

**Julie James AS/MS**  
**Y Gweinidog Newid Hinsawdd**  
**Minister for Climate Change**



**Llywodraeth Cymru**  
**Welsh Government**

Llyr Gruffydd MS  
Chair Climate Change, Environment and Infrastructure Committee

6 August 2021

Dear Llyr,

Thank you for your letter of 20 July about the Legislative Consent Memorandum for the UK Government's Environment Bill. Please accept my apologies for not meeting your deadline.

I am pleased to provide additional information as requested in your letter.

Yours sincerely

A handwritten signature in blue ink that reads "Julie James". The signature is written in a cursive, flowing style.

**Julie James AS/MS**  
**Y Gweinidog Newid Hinsawdd**  
**Minister for Climate Change**

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:  
0300 0604400

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1SN

[Gohebiaeth.Julie.James@llyw.cymru](mailto:Gohebiaeth.Julie.James@llyw.cymru)  
[Correspondence.Julie.James@gov.Wales](mailto:Correspondence.Julie.James@gov.Wales)

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.

## Concurrent plus powers

### 1. Can you provide a detailed explanation of the circumstances under which you believe it would be appropriate for the Secretary of State to use the concurrent plus powers?

In certain cases, the powers being taken can be exercised in relation to Wales by either the Welsh Ministers or the Secretary of State with the consent of the Welsh Ministers. This is considered reasonable where a UK wide approach may be appropriate or most beneficial.

Clauses 50-51 (previously 49-50): Extended Producer Responsibility

Clauses 52-54 (previously 51-53): Resource Efficiency Information and Deposit Return Schemes

The Bill provides powers to bring in Extended Producer Responsibility and Deposit Return Schemes on a wide range of items. The items will be considered on a case by case basis and in conjunction with the other nations. The legislative approach taken will depend on the requirements of each scheme. For this reason it is necessary to maintain the flexibility to either:

- make our own regulations in Wales for a bespoke Welsh scheme;
- create 'mirror' legislation where common schemes in each nation are required, but we may wish to retain the ability to amend for certain aspects for Wales in the future or;
- allow the Secretary of State to legislate on our behalf, should a UK wide scheme be appropriate.

The powers taken under these clauses, together with the carve-out of schedule 7b of the Government of Wales Act 2006 achieves the required level of flexibility.

Although we are progressing Extended Producer Responsibility for packaging on a UK wide basis and a Deposit Return Scheme for drink containers covering Wales, England and Northern Ireland, we are planning to lay Welsh specific regulations in the Senedd which bring these regimes into force. This is being co-ordinated with the other nations of the UK to maintain that wider coverage. Scottish Government for Scotland and the UK Government for England and Northern Ireland will be bringing in their own "mirror" secondary legislation at the same time to enable this UK wide implementation. Importantly this approach will maintain Welsh Ministerial accountability, ensure there are Welsh regulations in place and give the opportunity to the Senedd to scrutinise the details of these reforms.

The approach taken for EPR packaging and DRS drinks is a balance of maintaining a level of Welsh ministerial accountability, the laying of Welsh secondary legislation, whilst at the same time being pragmatic on the use of resources we have and how working across the UK can maximise the outcomes for Wales.

Clause 85 (previously 83) Water - this aims to reflect how the powers were exercised previously. These clauses seek to address a gap left following UK exit from the EU in relation to priority substances. Those powers were previously exercised under section 2(2) but were also implemented via the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017. Welsh Ministers powers are exercised for river basin districts wholly in Wales but for the 2 cross border river basin districts (Dee and Severn) those powers are exercised jointly with the Secretary of State.

Clause 136 (previously 133) REACH - the approach restores the situation that existed for making or amending domestic enforcement arrangements for chemicals (a partly devolved, partly reserved policy area) when Welsh Ministers had European Communities Act (ECA) 1972 powers and were designated to make regulations under the ECA, or else they could consent to the SoS making them, and in this policy area they usually favoured the SoS option. Such regulations made by the SoS would not have previously received Senedd scrutiny.

