



Constitutional and Legislative  
Affairs Committee  
**Report on the Land Transaction  
Tax and Anti-avoidance of  
Devolved Taxes (Wales) Bill**

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December 2016



**National Assembly for Wales**  
Constitutional and Legislative Affairs Committee

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**National Assembly for Wales**  
Constitutional and Legislative Affairs Committee

# Constitutional and Legislative Affairs Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

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## Current Committee membership:



**Huw Irranca-Davies AM (Chair)**  
Welsh Labour  
Ogmore



**Dafydd Elis-Thomas AM**  
Independent  
Dwyfor Meirionnydd



**Nathan Gill AM**  
Independent  
North Wales



**Dai Lloyd AM**  
Plaid Cymru  
South Wales West



**David Melding AM**  
Welsh Conservative  
South Wales Central

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## Recommendations

**Recommendation 1.** We recommend that during the Stage 1 debate the Cabinet Secretary clarifies whether regulations made under section 34(6) that change a person's tax liability could also increase that person's liability as a consequence or impose a liability on a person not currently subject to a liability. If that is the case, the Cabinet Secretary should explain why the affirmative procedure is not being applied to the making of these regulations in such circumstances.. Page 19

**Recommendation 2.** We recommend that the Cabinet Secretary, during the Stage 1 debate clearly states what evidence, information or modelling he will use to make a judgement about whether the regulations have the effect of imposing or increasing a tax liability and accordingly about whether to apply the affirmative procedure. ....Page 22

**Recommendation 3.** We recommend that the Cabinet Secretary should table an amendment to the Bill to ensure that regulations made under section 76(1) in accordance with section 76(2) are subject to the affirmative procedure. .. Page 23

# 01. Introduction

## The Committee's remit

1. The remit of the **Constitutional and Legislative Affairs Committee** (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21<sup>1</sup> (with the exception of Standing Orders 21.8 to 21.11<sup>2</sup>) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced into the National Assembly, our approach is to consider:
  - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
  - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
  - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
  - any other matter we consider relevant to the quality of the legislation.

## Introduction of the Bill

3. On 12 September 2016, Mark Drakeford AM, the Cabinet Secretary for Finance and Local Government (the Cabinet Secretary) introduced the **Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill** (the Bill) and accompanying **Explanatory Memorandum**.<sup>3</sup>
4. The National Assembly's **Business Committee** referred the Bill to the **Finance Committee** on 12 July 2016 and, on **13 September 2016**, set a deadline of 22 December 2016 for reporting on its general principles.
5. On 13 September 2016, we received a copy of a **letter** to Simon Thomas AM, Chair of the Finance Committee from the Cabinet Secretary enclosing information on the policy intent for the subordinate legislation to be made under the Bill.<sup>4</sup> We also received, on 16 September 2016, a copy of a **letter** to him from the Llywydd (Presiding Officer) covering legislative competence and the consent of the Queen and Duke of Cornwall to the Bill under section 111(4) of the **Government of Wales Act 2006**.
6. We considered the Bill at our meeting on **3 October 2016**, taking evidence from the Cabinet Secretary. The Cabinet Secretary was accompanied by two Welsh Government officials. Following that meeting, the Cabinet Secretary **wrote** to the Chair on 18 October 2016 providing further information on the Bill. The Chair **wrote** to the Cabinet Secretary on 21 October 2016 asking for further information and his **response** was received on 1 November 2016.

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<sup>1</sup> National Assembly for Wales, *Standing Orders of the National Assembly for Wales, September 2016*

<sup>2</sup> This is the responsibility of the External Affairs and Additional Legislation Committee by resolution of the National Assembly in plenary on 14 September 2016

<sup>3</sup> Welsh Government, *Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill – Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, September 2016

<sup>4</sup> Welsh Government, *Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill, Policy intent for subordinate legislation to be made under this Bill*, September 2016

## Background

7. The Explanatory Memorandum accompanying the Bill states that:

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“... this Bill will introduce a “Land Transaction Tax” (LTT), which will replace the UK Stamp Duty Land Tax (SDLT) in Wales from April 2018, as well as measures to tackle devolved tax avoidance. The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill (“the Bill”) is the second of three bills to establish devolved tax arrangements in Wales. This legislation is interlinked with the Tax Collection and Management (Wales) Act 2016 (TCM (Wales) Act 2016) which provides the powers and duties to collect the tax, and will be followed by a Bill to establish Landfill Disposals Tax (LDT).”<sup>5</sup>

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8. The Bill sets out:

- the key principles of LTT, such as the types of transactions that will incur a charge to LTT and the person liable to pay LTT;
- the procedure for setting tax rates and bands;
- how the tax will be calculated and what reliefs may apply;
- specific measures to tackle devolved tax avoidance;
- the application of the Bill in relation to leases;
- the specific provisions applicable to a variety of persons and bodies in respect of LTT;
- the provision for making a land transaction return and for the payment of the tax; and
- duties on taxpayers to make payments and pay penalties and interest in certain circumstances.<sup>6</sup>

9. Section 16 of the *Wales Act 2014* provides for SDLT to be dis-applied in Wales and for this provision to take effect in relation to land transactions on a date to be appointed by HM Treasury. The Explanatory Memorandum adds:

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“If the Welsh Ministers chose not to implement a form of tax on transactions involving interests in land in Wales, then the Welsh Government would not receive the receipts from this tax, which have varied from £100 million to £235 million per annum. This would have a significant impact on the resources available to fund public services in Wales.

