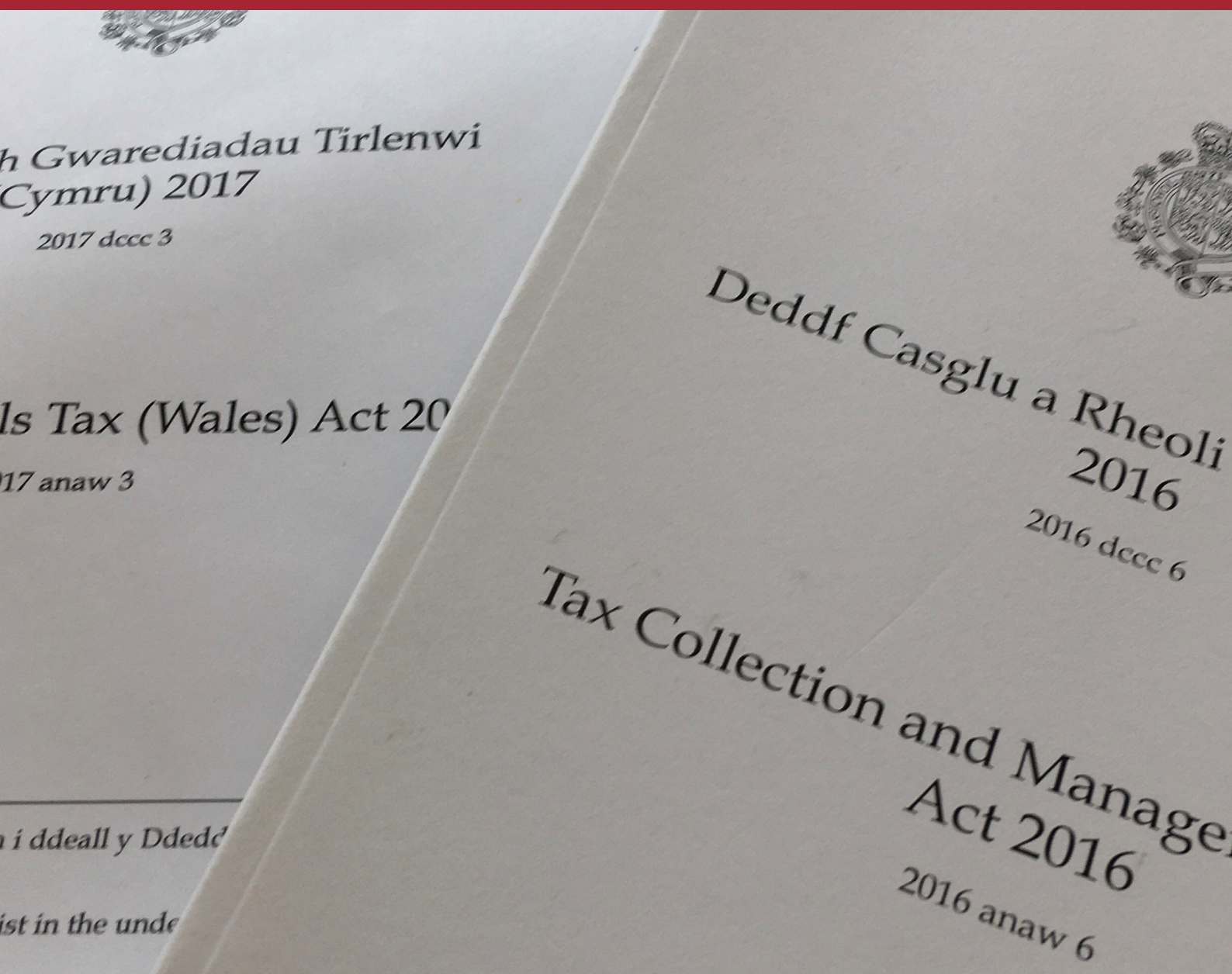


# Report on the Welsh Tax Acts etc. (Power to Modify) Bill

April 2022



The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

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# Report on the Welsh Tax Acts etc. (Power to Modify) Bill

April 2022



# About the Committee

The Committee was established on 26 May 2021. Its remit can be found at [www.senedd.wales/SeneddLJC](http://www.senedd.wales/SeneddLJC)

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Current Committee membership:



**Committee Chair:**  
**Huw Irranca-Davies MS**  
Welsh Labour



**Rhys ab Owen MS**  
Plaid Cymru



**Alun Davies MS**  
Welsh Labour



**Peter Fox MS**  
Welsh Conservatives

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## 1. Introduction

On 13 December 2021 Rebecca Evans MS, the Minister for Finance and Local Government (the Minister) introduced the Welsh Tax Acts etc. (Power to Modify) Bill (the Bill),<sup>1</sup> an accompanying Explanatory Memorandum (the EM)<sup>2</sup> and a draft policy statement on retrospection.<sup>3</sup>

1. The Senedd's Business Committee referred the Bill to the Finance Committee on 23 November 2021, and set a deadline of 8 April 2022 for reporting on its general principles.<sup>4</sup>
2. On 14 December 2021, the Minister issued a statement of policy intent for subordinate legislation to accompany the Bill.<sup>5</sup>

### The purpose of the Bill

3. The long title of the Bill is:

*"An Act of Senedd Cymru to confer on the Welsh Ministers a power to modify the Welsh Tax Acts and regulations made under those Acts for specified purposes; and to make provision for connected purposes."*

4. The Minister states in the EM that:

*"The Welsh Ministers' intended purpose in introducing this Bill is to enable changes to be made to the Welsh Tax Acts by regulations where the Welsh Ministers consider that such changes are necessary or appropriate and where they are required to have effect immediately or shortly thereafter. Those*

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<sup>1</sup> [Welsh Tax Acts etc. \(Power to Modify\) Bill](#), as introduced

<sup>2</sup> Welsh Government, [Welsh Tax Acts etc. \(Power to Modify\) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes](#), December 2021

<sup>3</sup> Welsh Government, [Statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc. \(Power to Modify\) Act 20XX](#), December 2021

<sup>4</sup> Business Committee, [Timetable for consideration: the Welsh Tax Acts etc. \(Power to Modify\) Bill](#), November 2021

<sup>5</sup> Welsh Government, [Welsh Tax Acts etc. \(Power to Modify\) Bill \("the Bill"\): Policy intent for subordinate legislation to be made under this Bill](#), December 2021

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*changes will be permitted in order to respond to a number of external circumstances. In summary:*

- i. to ensure the devolved Welsh taxes are not imposed where to do so would be incompatible with any international obligations;*
- ii. to protect against tax avoidance in relation to devolved Welsh taxes;*
- iii. to respond to changes made by the UK government to 'predecessor' UK taxes (that is, one where we have an equivalent devolved tax) which affect, or may affect the amount paid into the Welsh Consolidated Fund, and*
- iv. to respond to decisions of the courts/tribunals which affect or may affect the operation of the Welsh Tax Acts, or any regulations made under them."<sup>6</sup>*

**5.** The Bill comprises eight sections and has no schedules. It was introduced following a consultation exercise by the Welsh Government in 2020.<sup>7</sup>

### **The Committee's remit**

**6.** The remit of the Legislation, Justice and Constitution Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

**7.** In our scrutiny of Bills introduced in the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, 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;

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<sup>6</sup> EM, paragraph 3.2

<sup>7</sup> Welsh Government, [Consultation Document: Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts](#), July 2020. See also: Welsh Government, [Consultation – summary of response, Enabling changes to the Welsh Tax Acts](#), December 2020

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- 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 legislation.

**8.** We took evidence from the Minister on 14 February 2022.<sup>8</sup> Following our evidence session, we wrote to the Minister with additional questions in relation to the Bill.<sup>9</sup> The Minister responded on 11 March 2022.<sup>10</sup>

**9.** We have also taken account of written and oral evidence provided to the Finance Committee.<sup>11</sup>

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<sup>8</sup> [Legislation, Justice and Constitution Committee, 14 February 2022](#)

<sup>9</sup> [Letter to the Minister for Finance and Local Government](#), 24 February 2022

<sup>10</sup> [Letter from the Minister for Finance and Local Government](#), 11 March 2022

<sup>11</sup> See the [webpage for the Bill](#)

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## 2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.<sup>12</sup>

### General

**10.** We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act).

**11.** In her statement on legislative competence, the Llywydd, Elin Jones MS, stated that the Bill as introduced would be within the legislative competence of the Senedd.<sup>13</sup>

**12.** The Minister confirmed that the Welsh Government is content that all of the provisions of this Bill fall within the legislative competence of the Senedd:

*"There's no requirement for Secretary of State or Crown consents, and the legislation doesn't relate to a reserved matter; it relates to devolved taxes, which are within competence, and any amendments of legislation within the power of the Bill are amendments to Welsh tax Acts, and regulations made under them only. So, we are content."<sup>14</sup>*

### Human rights

**13.** One of the requirements which must be met for a bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act and requires all provisions of a bill to be compatible with the ECHR.