**2. Can you set out the criteria the Welsh Minister would use when determining whether to consent to the use of concurrent plus powers?**

The criteria the Welsh Ministers would use when determining whether to consent to the use of concurrent powers is detailed in Annex A.

**3. You told us the Senedd would be given an opportunity to provide a view on whether the Welsh Ministers should consent to the use of concurrent plus powers. There is currently no formal process in place to facilitate this. How do you envisage this process working in practice?**

For UK Government Statutory Instruments under the Environment Act (once enacted) where the consent of the Welsh Ministers is required, I will write to the relevant policy committees to inform them of an intention to consent, and, where time allows, provide an opportunity for the Senedd to express a view before Ministers give consent. I will also lay written statements in the Senedd after the laying of the Statutory Instruments in Parliament.

**Part 1 – Environmental Governance**

**4. Can you clarify whether you intend to consult on detailed proposals for a new environmental governance system? If so, what timeline are you working towards?**

The Welsh Government's policy approach to Environmental Principles and Governance (EPG) has been developed collaboratively, starting with the 2019 *Environmental principles and governance in Wales post European Union exit* consultation.

The EPG Stakeholder Task Group was established to build on the outcomes of the consultation exercise. In November 2020, the Welsh Government accepted the Task Group's recommendations, including enshrining the four EU environmental principles in Welsh law and for a statutory Welsh oversight body. It is my intention to seek further input by publishing either a White Paper or a draft bill prior to introducing a Senedd Bill.

As I advised the Committee, we have an ambitious Programme for Government which will require new primary legislation in many areas. When I have a firm timetable in which to legislate I will be in a position to determine when the optimum time to further consult is.

**5. What work has the Welsh Government undertaken to date to develop proposals for statutory environmental targets?**

We are committed to setting environmental targets including further recycling targets and improving air quality. We are also setting National Milestones to measure progress towards the Well-being Goals. While targets have a role in achieving our environmental ambitions it is the underpinning action to deliver which is important.

As part of the National Milestones we are considering long term targets in key environmental areas like greenhouse gas emissions, Wales' ecological footprint, biological diversity and the energy efficiency of our homes.

As set out in our Circular Economy strategy, Beyond Recycling, we have committed to work with Local Authorities and other key partners to develop statutory recycling targets in line with our pathway to make Wales a zero waste nation and reaching 100% recycling by 2050.

We are also anticipating a new decadal global biodiversity framework with clear goals and targets at the Convention on Biological Diversity's COP15 later this year, which we are proactively influencing.

**6. Can you provide us with an update on this matter [cooperative working between the Office for Environmental Protection and a future environmental governance body for Wales]? If the Bill has been amended, can you confirm you are satisfied that it makes adequate provision for cooperative working?**

We successfully negotiated an amendment to the Bill to insert Clause 23(5)(b) which ensures the Office for Environmental Protection's (OEP) strategy must set out how the OEP intends to co-operate with devolved environmental governance bodies.

I am content this change will ensure adequate cooperative working where that is required.

**Part 3 – Waste and resource efficiency**

**7. Why is it necessary to introduce a Bill to ban single use plastics given you already have the power to do this?**

The Programme for Government (PfG) sets out the commitment to legislate to abolish the use of more commonly littered single use plastic (SUP) items in Wales. I am determined to do everything I can to deliver on this commitment. We have already consulted on plans to ban or restrict some of the top items (closed October last year) by bringing forward regulations to ban the sale of SUP items on the Welsh market using powers under section 140 of the Environmental Protection Act (EPA) 1990 and section 62 of the Regulatory Enforcement and Sanctions Act 2008 ('RESA'). Since then, the UK Parliament has passed the United Kingdom Internal Market Act (UKIMA) into law (December 2020) and this has impacted on our original proposals.

However, our view, as put forward in the ongoing legal challenge on this issue, is that UKIMA cannot have curtailed the Senedd's legislative competence; so as to prevent it from enacting provision banning or restricting the sale in Wales.