The intended effect of the legislation is to provide a replacement for SDLT so that public services in Wales can continue to receive the benefit of the revenues raised by that tax. In line with the views of stakeholders, the legislation will broadly be consistent with SDLT, providing stability and clarity to businesses and the property market.”<sup>7</sup>

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<sup>5</sup> Explanatory Memorandum, paragraph 1.1

<sup>6</sup> Explanatory Memorandum, paragraph 1.2

<sup>7</sup> Explanatory Memorandum, paragraphs 3.2-3.3



**10.** According to the Explanatory Memorandum, the Bill is being introduced now to allow the Welsh Revenue Authority (being established under the *Wales Act 2014*) to set up the new systems needed for the collection and management of LTT by April 2018. This is the 'go-live' date for replacing SDLT with LTT.<sup>8</sup>

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<sup>8</sup> Explanatory Memorandum, paragraph 3.5

## 02. Legislative competence

**11.** The Explanatory Memorandum states that the National Assembly has the legislative competence to make the provisions in the Bill by virtue of paragraph 16A (Taxation) of Schedule 7 to the *Government of Wales Act 2006*. It adds that:

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“Section 116A (4) of GOWA 2006 provides that a tax specified in Part 4A of GOWA 2006 is defined as a devolved tax. Part 4A gives the Assembly legislative competence to make provision in relation to a tax on transactions involving an interest in land (*section 116L*), and a tax on disposals to landfill (*section 116N*).”<sup>9</sup>

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**12.** The Explanatory Memorandum notes that the *Human Rights Act 1998* has been considered by the Welsh Government as part of its equality impact assessment.<sup>10</sup> It also indicates the Welsh Government has conducted an analysis of the Bill against the ECHR—in particular Articles 1, 6, 8 and 14—and found that it does not contain provisions that are incompatible with the convention.<sup>11</sup>

**13.** The Llywydd **wrote** to the Chair of the Finance Committee noting that the provisions of a Bill must be compliant with rights set out in the *Human Rights Act 1998* (and taken from the ECHR). She suggested that the general anti-avoidance provisions (GAAR) of the Bill (set out in section 65) merit in-depth scrutiny in the light of the requirements of Article 1 of Protocol 1 of the convention.

**14.** In terms of the legislative competence available to make the Bill, the Cabinet Secretary told us that:

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“The Wales Act 2014 amended the Government of Wales Act 2006 to provide the Assembly with the legislative competence to make provision in relation to devolved taxes, and that includes a tax on transactions involving interests in land. That’s what this Bill therefore is, that’s where its competence derived, and so it falls under section 108 and Schedule 7 to the Government of Wales Act 2006, as amended. So, I am confident that it is entirely within the competence of the National Assembly to bring forward this Bill and to see it progress, hopefully, through the Assembly. I have had discussions about the Bill with UK Ministers at the Treasury, but it’s generally been about the substance of the Bill rather than the competence issue. Officials will have had discussions with the Wales Office on competence, and no issues in relation to competence have been raised in any of those conversations.”<sup>12</sup>

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**15.** We also sought to explore with the Cabinet Secretary human rights aspects of the Bill in the context of:

- Article 6: the right to a fair trial;
- Article 8: the right to respect for family and home; and
- Article 1 of Protocol 1: protection of possession.

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<sup>9</sup> Explanatory Memorandum, paragraph 2.3

<sup>10</sup> Explanatory Memorandum, paragraph 9.24

<sup>11</sup> Explanatory Memorandum, paragraphs 9.26-9.29

<sup>12</sup> Constitutional and Legislative Affairs (CLA) Committee, 3 October 2016, RoP [7]

**16.** In terms of Article 6, the Cabinet Secretary said:

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“I think it’s fair to say that case law suggests that the courts are relatively reluctant to get drawn into tax law in this area, but, nevertheless, I am satisfied that the Bill is consistent with article 6 of the human rights convention, because, if you are an individual who is not satisfied with the determination that the Welsh Revenue Authority has made, you have a right to require the revenue authority itself to carry out a review of its determination. If you are not satisfied with the review that the authority itself has carried out, you have a right of appeal to the first-tier tribunal, and that right of appeal to the first-tier tribunal carries with it all the other subsequent rights to appeal that a first-tier tribunal would normally have at its disposal. So, as an individual, I think there is a fair and proportionate balance struck in the Bill in relation to article 6.”<sup>13</sup>

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**17.** He also noted that compliance had been secured in relation to Article 6 by ensuring that when an anti-avoidance case came before a first-tier tribunal, the Bill had been constructed so that it is now not for the individual to prove that they have not acted in a way that avoids tax; it is for the Welsh Revenue Authority to prove that they have.<sup>14</sup>

**18.** The Cabinet Secretary told us that there is nothing in the Bill that is directly relevant to Article 8 because:

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“... article 8, investigatory and enforcement powers, were all constructed in the Tax Collection and Management (Wales) Act 2016. All the powers that will be used will flow from that Act, which was scrutinised in front of this committee and the whole Assembly, which received the Royal Assent, and was not challenged by the Attorney-General ... And, so, we rely on that for its compliance there.”<sup>15</sup>

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**19.** As regards Article 1 of Protocol 1 the Cabinet Secretary told us:

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“... this requires that a fair balance is struck between the needs of a community and the obligations placed on the individual, and, of course, in taxation, that is exactly what we are doing. We are deciding that, collectively, we will act to collect money from all of us to pursue important collective purposes. The test that you have to pass in front of a tribunal on this is that the tribunal can only find against the legislature if it finds that the law was devoid of reasonable foundation, and that’s a pretty high test...

