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Llywodraeth Cymru
Welsh Government

Mick Antoniw MS
Chair of Legislation, Justice and Constitution Committee

28 August 2020

Dear Mick

Legislation, Justice and Constitution Committee Report on the Legislative Consent Memorandum for the UK Environment Bill

Thank you for providing a copy of the Legislation, Justice and Constitution Committee's report and recommendations on the Legislative Consent Memorandum for the UK Environment Bill.

Please find the Welsh Government's response to the report's recommendations at Annex A.

I would like to take this opportunity to update the Committee on the current situation with the UK Parliament and Senedd Cymru's consideration of the Bill. The Bill was being considered by a public bill committee in the House of Commons but sittings of the Committee were suspended on 18 March until further notice. The Committee is now scheduled to report by Tuesday 29 September. There has been no update on when the parliamentary scrutiny of the Bill will likely recommence.

Given the uncertainty in the UK Bill timetable, no legislative consent motion debate has been scheduled for the Senedd at present. I now expect this to take place after summer recess.

Regards

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annex A

Welsh Government Responses to Recommendations from the Legislation, Justice and Constitution Committee on the Legislative Consent Memorandum for the UK Environment Bill

Recommendation	Welsh Government Response
<p>Recommendation 1.</p> <p>The Minister should respond to all recommendations contained in this report as a matter of urgency and in good time ahead of the Welsh Government tabling the relevant legislative consent motion.</p>	<p>Accept</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 2.</p> <p>The Minister should:</p> <ul style="list-style-type: none">▪ state clearly which clauses of the UK Bill are in policy areas with identified common frameworks;▪ explain how those clauses relate to the relevant planned common frameworks, in full or in part;▪ state when a common framework in those policy areas will come forward and identify the mechanisms by which it will be achieved.	<p>Accept</p> <p>The Bill includes provisions for chemicals and waste regulation. These are two policy areas where frameworks are being developed, namely the Chemicals Regulation (including Pesticides) Framework and the Waste and Resources Framework.</p> <p>The Bill does not provide a legislative basis to establish these frameworks. The frameworks are currently being developed on the basis they will be non-legislative in nature, likely to be underpinned by Ministerial Concordats.</p> <p>Once implemented, the frameworks may provide appropriate structures for the four governments to discuss the development of policy and legislation relating to those framework areas. For example, through inter-governmental groups established under the frameworks.</p> <p>Discussions are continuing between the four governments to develop these two frameworks. In particular, work is progressing on the draft Framework Outline Agreements which set out the proposed decision-making and governance arrangements. The aim is by the end of 2020 these frameworks will have a Framework Outline Agreement in place, which has received provisional confirmation by Ministers, and are operable in draft form.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 3.</p>	<p>Accept</p>