**14.** The Minister states in the EM:

*"The compatibility of the Bill with the European Convention on Human Rights (ECHR) has been considered prior to the introduction of the legislation. That analysis has found that the Bill is unlikely to contain provisions that are incompatible with the ECHR. The Bill does include provision for retrospective effect. It is recognised that legislation that affects past transactions or events,*

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<sup>12</sup> EM, Member's Declaration, page 1

<sup>13</sup> Presiding Officer's Statement on Legislative Competence, 13 December 2021

<sup>14</sup> LJC Committee, 14 February 2022, RoP [8]

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*even if not technically retrospective, may engage the rights set out in Schedule 1 to the Human Rights Act 1998 ('the Convention rights'). The Welsh Government considers that the Bill strikes an appropriate balance between the legislature's role in scrutinising tax policy changes, the Rule of Law and the unique nature of tax policy changes and their immediate fiscal and economic impacts.*<sup>15</sup>

**15.** We asked the Minister to confirm what assessments have been undertaken in relation to the human rights impact of the Bill, and what the outcome of these assessments had been. In particular, we asked the Minister if she was satisfied that regulations made under section 1 of the Bill which have retrospective effect (as permitted by section 2(1)(c)) would be compliant with the *Human Rights Act 1998*.

**16.** The Minister responded:

*"(...) the Bill will not in itself engage convention rights. However, it is correct that the future exercise of the power conferred in the Bill, particularly in relation to making legislation with retrospective effect, may give rise to convention rights, and in particular article 1 protocol 1, the right to peaceful enjoyment of possessions. It's not possible at this stage to undertake a definitive analysis of the issues that might arise as any assessment of these issues will inevitably depend on the policy proposal that is underpinning them in any future regulations. However, it is well recognised in the context of tax that there may be justification for the making of retrospective legislation in order to ensure fairness within the tax system and to prevent abuse of the rules. So, in relation to potential breaches of article 1 protocol 1, the courts have been known to give considerable margins of appreciation to national authorities that, when legislating retrospectively, attempt to strike a fair balance between protecting individual rights and the general public interest."*<sup>16</sup>

## **Our view**

**17.** We note the Llywydd's statement that the Bill as introduced would be within the legislative competence of the Senedd.

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<sup>15</sup> EM, paragraph 10.12

<sup>16</sup> LJC Committee, 14 February 2022, RoP [10]

**18.** In also stating that the Bill is within the Senedd's competence, we note the Minister's evidence that the Bill itself will not engage human rights but that subordinate legislation made using the power it contains may engage Article 1 Protocol 1 of the ECHR, subject to the underlying policy proposals within that subordinate legislation.

**19.** As we indicate in chapter 4, we do not believe that changes to tax law should be made retrospectively by subordinate legislation. In our view, such matters should be dealt with through primary legislation.

**20.** One consequence, therefore, of the nature and construction of this Bill (if enacted), is that matters of human rights relating to the retrospective changing of tax law will be subject to more limited scrutiny because, for example, relevant provisions cannot be amended in subordinate legislation, whereas they could be if included in primary legislation.

**21.** We consider this to be regrettable and draw this matter to the attention of the Senedd.

## 3. General observations

### Policy background

**22.** The *Wales Act 2014* (the 2014 Act) devolved new financial powers to the Senedd. Following its enactment, the Senedd gained legislative competence in relation to certain devolved taxes. The 2014 Act inserted a new Part 4A into the 2006 Act, which specified two such taxes – a Welsh tax on transactions involving interests in land (replacing stamp duty land tax in Wales) and a Welsh tax on disposals to landfill (replacing landfill tax in Wales).

**23.** The 2006 Act (as amended) also provides a mechanism for further tax devolution in the future by means of an Order in Council under section 116C.

**24.** The Senedd has subsequently enacted the following legislation in relation to devolved taxation:

- a. The *Tax Collection and Management (Wales) Act 2016* (“2016 TCM Act”)

The 2016 TCM Act makes provision for a Welsh tax system to enable the collection and management of devolved Welsh taxes. It established the Welsh Revenue Authority (WRA) as a non-ministerial government department which began collecting devolved taxes in April 2018. It also sets out the relationship between the WRA and taxpayers in Wales, including the relevant powers, rights and duties.

- b. The *Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017* (“2017 LTT Act”)

The 2017 LTT Act provides for a land transaction tax (“LTT”) to be charged on land transactions in Wales. Part 7 of the 2017 LTT Act also inserted a new Part 3A into the 2016 TCM Act establishing a general anti-avoidance rule (GAAR) for the purposes of counteracting avoidance arrangements in relation to devolved taxes.

- c. The *Landfill Disposals Tax (Wales) Act 2017* (“2017 LDT Act”)

The 2017 LDT Act provides for landfill disposals tax (“LDT”) to be charged on disposals to landfill in Wales.

**25.** The 2016 TCM Act, 2017 LTT Act and 2017 LDT Act are collectively defined as the “Welsh Tax Acts” in the Bill.

## Principles of law making and the use of skeleton legislation

**26.** In his written evidence to the Finance Committee, Professor Emyr Lewis of Aberystwyth University drew attention to matters relating to taxation, the constitution and the separation of powers. He stated:

*"The question of who has the power to impose a tax on the people is one of the core issues which has shaped the UK's constitutional arrangements and in particular the separation of powers. The Bill of Rights of 1689 created a clear dividing line by providing that it was illegal for the government to raise taxes except to the extent that Parliament had granted it the power to do so. In other words, the power to decide whether and to what extent people should be taxed lay with the representatives of the people (or at any rate in those days the people eligible to return MPs), not those of the Crown.*

*If we fast-forward to twenty-first century Wales, we find this principle reflected in the provisions about taxation in Wales' constitutional arrangements, as set out in the Government of Wales Act 2006, as it has been amended. Under that Act, it is the Welsh Parliament, Senedd Cymru, which has the power to decide whether and to what extent people should be subject to devolved taxes. That Act of the UK Parliament does not give any powers to the Welsh Government (aka Welsh Ministers) to make such a decision."<sup>17</sup>*

**27.** In terms of the Bill, Professor Lewis said:

*"...it appears to me that (...) whilst some aspects of it make common sense in terms of complexity and making things easier, much of this prospective legislation takes us to a point that is contrary to that principle that the source of important decisions with regard to taxation is the legislature, and not the Government."<sup>18</sup>*

**28.** Legislatures often delegate powers to the government to make laws (i.e. by means of subordinate legislation,<sup>19</sup> such as regulations). Such delegation usually occurs following proposals contained in a government bill and these proposals may also include Henry VIII

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<sup>17</sup> Finance Committee, [Written Evidence: WTA.01 Professor Emyr Lewis, Aberystwyth University](#), page 1

<sup>18</sup> Finance Committee, [11 February 2022](#), RoP [11]

<sup>19</sup> Subordinate legislation is also referred to as secondary or delegated legislation

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powers: powers which permit a government to amend an Act by means of subordinate legislation.

**29.** However, in recent years concerns have been expressed at the extent to which primary legislation is delegating powers to Ministers to make subordinate legislation and, also, at how those powers are being used to make important law but with more limited scrutiny.

**30.** These concerns have been expressed by the Hansard Society,<sup>20</sup> academics and practitioners,<sup>21</sup> and reports of parliamentary committees.<sup>22</sup>

**31.** Two recent reports by House of Lords' committees cover important constitutional matters that are relevant to law-making by all legislatures. The reports are by the Secondary Legislation Scrutiny Committee (SLS Committee), entitled *Government by Diktat: A call to return power to Parliament*,<sup>23</sup> and the Delegated Powers and Regulatory Reform Committee (DPRR Committee), entitled *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*.<sup>24</sup> In particular, they criticise the increasing tendency of UK Governments to adopt procedures which effectively by-pass the UK Parliament's role in the legislative process by enabling UK Ministers to make the detailed laws which govern everyday lives and how businesses and other organisations operate.<sup>25</sup>

**32.** In its report, the DPRR Committee highlighted the problem of skeleton legislation. It describes such legislation as follows:

*"Skeleton — or framework — legislation may involve the entire bill or clauses within a bill. The first report of the Scrutiny of Delegated Powers Committee*

<sup>20</sup> Hansard Society, [Delegated legislation: the problems with the process](#), November 2021

<sup>21</sup> For example, Sir Jonathan Jones KCB QC (Hon): Senior Consultant, Linklaters, [Remarks to the Statute Law Society \(edited\). The Rule of Law and Subordinate Legislation](#), 29 September 2021; Professor Stephen Tierney, University of Edinburgh, [Evidence to the Scottish Parliament Delegated Powers and Law Reform Committee](#), 14 December 2021

<sup>22</sup> For example, Constitutional and Legislative Affairs Committee (Fourth Assembly), [Making Laws in Wales](#), October 2015, paragraphs 12, 81 to 103; Constitutional and Legislative Affairs Committee (Fifth Senedd), [Report on the Landfill Disposals \(Tax\) Wales Bill](#), March 2017, paragraphs 41-61; Legislation, Justice and Constitution Committee (Fifth Senedd), [Legacy Report](#), March 2021, paragraph 108. See also footnotes 23 and 24.