The introduction of a short, single issue Bill is therefore intended to give full effect to our proposals, delivering the PfG commitment.

**8. Can you provide further information on your proposals for a plastics Bill and the timeline you are working towards for its introduction?**

We are considering all the options available to enable the Senedd to bring in the proposed bans. A short, single issue Bill is one of them. We are also progressing work under the common frameworks provided for in UKIMA. When I have further certainty on these matters I will be able to inform the committee of the likely timescale. Please see answer 9 below for further details.

**9. Can you provide an update on your discussion with the UK Government in relation to the potential impact of the Internal Market Act on your proposals to ban single use plastics?**

Discussion between officials suggests there are some differences in the intentions of different administrations in the UK with regard to the introduction of bans on single use plastic items. The impact of UKIMA has already been to delay our plans while we considered the impact of that Act on our proposals. The continuing differences between governments will mean we may need to revise our ambitions for the bans or further delay their introduction in Wales.

There are ongoing discussions as to the operation of the 'common frameworks' provided for under section 10 of UKIMA. Provisions under section 10 allow a potential carving out of SUP restrictions from the ambit of the 'mutual recognition principle' altogether. The main advantage of this approach is the original regulations envisaged under section 140 EPA 1990 would have effect in relation to all SUP items sold in Wales. This would be regardless of which part of the UK they were produced or imported into and irrespective of whether those items could be sold in that part of the UK free from any prohibitions on their sale – meeting the full policy ambition with a degree of certainty for stakeholders.

However, although there is an ambition for the operation of the frameworks to be agreed by December, UKG officials have suggested getting agreement on the carve out is unlikely to be a quick process. The resulting carve out regulations would be subject to the agreement of the Defra Secretary of State, with provisions in UKIMA allowing this to be imposed whether or not Welsh Ministers agree to the final content.

There is also the possibility for a consensus approach, where we could work with UK Government and the Scottish Government administrations outside of any Common Framework Agreement. This approach would seek to build consensus on the items to be banned and the timescale for introducing them. As such, it would avoid breaching the mutual recognition principle. This would need to be worked through in more detail as different administrations are in differing stages of advancement with their plans. Formal agreement for this approach would be required from relevant Ministers across the UK. Under this approach, it may be necessary to revise our ambitions on SUPs, either in scope or timescale. It is also worth noting, such an approach would be contrary to that taken on other post-EU Exit policies where cooperation across the UK is needed, for which Common Frameworks have been the preferred means of resolving difficult pan-UK issues.

## **Part 5 – Water**

### **10. Can you explain the purpose of the provisions for Wales in Part 5 of the Bill, and how and when you intend to use the powers conferred on the Welsh Ministers in Part 5?**

The water industry was privatised in 1989 pursuant to the Water Act 1989. The regulatory regime for the privatised water industry is principally set out in the Water Industry Act 1991, and amendments made to that Act (notably in 2003 and 2014). A number of the clauses in this Bill seek to update requirements and reflect current practices e.g. providing information by electronic means.

#### Clause 78 (previously 77)

The process for preparing water resource management plans has also been in place since privatisation and needs to be updated and streamlined. Given the current and future pressures on our water resources there is a need to adapt to ensure the process is fit for purpose and can address the pressure on our water resources such as climate change, population growth, extreme weather and changes in land management practice. These clauses seek to improve water resources planning, which facilitates collaborative planning

and considers the needs of all water users, including the environment. There is no specific timetable for the introduction of subordinate legislation yet.

#### Clause 79 (previously 78)

Drainage and sewerage systems are a critical but often overlooked asset. The Water Strategy for Wales sets out a commitment for drainage and sewerage infrastructure for both waste water and surface water to be well managed and maintained in an integrated way, with sufficient capacity to manage the demand placed on it without causing pollution or sewer flooding to people's homes.

Drainage and sewerage management plans will place drainage and wastewater planning on a statutory footing to assess risks to the network and to understand network capacity. Water companies are currently working on these plans on a non-statutory basis to inform our thinking for the statutory process. These will be submitted in Autumn 2022. Regulations and Directions will then be considered for introduction Spring 2023 subject to the legislative timetable.

