

The Welsh Government's Legislative Consent Memoranda on the UK Infrastructure Bank Bill

October 2022



1. Background

The UK Government's UK Infrastructure Bank Bill

1. The UK Infrastructure Bank Bill¹ (the Bill) was introduced into the House of Lords on 11 May 2022. It is sponsored by HM Treasury.
2. The long title to the Bill states that it is a Bill:

"to make provision about the UK Infrastructure Bank."

3. The Bill completed its passage through the House of Lords on 11 July 2022, and had its first reading in the House of Commons on 12 July 2022. At the time of writing this report, the date for Second Reading in the House of Commons was yet to be confirmed.

The Welsh Government's Legislative Consent Memorandum

4. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.
5. On 25 May 2022, Rebecca Evans MS, Minister for Finance and Local Government (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.²
6. The Business Committee agreed that the Legislation, Justice and Constitution Committee, the Economy, Trade and Rural Affairs Committee, the Finance Committee and the Climate Change, Environment and Infrastructure Committee, should report on the Memorandum by 29 September 2022.³ (But see also paragraph 15.)

Provisions for which the Senedd's consent is required

7. Paragraphs 24 to 42 of the Memorandum set out the Welsh Government's assessment of which provisions in the Bill require the consent of the Senedd, namely the entirety of the Bill which includes:

¹ UK Infrastructure Bank Bill, as introduced (HL Bill 3)

² Welsh Government, [Legislative Consent Memorandum, UK Infrastructure Bank Bill](#), May 2022

³ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the UK Infrastructure Bank Bill](#), June 2022

- Clause 1 - Defining the bank;
- Clause 2 - Objectives and activities;
- Clause 3 - Strategic priorities and plans;
- Clause 4 - Directions;
- Clause 5 - Financial Assistance;
- Clause 6 - Annual accounts and reports;
- Clause 7 - Directors: appointment and tenure;
- Clause 8 - Duties of the Bank;
- Clause 9 - Reviews of the Bank's effectiveness and impact;
- Clause 10 - Interpretation;
- Clause 11 - Extent, commencement and short title.

8. However, as outlined in paragraph 43 of the Memorandum the UK Government is of the view that the Senedd's legislative consent is only required for clauses 2 to 5, 8 and 11 of the Bill.

9. The Minister considers this to be a "narrow view of legislative competence"⁴, and states:

"...it is important to note that the Bill has a UK wide extent (as per clause 11(1) of the Bill) and whilst the Bank, which is wholly owned by HM Treasury, applies otherwise than in relation to Wales, for the purpose of establishing whether consent is required for the Bill, the question that the analysis must consider in respect of each clause of the Bill is whether the Senedd could legislate to do the same or something similar in relation to Wales. (...)

It is unclear whether this approach has been adopted by the Economic Secretary to the Treasury and it is possible that he has approached his analysis from a different angle."⁵

⁴ Welsh Government, Memorandum, paragraph 44

⁵ Welsh Government, Memorandum, paragraph 45

The Welsh Government's current policy position

10. Paragraphs 47 to 52 of the Memorandum set out the Welsh Government's current policy position.

11. The Minister states that the Welsh Government's position "must be to protect the powers of the Senedd, whereas the Bill as currently drafted threatens devolved competencies", and goes on to add:

*"The Bill as introduced provides no role for the Senedd, the Welsh Ministers, or Welsh Government officials in the governance of the Bank, while reserving certain activities for Parliament, the Chancellor and HM Treasury, such as the power for HM Treasury to amend the Bank's strategic direction including in areas of devolved competence without consulting the Senedd or Welsh Government."*⁶

12. Paragraphs 49 and 52 provide an overview of the correspondence the Minister has issued to the Economic Secretary to the Treasury urging him "to amend the Bill to enable the Senedd and the Welsh Ministers to take their appropriate role within Governance structures to ensure proper democratic accountability."⁷

13. As outlined in paragraph 54 of the Memorandum, the Minister is unable to recommend if the Senedd should give consent to the UK Government. She states:

"As set out above, the legislative consent of the Senedd Cymru is required for a number of clauses of the Bill. A number of these clauses are of constitutional concern to the Welsh Government. Thus, despite the merits of some of the clauses, the Welsh Ministers' final position on whether to recommend consent is subject to the outcome of ongoing discussions with the UK Government regarding bringing forwards amendments to the Bill."

⁶ Welsh Government, Memorandum, paragraph 47-48

⁷ Welsh Government, Memorandum, paragraph 52

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2)

14. On 8 July 2022 the Minister laid before the Senedd a Supplementary Legislative Consent Memorandum (Memorandum No. 2)⁸ in respect of amendments agreed at Report Stage⁹ in the House of Lords on 4 July 2022.