<sup>23</sup> House of Lords, Secondary Legislation Scrutiny Committee, [Government by Diktat: A call to return power to Parliament](#), 20th Report of Session 2021–22, HL Paper 105, 24 November 2021

<sup>24</sup> House of Lords, Delegated Powers and Regulatory Reform Committee, [Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#), 12th Report of Session, 2021–22, HL Paper 106, 24 November 2021

<sup>25</sup> House of Lords, [Two Lords reports published on the balance of power between Parliament and the Executive](#), 24 November 2021

*described a skeleton bill as one which contained so many significant delegated powers that the 'real operation [of the Act] would be entirely by the regulations made under it'. A few years later, the Committee gave a more colourful description: they were bills which were 'little more than a licence to legislate and so give flesh to the "skeleton" embodied in the bill'.<sup>26</sup>*

**33.** The DPRR Committee also stated that:

*"Maintaining the appropriate boundary between primary and delegated legislation is inextricably interlinked with protecting the integrity of Parliament; and the integrity of Parliament is based on the fundamental principles of parliamentary democracy, namely, parliamentary sovereignty, the rule of law and accountability of the executive to Parliament."<sup>27</sup>*

**34.** The SLS Committee noted that skeleton legislation having too little on the face of a bill effectively amounts to a "legislative blank cheque."<sup>28</sup>

**35.** In his evidence to the Finance Committee, Sir Paul Silk, a former Clerk to the then named National Assembly for Wales, also drew attention to these issues. He said:

*"Legislatures should remain sceptical and vigilant when Governments propose any enhancement of their own powers to make legislation without full scrutiny by the legislature. Governments naturally want as few obstacles in their way and will often favour secondary legislative routes if possible. It is the job of the legislature to ensure that appropriate checks are kept in place and that it does not surrender its legislative role. The Welsh Government's Explanatory Memorandum on the Welsh Tax Acts (Power to Modify) Bill refers to "the balance between providing the Welsh Ministers with ability to respond to external events in a flexible and agile way, and the importance of Senedd scrutiny of Welsh Ministers' actions". In my view, the balance is a different one: I would prefer to see the sentence instead reading "the balance*

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<sup>26</sup> House of Lords, Delegated Powers and Regulatory Reform Committee, Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, 12th Report of Session, 2021–22, HL Paper 106, paragraph 59

<sup>27</sup> House of Lords, Delegated Powers and Regulatory Reform Committee, Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, 12th Report of Session, 2021–22, HL Paper 106, paragraph 123

<sup>28</sup> House of Lords, Secondary Legislation Scrutiny Committee, Government by Diktat: A call to return power to Parliament, 20th Report of Session 2021–22, HL Paper 105, 24 November 2021, paragraph 30

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*between providing the Welsh Ministers with ability to respond to external events in a flexible and agile way, and the Senedd's legislative supremacy”<sup>29</sup>*

**36.** When questioned, Sir Paul Silk highlighted his concerns of “a gradual erosion of primary legislative functions of legislatures and their being taken over by Executives through secondary legislation”, noting that:

*“My concern, when I first looked at this Bill, was that this was another example of this in areas that are particularly contentious—the areas of taxation—and the way in which the Bill also allows this to be done retrospectively, which is, I think, the first time that a piece of secondary legislation can retrospectively affect taxation powers. So, this is an example for me, therefore, of a more general concern that I have about the way in which the Executive is taking over functions that I think properly belong to the legislature.”<sup>30</sup>*

## Justification for the Bill

**37.** In her foreword to the 2020 consultation paper, the Minister stated that “[w]e now need to consider whether we have the right and appropriate tools to ensure we can make changes to the “Welsh Tax Acts” at short notice in a number of circumstances”. The Minister noted that:

*“A key aim is to provide Welsh Ministers with powers to be able to respond to the UK Budget in a timely, proportionate and agile way in order to protect Welsh revenues.”<sup>31</sup>*

**38.** In the EM, the Minister pursued this approach of the Welsh Government needing to make changes to tax legislation where it is desirable “to have effect immediately or very soon thereafter.”<sup>32</sup> She stated:

*“The ability to make changes to tax legislation very quickly will enable the Welsh Ministers to respond rapidly and effectively to scenarios where immediate changes are desirable. An intervention of this kind may be appropriate where the Welsh Ministers need to promptly ‘close-down’ tax*

<sup>29</sup> Finance Committee, [Written Evidence: WTA 02 Paul Silk](#), paragraph 8

<sup>30</sup> Finance Committee, 11 February 2022, RoP [8]

<sup>31</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, Foreword

<sup>32</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraph 1.7

*avoidance schemes or ensure compliance with international obligations, if required. In the case of tax avoidance, the Welsh Revenue Authority (WRA) already has a range of powers available to it and is actively using them to ensure everyone pays the right amount of tax and no-one gains an unfair advantage. In some cases, though, a legislative change may also be needed to provide further clarity or to tighten the application of the provisions in question. The ability to stop avoidance activity seeks to protect the revenues on which public services depend (...)*

*The intended effect of the legislation is primarily to provide the Welsh Ministers with a proportionate mechanism to protect Welsh revenues if those revenues will be affected by external circumstances, for example, where the UK government introduces a change to a predecessor tax at short notice and with immediate effect, which could have implications for businesses, the property market, the environment and could also have a direct budgetary impact on the resources available to the Welsh Government through the block grant adjustment process.”<sup>33</sup>*

**39.** Citing the 2020 consultation paper, the Minister outlines a scenario in the EM relating to adjustments to LTT resulting from tax changes introduced by the UK Government.<sup>34</sup> She states:

*“...without the powers being introduced by the Bill, the Welsh Government would either need to operate with a reduced budget or find alternative ways of raising such revenues to maintain existing resource levels.”<sup>35</sup>*

**40.** In evidence to the Finance Committee, the Minister further explained part of the rationale for the Bill:

*“So, the vulnerability, really, of the Welsh Ministers in respect of being able to respond appropriately to tax policy changes made by the UK Government is quite clear, and Welsh Ministers should be in a position to provide near immediate responses to certain external events through the use of made affirmative regulations, and, where necessary, in some cases, retrospectively too. There is an issue of parity here, because the UK Government has the ability to make changes to existing taxes with immediate effect through the*

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<sup>33</sup> EM, paragraphs 3.4–3.5

<sup>34</sup> EM, paragraphs 3.6–3.10

<sup>35</sup> EM, paragraphs 3.9

*Provisional Collection of Taxes Act 1968, but the only element of the Welsh tax Acts that can be changed immediately is the tax rates and tax bands, and that's via the made affirmative procedure. So, the Bill really is essential to provide Welsh Ministers and the Senedd with the necessary powers to address an external event that the UK Government doesn't itself have to address, of course, and that's the tax decisions of the UK Government itself. This is an aspect of the devolution settlement that is significant and that the Welsh Government must have the tools to be able to address quickly and in an agile manner. (...)*

*And also, there might be times when Welsh Ministers want to pass on the benefit of tax reductions to Welsh businesses or citizens as soon as possible. So, again, the use of made affirmative procedure regulations, again, potentially retrospectively, would enable those tax savings to be provided as soon as possible, and that would then give taxpayers early certainty."<sup>36</sup>*

**41.** In relation to the points made by Sir Paul Silk, we asked the Minister whether there was a risk that, if the Bill was enacted in its current form, the Senedd would not have appropriate checks in place and could be surrendering its legislative role. In response the Minister said:

*"I think that there are really robust checks and balances in place for this legislation, and the scope of the power within the legislation has been really deliberately constrained by the inclusion of the four purpose tests. This is quite a departure from our original thinking (...)*

*I do accept, particularly in relation to retrospective legislation, that absolutely should not be something that you would do lightly or without a clear justification."<sup>37</sup>*

## **The extent of the proposed regulation-making power and the Senedd lock**

**42.** Section 1 of the Bill provides that the Welsh Ministers may, by regulations, modify any of the Welsh Tax Acts and regulations made under those Acts if they consider modifications "necessary or appropriate" for any of four purposes (see paragraph 126). The four purposes for which the regulation-making power in section 1 may be exercised differ from the Welsh

<sup>36</sup> Finance Committee, 22 December 2021, RoP [167–169]

<sup>37</sup> LJC Committee, 14 February 2022, RoP [24–25]

Government's original intention in its 2020 consultation paper for there to be three regulation-making powers, described as Power 1, Power 2 and Power 3.<sup>38</sup>

**43.** The consultation document suggested that for regulations under Power 2 having immediate but temporary effect, the power would be subject to a Senedd motion or lock.<sup>39</sup> The intention was that the lock would be applied to address concerns that the power was unusually broad. In essence, the lock would require a Senedd vote to unlock the use of the power to make regulations so that "the general principles of the regulations would be scrutinised before they were drafted."<sup>40</sup> The regulations would then be "subject to a longer scrutiny period: a 'super' provisional affirmative procedure".<sup>41</sup>

**44.** Professor Lewis told the Finance Committee that:

*"...as a general point, the wider ranging the power that the Government receives, the greater the risk that that power could be misused by another Government in future. And in my view, two and a half of the purposes that the Government has requested have been drafted too broadly".<sup>42</sup>*

**45.** He added:

*"If there is a legal case that goes against the Government, or goes any way, it enables the Government, through regulation, to amend one of the Welsh tax Acts as a result of that. There is no limit placed on the kind of amendment that could be made, with the exception that the constitution of the Welsh Revenue Authority cannot be amended and some types of tax thresholds can't be adapted either."<sup>43</sup>*