#### Clause 81, 82 & 83 (previously 79, 80 & 81)

These clauses update some of Ofwat's (the England and Wales independent economic regulator for the water industry) regulatory functions to reflect current practices and to formalise some existing practices. Clause 81 formalises the process for Ofwat to require information from water companies for the purpose of monitoring and strengthening the regulatory framework. Clause 82 applies to English water companies only. Clause 83 updates the requirement for service of documents to allow service to take place by electronic means.

#### Clause 84 – England only (previously 82)

#### Clause 85 & 86 (previously 83 & 84)

These clauses introduce measures to protect water quality in surface and groundwater, by enabling updates to the lists of priority substances that pose a threat to water bodies in line with the latest scientific knowledge, in the absence of powers under section 2(2) of the European Communities Act 1972. The clauses are drafted to reflect the current devolution settlement and how the powers were exercised previously. The powers were once exercised and implemented via the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017. Welsh Ministers powers are exercised for river basin districts wholly in Wales but there are 2 cross border river basin districts (Dee and Severn) where powers are exercised jointly with the Secretary of State. There is no specific timetable for the introduction of these Regulations yet.

#### Clauses 91-93 (previously 89 - 91)

Land drainage powers are necessary to allow for the revision and update of the methodology of calculating the split of income between special levies and drainage rates.

These clauses also makes provision to provide an alternative methodology for calculation of the value of chargeable land (agricultural land and buildings) to avoid the potential distortion of the apportionment calculation.

Fees are set for all Drainage Boards and administered by NRW in Wales, as such, 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.

## **11. Can you clarify whether and how the provisions in Part 5 interact with the regulatory framework for bathing water quality?**

The provisions in Part 5 will not impact the regulatory framework for bathing water quality however some of the provisions e.g. drainage and sewerage management plans will over time benefit our bathing waters and indeed our wider water environment as they will introduce a mechanism to ensure long term planning for ensuring drainage and sewerage assets are maintained, improved or replaced as necessary. This will include assets such as combined sewer overflows (CSOs).

### **Part 8 - REACH**

## **12. What assessment have you made of the potential risks of regulatory divergence from the EU in this area? Do you consider that the new UK REACH regime provides the same level of protection as the EU scheme it has replaced?**

As of the end of the implementation period, UK and EU REACH regulations were aligned as far as possible. Since then, decisions have been made under the EU REACH regime and a number of decisions will need to be taken under the UK replacement system. When considering action under UK REACH we are able to take the best ideas from both inside and outside the EU, and can take decisions that are fit for purpose in the GB context. As a result, divergence is considered on a case-by-case basis as decisions are taken.

The fundamental principles of REACH are enshrined in retained EU law and will remain protected from amendment using the powers contained in the Environment Bill. There is nothing to stop the UK replacement regime affording the same level of protection as the EU regime.

## **13. Can you provide an update on when a final Common Framework on chemicals and pesticides will be available?**

Provisional frameworks including the one covering chemicals and pesticides were agreed by the four governments of the UK at the end of the transition period. Work is ongoing to now develop these into final frameworks and the four governments are endeavouring to complete this by the end of 2021. As part of this phase of work, legislatures from across the UK are expected to have an opportunity to scrutinise frameworks. Discussions are ongoing between the four governments and their respective legislatures as to when this is likely to commence.

### **Financial Implications**

## **14. What work have you undertaken to assess the potential costs associated with the implementation of the provisions for Wales in the Bill?**

**Waste and Resource Efficiency:** The joint programmes developing DRS and EPR will include a regulatory impact assessment which sets out the costs of implementing and running these schemes. This will be refined as the preferred options emerge and the details of both schemes are worked up.