<p>The Minister should set out clearly, and with an appropriate explanation, which clauses of the UK Bill, as they apply to Wales:</p> <ul style="list-style-type: none"> ✦ are necessary to meet legal obligations arising from the UK's departure from the EU; ✦ are related to the UK's departure from the EU but are not necessary to meet legal obligations 	<p>None of the clauses in the Bill, as they apply to Wales, are necessary to meet legal obligations arising from the UK's departure from the EU</p> <p>The following clauses are related to the UK's departure from the European Union but are not necessary to meet legal obligations.</p> <p><u>Part 3</u> Clause 52 and Schedule 9 - Under Article 4 of the EU's Single Use Plastic Directive (DIR (EU) 2019/904), Member States have an obligation to achieve a 'substantial and sustained' consumption reduction in single use plastic cups for beverages and food container numbers. The Article does not stipulate how this reduction should be achieved, however suggested mechanisms includes the introduction of financial charges or levies. The single use carrier bag charge has shown the effectiveness of using this approach.</p> <p>Whilst the UK had voted to leave the EU at the point the Directive was introduced, there were ongoing uncertainties at the time of our future obligations and the details of any potential agreement with the EU. Despite this, the Directive's aim of reducing the environmental impact of single use plastics was supported by the Welsh Government and reflected our ambitions of moving Wales towards a circular economy. On this basis, a decision was made for Welsh Ministers to seek charging powers in the UK Environment Bill to enable us to maintain parity with other EU member states and to allow for the timely introduction of regulations in the absence of a suitable Welsh Bill.</p> <p>Clause 57 – Hazardous waste: The Hazardous Waste (Wales) Regulations 2005 were made under section 2(2) of the European Communities Act 1972. This Clause provides a power to allow Welsh Ministers to continue to be able to amend or replace the 2005 Regulations to ensure the manner in which hazardous waste is regulated prevents significant harm to the environment and human health.</p> <p>Clause 66 – Fixed Penalty Notices: This power is needed as there is no power in the Environmental Protection Act 1990 to amend the level of the FPNs relating to fly-tipping and householder duty of care. Such amendments have, in the past, been made under section 2(2) of the European Communities Act, which has now been repealed and cannot be used after the end of the Implementation Period. Without this new power, Welsh Ministers will be unable to amend existing penalties for the FPNs relating to fly-tipping and householder duty of care.</p> <p><u>Part 8</u> Clause 125 and Schedule 19 (REACH) are related to the UK's departure from the EU, and are considered necessary to enable Ministers to keep the UK/GB REACH regime up-to-date</p>
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	<p>(including mirroring changes to EU REACH where appropriate) following the end of the implementation period.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 4.</p> <p>The Minister should set out clearly which clauses of the UK Bill as they apply to Wales are not covered by recommendation 3.</p>	<p>Accept</p> <p>The following clauses, as they apply to Wales, are not covered by recommendation 3:</p> <p><u>Part 1</u> Clause 19 - Statements about Bills containing new environmental law and Clause 43 - Meaning of environmental law (as it relates to clause 19).</p> <p><u>Part 3</u> Clause 47 and Schedule 4 – Producer Responsibility Obligations Clause 48 and Schedule 5 – Producer Responsibility Disposal Costs Clauses 49 – 51 – Resource efficiency Clause 55: Electronic Waste Tracking Clause 60 – Regulations made under the Environmental Protection Act 1990 Clause 61 – Powers to make charging schemes Clause 63 and Schedule 10 – Enforcement Powers Clause 65 – Littering Enforcement¹ Clause 67 – Regulation of Polluting Activities</p> <p><u>Part 4</u> Clause 69 – Local Air Quality Management Clause 70 – Smoke Control Areas</p> <p><u>Part 5</u> Clauses 75 and 76 – Plans and proposals Clause 77 – Authority’s power to require information Clause 79 – Electronic service of documents Clause 81 – Water Quality Secretary of State Powers Clause 82 – Water Quality Welsh Ministers Powers</p> <p>Clause 85 – Water Quality interpretation Clauses 87 – 89 – Land drainage</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 5.</p> <p>The Minister should explain why it was necessary to include the clauses identified in</p>	<p>Accept</p> <p>The former First Minister set out the criteria where it would be acceptable to use a UK Bill to take forward Welsh Government policy. These continue to be the policy approach used when determining the appropriateness of using UK Bills.</p>

<p>recommendation 4 within the UK Bill, rather than within a Welsh Bill in the Sixth Senedd</p>	<p>Powers requested for Welsh Ministers within the UK Environment Bill adhere to this criteria as either:</p> <ul style="list-style-type: none"> • The UK Government’s legislative proposal would also be appropriate for Welsh circumstances but there is no time available for similar provisions to be brought forward in the Assembly; • The interconnected nature of the relevant Welsh and English administrative systems mean it is most effective and appropriate for provision for both to be taken forward at the same time in the same legislative instrument. <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 6</p> <p>The Minister should explain why an Environmental Bill was not prioritised in any of the Welsh Government’s annual legislative programmes to cover:</p> <ul style="list-style-type: none"> ✦ environmental governance, including an appropriate body for Wales, arising from the UK’s departure from the EU; ✦ other non-Brexit related environmental policies that now appear within the UK Bill. 	<p>Accept</p> <p>The First Minister announced changes to the Welsh Government’s legislative programme for the remainder of this Senedd on 15 July. He reflected on the pressures that the end of transition and Covid-19 had put on the programme and that difficult decisions to remove Bills from the programme had been required based on priorities.</p> <p>Unfortunately, this meant legislation on environmental principles and governance could not be brought forward this term, but the First Minister reiterated his commitment to do so.</p> <p>As I have previously noted, the Welsh Government has finite resources for developing its legislative programme. There are always more proposals requiring primary legislation than there is the capacity to deliver. Decisions on which proposals are to be progressed and ultimately included in a legislative programme are taken by Cabinet, taking into consideration a number of factors such as the Government’s priorities across all its responsibilities, the relative maturity of development of a proposal, its likely size and timescale for delivery and the other policy and legal pressures in a portfolio which might impact on delivery.</p> <p>My officials are currently developing and preparing interim measures for receiving complaints about Environmental Governance in Wales to take effect by the end of the transition period for leaving the EU on 31 December 2020.</p> <p>In relation to principles, whilst we have a set of environmental principles in our Environment Act, the Welsh Government has already committed to continue to apply the four EU environmental principles in policy making until we include these in legislation.</p>