**46.** Sir Paul Silk noted that although:

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<sup>38</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraph 3.8

<sup>39</sup> Power 2 would have enabled the Welsh Ministers to make regulations to amend the Welsh Tax Acts in specific circumstances where they considered it expedient in the public interest to do so (see Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraph 3.17)

<sup>40</sup> EM, paragraph 4.2

<sup>41</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraph 3.19

<sup>42</sup> Finance Committee, 11 February 2022, RoP [23]

<sup>43</sup> Finance Committee, 11 February 2022, RoP [24]

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*"...the powers under the Bill are more limited than the powers proposed in the original consultation document (...) Ministers still will have power to make secondary legislation by regulations that impose landfill disposals tax or land transaction tax, or that modify or impose penalties. The power to make law imposing a tax is one that would normally be reserved for primary legislation."<sup>44</sup>*

**47.** In terms of the safeguards that could be implemented to protect taxpayers if the Bill is enacted, Sir Paul Silk said:

*"Well, the safeguards would have to be, by the nature of this Bill, in the secondary legislation, and that gets back to the concern that both Emyr and I have expressed about whether there (...) would be adequate scrutiny—of those safeguards if the secondary legislation route is used. I don't want to appear to accuse this Government or any other Government of bad faith about these things; I'm sure they actually absolutely mean what they say in their explanatory memorandum and so on to you. But circumstances arise that weren't anticipated at the time, and what the legislative process should try to do is to protect the citizen from those."<sup>45</sup>*

**48.** He also offered an overarching perspective about the approach in the Bill:

*"One doesn't want to exaggerate these things, but I think that there has been a historical trend towards giving more powers, including legislative powers, to the Executive, and by definition removing them from the legislature (...) I think it is a concern that many people who love parliaments have, to see the powers of parliamentary control eroded. This Bill is an example of that. It's not a particularly egregious example of that, except in its provisions about retrospectivity."<sup>46</sup>*

**49.** Other witnesses who gave evidence to the Finance Committee also highlighted the broad nature of the proposed regulation-making power. For example, the Institute of Chartered Accountants in England and Wales (ICAEW) said:

*"I think that you are potentially giving wide-ranging powers to the Executive to change tax, change the tax system, the Welsh tax system. And I think you*

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<sup>44</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 9

<sup>45</sup> Finance Committee, 11 February 2022, RoP [46]

<sup>46</sup> Finance Committee, 11 February 2022, RoP [110]

*need to consider very carefully whether those are the sorts of powers you want to effectively delegate, and, if so, on what terms (...) ultimately, you need to retain the responsibility to be able to review and to amend and to approve tax-raising powers."*<sup>47</sup>

**50.** In terms of the Senedd lock, Professor Lewis said:

*"...it could work. It would be better in terms of ensuring the primacy of the Senedd as a legislature, as it would be the Senedd and not the Government that would be deciding when the 'switch' would be used, if I can use another word instead of 'lock'. So, the switch would be turned on, but it wouldn't, in my view, in and of itself, be sufficient to respond to those areas under this Bill where there are very wide-ranging powers being requested by the Government."*<sup>48</sup>

**51.** Sir Paul Silk agreed, adding that "[i]t would be an extra step, but I'm not quite sure what benefit it would bring".<sup>49</sup>

**52.** When asked in her first evidence session with the Finance Committee whether the level of delegated powers that this Bill confers is appropriate, the Minister replied:

*"Yes, I do think it's appropriate, and that's because the scope of the power within the Bill has been deliberately constrained by the inclusion of the four purpose tests, and that sets out absolute clarity, I think, in terms of the circumstances in which the power may be used. So, as such, I do think that the level of delegated powers is appropriate."*<sup>50</sup>

**53.** The Minister added:

*"Well, my understanding is that it is relatively rare for legislation to include such a process as proposed by the Bill, but of course that shouldn't be a reason for not adopting an innovative and agile process that's right for Wales."*<sup>51</sup>

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<sup>47</sup> Finance Committee, 2 February 2022, RoP [163]

<sup>48</sup> Finance Committee, 11 February 2022, RoP [31]

<sup>49</sup> Finance Committee, 11 February 2022, RoP [33]

<sup>50</sup> Finance Committee, 22 December 2022, RoP [175]

<sup>51</sup> Finance Committee, 22 December 2022, RoP [177]

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**54.** In response to a question relating to the breadth of the regulation-making power in the Bill, the Minister also said:

*"However, the power within the Bill is not intended to cover the ordinary circumstances of law making. It is intended to afford timely protection to Welsh taxpayers and the Welsh Government's budget, by allowing the Welsh Ministers to make amendments to Senedd legislation for specific purposes and in specific circumstances, subject all the while to Senedd scrutiny. It is important to remember that any tax law made by the Welsh Ministers will require the approval of the Senedd. Although the law will be made by the Welsh Ministers for reasons of necessity, appropriateness, and/or urgency, the Senedd will have the ultimate sanction over those regulations and the taxpayers are protected in the event that the regulations fail to gain approval by the Senedd."*<sup>52</sup>

**55.** As regards the Senedd lock the Minister told us that:

*"...the scope of the Bill has narrowed considerably from that initially proposed in the policy consultation and therefore, in my view, the justification for the Senedd lock has, accordingly, reduced."*<sup>53</sup>

**56.** She added that:

*"I have responded to concerns raised by consultees on the broad and open-ended nature of the original proposals for the power, where any changes could be made that the Welsh Ministers considered to be expedient in the public interest. The Bill has been drafted specifically to limit the circumstances in which the power can be used. The introduction of the four purpose tests significantly constrains the use of the power, which can only be used to respond to the specified external events and – for the draft affirmative procedure – only when Welsh Ministers consider it necessary or appropriate in relation to the four purpose tests. The made affirmative procedure is further constrained and may only be used when considered necessary and in cases of urgency. As such, I consider there are robust and proportionate safeguarding measures in place."*<sup>54</sup>

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<sup>52</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 18

<sup>53</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 13

<sup>54</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 14

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## Using primary legislation

### Consultation document

**57.** The Welsh Government’s 2020 consultation document explored various existing mechanisms to change taxes, including using primary legislation subject to the emergency and the ‘fast-track’ procedures. The consultation document cited specific examples of mechanisms used within the Senedd, the UK Parliament and the Scottish Parliament.<sup>55</sup> The consultation document also cited the House of Lords’ Constitution Committee as recognising that Bills could be fast-tracked to implement Treasury announcements in the Budget or Autumn Statement. However, the consultation document also stated that there were only limited examples of their use.<sup>56</sup>

### A finance Bill and the Provisional Collection of Taxes Act 1968

**58.** The 2020 consultation document discussed the use of the Finance Bill as the principal legislative vehicle for tax legislation to be enacted by the UK Government, together with the *Provisional Collection of Taxes Act 1968* (“the 1968 Act”). The 1968 Act enables proposals for tax changes and tax continuations, such as the annual re-imposition of income tax, to have immediate provisional legal effect by means of resolutions, pending the necessary primary legislation receiving Royal Assent.<sup>57</sup>

**59.** The 2020 consultation document noted that the Senedd could adopt an annual (or less frequent) finance Bill process to make changes to the Welsh Tax Acts, but with a slightly different procedure to the UK Parliament’s finance Bill procedure. It noted and outlined difficulties that would need to be resolved.<sup>58</sup>

**60.** In a report on the Landfill Disposals Tax (Wales) Bill, our predecessor Committee in the Fifth Senedd called for an annual finance Bill to be considered in the future, coupled with legislation equivalent to the 1968 Act. It suggested that such an approach could potentially

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<sup>55</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraphs 2.2–2.27

<sup>56</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraphs 2.16–2.17

<sup>57</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraphs 2.32–2.37

<sup>58</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraphs 2.44–2.50

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overcome the need for the inclusion of so many Henry VIII powers in that Bill and “would make for a more transparent, accessible way to make changes to law involving tax.”<sup>59</sup>

**61.** Following an inquiry into a legislative budget process (i.e. the use of a finance Bill), the Finance Committee of the Fifth Senedd concluded that, as a matter of principle, “there should be annual legislation to pass the Welsh Government budget.”<sup>60</sup>

**62.** In response to the Finance Committee’s report, the Welsh Government agreed that “a Finance Bill covering taxation and spending plans will raise a number of complexities and would need very careful consideration.”<sup>61</sup>

**63.** Sir Paul Silk questioned whether an annual finance Bill process would be appropriate in the present circumstances:

*“I think one of the issues is that there are comparatively few taxes that are at present devolved, and there’s a whole argument about whether there should be more taxes that are devolved and so on. But leaving that to one side, there are relatively few taxes devolved at present. So, whether an annual finance Bill is a wise use of time in present circumstances, I’m not sure. And, of course, it wouldn’t allow the Senedd, which is the purpose of this Bill, to react urgently to circumstances that arise that adversely affect its tax take and so on. So, I’m not sure the finance Bill route would be sensible in these circumstances.”*<sup>62</sup>

**64.** Professor Lewis, in explaining the use of the 1968 Act and the accompanying Finance Bill at Westminster,<sup>63</sup> said that there’s “no reason” why such a process could not be introduced, “with purposeful alignment between Governments in London and Cardiff, and the two legislatures”.<sup>64</sup>