And, as this is a Bill designed entirely to make sure that the revenue stream that exists today for important public services in Wales goes on being available beyond April 2018, then I think we would pass that test without undue difficulty.”<sup>16</sup>

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<sup>13</sup> CLA Committee, 3 October 2016, RoP [98]

<sup>14</sup> CLA Committee, 3 October 2016, RoP [101]

<sup>15</sup> CLA Committee, 3 October 2016, RoP [102]

<sup>16</sup> CLA Committee, 3 October 2016, RoP [102]

## Our view

- 20.** We note that no issues have been raised with the Cabinet Secretary by the UK Government regarding the National Assembly's ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.
- 21.** We note that the Explanatory Memorandum includes some information on how human rights issues impact on the Bill. While some of the issues could have been explained further, we nevertheless acknowledge that the Welsh Government has sought to address this issue in the Explanatory Memorandum.
- 22.** We have considered the Cabinet Secretary's responses to the questions we posed in relation to the Bill's compatibility with human rights and consider the approach adopted to be reasonable in relation to the specific issues raised.

## 03. General observations

### Approach to the Bill

**23.** Given that the Bill covers complex financial matters, we asked the Cabinet Secretary how he had approached ensuring that it was as clear, simple and transparent as possible. He acknowledged that there were often tensions to resolve on such issues, and added:

“We have been very keen to provide a Bill that is clear, but, sometimes, clarity, involving putting things on the face of the Bill so that they are there for easy study, is in a bit of tension with simplicity. Because, the more detail you provide, inevitably, you add to the length of a Bill—it’s a very long Bill, and it is, as you said, technical in nature.”<sup>17</sup>

**24.** The Cabinet Secretary told us how he’d attempted to address these issues:

“First of all, one of the reasons for the Bill being the length it is, is that it brings together in one place legislation that had grown up, in the nature of things, through amendments to a variety of different Acts of Parliament. Where you would have to go and search in a number of different places to find the relevant law, we bring it all together in one place, and we try to make it more consistent in the way that the Bill is laid out, making it easier for the user. In a relatively limited number of places, we’ve tried to simplify some existing procedure. For example, we introduce a single targeted anti-avoidance rule, which brings together in the one place a series of previously single rules, dealing with known examples of previous tax avoidance. But I suppose the real way in which we have tried to pursue those objectives is by making this Bill recognisable to those practitioners who practise under the current legislation.”<sup>18</sup>

**25.** He also explained how the Bill had been carefully designed with the help of known experts in the field and commented on how the Welsh Government had been keen to ensure a smooth transition to the new system.<sup>19</sup> He added that:

“... we published the Bill back in July in a draft form, so that practitioners could have some comfort that they would see that we have responded as much as we can to that wish. As a result, we are inevitably drawing on existing legislation: that’s SDLT or stamp duty land tax in England and Wales; the Scottish equivalent—Scotland being a couple of years ahead of us around this track—is land and buildings transaction tax. We draw on both of those recognisable forms of legislation to try and make the best legislation we can for Wales.”<sup>20</sup>

**26.** The Cabinet Secretary also told us that:

“... we are legislating in a new area for us here. What we’ve done is try to learn from experiences they’ve had in Scotland already ... In my view, what we’re

<sup>17</sup> CLA Committee, 3 October 2016, RoP [9]

<sup>18</sup> CLA Committee, 3 October 2016, RoP [10]

<sup>19</sup> CLA Committee, 3 October 2016, RoP [12]

<sup>20</sup> CLA Committee, 3 October 2016, RoP [13]

trying to do is have some sort of balance between the powers the Government will have to use, if we are going to tax and collect taxes to do a lot of important things in Wales, and, on the other hand, being responsible for the rights that people have as individuals. That is why we have tried to build this Bill in this way.”<sup>21</sup>

## Derivation from existing legislation

27. Standing Order 26.6B<sup>22</sup> says:

“Where provisions of the Bill are derived from existing primary legislation, whether for the purposes of amendment or consolidation, the Explanatory Memorandum must be accompanied by a table of derivations that explain clearly how the Bill relates to the existing legal framework.”

28. The Welsh Government states in the Explanatory Memorandum:

“The requirement in Standing Order 26.6B for a Table of Derivations is not applicable to this Bill as the Bill is a standalone piece of legislation and does not derive from existing primary legislation for the purposes of amendment or consolidation.”

29. The Explanatory Memorandum also states that:

“In preparing for the Bill, an analysis of existing UK SDLT legislation and Scottish LBT<sup>23</sup> legislation has been undertaken. The Welsh Ministers have agreed, in line with the views of stakeholders, that LTT should broadly replicate SDLT processes and systems, unless there is a reason to change the existing provisions to improve efficiency, effectiveness or focus on Welsh needs and priorities. It is recognised that this will provide stability, and that the processes and procedures used to collect and manage SDLT are commonly understood by taxpayers and their agents.”<sup>23</sup>

30. In his letter to us dated 1 November 2016, the Cabinet Secretary included a table (in Annex 1) comparing powers, provisions and procedures within the UK SDLT legislation and the *Land and Buildings Transactions Tax (Scotland) Act 2013*.

