales.

Amendments to the **Government of Wales Act 2006** made by the **Wales Act 2017** sought to recognise the existence of Welsh law by inserting new section A2, which states:

> **Recognition of Welsh law**
>
> (1) The law that applies in Wales includes a body of Welsh law made by the Senedd and the Welsh Ministers.
>
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to recognise the ability of the Senedd and the Welsh Ministers to make law forming part of the law of England and Wales.

However, while noting there is a body of Welsh law made by the Senedd and the Welsh Ministers, it still forms part of the law of England and Wales.

While this distinction may not have been a significant issue for the first 450 years of the jurisdiction's existence, the establishment and development of devolution in Wales has **led to questions being asked** about whether judicial functions should also be devolved.

One jurisdiction: two legislatures

The establishment of devolution in Wales, and in particular the primary law-making powers the Senedd now has, means there is a growing body of law that applies only in Wales.

While Acts of the Senedd apply only in relation to Wales, they 'extend' to England and Wales. This means that courts in England can also **deal with litigation concerning laws which apply only in Wales** and vice versa.

In practice, this means cases involving issues only relating to Wales could be **decided by courts in England** and by judges with less experience of Wales or the laws created by the Senedd.

There has been divergence between the law made in the Senedd and the UK Parliament (in relation to England) on matters within the Senedd's legislative competence, which will likely increase in the future. This divergence has led some politicians, commentators and **academics** to suggest a change is needed to the jurisdiction as it currently stands.

Options for reform: separate or distinct?

This issue was considered by the then Assembly's **Constitutional and Legislative Affairs Committee** and in a **Welsh Government consultation** in 2012 in light of the Assembly gaining full primary law-making powers in the 2011 referendum. Both concluded it wasn't the time for change, but discussions about the legal jurisdiction reemerged during consideration of what was to become the Wales Act 2017, and in light of the move to a reserved powers model in 2018.

Two options have been put forward for change. Some have called for **a complete separation of England and Wales** as law districts, with separate court systems, legal professions and devolution of the administration of justice. For example, the Welsh Government published the **draft Government and Laws in Wales Bill** in 2016, which proposed the complete separation of Wales and England as legal jurisdictions.

An alternative would be to move towards a 'distinct' jurisdiction, which would recognise the divergence between the law of Wales and the law of England, while maintaining a unified system of judicial administration. It has been argued this could remove some of the "**inconveniences which such complete separation would cause**" as a result of a considerable amount of law continuing to apply in both countries, while also recognising the expansion of the divergent bodies of law.

Maintaining the status quo

The UK Government has strongly advocated for continuing the England and Wales jurisdiction, arguing "**a single jurisdiction is the most effective way to deliver justice across England and Wales**".

When discussions about the future of the jurisdiction were live during development of the Wales Act 2017, the then Secretary of State for Wales, Stephen Crabb MP, **said:**

> *With the Assembly being given full law-making powers in 2011, there is now a growing body of distinct Welsh law. At present, this makes up a tiny fraction of the overall body of law for England and Wales which has developed over 500 years of legal history.*

The UK Government has also highlighted the **potential costs** of creating a Welsh jurisdiction as a reason to maintain the status quo. Former Under-Secretary of State for Justice, Chris Philp MP, referenced estimates made by the Silk Commission in 2014 that "the extra incremental cost of creating a separate jurisdiction would be about £100 million a year".

Professor Richard Owen argued in 2016 that finding the law that is only applicable to Wales can be "**challenging to say the least**". Laws that apply only to Wales are intertwined with those that apply throughout England and Wales. This issue could become more complex in light of the **increased volume of UK Bills legislating in devolved areas**.

Former Counsel General for Wales, Theo Huckle KC, also **noted** the challenge that would come from pursuing a separate legal jurisdiction without the Welsh Ministers and the Senedd obtaining powers relating to the administration of justice. The **Commission on Justice in Wales**, established by the Welsh Government in 2017, recommended that powers over justice should be wholly devolved to the Senedd and Welsh Government.

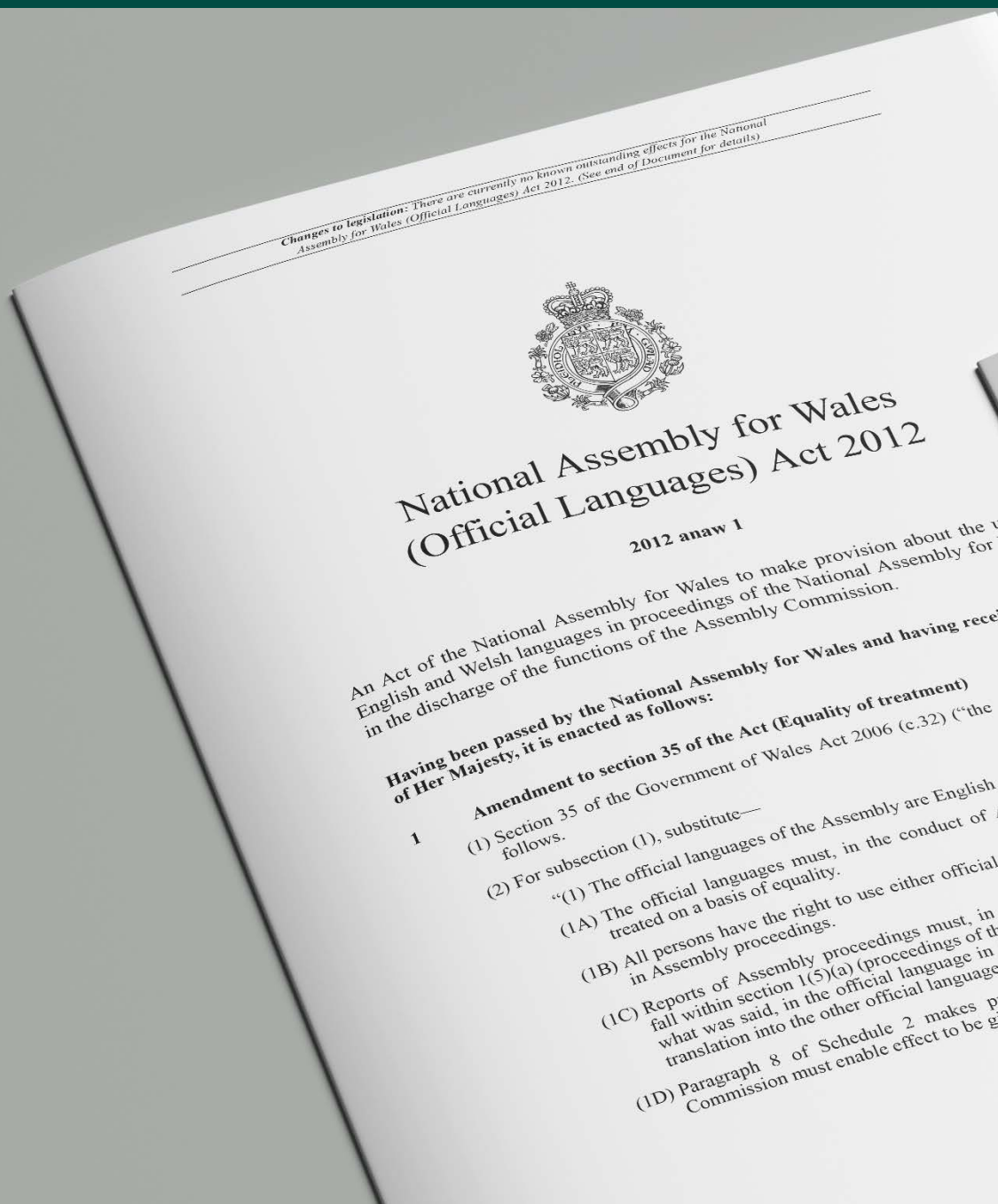
Where next for this question?

While the Welsh Government supports the devolution of justice, any changes would require the support of the UK Government and legislation in the UK Parliament.

As divergence between the law that applies in Wales and the law that applies in England continues to grow, questions about whether to maintain a centuries old joint legal jurisdiction are unlikely to go away.