**65.** Dr Sara Closs-Davies of Bangor University was also supportive of an annual finance Bill process as:

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<sup>59</sup> Constitutional and Legislative Affairs Committee (Fifth Senedd), [Report on the Landfill Disposals \(Tax\) Wales Bill](#), March 2017, paragraphs 57-59 and recommendation 3

<sup>60</sup> Finance Committee (Fifth Senedd), [Inquiry into a legislative budget process](#), August 2020, Conclusion 1

<sup>61</sup> Welsh Government, [Response to the Finance Committee’s Report: Inquiry into a legislative budget process, October 2020](#), page 2

<sup>62</sup> Finance Committee, 11 February 2022, RoP [40]

<sup>63</sup> Finance Committee, 11 February 2022, RoP [112]

<sup>64</sup> Finance Committee, 11 February 2022, RoP [115]

*"...a useful legislative tool to allow the Welsh Government to react to external factors, review and make appropriate changes on an annual basis to protect tax revenues and funding of public services."*<sup>65</sup>

**66.** She also explained that an annual finance Bill "would help provide certainty and clarity to taxpayers and tax practitioners if it were implemented and communicated effectively", and also noted potential benefits in terms of reducing "the amount of time and money spent on searching for information and guidance from other multiple sources, as the Finance Bill would be the main point of reference." However, Dr Closs-Davies also said "considering the limited level of devolved tax powers in Wales, the cost and resources involved in creating and implementing an annual Welsh Finance Bill might be unjustified and inefficient at the current time."<sup>66</sup>

**67.** The Association of Chartered Certified Accountants (ACCA) were also supportive of a finance Bill process, and that "good alignment" with announcements arising from UK Parliament finance Bills would be welcome.<sup>67</sup>

**68.** In addition, in stating that it was not convinced about the argument for amending tax law through secondary legislation, ICAEW noted:

*"...we would prefer a primary legislation approach. (...) we don't have what I might call an annual finance Bill procedure that we have at the UK level, and I think that does then (...) make it quite problematic in trying to do changes, if you like, at fairly short notice. (...)*

*[we're] still not convinced, really, that we shouldn't at least investigate or examine the need for an annual—however short it might be, or an expedited process—finance Bill procedure."*<sup>68</sup>

**69.** In her evidence to the Committee, the Minister explained her position:

*"...this Bill offers the opportunity to respond rapidly to external events, which the longer process of a finance Bill doesn't. And we've talked previously about keeping that option open for the future, and continuing the discussions around that. But, I think, even if there were a finance Bill, Welsh Ministers*

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<sup>65</sup> Finance Committee, [Written Evidence: WTA 06 Dr Sara Closs-Davies, Bangor University](#), page 7

<sup>66</sup> Finance Committee, [Written Evidence: WTA 06 Dr Sara Closs-Davies, Bangor University](#), page 8

<sup>67</sup> Finance Committee, 2 February 2022, RoP [161]

<sup>68</sup> Finance Committee, 2 February 2022, RoP [96-97]

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*would still need the powers as set out in this proposed Act to respond quickly. So, a finance Bill in and of itself wouldn't help solve some of these issues.*"<sup>69</sup>

**70.** Furthermore, in correspondence with the Committee, the Minister explained why, in her view, introducing a bill containing powers similar to those within the 1968 Act (also referred to as the "PTCA") would not be appropriate:

*"PCTA and its resolutions are most commonly encountered during the annual (or otherwise) UK Budgets. However, they have also been made outside those events where a change is announced that requires a resolution to bring those changes into temporary effect followed by a 'special purpose' Bill (as opposed to a Finance Bill) introduced to give permanent effect (subject to UK Parliament approval). Examples of such special purpose Bills include what became the Stamp Duty Land Tax Act 2015 and the Stamp Duty Land Tax (Temporary Relief) Act 2020.*

*The PTCA (...) resolutions are most closely associated with the annual Finance Bill cycle. However, I do not consider the timing is right to introduce an annual tax or Finance Bill cycle here in Wales and it therefore follows that it is not currently appropriate to introduce a mechanism which would undertake functions similar to the PCTA.*

*Furthermore, I consider that even if there were an annual Finance Bill and accompanying PCTA mechanism here, we would still need the power provided in the Welsh Tax Acts etc. (Power to Modify) Bill. The Bill enables Welsh Ministers to respond to external events, which will not necessarily coincide with a Welsh Government Finance Bill cycle.*"<sup>70</sup>

## General observations

**71.** The Chartered Institute of Taxation and Low Incomes Tax Reform Group (CIOT) noted that its starting point "is that tax law should be set out in primary legislation particularly in so far as it relates to the exercise of tax powers setting out what is subject to tax and imposing burdens on taxpayers".<sup>71</sup>

<sup>69</sup> LJC Committee, 14 February 2022, RoP [60]

<sup>70</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 2–4

<sup>71</sup> Finance Committee, [Written Evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group](#), paragraph 2.1

**72.** CIOT commented that this is due to primary legislation being “subject to more scrutiny and debate”. It also noted that with primary legislation “it’s possible to end up not just in a binary way accepting or rejecting a proposal, but it’s possible to amend it”.<sup>72</sup>

**73.** The Chartered Institute of Public Finance and Accountancy (CIPFA), ACCA, and ICAEW agreed with the need for a legislative budget process and in principle the use of primary legislation to amend tax law.<sup>73</sup>

**74.** Sir Paul Silk expressed his preference for the Senedd’s emergency bill procedure<sup>74</sup> to be used for amending tax legislation, rather than via subordinate legislation:

*“...you have a Standing Order about Government emergency Bills, and that allows Bills to be passed expeditiously in the Senedd. It allows them all to be done in one day in the Senedd, but it doesn't require them to be done in one day in the Senedd. It's quite flexible, your Standing Order 26.95. So, personally, I think that would be preferable. I'm not sure that in all circumstances that are envisaged under the current Bill—there wouldn't even necessarily need to be emergency Bills. There undoubtedly would be circumstances when emergency Bills would be necessary when things were done in London that affected adversely the tax take in Wales. But the procedures are there, under the normal legislative processes, so that secondary legislation would not, I would have thought, be necessary.”<sup>75</sup>*

**75.** In written evidence to the Finance Committee, Professor Lewis concluded by saying:

*“On the one hand, the case for empowering the executive to act has been clearly made out in relation to compliance with international law and to the impact on the block grant of changes to predecessor UK taxes. In both cases, the statutory purposes seem sufficiently precisely drafted to avoid unintended broader use of the delegated power to legislate. In both cases, the need for retrospective effect is clear, but in the case of responding to UK tax changes it is less clear why an alternative method of achieving such changes simultaneously and which respects the Senedd's primacy over taxation could not be introduced, paving the way for primary legislation in due course.*

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<sup>72</sup> Finance Committee, 2 February 2022, RoP [15]

<sup>73</sup> Finance Committee, 2 February 2022, RoP [101-107]

<sup>74</sup> See [Standing Orders 26.95–26.104](#)

<sup>75</sup> Finance Committee, 11 February 2022, RoP [36]

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*On the other hand, the case for empowering the executive to act has not been so clearly made out in relation to the anti-avoidance purpose or to the purpose of responding to a court or tribunal decision. In each case, the scope of the purpose as drafted is very broad and encroaches on territory which may be regarded as more properly that of the Senedd than of the Government. In the case of the antiavoidance purpose, its scope is potentially far greater than that suggested by the Government. There are no clear constraints in the Bill on the use of the power retrospectively for these purposes. The potential impact on the rule of law of retrospective use is significant. The breadth of these purposes as drafted suggests that they may be being sought as 'just in case' power, which goes against the grain of the apparent principle that it is the representatives of the people rather than those of the Crown who decide whether and to what extent people should be taxed."*<sup>76</sup>

**76.** He made similar points when asked subsequently if the Bill was necessary and if not, what the alternatives were,<sup>77</sup> views with which Sir Paul Silk agreed.<sup>78</sup>

## Scrutiny

**77.** A key theme that has emerged during our scrutiny of the Bill is how tax legislation should be scrutinised in principle.