## Balance between what is on the face of the Bill and what is left to subordinate legislation

31. The issue of the balance between what is on the face of the Bill and what is left to subordinate legislation such as regulations is a key consideration for us. When questioned on this issue the Cabinet Secretary told us:

“... the balance we are trying to strike in that regard is between wanting the system on day one to be close to and recognisable to practitioners, so that there is a smooth transition, but to use regulation-making powers to allow for policy

<sup>21</sup> CLA Committee, 3 October 2016, RoP [78]

<sup>22</sup> Of the National Assembly’s Standing Orders

<sup>23</sup> Explanatory Memorandum, paragraph 3.8

divergence in the future. So, you need some flexibility built into the Bill because the early days are days when we've got to make sure that the people are able to operate effectively in this area. In the future, decisions will be made differently on the other side of the border; future Welsh Ministers may wish to pursue different policy objectives through this tax, and the regulation-making powers are there to allow for the development of difference as time goes on."<sup>24</sup>

## Use of affirmative and negative procedure in the Bill

**32.** Chapter 4 of this report looks at the specific procedure attached to individual powers for the Welsh Ministers to make regulations. However, the Cabinet Secretary provided a general overview of the approach adopted in response to our questioning about the use of the affirmative procedure in the Bill. He said:

"... by using the powers of this Bill, it will be possible for Welsh Government to increase the tax liability that taxpayers will have to meet in the future. And my judgment was that that is a significant use of power and that the National Assembly ought to have additional scrutiny arrangements to make sure, in a check and balance sort of way, that that power is being used reasonably.

Where powers can be used in the Bill only to lower the amount of tax that is paid, we have opted generally for the negative procedure, but where the amount that someone would have to find is increased, we think it's right that the National Assembly should be able to examine that and decide whether that's reasonable."<sup>25</sup>

**33.** In his **letter** to us of 1 November 2016, the Cabinet Secretary provided a comparison between the procedure applied in relation to equivalent UK and Scottish legislation. He also reiterated the approach:

"I have determined the appropriate subordinate legislation procedure by considering whether the regulations could have an effect on an individual's tax liability. Where the regulations make a substantive difference to the amount of tax for which buyers are liable (i.e. by imposing or increasing a charge to tax), they are subject to the affirmative or provisional affirmative procedure. Powers to make regulations as to matters which, by contrast, do not substantively affect the charge to tax and are technical or mechanical are subject to the negative procedure."

## The use of the super-affirmative

**34.** We asked the Cabinet Secretary why use was not made of the super-affirmative procedure in the Bill and for example in relation to the powers to make regulations under section 30(6).<sup>26</sup> The Cabinet Secretary replied:

<sup>24</sup> CLA Committee, 3 October 2016, RoP [97]

<sup>25</sup> CLA Committee, 3 October 2016, RoP [32-33]

<sup>26</sup> Section 30(6) of the Bill gives Welsh Ministers the power to introduce, by regulations subject to the affirmative procedure, new reliefs, modify existing reliefs, remove a relief entirely, or modify section 31 (Reliefs: anti-avoidance) to reflect policy changes and/or the economic and property markets conditions.

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“I don’t think the powers that we are talking about here will require the additional level of consultation, and so on, that the superaffirmative procedure expects.

In relation to the specific example, which I think is introducing new reliefs, if I’ve got that section right, if you think of the test that I just set out, if you’re introducing a new relief then people can only benefit from it in the sense that that can only be tax-reduced. You might argue that, if we were to amend a relief so that people became liable for more tax, or take a relief away so that you had no relief from tax at all, that that would require a higher level of scrutiny.

... in general, I don’t think the superaffirmative procedure would be justified. In relation to the issue of reliefs, if the committee were to hear evidence or to give further thought to this, then I would look carefully at what the committee had to say.”<sup>27</sup>

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### A new procedure – the provisional affirmative

**35.** The Bill uses a procedure (set out in section 25) for scrutinising subordinate legislation that has not been used previously in Welsh Government Bills: the provisional affirmative procedure. The Explanatory Memorandum describes it as enabling:

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“... regulations to have effect from the date they are laid in the National Assembly. However, the regulations must be approved by the Assembly within 28 days of being laid if they are to have permanent effect.”<sup>28</sup>

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**36.** We explored with the Cabinet Secretary his reasons for adopting this new approach. He told us that because the National Assembly is a revenue-raising authority for the first time, it needs to act quickly in changing rates and bands, adding that the purpose of the procedure was:

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“... to prevent people from trying to act in the short term to avoid the tax that they would otherwise have to pay ... If we were to alter rates and bands, we do not want people trying to arrange their affairs, bringing them forward or postponing them to try and take advantage of the new arrangements.”<sup>29</sup>

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**37.** The Cabinet Secretary also told us that in the House of Commons an annual Finance Bill would be used but that this device is not available to the National Assembly. He noted that the approach was taken from Scottish legislation and that:

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“... it is a proper balance between the need to be able to ensure that taxes that are properly needing to be collected are collected while giving the Assembly the opportunity to confirm or deny that decision.”<sup>30</sup>

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<sup>27</sup> CLA Committee, 3 October 2016, RoP [35-37]

<sup>28</sup> Explanatory Memorandum, page 132

<sup>29</sup> CLA Committee, 3 October 2016, RoP [16]

<sup>30</sup> CLA Committee, 3 October 2016, RoP [22]