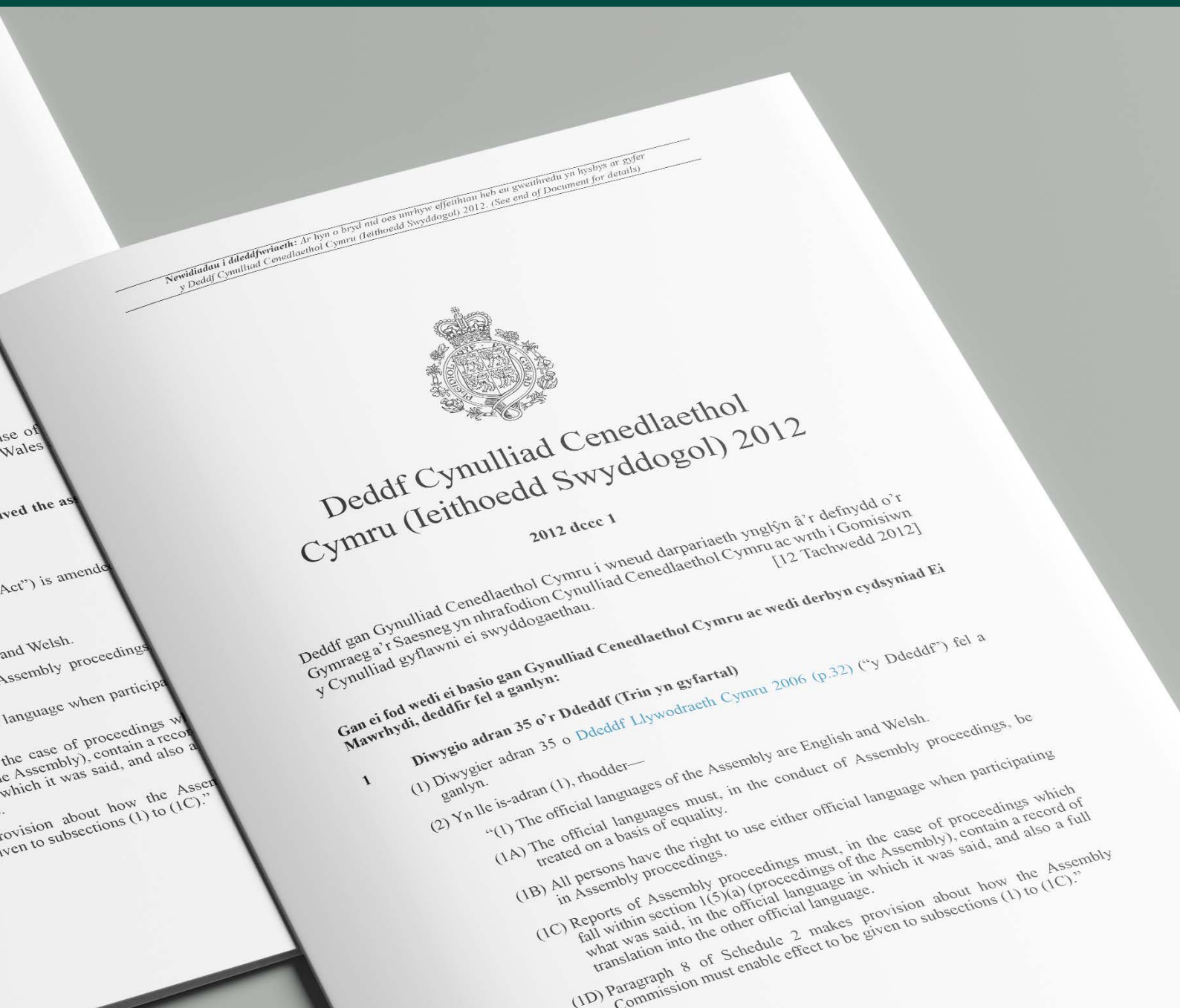
About the photo:

English and Welsh versions of the National Assembly for Wales (Official Languages) Act 2012.



Resurrecting Welsh as a legal language

Nia Moss



The creation of the Assembly in 1999 resurrected Welsh as a legal language. Since then, the Senedd has been a bilingual legislature making laws of equal status in both English and Welsh.

The body of Welsh law that has developed is Welsh in two senses - in its distinctive content and in its language. Drafters, lawyers, translators, Members and officials have played a role in making sure the law of Wales is available to citizens in both official languages.

The development of Welsh as a modern legal language has been fundamental to the Senedd's 25 year law-making story.

Equal status

The **Government of Wales Act 2006** enshrines in law the principle that, where legislation is made bilingually, the English and Welsh texts "are to be treated for all purposes as being of equal standing". This important principle was restated in the **Legislation (Wales) Act 2019**.

This equal status is reflected in the rules, procedures and guidance that have developed in the Senedd and Welsh Government on how laws should be made. For example:

- the **Senedd's Standing Orders**, that govern how the Senedd is run, say a Bill "must be introduced in both English and Welsh" (except in very specific cases) and that a committee established to look at subordinate legislation must report on whether the Senedd should pay special attention to "inconsistencies between the meaning of the English and Welsh texts" when scrutinising laws;
- handbooks developed by the Welsh Government **on how Bills** and **subordinate legislation** should be drafted state drafters must ensure both texts "**achieve the same legal effect**" and "**steps should be taken to ensure the Welsh language is treated no less favourably than the English language**"; and
- scrutiny, amendment and voting on legislation takes place bilingually in the Senedd and innovations, such as **bilingual Bill glossaries**, have helped support scrutiny in both languages.

However, **as the Law Commission noted**:

A system in which laws are made in two languages which are treated for all purposes as of equal standing has created novel challenges for those required to interpret and apply them.

The challenge of interpreting bilingual legislation

The challenge of how legislation written in two different languages should be interpreted by both citizens and courts is a common issue in systems with bilingual laws. What happens if the words used in different languages appear to have different meanings or emphases?

The Law Commission considered this issue **in its review of the accessibility of Welsh law in 2016**. It concluded that those looking to understand the meaning of bilingual law in Wales must consider both language texts to arrive at an answer. It said reliance on only one language would undermine the equal status of English and Welsh.

It considered in detail what should happen if it's not possible to find common meaning between the two languages and concluded that, while it's ultimately a matter for the courts, the best approach would be to consider the intent of the Senedd when making the law. The Welsh Government deliberately references these principles **in its Explanatory Notes** for the Legislation (Wales) Act 2019.

In 2020, **the first case was brought to the Administrative Court** asking it to consider differences in the English and Welsh versions of the law. This **decision was overturned in the Court of Appeal**, but, in reaching its judgment, the Court considered that the normal **principles of statutory interpretation** should be applied to analysis of both English and Welsh texts equally. It held that, where a common meaning can't be found, courts should look at what the purpose and intent of the Senedd was in making the law.

The debate about this case and the practice the courts should adopt when considering cases involving interpretation of legislation in English and Welsh remains a live issue. **The Law Commission said** ensuring there's sufficient numbers of judges able to work in Welsh on cases where there are differences in the language versions should be a "long term aspiration".

This case, and the debates arising from it, underline the importance and responsibility of the Senedd to scrutinise equally the English and Welsh versions of legislation.

Accessibility of the law in Welsh

In developing Welsh as a modern legal language, the Welsh Government and Senedd have also had to grapple with how to make Welsh language law accessible to citizens.

Developing terminology

Drafters and translators have had to develop new and consistent Welsh terminology. The **BydTerm Cymru website** and **legislative drafting glossaries** have been developed by the Welsh Government to help with this task. **Schedule 1 to the Legislation (Wales) Act 2019** sets out for the first time a bilingual list of defined key legal terms and expressions.

Law that is up-to-date

Access to publicly available up-to-date versions of amended legislation in Welsh has also been a challenge and forms part of the **Welsh Government's first programme** to improve the accessibility of the law in Wales.

Writing laws in Welsh

How the law should be written or drafted in Welsh, to ensure it's clear and easy to understand, has been an ongoing focus for those drafting and scrutinising law in the Senedd.

The need for the law not to be "rigidly translated" but clear and equally "usable" has been emphasised by the **Law Commission**, **civil society** and by **Senedd committees.**

Some bilingual legislation is co-drafted in English and Welsh but often Welsh language versions are translated from English by jurilinguists, experts in translating the law.

A key demand has been the need for sufficient time in the legislation writing process for translated drafts of legislation:

- to be considered as part of an iterative process of developing a Bill; and
- checked to ensure they have equal meaning.

The Law Commission called for the time available for translation and the consideration of both language texts to be "vigorously protected". A **previous Senedd Committee** also called for the Welsh Government to put long-term plans in place to increase the proportion of Bills co-drafted.

The Senedd as a guardian

As well as passing bilingual laws, the Senedd and its committees act as guardians for the equal status of law, ensuring the law presented in both languages meets the rules and standards expected of it.

The current Legislation, Justice and Constitution Committee scrutinises whether subordinate legislation made in English and Welsh is consistent. **It publishes reports which point out inconsistencies** and asks the Welsh Government to clarify its meaning.

Laws made in Westminster in devolved areas are made in English only. The Committee has raised concerns about the impacts of this on citizens' access to laws in the Welsh language. It also continues to scrutinise **the Welsh Government's programme** for improving the accessibility of the law in Wales.

A truly bilingual jurisdiction?

There's no doubt the creation of the Senedd 25 years ago led to a revival of Welsh as a legal language. Its equal status is enshrined in law and embedded in the rules that govern how laws are made in Wales.