**78.** We asked the Minister whether the regulation-making power approach taken in the Bill is the right one or whether an expedited Bill procedure should be used. She replied that, "the powers afforded by the Bill arguably provide equal or greater opportunities for scrutiny."<sup>79</sup> The Minister explained her reasoning:

*"...for draft affirmative regulations, the debate cannot take place until either the committee has reported or the statutory instrument has been laid for 20 days, whichever is earlier. Standing Orders do, however, enable a longer period than 20 days between laying and the debate when Welsh Ministers feel this to be appropriate. So, we have here a flexible mechanism that we can consider on a case-by-case basis what time is appropriate for scrutiny,*

<sup>76</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 10

<sup>77</sup> Finance Committee, 11 February 2022, RoP [125–126]

<sup>78</sup> Finance Committee, 11 February 2022, RoP [128]

<sup>79</sup> LJC Committee, 14 February 2022, RoP [17]

*reflecting the complexity of the regulations and the impact on taxpayers. And the made affirmative procedure will only be used in cases of urgency, and here it's proposed there should be a maximum scrutiny period of 60 days. So, we feel that we're trying to maximise the opportunity for scrutiny.*

*(...) we've got other considerations in Wales too. An expedited Bill would need to be considered by the Llywydd, so they may want to make a statement under Standing Order 26.4 before it could be introduced, and then, obviously, after the Senedd passes a Bill we have the period where the Counsel General or the Attorney General may refer to the Supreme Court, so there's an additional period there. All of this can add around eight weeks, although, of course, it can be shortened by agreement, on top of the actual passing of the emergency or fast-tracked Bill through the Senedd. So, I think that we've recognised in this Bill the value of scrutiny and tried to respect that in the way in which we've made these proposals."<sup>80</sup>*

**79.** In correspondence with the Committee, the Minister further commented:

*"It is also, of course, open to the Business Committee to propose alternative dates for the debates when it considers that more, or less, time is required for scrutiny before the vote. The respective 60 and 20 Senedd day requirements provide a flexible mechanism so that we, Ministers and the Senedd, can consider, on a case-by-case basis, what time is appropriate for scrutiny, reflecting the complexity of the regulations and the impact on taxpayers.*

*My intention is not to reduce the period of scrutiny, but rather to emphasise that I am looking to provide longer than, necessarily, the minimum period permitted by Standing Orders, and future Ministers will be advised to follow the same approach".<sup>81</sup>*

**80.** An official accompanying the Minister drew comparison between the approach proposed in the Bill and the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill introduced to the Scottish Parliament in January 2016.<sup>82</sup> He stated:

*"Looking again at the Scottish experience with their additional dwelling supplement, it's something that I think it's probably fair to say is the key*

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<sup>80</sup> LJC Committee, 14 February 2022, RoP [17-18]

<sup>81</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 11–12

<sup>82</sup> Scottish Parliament, [Land and Buildings Transaction Tax \(Amendment\) \(Scotland\) Bill](#)

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*driver for our reviewing the legislation, or the Government seeking the additional power for the Welsh Ministers. Part of it is, if you remember, to look to respond to UK action, or UK budget changes, and with the ADS, the Scottish Government effectively received Royal Assent to their Bill three days after the UK Government introduced their legislation. So, the Scots had to respond in the absence of seeing the UK legislation. I think that's something that's important—that if we accept that we need to respond to UK legislation that will have an effect on the amount paid into the consolidated fund, then, clearly, being able to see actually what's going to happen is very helpful. So, here the Scottish Government responded in time using their expedited legislation to have their legislation receive Royal Assent before 1 April 2016, but in doing that, they obviously had to do it absent of any view of the UK legislation to which they were actually trying to respond. I think that's where, partly, we have an advantage to ours—that we can bring in our legislation. In that scenario, obviously we'd have to be very, very quick, but after the UK Government had introduced its legislation, we'd still have time, potentially, for the Welsh Ministers, should they want to, to make the made affirmative regulations before the 1 April date passed.”<sup>83</sup>*

**81.** The official accompanying the Minister also compared the UK Government's introduction of a temporary increase to the nil rate band for Stamp Duty Land Tax (SDLT) in July 2020 via primary legislation with the use by the Welsh Government of regulations subject to the made affirmative procedure. He said:

*“Yes, the UK Government brought their changes in through primary legislation. An announcement was made on 8 July (...) followed by a Provisional Collection of Taxes Act 1968 resolution. Of course, PCTA resolutions by convention are approved, so, yes, there is a vote, but, 'Is there a vote?', I suppose, is a question there around convention. Then, on 13 July, the legislation was introduced. On 17 July, it was agreed. On 22 July or 23 July, it received Royal Assent. That was the speed with which that piece of primary legislation went through. Yes, there were debates in the Commons. Yes, there was a committee of the house that scrutinised the Bill. But I would question if a three-day scrutiny period is actually sufficient for legislation.”<sup>84</sup>*

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<sup>83</sup> LJC Committee, 14 February 2022, RoP [21]

<sup>84</sup> LJC Committee, 14 February 2022, RoP [90]

**82.** In continuing the comparison, the official added:

*"You could say, 'Yes, it's primary, isn't that good?', but for us, we did ours through the section 24 LTT Act power that enabled the Minister to introduce made affirmative regulations (...) the Minister made the announcement on 14 July, and on 24 July the regulations were made, coming into force on 27 July (...) But the Minister appeared at the Finance Committee and gave evidence (...) We had a detailed explanatory memorandum. And then the vote happened (...) on 29 September.*

*I would say that I think that was a better form of scrutiny that happened for the regulations, that there was more ability for the Finance Committee to input. They invited the Minister. They could have invited external evidence. They had the time to do that (...) I think that we're trying to introduce something that has the flexibility but does really recognise that the Senedd has a key role, and part of that, obviously, is the vote at the end, but also the process and the time that they have in order to scrutinise the legislation that goes through. Yes, that is going to lack, unfortunately, an ability to amend, but I think that, again, it's that balance between the length of time for scrutiny, the ability to write a full, comprehensive report, and compared to the UK potential expedited emergency Bill process that would have you having Royal Assent before you'd even opened the first page of the explanatory memorandum, to some extent."<sup>85</sup>*

## **Inclusion of a sunset provision**

**83.** On the question of whether a sunset provision should be included within the Bill, Sir Paul Silk said:

*"...I think a sunset clause is a good device where you're not sure whether something is being used well or not. So, it is something that we see sometimes in legislation and can be desirable, but I personally would prefer to see things got right in the first place, rather than having a sunset clause put into them, just to see, 'Well, let's have a go at it and see whether it works or not.' So, my advice would be to get it right in the first place."<sup>86</sup>*

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<sup>85</sup> LJC Committee, 14 February 2022, RoP [91–92]

<sup>86</sup> Finance Committee, 11 February 2022, RoP [59]



**84.** CIOT suggested that:

*"...it would be an option to grant these new powers, but only for a limited period, subject to a possible renewal. And then at the time of renewal, you, as the legislators, would have the opportunity to see how things have worked out before you granted that renewal. I think this is something we quite often call for—a sunset clause."<sup>87</sup>*

**85.** ACCA felt that sunset clauses improve the transparency for taxpayers and provide an opportunity to “undertake impact assessments and justify whether something is needed or needs to be extended”.<sup>88</sup>

**86.** However, the Minister rejected the inclusion of such a provision, based on its practical implications.<sup>89</sup> An official accompanying the Minister during her appearance before the Finance Committee expanded:

*"...the issue that we would have with that is, if we had primary legislation in place within this Bill, which had a sunset clause, any regulations that we made underneath that would fall away once the enabling power fell away.*

*I think in the UK it's a different scenario because sunset clauses that are made under the Finance Acts are, essentially, absorbed or mopped up, for want of a better phrase, by an annual finance Bill. So, there's always a vehicle that will ensure that those provisions remain in force, whereas we don't have similar provision."<sup>90</sup>*

## **Our view**

**87.** During the first year of the Sixth Senedd we have spent a lot of time reporting on the Welsh Government's legislative consent memoranda and expressing concern at the extent to which the UK Government is legislating in devolved areas. One consequence of this approach is that legislative scrutiny on important matters within devolved areas is performed in the UK Parliament, with the Senedd and its elected Members effectively only being provided with an “all or nothing” approach when voting on the legislation by means of a legislative consent motion.

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<sup>87</sup> Finance Committee, 2 February 2022, RoP [26]

<sup>88</sup> Finance Committee, 2 February 2022, RoP [117]

<sup>89</sup> Finance Committee, 16 February 2022, RoP (164)

<sup>90</sup> Finance Committee, 16 February 2022, RoP [165–166]

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**88.** It is therefore profoundly disappointing that the second piece of primary legislation introduced by the Welsh Government is an enabling Bill which inherently leaves all significant policy development and implementation to be determined by subordinate legislation. This means that the Senedd and its elected Members will face voting on such matters on an “all or nothing” basis, because subordinate legislation is not subject to line-by-line scrutiny and is not amendable.

**89.** What makes the situation even more problematic is that the Bill features an extensive Henry VIII power to amend existing Senedd Acts on matters of taxation.

**90.** In essence, the Bill will permit the Welsh Tax Acts already passed by the Senedd to be amended by subordinate legislation. As evidence cited in this report shows, this approach proposed by the Welsh Government is contrary to established parliamentary practice and principles associated with good law-making.

**91.** We note the justification for the approach the Minister has adopted and we believe it lacks merit. We share the Minister’s understanding that the use of such a Bill is rare but disagree that it represents an “innovative” process that is “right for Wales”.

**92.** In our view, the overall approach delivers a Bill that not only represents poor legislative practice but is constitutionally flawed. The need for the Welsh Government to act quickly should not be at the expense of the primary legislative functions and supremacy of the Senedd.

**93.** We acknowledge that some of the circumstances in which the powers under the Bill may theoretically be used to make regulations seem sensible in principle. However, this does not justify the overall approach proposed.

**94.** We are also concerned that the approach adopted will reduce the transparency and accessibility of Welsh law by complicating the statute book.

**Conclusion 1.** The Bill does not represent an appropriate legislative vehicle to make changes to the Welsh Tax Acts and it should be regarded as a short-term, temporary measure only.