	<p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 7</p> <p>The Minister should confirm that it remains the Welsh Government’s policy to create a Welsh environmental governance body using primary legislation.</p>	<p>Accept</p> <p>The First Minister announced changes to the Welsh Government’s legislative programme for the remainder of this Senedd on 15 July. He reflected on the pressures the end of transition and Covid-19 had put on the programme and difficult decisions to remove Bills from the programme had been required based on priorities.</p> <p>Unfortunately, this meant legislation on environmental principles and governance could not be brought forward this term, but the First Minister reiterated his commitment to do so.</p> <p>My officials are currently developing and preparing interim measures for receiving complaints about Environmental Governance in Wales to take effect by the end of the transition period for leaving the EU on 31 December 2020.</p> <p>In relation to principles, whilst we have a set of environmental principles in our Environment Act, the Welsh Government has already committed to continue to apply the four EU environmental principles in policy making until we include these in legislation.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 8.</p> <p>The Minister should confirm that primary legislation to create a Welsh environmental governance body will include standalone sections, in line with its commitment to consolidated legislation, and will not amend the UK Bill as a means of delivering the Welsh Government’s policy objectives.</p>	<p>Accept</p> <p>The intention is for Wales to have its own Welsh Environmental Principles and Governance Bill, the provisions of which will provide the necessary framework and mechanics for a Welsh environmental governance body, along with legislating to enshrine the four EU environmental principles into Welsh law.</p> <p>At our current stage of policy development we do not envisage amending the UK Bill as a means of delivering the Welsh Government’s policy objectives.</p> <p>However it may be necessary to make consequential amendments to the UK Bill once a Welsh Bill is in place to ensure both pieces of legislation are able to operate smoothly alongside one another.</p> <p>Financial Implications – There are no additional financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 9.</p>	<p>Accept</p>

<p>The Minister should explain how she will seek amendments to the UK Bill to reflect the outcome of relevant Welsh Government consultation exercises that have closed after the UK Bill's introduction to the UK Parliament.</p>	<p>Should the outcome of recent consultations result in a need to change the proposed provisions in the Bill, I will request the UK Government seeks the necessary amendments on our behalf.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 10.</p> <p>The Minister should seek an amendment to the UK Bill such that the clauses covered by recommendation 4 are subject to a sunset clause requiring them to expire after a specified date.</p>	<p>Reject</p> <p>The First Minister announced changes to Government's legislative programme for the remainder of this Senedd on 15 July. He reflected on the pressures the end of transition and Covid-19 had put on the programme and difficult decisions to remove Bills from the programme had been required based on priorities.</p> <p>We usually consider sunset clauses in UK legislation where there is a clear timetable for replacement of Welsh provisions and as, we do not have an Environment Bill scheduled in this term, we do not have sufficient certainty.</p>
<p>Recommendation 11</p> <p>The Minister should explain: ✦ why consent is required for clauses 21, 45, 46, 78, 90, 100, 115, 122 and 124 of the UK Bill in so far as they relate to the general provisions in Part 8 of the UK Bill; ✦ why information included in her letter of 14 May 2020 in response to Q11 is not included in the LCM with appropriate commentary and in accordance with Standing Order 29;</p> <p>✦ why her response to Q11 does not refer to clauses 55, 57, 60, 61, 65, 66, 67, 75-77, 79, 81, 82, 85 and 87-89.</p>	<p>Accept</p> <p>The list provided in response to Q11 was included in error.</p> <p>The nature of the general provisions means that we cannot recite with certainty what their specific application will be in all cases, and therefore what specific nexus they might have with a 'relevant provision'.</p> <p>However, to the extent that the general provisions in clauses 126 to 133 either concern or else may be exercised or understood in such a way as to bite on a relevant provision elsewhere in the Bill (i.e. on clauses 19, 43, 47 to 52, 55, 57, 60 to 61, 63, 65 to 66 to 67, 69 to 70, 75 to 77, 79, 81 to 82, 85, 87 to 89 and 125), we believe they constitute a 'relevant provision' for the purposes of Standing Order 29 in their own right.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 12.</p>	<p>Accept</p>