**38.** When questioned about protection for the taxpayer if the National Assembly decided not to approve regulations, the Cabinet Secretary said:

“The Bill specifically makes provision for that. If someone has paid more tax than the Assembly legitimates, then the Bill provides for the Government to repay that tax to the individual. So, the risks are all borne by the Government. The individual is protected. If they’ve had any advantage in the meantime, then they keep it. If they’ve had any disadvantage, they get reimbursed. The individual is protected from the risks of the provisional affirmative procedure.”<sup>31</sup>

### Her Majesty’s and Duke of Cornwall’s consent

**39.** In accordance with section 111(4) of the *Government of Wales Act 2006* and Standing Order 26.67, the Assembly may only pass a Bill if, where the consent of Her Majesty or the Duke of Cornwall is required, such consent has been signified by a member of the government at a meeting of the Assembly. The Presiding Officer raised the issue of consent in correspondence with the Chair of the Finance Committee, copied to us. When we asked the Cabinet Secretary whether consents were required, he told us:

“... the sovereign is already liable to pay tax on her private estates as a result of the Crown Private Estates Act 1862, placed on the statute book by Chancellor Gladstone, as a result, I believe, of the transfer of Balmoral from the ownership of Prince Albert to Queen Victoria. And, using that important precedent, there’s nothing in this Bill that upsets that longstanding position, and, as a result, we have come to the conclusion that consents are not required.”<sup>32</sup>

### Our view

**40.** This Bill covers difficult and complex issues. We therefore welcome the approach that the Cabinet Secretary has adopted both in the early involvement of stakeholders and practitioners and by seeking to provide clarity and transparency in the drafting the Bill, including the element of consolidation that has been introduced.

**41.** We have noted that the Bill draws on existing primary legislation from England and Scotland, particularly in light of comments made by the Cabinet Secretary (see paragraph 24 above) and in the Explanatory Memorandum (see paragraph 29 above). This may or may not fall within the scope of Standing Order 26.6B. Either way, we think that the Explanatory Memorandum could have included the Annex provided by the Cabinet Secretary in his letter to us of 1 November 2016. Given it is likely that it would have been prepared in parallel with the Bill, we do not consider that it would have been onerous to include it. It would have increased transparency and helped stakeholders and practitioners in their understanding of the Bill.

**42.** We are content with the balance that has been achieved between what is included on the face of the Bill and what is left to subordinate legislation.

**43.** We have also noted the approach, outlined in paragraphs 32-33 above, that the Cabinet Secretary has taken in determining whether to apply the negative or affirmative procedure to subordinate legislation under the Bill. We consider this to be a sensible and logical approach. As such,

<sup>31</sup> CLA Committee, 3 October 2016, RoP [24]

<sup>32</sup> CLA Committee, 3 October 2016, RoP [110]

we are largely content that procedures chosen in relation to the making of subordinate legislation are reasonable and proportionate.

**44.** In reaching this view, we have also given further thought to whether the super-affirmative procedure would be appropriate for some subordinate legislation making powers. We accept the views of the Cabinet Secretary on this issue and are therefore content that no such procedures are appropriate.

**45.** We have also noted the introduction of a new procedure—the provisional affirmative—to the making of subordinate legislation. We recognise that the procedure has been adopted to reflect that the National Assembly, by virtue of the *Wales Act 2014*, has become a revenue-raising authority. We believe that the new procedure is sensible in principle. We welcome the provisions in the Bill for the repayment of tax in circumstances where the regulations cease to have effect following their rejection by the National Assembly.

**46.** We comment separately in Chapter 4 on the use of this procedure at various places in the Bill.

## 04. Observations on specific powers to make subordinate legislation

### Background

**47.** The Bill includes 33 powers permitting the Welsh Ministers to make subordinate legislation (mainly in the form of regulations). The rationale for the use of these powers and for the parliamentary procedure attached to them is contained in Chapter 5 of the Welsh Government’s Explanatory Memorandum.

**48.** Of the 33 powers to make subordinate legislation:

- 19 are subject to the affirmative procedure;
- 9 are subject to the negative procedure;
- 3 are subject to the affirmative procedure followed by the provisional affirmative procedure; and
- 1 is subject to the negative or affirmative procedure dependent on the judgement of the Welsh Ministers.

**49.** Our scrutiny session focused on those powers of most interest to us and our consideration below focuses on the use of the provisional affirmative procedure as a new procedure and specific matters that we wish to draw to the attention of the National Assembly.

### Part 3 – Calculation of Tax and Reliefs

**50.** Part 3 makes provision for how LTT is to be calculated and provides that the Welsh Ministers can by regulations specify tax bands and the percentage tax rate for each band. There must be tax bands and tax rates for both residential and non-residential transactions and for these different types of transactions the regulations must specify a zero rate band and at least two or more tax bands above the zero rate band, together with the tax rate for each such band.

### Section 24 – Regulations specifying tax bands and tax rates

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**51.** Section 24(1) of the Bill places the Welsh Ministers under a duty to set in regulations the initial rates and bands applicable to LTT. The Welsh Government’s statement of policy intent notes that:

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“The ability to set and vary tax rates and bands is an integral feature of the tax regime. The power places the Welsh Ministers under a duty to set the initial rates and bands applicable to LTT and provides Welsh Ministers with the power to vary tax rates and bands in the future. This power will enable the Welsh Ministers to set and vary the tax rates and bands promptly to reflect fluctuations in the wider economy or property market conditions, as well as wider policy changes.”<sup>33</sup>

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**52.** The first set of regulations made under section 24 will be subject to the affirmative procedure. Subsequent changes to the rates and bands will be given effect through further regulations, which will be subject to the provisional affirmative procedure. This procedure requires that changes which

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<sup>33</sup> Statement of policy intent, page 3

are made to tax rates and tax bands by those regulations will only have effect for 28 days (as defined by section 25(2)) unless the regulations are approved by a resolution of the Assembly within that period. If the Assembly resolves not to approve those regulations within that 28 day period, the regulations will cease to have effect on the day on which the Assembly resolves not to approve them.