**95.** We note the Minister’s views on why she has decided against an annual finance Bill. We also note that some commentators have suggested that the current limited amount of devolved tax legislation may not be sufficient to justify updates by way of annual primary legislation. We will discuss later how we believe a finance Bill could be part of a legislative package for dealing with legislating in relation to tax.

**96.** We also note the Minister’s views on the use of the 1968 Act. The Welsh Government’s 2020 consultation document drew attention to the 1968 Act, highlighting its use but concluding there is “no equivalent provision to the Provisional Collection of Taxes Act 1968 in Welsh law”.<sup>91</sup> That, of course, does not mean that such a provision (or similar) cannot be introduced into Welsh law.

**97.** As regards the Senedd lock, we share the view of Sir Paul Silk that its inclusion would be of limited benefit. Moreover, the initial proposal of a Senedd lock would not have been a substitute for using primary legislation. The suggestion from the Minister that the lock has been replaced by a narrower regulation-making power does not therefore amount to a significant improvement. The earlier proposal consulted on may have been unpalatable to the Senedd but it was a Welsh Government proposal and, as such, moving away from it is not a concession to the legislature.

**98.** We certainly do not agree with the Minister that the level of delegated power in the Bill is appropriate. We are also not persuaded that the extent of the power in the Bill has been adequately constrained by the inclusion of the four purpose tests. In our view they do not provide the absolute clarity suggested by the Minister. The Bill provides far too much power for the Welsh Ministers at the expense of the role of the Senedd. While we do not doubt the intention of the Minister to exercise the power in the way she proposes, what is always more relevant is how the power could be used by a future government. The proposals in the Bill therefore give us considerable cause for concern.

**99.** We recognise the need for the Welsh Government to act quickly to avoid negative consequences to public finances. However, we consider the balance in the Bill is tilted too much in favour of the Welsh Government’s desire to respond quickly and against the fundamental functions of the Senedd as a legislature.

**100.** We are therefore concerned that the Bill as drafted has the potential to marginalise the democratic mandate of the Senedd. On this point the words of Professor Lewis resonate strongly with us:

*“The breadth of these purposes as drafted suggests that they may be being sought as ‘just in case’ power, which goes against the grain of the apparent*

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<sup>91</sup> Welsh Government, Consultation Document: Tax Devolution in Wales – Enabling changes to Welsh Tax Acts, July 2020, paragraph 2.37

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*principle that it is the representatives of the people rather than those of the Crown who decide whether and to what extent people should be taxed".<sup>92</sup>*

**101.** We have listened to the Minister and her officials seek to explain why the use of subordinate legislation arising from the Bill provides equal or greater opportunities for scrutiny than the use of primary legislation. That is clearly not the case and we were disappointed to hear the arguments put forward. In our view, references in evidence and supporting documents to "Senedd scrutiny" have invariably been based on the perspective of those subject to scrutiny, rather than those tasked with the responsibility of undertaking that function.

**102.** The length of time available for scrutiny is one thing, but the actual time that a Minister is subject to formal scrutiny is quite another. Moreover, Parliaments are not simply audiences for Ministers. The ability to table amendments to a bill, as we keep having to state, is a key tool of scrutiny because it provides the opportunity for elected Members to table amendments to test, challenge and influence the Welsh Ministers. Our view, which will doubtless be shared by others, is that the more thorough the scrutiny, the better the legislation.

**103.** We would like to illustrate why the length of time in days is not a helpful method of assessing the effectiveness of scrutiny, particularly when comparing the passage of primary legislation with proposed timescales for approving regulations. Section 4(5) of the Bill provides that, under the made affirmative procedure, approval of a regulations by a resolution of the Senedd must take place within 60 days or they cease to have effect. By contrast, the Welsh Elections (Coronavirus) Bill was introduced on 27 January 2021 and received Royal Assent on 16 March 2021, which is a period of 49 days (not including pre-introduction considerations relating to legislative competence). Both options last approximately the same amount of days but the option of using a bill offers more opportunity for detailed scrutiny, including tabling amendments for debate, than the use of regulations.

**104.** We have also heard the Minister say that the use of regulations is appropriate because the Senedd has the final say. However, as Professor Lewis said in his evidence to the Finance Committee:

*"It may be objected that it does not matter that changes to the law will be made by Welsh Ministers, because to have full effect they must be approved by the Senedd, either before they are made, or in an emergency within 60 days.*

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<sup>92</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 10

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*That is factually correct, but the end point of that reasoning is that there is no need for any laws to be made by the Senedd, so long as the Senedd has power of approval over secondary legislation.*"<sup>93</sup>

**105.** Not only does the Bill set an unwelcome precedent in terms of legislative principles, it also puts in place a system for the making of tax law that would exist not only for the duration of the Sixth Senedd but potentially in future Seneddau for use by future governments. In addition, the approach adopted may prove reason to further delay the development of a legislative budget process (i.e. a finance Bill, which we come on to discuss below). This is because the existence of this power on the statute book would allow an argument to be made, for example, that the Welsh Ministers already have the appropriate tools to respond to fiscal events at the UK level as regards the devolved taxes. This is particularly the case when considered with the existing regulation-making powers for setting rates and bands in the Welsh Tax Acts (which we comment on further below).

**106.** We acknowledge that there may be a future need to legislate urgently in some of the circumstances envisaged during scrutiny of the Bill. However, as we have already suggested, that does not make the overall approach adopted by the Welsh Government appropriate.

**107.** We note that the Minister has said<sup>94</sup> that the Senedd has already set a precedent in relation to the use of the made affirmative procedure to give the Welsh Ministers powers to change rates and bands in relation to devolved taxes. However at that time, during the infancy of developing and implementing the Welsh Tax Acts, a legislative budget process did not exist. As such, the decision by a previous Senedd to adopt the use of regulations to set tax rates and bands may have been entirely appropriate at that time. It does not follow that this Senedd should continue to support that approach, not least as the experience and usage of devolved taxes develops and matures. The adoption of a legislative budget process could allow for the annual setting of rates and bands (and other tax-related legislative changes) in primary legislation, in line with the approach taken in the House of Commons.

**108.** We note the evidence from practitioners who have said that primary legislation is appropriate to deal with changes in tax law of the nature proposed by the Welsh Government. We share those views. We also consider that existing procedures for dealing with Bills in an expedited fashion, suitably amended if necessary, would have been preferable to an enabling

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<sup>93</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 9

<sup>94</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 15

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Bill delegating an extensive Henry VIII power to the Welsh Ministers to amend existing primary legislation on tax made by previous by Seneddau.

**109.** In our view, it would have been more beneficial to bring forward a package of legislative proposals that respected parliamentary principles and encompassed good law-making. Such an approach would still have enabled the Welsh Government to pursue and deliver its financial objectives but in a way that allowed those objectives to be subject to what we consider to be appropriate levels of scrutiny by the Senedd. This is particularly important as we are not persuaded that all of the purposes for which the power contained in the Bill may be exercised are needed at this point in time (see the evidence highlighted in Chapter 4).

**110.** We note from the Welsh Government's consultation document that it has acknowledged that it would be possible for the Senedd to adopt an annual (or less frequent) finance Bill process to make changes to the Welsh Tax Acts, subject to certain difficulties being resolved. We also note the Welsh Government's acknowledgement that a special purpose Bill (as opposed to a finance Bill) has been used in the UK Parliament. We acknowledge that this may require a new Senedd procedure but do not consider that would represent an insurmountable burden.

**111.** In expressing this view, we draw a comparison with how the Welsh Government requested<sup>95</sup> the development of a Senedd procedure and new Standing Order to accommodate the introduction and scrutiny of Welsh Government consolidation Bills. As work was underway on these new procedures, led by the Senedd's Business Committee, the Welsh Government brought forward its Legislation (Wales) Bill which, now since enacted, provides the legal basis for the Welsh Government's commitment to consolidate Welsh law. Our predecessor Committee was closely involved in the consideration of the draft Standing Order and was the lead committee on the scrutiny of the Bill. Should the Minister have wanted to pursue a primary legislative vehicle to make changes to the Welsh Tax Acts, not only is it clearly possible to develop the accompanying Senedd procedures, there is also a very recent example of how it can be achieved.

**112.** We therefore believe the Welsh Government should have developed a more strategic, coherent and long-term package of legislative measures to deliver its proposals and objectives in relation to tax. This could have included the use of primary legislation to deliver the relevant tax changes needed as a matter of urgency (such as a finance Bill, annual or otherwise, or a 'special purpose' Bill, subject to an expedited procedure), potentially coupled with equivalent

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<sup>95</sup> [Letter from the then Counsel General to the Llywydd](#), 12 December 2016

provisions to the 1968 Act and those aspects of the existing Bill that are also required as a matter of urgency.

**113.** We also believe that the Minister has been too quick to discount an approach akin to the use of the 1968 Act solely because there is not currently an annual finance Bill. We believe there would have been merit in exploring an approach that involved a motion of the Senedd subsequently being given permanent effect by the use of a bill (which, if needed, could be subject to an expedited or other bespoke legislative procedure). Such an approach could have been developed to enable the Welsh Government to react quickly to external events and safeguard public finances, while at the same time respecting the legislative supremacy of the Senedd.

**Conclusion 2.** Our preferred approach is that, in principle, primary legislation should be used to amend the Welsh Tax Acts.