<p>The Minister should provide information, in either a supplementary document or within any supplementary LCM, justifying why it is appropriate to take each of the delegated powers for the Welsh Ministers contained within the UK Bill, and the choice of procedure for each power.</p>	<p>The information provided in Annex A of the LCM fulfilled the requirements of SO29.3:</p> <p>“A Legislative Consent Memorandum must” SO29.3(iv):“where the Bill contains any relevant provision conferring power to make subordinate legislation on Welsh Ministers, set out the Senedd procedure (if any) to which the subordinate legislation to be made in the exercise of the power is to be subject;”</p> <p>I have since provided the additional information requested to the Committee in my letter of 14 May.</p> <p>In the interests of ensuring ease of access to all of the information, I will instruct my officials to collate the information into one document and publish this alongside the LCM after summer recess.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation</p>
<p>Recommendation 13.</p> <p>The Minister should confirm that she requested the procedure to be used for each delegated power for the Welsh Ministers contained in the UK Bill and that in each case her request was granted.</p>	<p>Accept</p> <p>For each delegated power for the Welsh Ministers, I agreed the procedure to be used.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation</p>
<p>Recommendation 14.</p> <p>The Minister should clarify why it was necessary to include regulation-making powers in the UK Bill under clause 52 and Schedule 9 rather than in a future Welsh Bill covering recycling policy as part of its wider environmental and sustainability agenda.</p>	<p>Accept</p> <p>As noted in Recommendation 3, the Welsh Government sought the inclusion of powers via the UK Bill as this provided the most suitable vehicle at the time, to enable us to meet potential EU Directive obligations. Whilst the terms of the UK’s exit currently mean we are no longer legally obligated to transpose the Directive or meet the required timescales, the Welsh Government still aims to match its ambitions in relation to single use plastic.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 15</p> <p>The Minister should explain why she is</p>	<p>Accept.</p> <p>I refer the Committee to my responses to recommendation 3 and 5.</p>

<p>taking regulation-making powers in the UK Bill without a clear indication of when she intends to use them and therefore why they could not be included in a Welsh Environmental Bill within the Sixth Senedd.</p>	<p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 16</p> <p>The Minister should seek an amendment to the UK Bill applying the affirmative procedure to the making of regulations under section 33ZB(10A) and 34ZB(8A) of the <i>Environmental Protection Act 1990</i>, as inserted by clause 66 of the UK Bill.</p>	<p>Reject</p> <p>Given this is an updating power (substituting one figure for another), negative procedure is deemed appropriate given its limited scope. The process of amending the penalty amounts requires secondary legislation and are subject to an appropriate assessment of impacts to ensure the fixed penalty notices are set at a suitable level.</p>
<p>Recommendation 17</p> <p>The Minister should explain:</p> <ul style="list-style-type: none"> ▪ why it is so important to include clause 70 as it applies to Wales in the UK Bill, rather than in the Clean Air Bill to be introduced in the Sixth Senedd; ▪ without these powers, when the Welsh Ministers would next be due to amend regulations relating to smoke control areas using their powers under the <i>Clean Air Act 1993</i>. 	<p>Accept</p> <p>In relation to air quality, specifically clause 70 and Schedule 12 to the UK Environment Bill, the rationale for using the UK Environment Bill is to bring about benefits for both manufactures and consumers as soon as possible. Businesses and manufacturers will benefit as the delay between obtaining a recommendation from the technical experts who recommend products for use and placing products on the market will be reduced; the adoption of published list will minimise the margin of error when recording and updating the lists of products which can be lawfully used; and a streamlined, more effective process will increase consumer choice as more products enter the market sooner. In addition to the economic benefits for manufacturers and increased consumer choice for the public, there will also be an environmental benefit as this improvement to the operation of the smoke control regime in Wales will make it easier to identify products which can be lawfully used in smoke control areas. The UK Environment Bill was judged to be the delivery vehicle which could bring about this improvement to the operation of the smoke control regime in Wales sooner than any other mechanism.</p> <p>Once clause 70 is enacted, the Welsh Ministers' power to make subordinate legislation to authorise approved fuels under section 20(6) of The Clean Air Act 1993 will be repealed, as will the Welsh Ministers' power to make subordinate legislation to exempt appliances/fireplaces under section 21(5) of the same</p>