**53.** The Explanatory Memorandum explains why this approach is being adopted:

“The affirmative procedure is prescribed for the first regulations made under this power because the regulation will be used to prescribe the amount of tax chargeable in respect of residential and non-residential property transactions.

Second and subsequent regulations would be subject to the provisional affirmative procedure. The provisional affirmative procedure will minimise forestalling and provide market certainty.”<sup>34</sup>

**54.** The statement of policy intent notes that the “procedure will permit the Welsh Ministers to vary rates and bands at short notice on a provisional basis, while maintaining the Assembly’s role in approving any permanent variation”. It adds that the power is similar to that in section 24(1) of the *Land and Buildings Transaction Tax (Scotland) Act 2013*.<sup>35</sup>

**55.** We explored with the Cabinet Secretary his reasons for adopting this new approach. He told us that the procedure was being used:

“... to prevent people from trying to act in the short term to avoid the tax that they would otherwise have to pay... If we were to alter rates and bands, we do not want people trying to arrange their affairs, bringing them forward or postponing them to try and take advantage of the new arrangements.”<sup>36</sup>

**56.** When questioned about protection for the taxpayer if the National Assembly decided not to approve regulations, the Cabinet Secretary said:

“The Bill specifically makes provision for that. If someone has paid more tax than the Assembly legitimates, then the Bill provides for the Government to repay that tax to the individual. So, the risks are all borne by the Government. The individual is protected. If they’ve had any advantage in the meantime, then they keep it. If they’ve had any disadvantage, they get reimbursed. The individual is protected from the risks of the provisional affirmative procedure.”<sup>37</sup>

**57.** The Cabinet Secretary also explained that the need to “minimise forestalling and provide market certainty” was aimed at ensuring significant revenue was not lost, a point he illustrated by reference to a practical example of an experience in Scotland related to high value properties.<sup>38</sup>

## **Our view**

**58.** We have already noted that in principle the provisional affirmative is an appropriate procedural mechanism to be used in the Bill.

<sup>34</sup> Explanatory Memorandum, Chapter 5, page 29

<sup>35</sup> Statement of policy intent, page 4

<sup>36</sup> CLA Committee, 3 October 2016, RoP [16]

<sup>37</sup> CLA Committee, 3 October 2016, RoP [28]

<sup>38</sup> CLA Committee, 3 October 2016, RoP [26]

59. We are content with its use in relation to regulations made under section 24(6) of the Bill.

### Section 34 – Unit trust schemes

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60. Section 34 provides that a unit trust scheme (as defined in subsection (5)) is treated for the purposes of LTT as if the trustees were a company, and the rights of the unit holders were shares in the company, except in relation to group relief, reconstruction and acquisition relief.

61. Section 34(6) gives the Welsh Ministers the power, by regulations, to specify that a particular type of unit trust scheme falling within the definition provided by section 34(5) is not to be treated as such a scheme for the purpose of this Bill. This power is considered necessary to enable changes to be made where types of unit trust schemes emerge, or where it becomes inappropriate for the provisions on unit trust schemes to apply.

62. The regulations are subject to the negative procedure because they “will provide technical detail as to the application of the Bill to certain types of unit trust schemes”.<sup>39</sup> The Welsh Government’s statement of policy intent indicates that a similar power is provided for in section 101(5) of the *Finance Act 2003* and section 45(6) of the *Land and Buildings Transaction Tax (Scotland) Act 2013*.<sup>40</sup>

63. The Cabinet Secretary explained why the negative procedure was chosen:

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“This power can only be used to reduce the amount of tax taken, and that’s the principle we’ve adopted. If you’re acting so that the liabilities on taxpayers are reduced—the negative procedure. The unit trust schemes is a very good example of just that.”<sup>41</sup>

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64. In his **letter** to us of 18 October 2016, the Cabinet Secretary told us:

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“In my evidence to the Committee (at paragraph 38-39), I noted that regulations made under this section could only have the effect of reducing tax liability. I think it is important to clarify that the regulations made under this section could nevertheless have the effect of changing the person who is liable for that tax. While the quantum of tax taken will not be increased, liability for individuals and companies could alter as they would be liable for the tax rather than the trustees of the unit trust.”

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### Our view

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65. We note the Cabinet Secretary’s comments. In particular, we note his view that the regulations could have the effect of changing the person who is liable for the tax. We are not clear, however, whether such a change could increase the tax liability of that individual person, or impose a liability on a person not currently subject to a liability, and accordingly whether, on the basis of the Cabinet Secretary’s own principles, the affirmative procedure should apply.