15. The Business Committee agreed that the Committee, the Economy, Trade and Rural Affairs Committee, the Finance Committee and the Climate Change, Environment and Infrastructure Committee should report on Memorandum No. 2 (and the Memorandum) by 17 November 2022.¹⁰

Update on the position since the publication of the Memorandum and amendments for which consent is required

16. At paragraph 7 of Memorandum No. 2 the Minister states that "Welsh Government officials have sought amendments relating to the remit of the bank in areas of devolved competence to ensure devolution is respected, but to date the UK Government has not yet made any such changes".

17. Paragraphs 16 to 29 of Memorandum No. 2 note the amendments agreed since the laying of the Memorandum for which the Welsh Government considers the Senedd's consent is required. The agreed amendments make changes to clauses 2 and 9.

18. The amendments to clause 2:

- expand the definition of "infrastructure" for the purposes of the Bill;
- add a governance requirement for the Bank and obliges the Bank to have regard to the UK Government's Levelling Up White Paper when exercising its functions.¹¹

19. The amendments to clause 9 "alter the administrative requirements on the Treasury". Further detail is set out in paragraph 28 of Memorandum No. 2.

⁸ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\), UK Infrastructure Bank Bill](#), July 2022

⁹ [UK Infrastructure Bank Bill](#), as amended at Report Stage

¹⁰ Business Committee, [Timetable for consideration: Supplementary Legislative Consent Memorandum on the UK Infrastructure Bank Bill](#), July 2022

¹¹ Welsh Government, Memorandum No. 2, paragraphs 19, 21 and 23.

20. At paragraphs 30 and 31 of Memorandum No. 2 the Minister confirms that both the Welsh and UK Governments' view on the need for consent remains the same as outlined in the first Memorandum.

21. The Minister also states that the Welsh Government will continue to engage with HM Treasury "despite there being no progress on amendments to date".¹²

22. The Minister concludes:

*"The Bill remains of constitutional concern to the Welsh Government. Despite the merits of some of the clauses, the Welsh Ministers' final position on whether to recommend consent is subject to the outcome of ongoing discussions with the UK Government regarding bringing forwards amendments to the Bill."*¹³

¹² Welsh Government, Memorandum No. 2, paragraph 33

¹³ Welsh Government, Memorandum No. 2, paragraph 36

2. Committee consideration

23. We considered the Memorandum at our meeting on 4 July 2022.¹⁴ Following that meeting we wrote to the Minister on 8 July with a series of questions.¹⁵ The Minister responded on 22 July.¹⁶ We considered Memorandum No. 2, and the Minister's correspondence, at our meeting on 26 September 2022.¹⁷ We agreed our report on both Memoranda at our meeting on 10 October 2022.¹⁸

Our view

24. We note the Welsh Government's assessment that the entirety of the Bill requires the Senedd's consent as set out in the Memoranda. We further note that the UK Government's view does not align with that of the Welsh Government.

Conclusion 1. We agree with the Welsh Government's assessment that the Senedd's consent should be sought for the entirety of the Bill.

25. Our letter to the Minister dated 8 July 2022 posed a number of questions relating to the drafting of the Bill and sought clarification on any intergovernmental working that may have taken place during that drafting period.

26. In the Counsel General's written statement of 13 May 2022 on the UK Government's Legislative Programme he said "Following discussions at the first Inter-Ministerial Standing Committee meeting on 23 March, I am encouraged that there has been some positive engagement between UK Government and Welsh Government officials on a number of Bills in the UK Government's legislative programme". A UK Infrastructure Bank Bill is one of the 12 Bills noted in this statement.

27. As such, we asked the Minister to confirm that the Bill was the subject of intergovernmental discussion before its introduction to the UK Parliament, which the Minister confirmed was the case in her response to us on 22 July. The Minister also confirmed that "[d]ialogue took place between HM Treasury and Welsh Government officials through last year" and that "engagement continued between Welsh Government and HM Treasury officials in 2022

¹⁴ Legislation, Justice and Constitution Committee, 4 July 2022

¹⁵ Letter to the Ministers for Finance and Local Government, 8 July 2022

¹⁶ Letter from the Minister for Finance and Local Government, 22 July 2022

¹⁷ Legislation, Justice and Constitution Committee, 26 September 2022

¹⁸ Legislation, Justice and Constitution Committee, 10 October 2022

as the Bill was proposed to put the Bank on a statutory footing".¹⁹ The Minister told us that the Welsh Government "did seek to directly influence the drafting of the Bill".²⁰

Conclusion 2. It is unclear to us why the Bill introduced to the UK Parliament on 11 May 2022 (and shared with the Welsh Government in draft format on 14 April 2022²¹) reserves powers for the Chancellor and HM Treasury – powers which were bound to cause concern for both the Welsh Government and the Senedd – given that both governments appear to have worked on the Bill extensively for several months. Once again, and despite reforms to the intergovernmental machinery, we are still seeing clear failures in intergovernmental working.