Broadly speaking, EPR and DRS should be cost neutral to public finances with the schemes looking to recover their costs through the fees and charges which will be payable by industry. This will include costs to cover regulatory oversight through compliance monitoring and enforcement. However, we do recognise there are start-up costs to both schemes, to

support this the HM Treasury budget on 11 March 2020 allocated £700,000 for initial ICT work on EPR for Packaging.

**Electronic waste tracking** – The policy development has been overseen by an internal Project Management Board with a core membership of officials from each of the four administrations.

In the March 2020 budget HM Treasury committed funding for the development of the UK wide waste tracking service up to FY23/24. In line with the polluter pays principle, once the mandatory electronic Waste Tracking Service goes live, the proposal is for the costs for ongoing operation and maintenance of the service and associated regulatory work to be met by the service users.

In 2020, as part of the GovTech Catalyst Challenge fund<sup>[1]</sup>, prototypes of an electronic waste tracking service were developed with two technology suppliers. This provided the groundwork for the development of the live service. The IT service development is supported by a user panel of around 1200 members representing waste producers, carriers, brokers, dealers, waste site operators, local authorities and regulators from across the UK. Members of this panel help to develop the service by participating in user research and testing the system as it is developed.

The Welsh Government will shortly be taking part in a UK-wide consultation on the introduction of mandatory electronic tracking of waste, including an impact assessment. One of the areas is around fees and charges in relation to the recovery of system related costs i.e. costs of establishing, operating or maintaining the IT element of the waste tracking service. NRW will review their current charging schemes and will be developing proposals for refreshed charging frameworks considering the introduction of electronic waste tracking and the new functions that will be conferred on them. NRW will consult on these proposals in due course.

**Charges for single use plastic items:** A study was undertaken by WRAP looking specifically at charges for single use plastic cups (SUPCs) and single use fibre based cups (SUFCS), which contain a plastic lining. The study looked at the quantity and weight of single use cups placed on the market in the UK during 2019. Estimates for volumes placed on the market in each devolved nation were also given, with Wales accounting for an estimated 4% of the estimated 1.0 billion units (+/- 9%) placed onto the UK market, with an estimated value of around £43m. (This number accounted for other types of fibre based single use packaging, such as that used for sandwiches).

The charges element was modelled, on the basis of a 25 pence charge per single-use item to be implemented via regulatory mechanisms similar to the Single Use Carrier bag charge. The charge is not redeemable. As such, the charges are retained by the 'sellers' and may help fund any additional costs of collection and management of these items. The charge is a gain to 'sellers' and a loss to consumers.

### Estimated impact

- The charge reduces the number of SUFCs placed on the market by 2.2 billion and reduces SUPCs by 725 million between 2022 and 2034.

---

<sup>[1]</sup> Department for Environment, Food & Rural Affairs – Waste management: smart tracking of waste (GovTech Catalyst) (2019): <https://www.gov.uk/government/collections/waste-management-smart-tracking-of-waste-govtech-catalyst>



- The sales market value of SUFCs reduces by £42million, and of SUPCs by £7million.
- These items are replaced by RUCs, with an additional 5.9million RUCs placed on the market in the place of SUFCs and an additional 2million RUCs in the place of SUPCs.
- With fewer SUFCs and SUPCS on the market, litter, disposal and collection is all reduced with waste management costs also decreased.

A number of other potential charging scenarios were modelled, including charges with recycling rates targets, together with EPR options and various take back schemes. It should be noted, a key finding from the report was a gap in data regarding the environmental impact of each alternative approach to charges also modelled. Further work would be required to ascertain whether a charging model is the best approach to deliver the environmental benefit.

Similar work on charges for other single use plastic items would be required.

**Air Quality:** With regard to clause 72 and Schedule 11 (on the National Air Quality Strategy), there are no immediate financial implications for the Welsh Government. In relation to clause 73 and Schedule 12 (relating to the smoke control regime in Wales), a preliminary assessment estimates costs will be minimal with no ongoing costs other than translation costs.

**Land Drainage:** The amendments to land drainage rates & levies strengthen the positions of Welsh Government and NRW who administer Internal Drainage Boards in Wales, thus providing a mechanism for applying the correct levies and drainage rates.