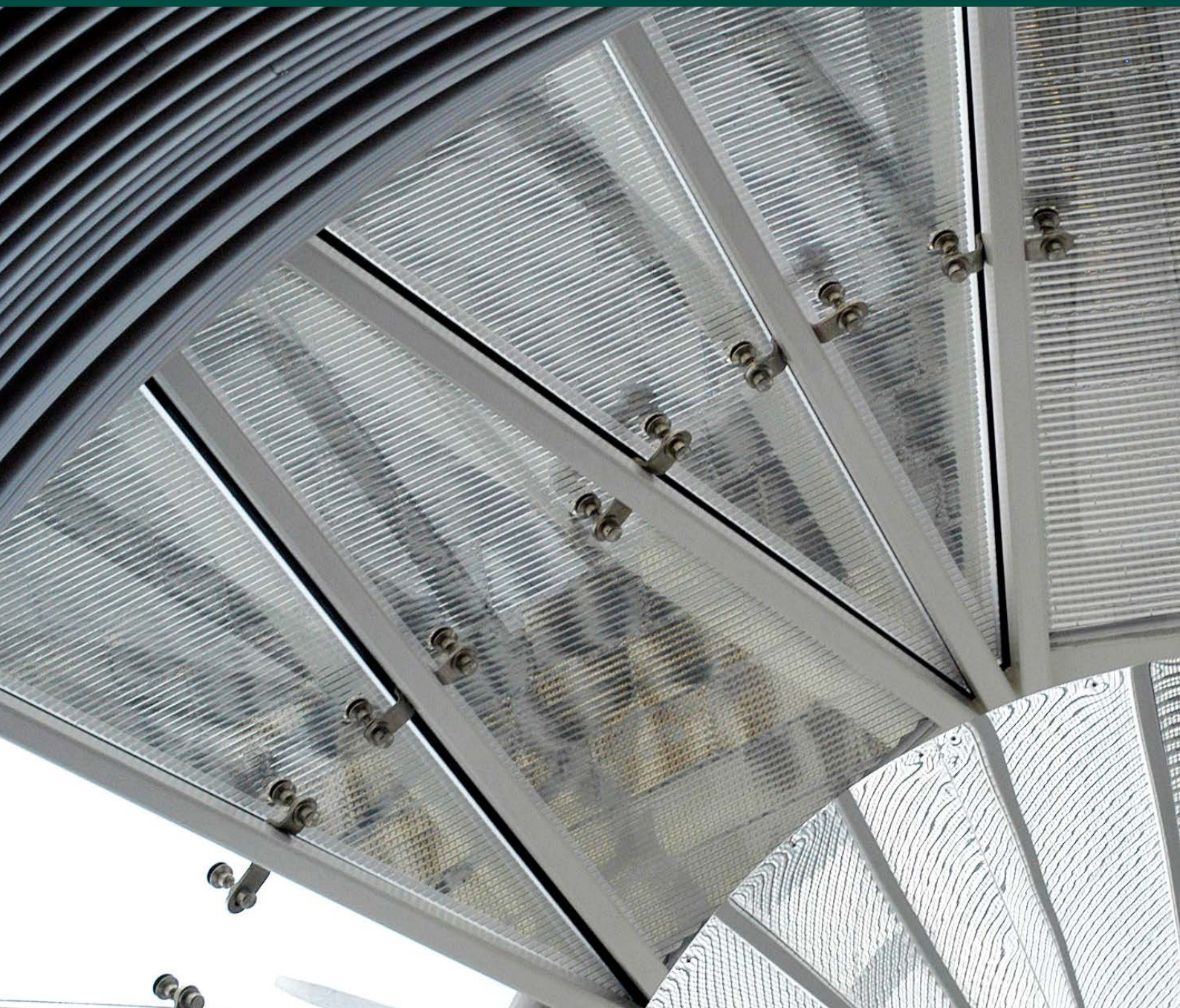
The wider impact of this equal status is also clear in the development of Welsh language drafters and jurilinguists, in the development of Welsh legal terminology and in calls for more Welsh speaking law students, lawyers and judges.

Yet the need remains for a continued focus on ensuring bilingual law is truly equal and accessible. **The Welsh Government's programme on the accessibility of Welsh law** sets out several objectives for better provision of the law in Welsh. Senedd committees and Members continue to call for the equal status to be **properly honoured** in the laws being made.

In its first 25 years, the Senedd has set the foundations for Welsh to endure as a legal language. The achievement of truly equal status will be a key issue for the Senedd's next 25 years.

About the photo:

The Siambr's glass ceiling.



The UK Parliament and law-making in Wales

Adam Cooke

Throughout its 25-year history, the Senedd's relationship with the UK Parliament has been a crucial element of Welsh law-making.

This article explores this relationship since 1999 and considers, even with the Senedd's growing devolved powers, the enduring significance of the UK Parliament.

Early years of the Assembly

In 1999, the then National Assembly for Wales was established as a single "corporate body" – there was no formal separation of the executive and legislature.

The Assembly didn't have primary legislative powers and could only make subordinate legislation in areas which had been devolved through the **Government of Wales Act 1998**. This meant the UK Parliament remained responsible for passing primary legislation for Wales.

What is secondary legislation?

Also commonly known as subordinate or delegated legislation, secondary legislation is law made by Ministers (or other bodies) under powers given to them by primary legislation (usually an Act).

During its first two terms, the Assembly made use of secondary legislative powers to implement policy changes, explained in our Making laws in Wales article in this series.

The two institutions maintained a close relationship and the UK Parliament sometimes passed Wales-specific Acts and Acts containing provision for Wales.

For example, in 2001 the UK Parliament passed the **Children's Commissioner for Wales Act** following **recommendations from an Assembly Committee**. The Act amended the **Care Standards Act 2000**, which had established the post of Commissioner, and set out its remit in line with the Committee's recommendations.

The Assembly relied on Westminster allocating legislative time during this period. Effective communication between MPs and AMs **was important** to ensure Welsh issues were considered in Westminster legislation. While Assembly committees considered legislative proposals, there was no formal mechanism for them to convey their views on legislation going through the UK Parliament.

Introduction of primary legislative powers

In 2002, the First Minister, Rhodri Morgan AM, established the **Commission on the Powers and Electoral Arrangements of the National Assembly for Wales** (the Richard Commission).

The Richard Commission **found that** the powers of the Assembly and (de facto) Welsh Assembly Government had developed in an ad hoc way, and both bodies had been "heavily involved" in developing legislation, including through working with the UK Parliament.

The Commission recommended that the Assembly be granted primary legislative powers.

The subsequent **Government of Wales Act 2006** (GoWA) altered the legislative powers of the Assembly, through:

- establishing a formal separation between the legislature (Assembly) and executive (Welsh Assembly Government);
- granting the Assembly the ability to pass primary law-making powers (known as Measures) subject to Legislative Competence Orders (LCOs) within **20 listed areas**; and
- granting the Assembly full primary legislative powers in those listed areas, subject to a referendum.

The LCO system required joint working between the Assembly and UK Parliament. The Assembly and both Houses of Parliament had to consent to an LCO for the Assembly to gain the ability to pass a Measure. UK Parliament committees, such as the Welsh Affairs Committee and Constitution Committee, **also had a role** in pre-legislative scrutiny of an LCO, as did Assembly committees.

Law-making powers could also be devolved to the Assembly through Westminster legislation, as happened with the **Marine and Coastal Access Act 2009** which provided "Measure-making powers for the Assembly on coastal access". Unlike LCOs, powers devolved through Westminster Bills did not have to fall within the 20 devolved areas listed in GoWA.

Growing legislative powers – the 2011 referendum

In a 2011 referendum, 63.5% **voted to grant the Assembly** full law-making powers in the areas for which it already had responsibility. This meant the Assembly could

pass laws in these areas "**without recourse to Westminster**".

This move significantly changed the relationship between the Assembly and UK Parliament, ending the LCO process.

However, as **anticipated by the Richard Commission**, after the Assembly gained primary powers, Westminster continued "to legislate extensively for Wales in relation to both devolved and non-devolved matters". Parliamentary sovereignty meant that the Assembly gaining the ability to pass primary legislation did not impact on the powers of the UK Parliament.

Legislative consent: a shared space for law making

While the UK Parliament can still legislate on devolved matters, the **Sewel Convention** provides that it does not normally do so without the consent of the Senedd.

What is the Sewel Convention?

This is the set of processes and procedures that allow a devolved legislature to decide whether to grant or withhold consent to a UK Bill that covers some part of devolved powers.

The Convention is that the UK Parliament will not normally legislate if a devolved legislature withholds its consent, but it can choose to do so if it wishes.

The **Wales Act 2017** put the Sewel Convention into statute with regards to Wales.

In 2017, the **Supreme Court ruled that** the Sewel Convention cannot be enforced by legal action. The Court said:

> *The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.*

The ruling was significant and left no doubt that the Sewel Convention is merely a political convention which therefore cannot be enforced by the courts.

Where the UK Parliament wishes to make laws on devolved matters, the Senedd indicates formally whether it consents through a **Legislative Consent Motion** (LCM).

The first LCM was introduced (and agreed) in 2008 and related to the **Education and Skills Bill**.

While the Sewel Convention is not legally binding, withholding consent has sometimes led to the UK Government making changes. In February 2011, the Assembly **voted to refuse** consent (for the first time) to part of the Police Reform and Social Responsibility Bill. The UK Government **subsequently made amendments** to "respect the Assembly's decision".

Broadening the scope of the Assembly's powers brought with it an increase in the areas for which LCMs were required.

During the Fourth Assembly (2011-2016), **36 LCMs were voted on**. Six of these were not agreed. On **four occasions during this term**, the UK Parliament legislated despite the Assembly withholding consent. Disagreements often related to whether an area was devolved to the Assembly or reserved to the UK Parliament. Such debates contributed to reform of the devolution settlement.

During the Fifth Assembly (2016-2021), debates around legislative consent intensified following the UK's vote to leave the EU. For example, the Welsh Government's original recommendation that the Senedd withhold consent to the **European Union (Withdrawal) Bill** resulted in amendments and an intergovernmental agreement between the Welsh and UK governments.

A significant breach of the Sewel Convention occurred when the UK Parliament passed the **United Kingdom Internal Market Act 2020** against the wishes of the Senedd. Senedd **committees argued** that the Act would **reduce the practical effect** of Welsh law.

Relationship with the UK Parliament in the Sixth Senedd

The Sixth Senedd (2021-2026) has seen an increase in the number of LCMs; 115 LCMs or Supplementary LCMs relating to 47 Bills have been laid so far.

Welsh governments have used Bills introduced to the UK Parliament to make changes in devolved areas, **arguing that** using UK Bills is sometimes "sensible and advantageous".

However, there has also been an **increase in the number** of UK Bills making provision in devolved areas without the consent of the Senedd. Former First Minister, Mark Drakeford MS, **expressed concern** that breaching the Sewel Convention has become "almost normalised".

The Senedd's Legislation, Justice and Constitution Committee **argued that** the use of UK Bills to make provision in devolved areas, whether such provision is sought by the Welsh Government or not, is creating a "democratic deficit" which is bypassing the Senedd's legislative scrutiny functions.