28. We acknowledge that the Minister raised concerns, during the Finance Inter-Ministerial Standing Committee (F:ISC) meeting on 15 June 2022 (after the Bill's introduction), that the Bill reserves these powers for the Chancellor and HM Treasury.²²

Conclusion 3. It is disappointing that there appears to have been a breakdown in intergovernmental working to the extent that a UK Bill, which has received the consideration of and input by the Welsh Government over a long period, still contained "clauses... of constitutional concern"²³ on its introduction to the UK Parliament meaning the Welsh Government is not in a position to recommend, in the legislative consent memoranda laid before the Senedd, that consent be given to the relevant provisions in the Bill.

29. In his letter to us on 4 August 2022²⁴, Mick Antoniw MS, the Counsel General and Minister for the Constitution, said that the formal dispute resolution process (which forms part of the reformed intergovernmental machinery) "remains an option available to us and we will carefully consider utilising the process, as a last resort, if all other avenues have been exhausted."

Recommendation 1. We would welcome clarity on why instances of failures in intergovernmental working, as shown in relation to this Bill, are not escalated to higher levels in the intergovernmental structures, including the reformed dispute resolution procedures.

¹⁹ Letter from the Minister for Finance and Local Government, 22 July 2022, response to question 1

²⁰ Letter from the Minister for Finance and Local Government, 22 July 2022, response to question 3

²¹ Letter from the Minister for Finance and Local Government, 22 July 2022, response to question 2

²² Letter from the Minister for Finance and Local Government, 22 July 2022, response to question 1

²³ Welsh Government, Memorandum, paragraph 54

²⁴ [Letter from the Counsel General](#), 4 August 2022

30. We also asked the Minister to confirm what specific amendments she has sought to the face of the Bill in order to “enable the Senedd and the Welsh Ministers to take their appropriate role within Governance structures”.

31. In our view the Minister’s statement, that the “specific details of the amendments will be subject to ongoing discussions with the UK Government and I will update the Senedd on the outcome of those discussions as appropriate”, is not helpful to Senedd Members who are trying to undertake a serious and important scrutiny role to a set timescale within the legislative consent process.

32. Furthermore, it remains unclear whether the Welsh Government is pursuing amendments to the face of the Bill that would protect a role for the Welsh Ministers and the Senedd. We specifically asked the Minister if she had sought amendments to the Bill which:

- i. would provide the Welsh Ministers with directly equivalent delegated legislative powers, meaning the Senedd would be responsible for scrutinising the exercise of those powers;
- ii. would provide the Welsh Ministers with a consultative role before UK Ministers exercise their delegated powers, meaning there would be no role for the Senedd in scrutinising the exercise of those powers.

33. We believe that clarity on two matters is needed as regards the Minister’s response²⁵ to these questions, as follows.

Recommendation 2. The Minister should clarify, as soon as possible and in advance of the Senedd’s debate on the relevant legislative consent motion, what is meant by her statement that the Welsh Government continues to “advocate that the Senedd and the Welsh Government all exercise equivalent powers to those of our UK counterparts”.

Recommendation 3. The Minister “seeking concessions to the Bill” which reflect the Welsh Government Cabinet principles on UK Bills is not the same as seeking textual amendments to the face of the legislation. The Minister should clarify and confirm:

- if the ‘concessions’ being sought are not amendments to the face of the Bill;
- if so, what ‘concessions’ are being sought and how are they to be delivered.

²⁵ Letter from the Minister for Finance and Local Government, 22 July 2022, response to question 5

34. Finally, we have again²⁶ noted an interesting choice of words used in paragraph 7 of Memorandum No. 2 which states "Welsh Government officials have sought amendments". While we recognise that government officials provide necessary and required advice to the Welsh Ministers, any such negotiations and final decisions should be and are made by the Welsh Ministers themselves and we would expect this to be made clear. Moreover, if official-to-official discussions are not proving to be a successful way of resolving matters in a timely fashion, we would expect the Welsh Government to ensure increased Ministerial level discussions such that it fully demonstrates its commitment to "protect the powers of the Senedd"²⁷.

²⁶ Legislation, Justice and Constitution Committee, [Report on The Welsh Government's Supplementary Legislative Consent Memoranda \(Memorandum No. 2 and Memorandum No. 3\) on the Health and Care Bill](#), February 2022, paragraph 104

²⁷ Welsh Government, Memorandum, paragraph 47