**Water:** With the exception of statutory Drainage and Wastewater Management Plans, there should be no additional costs as water companies already prepare statutory water resource management and drought plans.

The Bill gives the Welsh Ministers powers to require the water companies to produce joint water resource management plans but there are no current plans to use this power. If a need to do so became apparent, we would consider any resource implications with the water companies and regulators.

The water companies in Wales have already undertaken to prepare drainage and wastewater management plans on a non statutory basis by 2022. The costs of this are met via the price review mechanism undertaken by Ofwat every 5 years. There may be some additional costs to NRW and local authorities but these would be subject to the extent of their role in regulating and evaluating the plans which has not yet been determined. This will be a matter for more detailed consultation and discussion supported by a regulatory impact assessment.

**REACH:** There are no financial implications arising from the powers given to Ministers by the chemicals provisions as Ministers do not have to exercise them. The provisions do not create new obligations but give powers to amend the existing REACH regulations. When Ministers decide to exercise these powers an assessment of the financial implications would be made at the time. This could result in financial costs or savings.

### **Update on response from UK Government**

I am pleased to advise the Committee that my request for Third reading to be scheduled to allow more time for Senedd Committee scrutiny of the Consent Memorandum has been agreed.

The Legislative Consent Debate will now take place on 28 September.

Yours sincerely

A handwritten signature in blue ink that reads "Julie James". The signature is written in a cursive, flowing style.

**Julie James AS/MS**  
Y Gweinidog Newid Hinsawdd  
Minister for Climate Change

## Guidance for Welsh Government officials on concurrent powers

### 1. Concurrent Powers

A concurrent power is a power which can be exercised:

- (a) by Welsh Ministers, in relation to Wales; or
- (b) by UK Ministers in relation to Wales (for example, where UK Ministers are exercising powers in relation to the whole of the UK; or in relation to England and Wales).

UK Ministers should not normally exercise their powers in relation to Wales without the agreement of the Welsh Ministers, but (unless it is a concurrent plus power – see below) they are not legally required to obtain consent in order to legislate.

### 2. “Concurrent plus” powers

A “concurrent plus” power is a special type of concurrent power which can be exercised:

- (a) by the Welsh Ministers, in relation to Wales; or
- (b) **provided** that the Welsh Ministers consent, by UK Ministers in relation to Wales.

When the Welsh Ministers are considering whether to give consent to UK Ministers exercising a concurrent plus power, they are exercising a statutory function. If they do not consent, UK Ministers cannot exercise these powers in relation to Wales. An example of a “concurrent plus” power is:

#### [The Transmissible Spongiform Encephalopathies and Animal By-Products \(Amendment etc.\) \(EU Exit\) Regulations 2019](#)

Regulation (EC) No. 999/2001, which lays down the rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, provides that each Member State shall draw up a list of establishments, plants and operators which have been approved or registered in accordance with this regulation within its territory. As this reference in retained EU law will be deficient post exit, regulation 2(22) of the Transmissible Spongiform Encephalopathies and Animal By-Products (Amendment etc.) (EU Exit) Regulations 2019 provides for this to be exercised by the appropriate authority within its constituent nation. The appropriate authority includes the Secretary of State in respect of England and devolved administrations in respect of Wales and Scotland, and the NI Department of Agriculture, Environment and Rural Affairs in respect of Northern Ireland. It further provides that the Secretary of State may also be the appropriate authority for Wales, Scotland or Northern Ireland with the consent of the relevant devolved administration or NI Department.

This is concurrent plus because the substantive power is transferred to the Welsh Ministers in relation to Wales, the only way it can become exercisable by the UK Ministers in relation to Wales is if the Welsh Ministers give their statutory consent to the UK Ministers to do so. It is this statutory consent power of the Welsh Ministers that is the “plus” element of a “concurrent plus” power.

We use the term “concurrent powers” in this guidance to cover both concurrent and concurrent plus powers, except where we say otherwise.