	<p>Act. The duty on Welsh Ministers (as distinct from a power) introduced by the enactment of the Bill to create published lists will be an administrative function as opposed to a regulation-making/legislative function.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 18.</p> <p>The Minister should explain clearly why it is more appropriate to replace existing sections in the <i>Water Industry Act 1991</i> with regulation-making powers under that Act.</p>	<p>Accept</p> <p>Clause 75(3) in so far as it applies to Wales repeals section 37B and 37C of the Water Industry Act 1991. These provisions relate to Water Resource Management Plans and Drought Plans. Section 37B deals with the publication of, and representations on, those plans. This includes wide powers for the Welsh Ministers to make Regulations and Directions in respect of such plans. Section 37C then deals with the provisions of information between licensed water suppliers to provide the water undertakers.</p> <p>Section 37B includes a requirement for water companies to consult the Welsh Ministers and Natural Resources Wales before preparing a draft Water Resource Management of Drought Plan. However, a requirement to consult on draft plans is included in the Water Resources Management Plan Regulations 2007 and the Drought Plan Regulations 2005 and so the requirement to consult still exists despite the repeal of section 37B of the Act.</p> <p>Clause 75(7) of the Environment Bill inserts new Section 39F into the Water Industry Act 1991. This does not confer new powers on Ministers – it essentially re-enacts most of the powers currently contained in Section 37B to make regulations and directions and, instead of requiring consultation responses on plans to be sent to the Welsh Ministers it enables the regulations to provide for another system, for example to respond directly to the water company holding the consultation.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 19</p> <p>The Minister should explain the rationale for taking the powers of direction in proposed sections 39G(1) and 94C(8) of the <i>Water Industry Act 1991</i> (inserted by clauses 75 and 76 of the UK Bill) and explain how they will be used.</p>	<p>Accept</p> <p>Proposed Section 39G(1) says regulations made under section 39F may confer on the Minister power to make provision by directions. This does not give the Minister Direction making powers – it enables regulations to provide the Minister with powers of Direction.</p> <p>The power to enable the Minister to give Directions is narrow and specific and is limited to the procedure and detail for preparing and publishing a water resource management or drought plans. They largely replicate the powers of Direction</p>

	<p>currently conferred on the Minister by section 37 which the Bill repeals and do not provide additional powers.</p> <p>An example is the Water Resources Management Plan (Wales) Directions 2016 which direct the water companies to prepare a WRMP for 2020</p> <p>The procedure for preparing Drainage and Wastewater Management Plans is intended to broadly mirror the process applied to water resource management and drought plans, so section 94C(8) which applies to DWMP's replicates section 39G(1) which applies to the other plans.</p> <p>Any use of the powers of Direction will be prescribed the Regulations made under these provisions, and will form part of the regulatory framework. These will be consulted on before they are made. The powers of Direction will be used for detailed points of process or procedure as at present.</p> <p>Financial Implications – There are no financial implications as a result of accepting this recommendation.</p>
<p>Recommendation 20</p> <p>The Minister should explain: ▪ why she has not discussed clause 81 with UK Ministers given that it is a concurrent plus power that impacts on Wales; and ▪ why the Secretary of State's powers under this clause are more limited in Scotland than in Wales.</p>	<p>Accept</p> <p>Engagement at Official level has been sufficient to secure agreement on these clauses. Welsh Government and Defra officials have discussed both the standalone Clause 82 and concurrent Clause 81. The rationale for the territorial extent of Clause 81 was, if the devolved administrations consented, the substances and standards to be taken into account in assessing the chemical status of surface water or groundwater could be set on a UK basis to the extent of England, Wales, NI and the cross border river basin districts with Scotland. This would deliver two benefits; having uniform standards across these territories and avoiding the need for several sets of regulations.</p> <p>The Secretary of State's powers in Clause 81 are not more limited in Scotland than in Wales.</p> <p>Subsection (4) establishes the Secretary of State can only exercise the powers in this section to make provision which could be made by the Welsh Ministers or DAERA under their own powers in clauses 82 and 83 respectively, with their consent. As there is no comparable standalone clause for Scottish Ministers*, subsection (5) establishes a similar consent mechanism should the Secretary of State exercise the powers in a part of a Scottish <i>cross-border</i> river basin districts which are in Scotland. This is necessary as subsection (2), which establishes the relevant water quality legislation, includes both the Solway Tweed and Northumbria River Basin District (RBD) Regulations. These are cross-border regions which straddle the border between England and Scotland.</p>

	<p>Scottish Ministers did not want to take a cl. 82/83 type stand alone power in the Environment Bill as the Regulations for the non-cross-border area of Scotland (the 'Scotland RBD') is set out in Scottish primary legislation and they plan to create powers of their own in a Scottish Bill.</p>
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Financial Implications – There are no financial implications as a result of accepting this recommendation.