**Recommendation 1.** We recommend that during the Stage 1 debate the Cabinet Secretary clarifies whether regulations made under section 34(6) that change a person’s tax liability could also increase that person’s liability as a consequence or impose a

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<sup>39</sup> Explanatory Memorandum, Chapter 5, page 30

<sup>40</sup> Statement of policy intent, page 5

<sup>41</sup> CLA Committee, 3 October 2016, RoP [39]

liability on a person not currently subject to a liability. If that is the case, the Cabinet Secretary should explain why the affirmative procedure is not being applied to the making of these regulations in such circumstances.

## Part 8 – Interpretation and final provisions

**66.** This Part contains provisions on subordinate legislation powers and commencement as well as other final and ancillary provisions.

### Section 76 – Power to make consequential etc. provision

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**67.** Section 76(1) provides that Welsh Ministers may, by regulations, make such incidental, consequential, supplemental, transitional, transitory or saving provision as they think appropriate for the purpose of, or in connection with, or for giving full effect to, any provision made by or under this Act.

**68.** This is subject to the negative procedure where regulations are limited to giving effect to the provisions in the Bill. However, where the Welsh Ministers form the opinion that the effect of the regulations may lead to the imposition or an increase in an individual’s liability to tax, the affirmative procedure is prescribed.

**69.** The Explanatory Memorandum says that:

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“The negative procedure is prescribed where regulations are limited to giving effect to the provisions in the Bill. However, where the Welsh Ministers form the opinion that the effect of the regulations may lead to the imposition or an increase in an individual’s liability to tax, the affirmative procedure is prescribed.”<sup>42</sup>

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**70.** The statement of policy intent says:

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“This power would only be used for such matters as making changes to other legislation needed in consequence of the provisions of this Bill, or to deal with unforeseen details arising out of the implementation of the new system.

Transitional, saving and consequential elements are designed to cater for the process of moving from one land transaction tax regime to another, so that the process is as “seamless” as possible and that the new law operates as intended.

Similar powers are provided for in section 109 Finance Act 2003 and section 67 LBTT(S)A 2013.”<sup>43</sup>

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**71.** Section 76(2) permits regulations made under section 76(1) to amend primary legislation. Such regulations would be subject to the negative procedure.

**72.** We explored with the Cabinet Secretary how decisions would be made in determining which procedure to use when exercising powers in make regulations under section 76(1). He told us:

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<sup>42</sup> Explanatory Memorandum, page 33

<sup>43</sup> Statement of policy intent, page 7

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“... the scope of regulations under section 76 is limited to giving effect to incidental, consequential or supplementary changes required as a result of the Bill becoming law. The power cannot be used to make regulations containing new substantive provisions, or to make fundamental changes to other legislation, or to extend the scope of the Bill. They can only be used to make the necessary changes to ensure that the provisions of this Bill work properly. The power in section 76 would only be used for such matters as making changes to other legislation needed in consequence of the provisions of this Bill.

... it’s not normally necessary, I think, for these regulations to be subject to the affirmative procedure where their effect is administrative in nature. That’s why the negative procedure is available within section 76. However, section 76 could also be used in a way that would increase the tax liability of any individual. Consistent with that basic principle—that if a regulation-making power is exercised in that way it should be affirmative—then this section allows for the affirmative procedure to be used in those instances ... It is for the Welsh Ministers to decide between negative and affirmative here ... Where it is just smoothing the path from the current position to the future position, the negative procedure; where the section is used to increase tax liability, the affirmative procedure. It is unusual. It’s not unique. Parallel powers exist in the Government of Wales Act and in the Regulation and Inspection of Social Care (Wales) Act 2016, which I remember being in front of this committee on only last year.”<sup>44</sup>

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**73.** We pressed the Cabinet Secretary on the extent to which the decision to adopt a procedure is actually a judgement for a Cabinet Secretary to make. He told us:

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“It is a judgement for Welsh Ministers, but where a new liability to tax is created, or an additional liability to tax is created, consistently with the way that we’ve constructed the whole of the Bill, the affirmative procedure would be used.”<sup>45</sup>

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**74.** An official accompanying the Cabinet Secretary told us that:

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“The judgement call is whether the regulations have the effect of imposing or increasing a tax liability.”<sup>46</sup>

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**75.** We asked for further information on what evidence or modelling would be used to judge whether the regulations have the effect of imposing or increasing a tax liability. We also asked why regulations made in accordance with section 76(2), which would amend primary legislation, are not subject to the affirmative procedure. In a **response** to our request for further information on this issue the Cabinet Secretary repeated his view above and said:

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“As the substance of this Bill is being scrutinised closely, it is not normally necessary for these regulations to be subject to the affirmative procedure, as

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<sup>44</sup> CLA Committee, 3 October 2016, RoP [48-49]

<sup>45</sup> CLA Committee, 3 October 2016, RoP [59]

<sup>46</sup> CLA Committee, 3 October 2016, RoP [65]

they will be limited to making incidental, consequential, supplementary, transitional, transitory or saving provisions which are necessary to make sure the provisions in this Bill work properly.

However, it is possible that regulations made under this section might have the effect of changing a person's tax liability. To maintain consistency with the broader approach taken across the Bill, the affirmative procedure is prescribed in these cases.

The question of whether particular regulations will have this effect, and therefore be subject to the affirmative procedure, will need to be considered carefully on a case-by-case basis, taking into account the purpose of the regulations and their overall effect. For this reason, it is not possible to give an exhaustive list of cases where regulations would always be subject to the affirmative procedure, but I am committed to explaining how the Welsh Ministers have reached this decision in the explanatory memorandum accompanying any regulations made under this section.”