### **3. Concurrent functions created by UK Brexit SIs and UK Brexit Bills**

The Government of Wales Act 2006 (GoWA) as amended requires Minister of the Crown consent for Senedd legislation modifying or removing concurrent powers.

The Government of Wales Act 2006 (Amendment) Order 2021 made under s109 of GoWA, commonly known as a “section 109 Order”, removed this requirement in relation to the removing of concurrent powers created in specific Brexit enactments only.

### **4. Exercise of concurrent functions**

Ministers have agreed the following principles for exercise of concurrent functions.

***Principle 1: There must be robust governance arrangements – i.e. clearly defined processes covering detailed policy negotiations at official level right through to oversight by Ministerial forums – to enable intergovernmental agreement about the exercise of functions.***

Work is underway to map intergovernmental machinery and assess its robustness with a view to agreeing a consistent set of principles which can apply across intergovernmental relations, frameworks and negotiations.

***Principle 2: If we are recommending consent for expediency in the absence of fully developed governance arrangements, or if we are not certain about how the functions will be exercised at the point when consent is sought, we should ensure that our consent is as narrowly defined as possible in terms of:***

- exactly what exercise of what functions we are consenting to;
- the period for which we are giving consent – preferably a short period, with a defined review mechanism, and without prejudice to longer term arrangements;
- the minimum requirements for ongoing intergovernmental engagement.

***Principle 3: Officials must be able to provide assurance to Ministers that they have:***

- carefully considered the longer term policy rationale and wider constitutional principle that the Welsh Ministers exercise functions in

relation to Wales, in the expectation that capacity issues are only material in the short term;

- evaluated the Wales only option and found it undesirable in this case;
- considered whether or not the governance arrangements are robust enough to protect Wales' interests;
- designed the best possible terms and process for giving consent which safeguards our position in the longer term (with clearly defined scope and duration as well as full involvement at all stages of policy development and implementation); and
- taken a consistent approach to decision making, so that the Welsh Government overall is acting coherently – at both portfolio level and more widely.

***Principle 4:*** A decision on whether to give consent for the UK Government to exercise a concurrent function in relation to Wales for the first time should be presented to the Counsel General and the portfolio Minister at the earliest possible stage in the process.

***Principle 5:*** Ministers should write to the relevant policy committees to inform them of an intention to consent to the UK Government exercising a concurrent plus legislative function in relation to Wales, and where time allows provide an opportunity for the Senedd to express a view before Ministers give consent.

***Principle 6:*** The same principles around intergovernmental working, Ministerial agreement and notifying the Senedd apply to both providing and withdrawing consent to exercise a concurrent function.

## **5. Removal of concurrent functions**

***Principle 7:*** Concurrent functions should be removed at the first opportunity.

The removal of concurrent functions by way of provisions in an Act of the Senedd trigger the requirement in GoWA to obtain Minister of the Crown consent. It is important, given their constitutional implications (i.e. they limit legislative competence) that opportunities to remove functions are taken as soon as possible.

## **6. Proposals for new concurrent powers**

***Principle 8:*** New concurrent functions should only be created in very exceptional circumstances and teams should ensure that a carve out will apply such that no consent will be required when removing them (to protect legislative competence), and that they are concurrent plus (to protect executive competence).

Given that the creation of concurrent powers confines the Senedd in exercising its legislative competence, and GoWA is constructed on the basis that the number of concurrent powers will reduce, rather than increase, we should avoid

seeking or agreeing to new concurrent powers wherever possible. Alternative solutions such as taking the powers for the Welsh Ministers only, implementing intergovernmental agreements through separate regulations, or composite instruments, should be sought.

Where a new concurrent power is proposed, Ministers (including the Counsel General **through whom all MAs proposing a new power of this sort must be routed**) will need assurance that there is a very clear and strong rationale for requiring the power to be created in this way. Welsh Government officials should also satisfy themselves that a carve out will apply to the power being created, to ensure that removal of the power, in an Act of the Senedd, would not trigger any consent requirement.