Enduring importance

Though the Senedd has much enhanced legislative powers compared with 1999, the UK Parliament continues to make a significant contribution to the law relating to devolved areas in Wales. The relationship between Wales and Westminster remains a key feature of law-making in Wales.

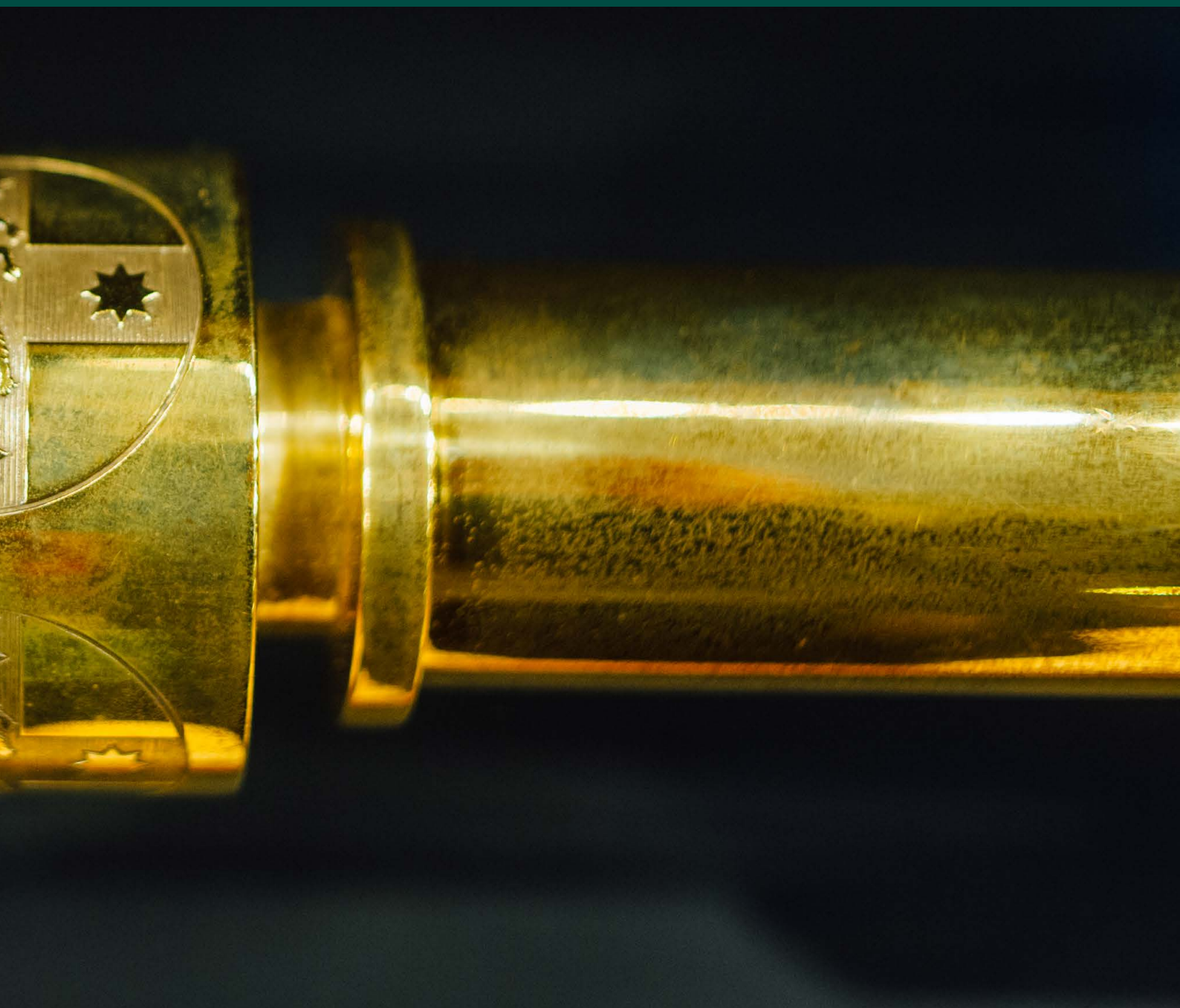
The UK's exit from the EU, and resulting changes to the UK constitution, have **brought a renewed focus** to the issue of parliamentary sovereignty and legislative consent.

About the photo:

The Senedd mace.

Wales at the Supreme Court

Adam Cooke



Over the last 25 years, Supreme Court rulings have played a key role in how devolution and the law-making process are understood and work in Wales.

The cases have not only influenced the operation of specific pieces of legislation, but have also influenced the design of the devolution settlement.

This article explores key rulings from the Supreme Court.

When will a case reach the Supreme Court?

The legislative competence of the Senedd (its remit to make law) is defined in the **Government of Wales Act 2006** (GoWA).

If legislative competence is called into question, **the Supreme Court must rule** on the extent of the Senedd's legal powers.

A case reaches the Supreme Court when a Bill is referred by a law officer. Either the Counsel General for Wales (Welsh Government) or the Attorney General for England and Wales (UK Government) may refer a Bill after it has been passed by the Senedd and before it is submitted for Royal Assent.

There can also be statutory references or appeal of a "**devolution issue**", or the appeal of cases from lower courts through the normal judicial process.

Initial successes for the Welsh Government

Two initial rulings of the Supreme Court found in the Welsh Government's favour, and had significant implications for the interpretation of the devolution settlement.

Local Government (Byelaws) Wales Bill

In 2012, the then Attorney General, Dominic Grieve MP, referred the **Local Government Byelaws (Wales) Bill** to the Court. It was the first time that powers under **Section 112 of GoWA** had been used to refer a Bill.

The Bill was the first to be passed by the Assembly since it had gained enhanced primary legislative powers in 2011.

The Attorney General's referral related to Sections 6 and 9 of the Bill, which removed the need for the UK Secretary of State to confirm byelaws.

The **Supreme Court ruled unanimously** that the Assembly did have the legislative competence to remove the Secretary of State's confirmatory powers, stating that the removal:

> *would be incidental to, and consequential on, the primary purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments*

and that

> *the primary purpose of the Bill cannot be achieved without that removal.*

The ruling was **accepted by both parties**, with the UK Government stating it helped with an understating "as to where the devolution boundary lies".

Agricultural Sector (Wales) Bill

In 2013, the Assembly passed the **Agricultural Sector (Wales) Bill** in response to the UK Government's abolition of the Agricultural Wages Board for England and Wales. Through the Bill, the Welsh Government intended to retain a system for regulating agricultural workers' wages.

The Attorney General referred the Bill to the Supreme Court, arguing that it related to the reserved areas of employment and industrial relations, rather than agriculture.

The **Supreme Court held that** the Bill was within the legislative competence of the Assembly, deciding that it was necessary to look beyond the "dictionary definition" of agriculture, and to consider the intentions of the Bill. In this context, the Court considered that agriculture referred to "industry or economic activity of agriculture in all its aspects".

The Court also noted that neither "employment" nor "industrial relations" were listed as exceptions to the Assembly's legislative competence, while other aspects of employment (such as pension schemes) were. It cited this as evidence that there was no intention by the UK Parliament to create more general limitations on the Assembly's competence in this area.

The Court ruled that the Assembly could legislate for subjects not specified as exemptions, or "**silent subjects**", as long as the main purpose of a Bill "fairly and realistically" related to a devolved subject.

Constitutional lawyer **Ann Sherlock labelled** this ruling a "significant clarification" of the Assembly's competence.

First Minister Carwyn Jones AM welcomed the "**exceptionally important judgment**", but suggested that confusion over competence was cause to move the Assembly to a reserved powers model (more below).

Pushing the limits

In 2015, for the first time, the Supreme Court ruled that a Bill was outside of the Assembly's competence.

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill

The **Bill would have enabled** the Welsh Ministers to recover costs incurred by NHS Wales in providing treatment to victims of asbestos-related diseases. Those costs would be recovered from whoever was required to pay compensation to the victims.

The Bill was referred to the Supreme Court by the Welsh Government's Counsel General, Theodore Huckle QC. This was the **first time a Counsel General had referred** a Bill. Though the Counsel General believed the Bill to be within competence, he **stated it was** appropriate "to have the issue of the competence of this Bill clearly resolved before the Bill comes into force", given the Assembly's competence had been disputed by others. It was felt better for the Supreme Court to rule in this way, rather than allowing those with private interests to challenge the Bill post-enactment.

The **Supreme Court ruled that** the Bill was not within the Assembly's legislative competence and was incompatible with the European Convention on Human Rights due to its impact on compensators' rights. However, there was disagreement among the judges as to the **extent and scope** of the competence issues.

From conferred to reserved powers

The relative frequency at which Senedd legislation was referred to the Supreme Court influenced discussions on reforming the devolution settlement.

The **second report of the Silk Commission** recommended moving from a conferred-powers model to a reserved-powers model of devolution, in which "the settlement would set out clearly the limits of devolved competence" and law-makers could "legislate with greater confidence".

First Minister Carwyn Jones AM **stated that the Welsh Government** "fully supported" the recommendation, but cautioned that there was no case for removing powers from the Assembly through the process.

The Assembly's Constitutional and Legislative Affairs Committee **expressed concerns** that the **UK Government's proposed Wales Bill** would have converted "silent subjects" identified by the Court into reservations and therefore lead to a roll-back of competence, in effect reversing the Agricultural Sector (Wales) Bill ruling.

Following the passage of the **Wales Act 2017**, the Assembly moved to a reserved-powers model; all areas were devolved, except those listed in **Schedules 7A** and **7B**.