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## Our view

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**76.** We note the Cabinet Secretary's views as expressed during our scrutiny session and subsequently in correspondence. We remain unclear about how the Cabinet Secretary will judge whether regulations will have the effect of imposing or increasing a tax liability and therefore whether to apply the affirmative procedure in such circumstances.

**Recommendation 2.** We recommend that the Cabinet Secretary, during the Stage 1 debate clearly states what evidence, information or modelling he will use to make a judgement about whether the regulations have the effect of imposing or increasing a tax liability and accordingly about whether to apply the affirmative procedure.

**77.** It has been a long standing theme and principle of the reports of our predecessor Committee that regulations which amend primary legislation should be the subject to the affirmative procedure. We concur with this view.

**78.** As such, we agree with comments referred to in our predecessor **Committee's legacy report** that any proposed change to an Act (however trivial it is perceived to be), which has been subject to a four stage scrutiny process by the legislature, deserves to be approved by the legislature. It is clearly important to ensure that the rights of the National Assembly, as the legislature, are protected.

**79.** It is therefore disappointing that the first Welsh Government Bill in the Fifth Assembly seeks to apply the negative procedure to regulations that amend primary legislation.

**80.** We also note that Annex 1 accompanying the Cabinet Secretary's **letter** of 1 November 2016 notes that for the similar power in the *Land and Buildings Transactions Tax (Scotland) Act 2013* the affirmative procedure is used when amending primary legislation.

**81.** We note the intention to ensure a seamless transition between tax regimes. We do not believe that applying an affirmative procedure in such circumstances will delay or hinder the transition between regimes.



**Recommendation 3.** We recommend that the Cabinet Secretary should table an amendment to the Bill to ensure that regulations made under section 76(1) in accordance with section 76(2) are subject to the affirmative procedure.

## Schedules

**82.** The Bill contains 22 Schedules.

### Schedule 5 – Leases

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**83.** Schedule 5 (introduced by section 32) makes provision about leases and includes a range of provisions delegating powers to the Welsh Ministers to make regulations. Of particular interest to us were powers under paragraph 27(4) and 28(1) that require the use of the provisional affirmative procedure.

**84.** Paragraph 27 of Schedule 5 provides that rents paid under a lease are not chargeable to LTT. Sub-paragraph 2 provides a regulation making power, subject to the affirmative procedure, so that the Welsh Ministers can make such rents chargeable to the tax, thereby extending the scope of LTT. The statement of policy intent states that:

“Currently, taxing the rent element of a residential lease in Wales brings in little revenue (£10,000 in 2014/15). However, Welsh Ministers may wish to exercise this power if future changes in behaviour mean that the rent element on newly granted residential leases should be taxed due to increases in rents payable and the length of leases, or potentially to counteract avoidance activity.”<sup>47</sup>

**85.** In the event that the Welsh Ministers exercise the power in paragraph 27(2) to include the rent element of residential leases within the scope of LTT, further regulation making powers are provided under paragraph 27(4) to set the initial rates and bands. According to the Explanatory Memorandum “the power enables the Welsh Ministers to vary rates and bands in the future to reflect the economic and property market circumstances of the time”.<sup>48</sup>

**86.** Paragraph 28(1) of Schedule 5 gives the Welsh Ministers the power to set by regulations the initial rates and bands for the rent element of non-residential and mixed leases applicable to LTT and the power to vary rates and bands in the future, again “to reflect the economic and property market circumstances of the time”.<sup>49</sup>

**87.** According to the Explanatory Memorandum, in each case the affirmative procedure is to be used in the first instance “because the regulation will be used to prescribe the amount of tax chargeable in respect of property transactions”, with the provisional affirmative to be used in subsequent regulations “to minimise forestalling and provide market certainty”.<sup>50</sup> In respect of regulations made under paragraph 28(1) the statement of policy intent states:

“This procedure will permit the Welsh Ministers to vary rates and bands at short notice on a provisional basis, while maintaining the Assembly’s role in approving any permanent variation.

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<sup>47</sup> Statement of policy intent, page 7

<sup>48</sup> Explanatory Memorandum, Chapter 5, page 34

<sup>49</sup> Explanatory Memorandum, Chapter 5, page 35

<sup>50</sup> Explanatory Memorandum, Chapter 5, pages 34-35

A similar power is provided in paragraph 3(1) of Schedule 19 LBTT(S)A 2013.”<sup>51</sup>

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**88.** The Cabinet Secretary explained the reason for his approach:

“One of the ways in which we have sought to simplify the operation of the law in this area in Wales is that we’ve taken a policy decision that we will not include the rent element of residential leases within the scope of the LTT, but the Bill provides a power for that to change in the future should Welsh Ministers make a different decision then. If it were to be brought within the scope of LTT and non-residential and mixed leases are within the scope, then the arguments are exactly the same. If you wanted to change the rates and bands, you would want to be able to do it with immediate effect, to prevent people from organising their affairs to take advantage of the change. The Assembly would, within 28 days, be able to confirm or overturn the Government’s decision.”<sup>52</sup>

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### **Our view**

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**89.** We have already noted that in principle the provisional affirmative is an appropriate procedural mechanism to be used in the Bill.

**90.** We are content with its use in relation to regulations to be made under paragraphs section 27(2) and 28(1) of Schedule 5 to the Bill.

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<sup>51</sup> Statement of policy intent, page 8

<sup>52</sup> CLA Committee, 3 October 2016, RoP [71]