While the move led to a reduction in Supreme Court cases, **cases on the competency** of the Scottish Parliament (where a reserved-powers model has always been in place) demonstrate that escalation is still possible.

Brexit and the Supreme Court

Since 2016, disagreements over the process of leaving the EU and the resettlement of powers have led to legal challenges from the **devolved governments** and the **UK Government**. Subsequent rulings have led to further important clarifications.

In particular, in 2017, the **Supreme Court ruled that** the **Sewel Convention** cannot be enforced by legal action.

For more information, see our Leaving the European Union article in this series.

Interpreting devolution

The Supreme Court's role in interpreting the devolution settlement in Wales has been, and remains, significant. Recent **discussions and evidence** relating to whether the **Senedd Cymru (Electoral Candidate Lists) Bill** is within the Senedd's legislative competence have often made reference to the Supreme Court's ability to act as an ultimate arbiter on these matters.

Should further debates over legal boundaries arise, the Court's rulings will likely play a key role again.

About the photo:

The Pierhead clock.

Leaving the European Union

Sara Moran

When the National Assembly for Wales met for the first time on 12 May 1999, the UK had been an EU Member State for over 26 years.

For the first 20 years, eight months and 19 days of its 25-year history, the Senedd existed in the context of EU membership.

On 23 June 2016, **Wales voted to leave the EU** by a margin of 52.5% to 47.5%.

The referendum started the first phase of Brexit - a complex legislative process to extract a Member State from the EU for the first time. The second phase handled what came next – setting up a new UK-EU relationship that's still in its infancy today. While these two key phases were playing out at a UK-EU level, the UK put new domestic arrangements in place for its internal market, intergovernmental relations and for the EU law that remained on the statute books.

Leaving the EU significantly changed how law in Wales is made and how it works.

It turned off the automatic application of EU law and removed the duty on Ministers to comply. It meant that international law replaced EU law as the UK's main source of external law. Ministers were empowered to make changes to the EU law that remained, while the **UK Internal Market Act 2020** and **common frameworks** added another important dimension to the post-Brexit landscape.

For the first time in one place, we present a timeline of the process of leaving the EU at the Senedd. Each date on the timeline:

- summarises a key development;
- explains how it changed how law is made and how it works; and/or
- confirms if the Senedd had a vote, and the vote results.

23 June 2016: Wales votes to leave EU

On 23 June 2016, **UK voters were asked**:

> Should the United Kingdom remain a member of the European Union or leave the European Union?

In Wales, 854,572 voted to leave and 772,347 voted to remain – a **52.5% / 47.5% split** in favour of leaving. Blaenau Gwent had the highest leave vote (62.0%) while Cardiff had the lowest leave vote (40.0%).

Turnout in Wales was 71.7% compared to 72.2% in the UK as a whole. Turnout was highest in Monmouthshire (77.8%) and lowest in Merthyr Tydfil (67.4%).

24 January 2017: Supreme Court rules UK Parliament should decide to trigger Article 50 (the "Miller" case)

The **Supreme Court agrees** that the UK Parliament (not the UK Government) should decide to trigger Article 50 of the Treaty of the EU. Doing so would notify the EU of the UK's intention to leave and start a two-year countdown to exit.

The ruling was significant for devolution for two reasons:

1. it unambiguously reaffirmed the principle of (UK) parliamentary sovereignty, dampening any notion of shared sovereignty with the devolved legislatures; and
2. it left no doubt that the **Sewel Convention** is a political, and not a legal, convention, which therefore cannot be enforced by the courts.

Since Brexit, there's been a significant increase in **UK laws going ahead without devolved consent**. It's unknown to what extent the Miller ruling contributed to this.

16 March 2017: UK Parliament grants Prime Minister power to notify EU of UK's intention to leave

No Senedd vote on consent took place.

The **EU (Notification of Withdrawal) Act 2017** received Royal Assent on 16 March 2017. The Act has two clauses authorising the Prime Minister to notify the EU of the UK's intention to leave.

29 March 2017: UK triggers Article 50, starting two-year countdown to EU exit

UK Prime Minister, Theresa May, **notifies the European Council's President**, Donald Tusk, of the UK's intention to leave the EU and Euratom. Invoking Article 50(2) of the Treaty on the EU starts a two-year countdown to the UK's exit.

16 October 2017: UK's governments agree to establish common frameworks in areas formerly coordinated or governed by EU

Common frameworks are agreements between the four governments of the UK on how to manage divergence between the four nations in areas previously governed or coordinated at EU level. Changes proposed to legislation by any of the four nations in one of **26 areas covered by a common framework** should be

discussed by the intergovernmental groups established by the relevant framework before a government introduces it to their legislature. This marks a significant change to law-making in the UK.

6 June 2018: Emergency law passed by the Senedd receives Royal Assent

Act passed in the Senedd on 21 March 2018.

***Vote result**: For 39, Against 13, Abstain 1.*

The **Law Derived from the European Union (Wales) Act 2018** started as an Emergency Bill introduced on 7 March 2018 by the then Cabinet Secretary for Finance, and former First Minister, Mark Drakeford MS.

The Act would:

1. preserve EU law covering subjects devolved to Wales on the UK's withdrawal from the EU;
2. ensure legislation covering these subjects worked effectively after the UK left the EU;
3. enable the Welsh Ministers to legislate to maintain regulatory alignment with the EU to facilitate continued access to the EU market for Welsh businesses;
4. create a default position in law whereby the consent of the Welsh Ministers was required before any changes were made by UK Ministers to devolved legislation within the scope of EU law.

The Act would later be repealed on 22 November 2018 (see this date below on the timeline for more information).

Similar legislation in Scotland went ahead and received Royal Assent on 29 January 2021. The **UK Withdrawal from the EU (Continuity)(Scotland) Act 2021** remains in force today.

26 June 2018: EU (Withdrawal) Act 2018 receives Royal Assent

A Senedd vote on consent took place and consent was granted on 15 May 2018.

***Vote result**: For 46, Against 9, Abstain 0.*

The **EU (Withdrawal) Act 2018** (EUWA18) has three main functions. It:

1. repealed the European Communities Act 1972, through which EU law automatically applied in the UK;
2. converted EU law to UK law on the day of the UK's exit (11pm, 31 January 2020) and created a new category of UK law, retained EU law; and
3. gave UK and Welsh Ministers temporary powers to deal with deficiencies so that the law functioned effectively.

EUWA18 amended the Government of Wales Act 2006 accordingly, including to remove the requirement for an Act of the Senedd to be compatible with EU law.

The Welsh Government originally **recommended the Senedd withhold consent** to the EU (Withdrawal) Bill. Following amendments and an **intergovernmental agreement** with the UK Government, the Welsh Government **recommended the Senedd consent to the Bill**.

22 November 2018: Welsh Government repeals emergency law

Following an **intergovernmental agreement** between the UK and devolved governments on the EU (Withdrawal) Bill and the establishment of **common frameworks**, the Welsh Government agreed to repeal the Law Derived from the EU (Wales) Act 2018.

The **Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018** came into effect on 22 November 2018. The regulations repealed the Act in its entirety.

17 October 2019: Withdrawal Agreement agreed between UK and EU

No Senedd vote on consent took place.

The **Withdrawal Agreement** is an international law treaty between the UK and EU. It deals only with the separation of the UK from the EU and Euratom.

International treaties are subject to a scrutiny process in the UK Parliament but this was disapplied for the Withdrawal Agreement by section 32 of the **EU (Withdrawal Agreement) Act 2020**.

The Withdrawal Agreement set out that the UK would enter a transition period when it left the EU while the terms of the UK-EU future relationship were negotiated. This would last from 1 February 2020 – 31 December 2020.

The Withdrawal Agreement includes the **Northern Ireland Protocol**. It protects the rights of UK and EU citizens living in the territory of the other and sets out the UK's financial obligations to the EU. It established **governance arrangements** to oversee its implementation. The Welsh and Scottish governments do not attend these meetings.

Parts of the Protocol were changed by the **Windsor Framework** in February 2023. Although the Protocol still exists, both agreements are often referred to together as the Windsor Framework.

23 January 2020: EU (Withdrawal Agreement) Act 2020 receives Royal Assent

A Senedd vote on consent took place and consent was withheld on 21 January 2020.

***Vote result**: For 15, Against 35, Abstain 0.*

The **EU (Withdrawal Agreement) Act**:

1. gives effect to the Withdrawal Agreement in domestic law; and
2. dealt with other separation issues, like how EU law would apply in the UK during and after the transition period. One important example is that a new body of law, called retained EU law (REUL), would be created at the end of the transition period.

The Welsh Government **recommended the Senedd withhold consent** to the EU (Withdrawal Agreement) Bill.

31 January 2020: UK leaves EU and enters transition period

The UK left the EU at 11pm GMT on 31 January 2020 when the Withdrawal Agreement entered into force at midnight CET. This started the Brexit transition period which would end on 31 December 2020.

During the transition period, arrangements stayed mostly the same. For example, the UK stayed in the EU's Single Market and customs union, contributed to the EU's budget and continued to apply the EU's laws and rules. However, the UK was no longer represented in EU institutions and it had no voting rights. The UK's 73 MEPs, including **four from Wales**, vacated their seats on 31 January 2020.

The transition period started a countdown for the UK and EU to agree the terms of

their post-Brexit relationship, which would start from 1 January 2021.

Negotiations continued throughout 2020 on what would later become the **Trade and Cooperation Agreement**, announced on 24 December 2020.

17 December 2020: UK Internal Market Act 2020 receives Royal Assent

A Senedd vote on consent took place and consent was withheld on 8 December 2020.

***Vote result**: For 15, Against 36, Abstain 0.*

The **UK Internal Market Act** (UKIMA):

1. establishes the presumption that (in general) goods, services and professional qualifications that can be sold or recognised in one part of the UK should be able to be sold or recognised in any other part, even if the law there is different;
2. introduces "market access principles" for goods and services. These mean that, even if the Senedd passes a law to ban or regulate a particular product, it can only be enforced on something produced in Wales or imported directly into Wales from outside the UK. Anything that comes into Wales from another part of the UK doesn't have to comply with this law if it falls within the scope of the Act, unless it is specifically excluded;
3. establishes an **Office for the Internal Market** which can investigate the impact of legislation proposed or made by any of the four legislatures of the UK on the operation of the UK internal market; and
4. places duties on Welsh Ministers in respect of the Northern Ireland Protocol and Northern Ireland's place in the UK internal market.

UKIMA doesn't affect the Senedd's legislative competence but it does impact the practical effect of its laws once they are in force.

A key amendment was agreed during the Bill's passage through the House of Lords which enables areas governed by a common framework to be excluded from the scope of the Act. However, only UK Government Ministers can add exclusions to the Act. Learn more from our **summary of the Act**.

The Welsh Government **recommended the Senedd withhold consent** to the Bill.

24 December 2020: Trade and Cooperation Agreement (TCA) agreed between UK and EU

No Senedd vote on consent took place.

The TCA is an international treaty between the UK and EU. It deals only with their cooperation after Brexit.

It was agreed on 24 December 2020 and signed on 30 December 2020. It applied provisionally from 1 January 2021 and entered fully into force on 1 May 2021, after approval from the European Parliament and European Council.

Agreements on nuclear cooperation and the security of classified information were agreed alongside the TCA.

International treaties are subject to a scrutiny process in the UK Parliament but this was disapplied for the TCA by section 36 of the **EU (Future Relationship) Act 2020**.

31 December 2020: EU (Future Relationship) Act 2020 receives Royal Assent

No Senedd vote on consent took place.

The **Senedd was recalled** *from Christmas recess on 30 December 2020 to debate the end of the transition period.* A **vote was held on a motion** *noting that the Senedd was not in a position to determine consent.*

***Motion vote result**: For 28, Against 24, Abstain 0.*

The Act:

1. implements the TCA, the **Civil Nuclear Agreement** and the **Security of Information Agreement**, in domestic law;
2. gives Welsh Ministers powers to implement the TCA in devolved areas;
3. set procedures for the exercise of Welsh Ministerial powers at the Senedd; and
4. made further provision relating to the UK-EU future relationship, including requiring all domestic legislation to be read in accordance with the TCA retrospectively.

31 December 2020: End of Brexit transition period

The Brexit transition period ended on 31 December 2020.

To minimise disruption and maintain the status quo, EU law as it was on this date was converted into domestic law, creating a snapshot in time of EU law. This new body of UK law was named retained EU law, or REUL.

In 2023, the UK Government would introduce legislation giving UK and Welsh Ministers wide ranging powers to make changes to REUL. This is the **Retained EU Law (Revocation and Reform) Act 2023**.

1 January 2021: New UK-EU relationship takes effect

The TCA and accompanying agreements applied provisionally from 1 January 2021 and entered fully into force on 1 May 2021, after approval from the European Parliament and European Council.

The Welsh Government **published analysis** of the implications of the new UK-EU relationship for Wales and Welsh businesses on 12 February 2021.

1 May 2021: TCA enters fully into force

The TCA entered fully into force on 1 May 2021, after approval from the European Parliament and European Council.

13 June 2022: Northern Ireland Protocol Bill introduced, and later paused

A Senedd vote on consent took place and consent was withheld on 22 November 2022.

***Vote results**: For 15, Against 35, Abstain 0.*

The Northern Ireland Protocol is part of the Withdrawal Agreement, an international treaty between the UK and EU.

The **Bill would**:

1. disapply parts of the Northern Ireland Protocol and the Withdrawal Agreement in domestic law;
2. empower UK Ministers to disapply more parts in future and to put new

arrangements in place without the EU's input or consent;

3. enable UK Ministers to pass on their regulation-making powers to Welsh Ministers; and
4. allow UK Ministers to determine scrutiny arrangements at the Senedd.

The Welsh Government **recommended the Senedd withhold consent** to the Bill. The Bill's scrutiny led to **unprecedented debate** on the role of international law at the Senedd and how it should respond.

The Bill did not proceed as a condition of **the Windsor Framework**.

27 February 2023: Windsor Framework agreed between UK and EU

No Senedd vote on consent took place.

The **Windsor Framework** changed parts of the Northern Ireland Protocol in relation to trade, the UK's internal market, and Northern Ireland's say in decision-making.

The UK Government agreed **not to proceed** with the Northern Ireland Protocol Bill. The EU agreed:

- **not to proceed** with **seven infringement proceedings** it had against the UK; and
- to proceed with granting the UK access to the EU's science and research programmes, including the €96 billion Horizon programme.

The Framework is credited with improving UK-EU relations and was generally **welcomed by the Welsh Government** despite it not having been consulted on the changes. The Welsh Government would later consent to UK regulations to implement the Framework.

Learn more in our article, **Wales and the Windsor Framework**.

29 June 2023: Retained EU Law (Revocation and Reform) Act 2023 receives Royal Assent

Two Senedd votes on consent took place and consent was withheld on 28 March 2023 and 6 June 2023.

***Result of first vote**: For 13, Against 38, Abstain 0.*

***Result of second vote**: For 17, Against 36, Abstain 0.*

To minimise disruption when exiting the EU, the UK converted EU law to domestic law and called it REUL. This meant that pre-Brexit laws stayed in place with the aim of avoiding gaps in important areas like product standards, animal welfare and employment law. REUL became a distinct body of law but there are different views on what should be done with it.

The Act puts some of the UK Government plans for REUL into place and grants powers to UK and Welsh Ministers to make future changes.

The **Welsh Government recommended the Senedd withhold consent** to the Bill in all five of its **Legislative Consent Memorandums** (LCMs). LCMS are laid in the Senedd when a UK Bill covers policy areas devolved to Wales. Members then vote on whether or not the Senedd should give consent for the UK Parliament to legislate on its behalf.

The Act:

1. revoked some REUL so it expired on 31 December 2023. This is the 587 items of REUL listed on Schedule 1, EU-derived rights, the principle of supremacy and general principles of EU law;
2. renamed remaining REUL "assimilated law" from 1 January 2024;
3. grants UK and Welsh Ministers powers to amend, repeal and replace REUL and assimilated law more easily;
4. grants UK and Welsh Ministers powers to recreate the effect of REUL supremacy to a limited extent in relation to specific instruments;
5. provides domestic courts with greater discretion to depart from REUL case law; and
6. repealed the **Business Impact Target** as part of other regulatory reforms.

There is no requirement on the UK Government to obtain consent from the Welsh Ministers, nor the Senedd, when making changes in devolved areas.

The UK Government's programme of REUL/assimilated law reform is ongoing and an informal consent arrangement is in place whereby the Welsh Government's consent is sought, regardless. The Welsh Ministers have informally granted consent on this basis to UK regulations making changes in devolved areas, like the environment. To date, single statutory instruments have been used to revoke up to **93 pieces of REUL** at a time.

Learn more on our webpage, **The Retained EU Law Act: where are we now?**

31 January 2024: Safeguarding the Union Command Paper published

No Senedd vote on consent took place.

The Northern Ireland Executive is sworn into office for the first time in two years on 3 February 2024. This followed publication of the **Safeguarding the Union Command Paper** by the UK Government on 31 January and **new regulations** passed on 1 February. These make changes to address the Democratic Unionist Party's (DUP) concerns about the Windsor Framework.

Safeguarding the Union:

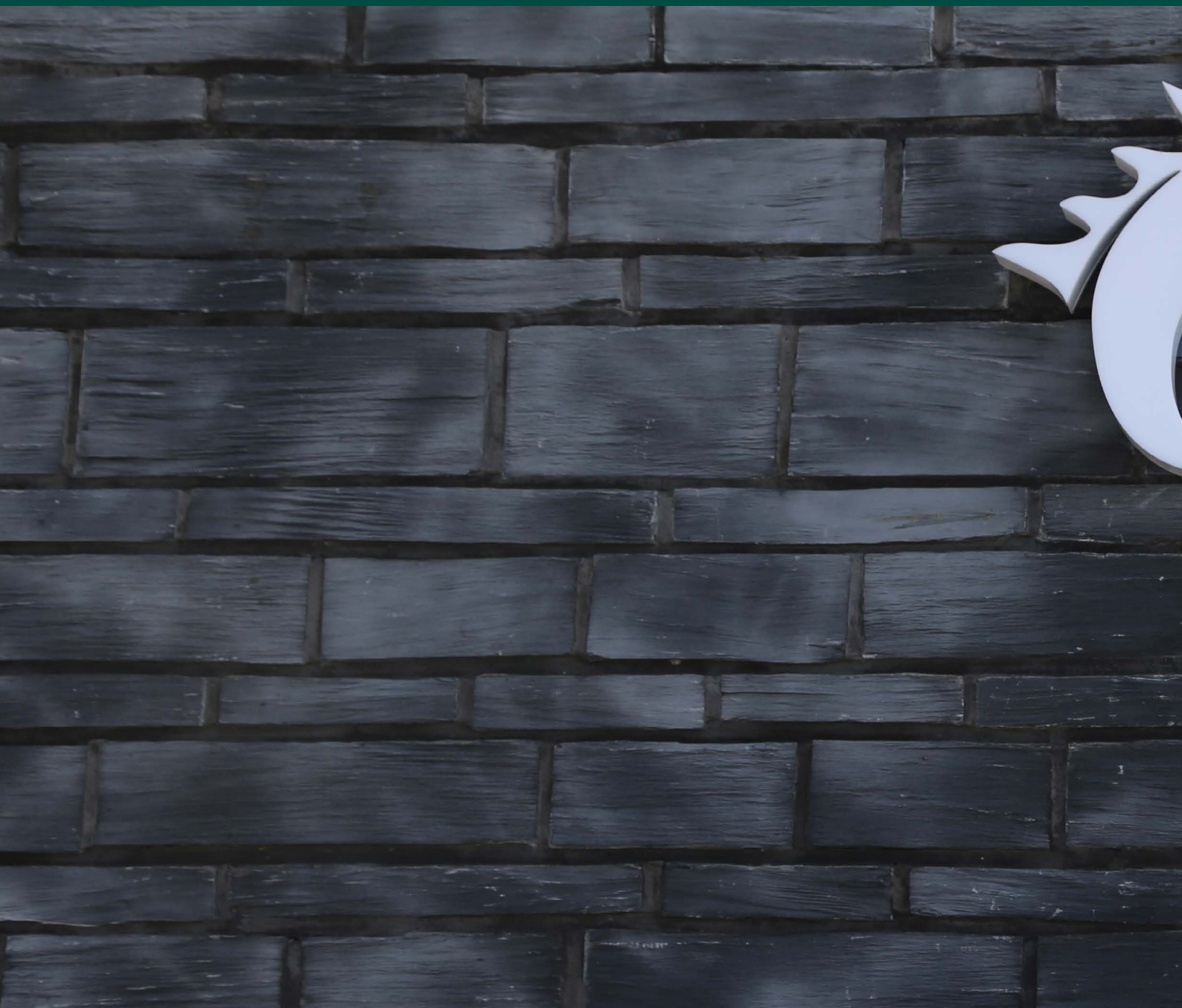
- established new NI-GB governance structures;
- changed trade rules to incentivise and boost NI-GB trade; and
- provided over £3 billion to the Northern Ireland Executive to address public sector pay pressures and provide an updated Barnett formula for Northern Ireland.

One regulation extended the UKIMA 2020's **market access principles** to goods from NI. It requires UK Ministers to issue guidance on how to comply with **the duty in section 46 of UKIMA** to have special regard to NI's place in the UK internal market and customs territory. Devolved ministers must now have regard to this guidance when carrying out relevant functions.

Learn more in our article, **Wales and Safeguarding the Union**.

About the photo:

The dragon symbol on the outer wall of the Senedd against a background of Welsh slate.



International law at the Senedd

Sara Moran

How does international law fit in to law making at the Senedd?

The original Government of Wales Act 1998 contained international provisions familiar to us in the **Government of Wales Act 2006** (GoWA). However, today they apply in a very different context.

This article charts their origins in the Senedd's founding statute to the present day, where international law has replaced EU law as the primary source of external law in the UK.

At the Senedd, this quickly raised new constitutional questions that required seeing the international law parts of the devolution settlement in a new light.

International obligations

International relations are reserved to the UK Government by paragraph 10 of **Schedule 7A to GoWA**.

Although there's scope within this reservation for the Welsh Government to act in an international capacity, it can't enter into legally binding commitments. Only the UK Government can do this for the UK, and does so on behalf of the four nations. These are referred to as 'international obligations' in GoWA.

International obligations cover legal duties and commitments the UK has agreed to, or universal rules of international law.

Importantly, the implementation and observation of international obligations are devolved, meaning Welsh Ministers must comply and are responsible for putting international law duties in place in devolved areas. The former First Minister, Mark Drakeford MS, **explained in 2021** that Welsh Ministers:

> *are required to take into account international obligations when making decisions, they could face Judicial Review or action from the Secretary of State for failing to do so.*

GoWA contains the following mechanisms that hold the Welsh Ministers to account when observing and implementing international law.

UK Government can intervene

The UK Government's Secretary of State has powers to:

- direct Welsh Ministers to take action to comply with any international obligation; or
- direct them not to take action if it would be incompatible; or
- revoke subordinate legislation made by Welsh Ministers if it is considered to be incompatible with international obligations, or in the interests of defence or national security.

These powers are contained in section 82, which has never been invoked.

Section 101(d) also empowers the Secretary of State to stop the Senedd passing laws that are incompatible with international obligations, or the interests of defence or national security.

European Convention on Human Rights (ECHR)

Welsh Ministers, including the First Minister and Counsel General, are specifically prohibited from taking action that's incompatible with Convention rights of the ECHR. This duty can be found in section 81 of GoWA.

Assistance to the UK Government

It is within the Senedd's competence to assist the UK Government in respect of international obligations and international relations. This can be found in paragraph 10(3) of Schedule 7A to GoWA.

Power to make any declaration on any matter affecting Wales

A new development in 2023 saw the Welsh Government cite another provision of GoWA for international matters. **Section 62 empowers** the Welsh Ministers, the First Minister and Counsel General to make appropriate representations about any matter affecting Wales. The Welsh Government relied on this broad power when it **published its analysis** of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) trade agreement.

This approach was supported by the Legislation, Justice and Constitution (LJC) Committee, which the **then Minister for Economy, Vaughan Gething MS, welcomed**, so we may see this approach again in future.

The Ministerial Code

Although not a legal duty, the Welsh Government's **Ministerial Code** places a duty on the Welsh Ministers to comply with international law and treaty obligations.

Brexit shifts the focus

GoWA contained a duty to comply with EU law until it was removed by the **EU (Withdrawal) Act 2018** and the **EU (Withdrawal Agreement) Act 2020**.

The UK-wide removal of this duty meant that international law replaced EU law as the main source of external law in the UK. The UK-EU **Withdrawal Agreement** and **Trade and Cooperation Agreement (TCA)** are international law treaties.

At the Senedd, this shift placed a new focus and reliance on GoWA's international provisions and raised new questions about law-making. The remainder of this article charts the Senedd's response to this unprecedented development in its 25-year history.

Sewel Convention

Two scenarios quickly emerged as the UK left the EU which raised fundamental questions about the relationship between **the Sewel Convention** and international obligations.

The first scenario asked:

What happens when Welsh Ministers must put in place international obligations using powers from UK Bills they opposed, and for which the Senedd refused consent?

This scenario first arose during scrutiny of the **Professional Qualifications Bill**, now Act, which established a new system for how professional qualifications gained overseas are recognised in the UK after Brexit.

When the LJC Committee **asked the former First Minister**, Mark Drakeford MS, the above question, **he replied that**, although the Welsh Government opposed the Bill, Welsh Ministers would nevertheless use its powers "responsibly". This, he said, is why the Welsh Government and the Senedd "have legitimate and crucial interests" in international obligations in devolved areas.

The second scenario asked:

What happens if the Senedd is asked to consent to UK Bills that could breach international law?

GoWA places duties on the Welsh Government and Senedd to comply with international obligations, and gives the UK Government powers to intervene if they don't. But it's silent when the situation is reversed and the compatibility of a UK Bill is in doubt when the Senedd is asked for consent.

This scenario first arose during the Senedd's **scrutiny of the Northern Ireland Protocol Bill**, which the **UK Government conceded** would breach the UK-EU Withdrawal Agreement. The Counsel General, Mick Antoniw MS, **explained to the Senedd** that:

> *It creates a particular constitutional problem for us, I believe, if it is in breach of international law, because we will be asked to give consent to the legislation, and whether we can actually consent to something that effectively legitimises unlawfulness.*

To address this scenario, the LJC Committee **developed a new position**. It said:

> *A decision by the Senedd to consent to the Bill could contribute to a breach of international law and would mean the Senedd acting incompatibly with international obligations, which would be in contrast to the spirit of the devolution settlement.*

While it's ultimately the UK Government's responsibility to ensure UK compliance, the Committee has since reapplied this recognition of scenarios not covered by GoWA during scrutiny of the **Illegal Migration Bill** and the **Economic Activity of Public Bodies (Overseas Matters) Bill**.

Treaty scrutiny

As acknowledged by **the former First Minister**, Mark Drakeford MS, the implementation of treaties can fall within Senedd competence, place duties on Welsh Ministers and fall on Welsh public bodies to deliver.

In 2019, the Senedd became the first devolved parliament to establish a **dedicated treaty scrutiny process**. If a treaty laid in the UK Parliament covers devolved areas,

or has important policy implications for Wales, Senedd committees assess its impact and report to the Senedd and the House of Lords' International Agreements Committee.

The process has secured **early wins for Senedd** scrutiny. It's obtained information from the Welsh Government which wouldn't otherwise be provided, ensured this information's in the public domain and enhanced understanding of the constitutional and practical implications of treaties.

The **devolved legislatures** can also incorporate treaties directly into their domestic law, a practice reaffirmed by the **Supreme Court in 2021.** The Welsh Government and the Senedd have **garnered recognition from the United Nations** for doing so.

Conclusion

Work to better understand international law at the Senedd shows no sign of slowing, and the Welsh Government has responded positively.

For example, it's agreed to make it clear when UK Bills subject to Senedd consent **intersect with international obligations** and **to include analysis of the TCA** where UK-EU matters are cited.

While the international aspects of GoWA were relatively settled during EU membership, the years since Brexit have demanded a new focus on these lesser known parts of our devolution settlement.

Using GoWA in this way for the first time in 25 years has brought new meaning to the place of international law at the Senedd, and has changed law-making in Wales.

About the photo:

The Siambr from above.

Two decades of reform: how have discussions about Wales' constitutional settlement shaped the Senedd?

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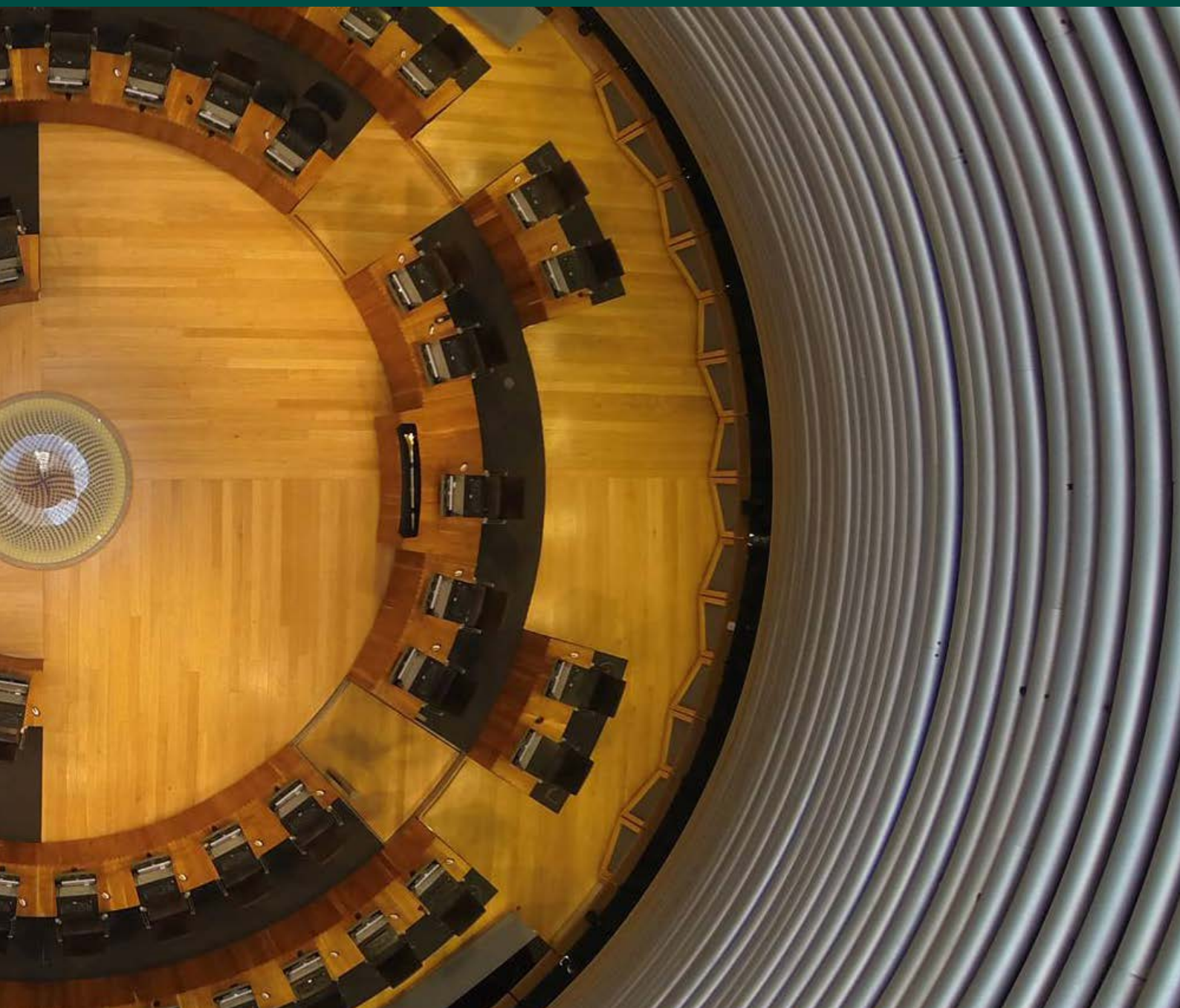

The way in which laws are made for Wales has been heavily influenced over the last 25 years by a series of commissions, committees and panels convened to assess the operation of the devolution settlement.

These bodies, often made up of former politicians and civil servants, alongside academics and representatives of business and civil society, have played a key role in shaping Welsh law-making.

This article looks at the role these groups have played and how their key findings have come to influence law-making in Wales.

Richard Commission – a first look at reform

Early in the first term of the then Assembly, Welsh Labour and the Welsh Liberal Democrats agreed as part of their coalition to establish an independent commission to look into the powers and electoral arrangements of the Assembly "**to ensure that it is able to operate in the best interests of the people of Wales**".

The Commission, chaired by Lord Richard, a Labour Peer and former leader of the House of Lords, **published its report** in 2004. It set out a proposal for primary law-making powers for the Assembly, specifying matters that would be reserved to Westminster. In doing so, the Commission recommended that the Assembly should increase in size to 80 and split into two separate bodies – an executive and a legislature – bringing to an end the 'corporate body' structure that was in place since 1999.

Some of the Commission's recommendations were taken forward in the **Government of Wales Act 2006,** which established a limited set of primary law-making powers for the Assembly, with the possibility of broadening these powers following a referendum vote, which was subsequently held in 2011. Our article on Making laws in Wales explores this in further detail.

Silk Commission – fiscal and legislative devolution

Following the affirmative vote in the 2011 referendum, the **Commission on Devolution in Wales** (known as the Silk Commission) was established as part of the UK Government coalition agreement between the Conservatives and the Liberal Democrats.

The Commission was tasked with reviewing the "**financial and constitutional arrangements in Wales**". It was chaired by Sir Paul Silk, a former Clerk to the Assembly, with representatives of the four political parties in the Assembly and two

independent members.

The Commission's **first report** on fiscal devolution was published in November 2012. The report made 33 recommendations that the Commission said would "empower the Welsh Government and bring greater responsibility by giving Wales its own taxation and borrowing powers". The report drew on the findings of the **Holtham Commission** on Funding and Finance for Wales. Many of the recommendations were taken forward in the **Wales Act 2014.**

Its **second report**, published in March 2014, recommended that the model of devolution to Wales should be replaced by a 'reserved powers model', with new legislation setting out the powers that would be reserved to the UK Parliament. It also recommended the devolution of powers over elements of transport, energy project consenting and policing.

The report also recommended that the size of the Assembly should be increased "so that it can perform its scrutiny role better" and that the institution should be recognised as "permanent, so long as that is the will of the majority of the people of Wales".

The UK Government's response to the second report was set out in '**Powers for a Purpose**' and changes to the devolution settlement were taken forward in the **Wales Act 2017**.

Senedd Reform – a changing and evolving institution

In anticipation of the Senedd gaining new powers over its size and legislative arrangements under the **Wales Act 2017**, **the Expert Panel on Assembly Electoral Reform** was established to provide:

> *robust, politically impartial advice on the number of Members needed to effectively represent the people of Wales, the most suitable electoral system, and the minimum voting age.*

The Panel, chaired by Professor Laura McAllister, made a series of **recommendations for changes** to the size of the Senedd, its electoral system and who could vote in Senedd elections.

Some of these recommendations were taken forward in the **Senedd and Elections (Wales) Act 2020**, which lowered the voting age to 16, allowed certain foreign citizens to vote and changed the name of the National Assembly for Wales to Senedd Cymru or Welsh Parliament.

Without the political consensus to take forward the rest of the reforms recommended by the Expert Panel, the Senedd established the **Committee on Senedd Electoral Reform** to examine the Panel's recommendations and outline a "**roadmap for reform**" to inform political parties' policy positions and manifestos for the 2021 Senedd election.

Following that election, the **Special Purpose Committee on Senedd Reform** was established in October 2021 to come up with proposals to be included in a Welsh Government Bill to reform the Senedd. The Committee made 31 recommendations, some of which were different to those reached in previous reports and some agreed by only a majority of the Committee.

Two Welsh Government Bills have been introduced to the Senedd aimed at taking forward these recommendations. The **Senedd Cymru (Members and Elections) Bill**, passed by the Senedd **on 8 May 2024**, will expand the size of the Senedd to 96 Members and introduce a **closed list electoral system**. The **Senedd Cymru (Electoral Candidates List) Bill**, which would introduce mandatory gender quotas for Senedd elections, is still being considered by the Senedd.

Independent Commission on the Constitutional Future of Wales – a continuing conversation?

The introduction of this legislation hasn't been the end of the discussion about the constitution of Wales. The **Independent Commission on the Constitutional Future of Wales** was established by the Welsh Government, as part of its Cooperation Agreement with Plaid Cymru, in November 2021, with two broad objectives:

1. to consider and develop options for fundamental reform of the constitutional structures of the UK, in which Wales remains an integral part; and
2. to consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales.

The Commission's **final report**, published in January 2024, concluded that the current devolution settlement is "at risk of gradual attrition" and without urgent action there will be no "viable settlement to protect". The Commission recommended the devolution of further powers over areas such as justice, policing and rail services.

While **it concluded** the current settlement is "not a reliable or sustainable basis for the governance of Wales", it stopped short of recommending a particular way

forward, instead identifying three "viable options": enhanced devolution, federalism and independence.

However, the Commission's report **did not receive unanimous support** from the Senedd, and its recommendations fall to the Welsh Government to consider and take forward.

Changes ahead

Throughout the period of devolution, there has been an almost continuous discussion about the powers and size of the Senedd. Legislation has now been passed that will increase the number of Members of the Senedd from 60 to 96.

It's likely this will have a significant impact on how the Senedd operates and the capacity available within its membership to perform its role in scrutinising the Welsh Government and legislation.