**114.** The Minister told us the time is not right for a finance Bill. However, we are concerned that this view is being repeated frequently without any thought being given to when the time would be right for a finance Bill. In our view, a debate needs to be initiated about the democratic oversight of taxation powers and in particular, the continuing appropriateness of the Welsh Ministers having the power to make such significant decisions regarding taxation by regulations.

**115.** We therefore believe that the Welsh Government should reflect on how its objectives could be achieved using primary legislation, with a view to bringing forward a more coherent package of measures in order to place the democratic oversight of the making of tax law on a sounder footing.

**116.** We note the suggestion of an official accompanying the Minister that the inclusion of any sunset clause would mean that any regulations that are made as a consequence of the Bill would fall away once the enabling power fell away. However, such a circumstance could be avoided by drafting a sunset provision that overcomes that issue.

**117.** In our view, the Minister should review the Bill within two years of it receiving Royal Assent in order to ascertain its effectiveness in delivering its objectives.

**Recommendation 1.** The Minister should table an amendment to the Bill to require a statutory review of the regulation-making power in the Bill within two years of Royal Assent. The review should include an assessment of the extent to which the power provided to the Welsh Ministers to make regulations has been used.

**Recommendation 2.** The Minister should table an amendment to the Bill to include an appropriate sunset provision such that no new regulations may be made under the power in section 1 after July 2027. This will provide the Welsh Government with sufficient time to develop more appropriate approaches to legislating in respect of devolved taxation involving the use of primary legislation.

**118.** We wish to comment on two other issues.

**119.** In materials accompanying the Bill reference is made to the Welsh Government taking action based on its view of what “the Senedd intended” when legislating.<sup>96</sup> This is simply not appropriate. The Minister may of course propose changes to the law but interpreting legislation in the event of a dispute is a matter for the courts.

**120.** When challenged on this in Committee, the Minister stated:

*“So, I think this might be an area where we could look to the wording in the draft policy statement, to potentially review and clarify. The intention of the statement wasn't to substitute the Government's view of what the law was intended to be with that of the courts', because interpretation of the law can only be carried out by the courts. I know that you'll be familiar with Professor Lewis's article where he says, once a court or tribunal has made a decision, then that is the law. So, I think a better explanation of the example might be if an element of the Welsh tax Acts is found to be unlawful by a court or tribunal, then Welsh Ministers may decide to amend the Welsh tax Acts to avoid further challenges to the interpretation of that legislation.”<sup>97</sup>*

**121.** The Committee welcomes the Minister's clarification on this issue but was disappointed to note that, in the Minister's subsequent correspondence with the Committee, reference was again made to matters being contrary to the intention to the Senedd in the context of the Minister's potential use of the power proposed in this Bill.<sup>98</sup>

**122.** We note that the Minister states in the EM:

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<sup>96</sup> See for example, Welsh Government, Statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc.(Power to Modify) Act 20XX, December 2021, paragraph 2.2; EM, paragraph 8.27

<sup>97</sup> LJC Committee, 14 February 2022, RoP [52]

<sup>98</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 60

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*"The provisions included in the Bill align to the principles set out in the consultation published in July 2020. The specific proposals have subsequently been further refined (...) These changes have been shared and expertise and input sought from key tax and accountancy representative bodies. Given the level of consultation responses and the length of the legislation, it was considered more appropriate and efficient to share and invite comment on the legislation from key stakeholders rather than publish a draft Bill as part of a full consultation."<sup>99</sup>*

**123.** However, we believe that consulting on a draft Bill would have been a sensible approach for a Bill of such significance and constitutional importance.

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<sup>99</sup> EM, paragraph 4.14

## 4. Specific observations on particular sections and the power to make subordinate legislation

### Introduction

**124.** The Bill contains eight sections that predominantly focus around a power to make regulations under section 1.

**125.** The statement of policy intent for subordinate legislation supplements chapter 5 of the EM. and the Minister states on page 2 that “it provides an indication of the current policy intention” for the regulations to be made by the Welsh Ministers under the Bill.<sup>100</sup>

### Section 1 – Power to modify the Welsh Tax Acts etc.

**126.** Section 1 provides that the Welsh Ministers may, by regulations, modify any of the Welsh Tax Acts and regulations made under those Acts if they consider modifications “necessary or appropriate” for any of the following four purposes:

- ensuring that LDT or LTT is not imposed where to do so would be incompatible with any international obligations (section 1(1)(a));
- protecting against tax avoidance in relation to LDT or LTT (section 1(1)(b));
- responding to a change to a predecessor tax (stamp duty land tax and landfill tax, which were replaced in Wales by LTT and LDT respectively) that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the 2006 Act (section 1(1)(c));
- responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under them (section 1(1)(d)).

**127.** In the statement of policy intent the Minister explains that section 1 “enables the Welsh Ministers to respond by regulations to a number of external circumstances that impact on Welsh

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<sup>100</sup> Welsh Government, Welsh Tax Acts etc. (Power to Modify) Bill (“the Bill”): Policy intent for subordinate legislation to be made under this Bill, December 2021, page 2

devolved taxes” and that the four purpose tests are “intended to constrain the use of the power.”<sup>101</sup>

**128.** The Minister states in the EM that:

*“The regulation making power will not be used to achieve routine policy changes to the devolved taxes. For such changes the Welsh Government will use powers that already exist in the Welsh Tax Acts or, where necessary, will introduce primary legislation. It is clear that the more significant the change is, the greater the need to make those changes in consultation with Welsh citizens and interested stakeholder groups, and in all cases with appropriate Senedd scrutiny.”*<sup>102</sup>

### **“Necessary or appropriate” test**

**129.** In correspondence with the Committee, the Minister explained that she viewed the wording “necessary or appropriate” within section 1 of the Bill as placing “sufficient restraints upon the use of the power, whilst also permitting a certain degree of flexibility”. The Minister further explained:

*“It is my view that the term ‘necessary’ sets a high bar, with the courts giving it a meaning including a degree of compulsion. Case law has determined that ‘something is necessary not if it is useful, reasonable or desirable but only if there is a pressing need for it’.*

*This will cover a scenario where the Welsh Ministers consider it necessary to exercise the regulation making power (a high bar) or where they consider it appropriate to do so (where it is suitable or proper in the individual circumstances).*

*I would not say that the ‘necessary test’ is always satisfied when considering which regulations to make, because section 1(1) states that the regulations must either be necessary or appropriate, thereby providing Welsh Ministers with alternative tests to choose from depending upon the circumstances.*

*There may be times that the making of a change would be appropriate, such as if a change was desirable following the making of a first set of regulations*

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<sup>101</sup> Welsh Government, Welsh Tax Acts etc. (Power to Modify) Bill (“the Bill”): Policy intent for subordinate legislation to be made under this Bill, December 2021, page 3

<sup>102</sup> EM, paragraph 3.3

*to, for example, remove a class of taxpayer unintentionally captured within the changes or where the scrutiny indicates that changes are wanted. Such changes may not be 'necessary' but they will, if the Welsh Ministers want to make them, be 'appropriate'. A further example would be if the Welsh Ministers wanted to make a change to provide a reduction in tax following changes to SDLT – again, such a change may not be 'necessary' but may certainly be considered 'appropriate' to confer an equal benefit to taxpayers or to protect the tax base.”<sup>103</sup>*

### **Compatibility with international obligations purpose under section 1(1)(a)**

**130.** ICAEW felt that the need for “compliance with international obligations, is likely to be a rare occurrence and the impact on Welsh taxpayers is likely to be very limited.”<sup>104</sup> It also was not convinced by the appropriateness of the proposed power given the current devolved taxes it would apply to, but noted that, in the future, this could possibly change if other taxes are devolved to Wales.<sup>105</sup>

**131.** When questioned on this point, the Minister felt the inclusion of the power in connection with international obligations “is justified, because Welsh devolved taxes do form part of a small number of taxes that actually operate in that UK environment”.<sup>106</sup>

**132.** The Minister also told us:

*“For non-compliance with any international obligations it is right that we are prepared for changes to be made – and if such a non-compliance were identified then Welsh Ministers may feel it necessary to introduce a change at pace using the made affirmative procedure and with retrospective effect. Failure to comply could have reputational risks for the Welsh Government and reflect on Wales more generally, impacting on potential inward investment. Failure may also oblige some taxpayers to file their returns in a manner that is contrary to the international obligations, necessitating amendments at a later date when compliance with the international*

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<sup>103</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 47–51

<sup>104</sup> Finance Committee, [Written Evidence: WTA 05 Institute of Chartered Accountants in England and Wales](#), paragraph 26

<sup>105</sup> Finance Committee, 2 February 2022, RoP [109]

<sup>106</sup> Finance Committee, 16 February 2022, RoP [46]

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*obligation is reflected in our law (assuming the change is made with retrospective effect).*<sup>107</sup>

**133.** The Minister agreed “it may not be readily apparent how international obligations may impact our devolved taxes”, but provided some possible examples.<sup>108</sup>

**134.** The Minister concluded that she considered it “better to be able to say ‘our legislation does comply with international obligations’ than ‘our legislation will comply with international obligations’.”<sup>109</sup>

### **Protecting against tax avoidance purpose under section 1(1)(b)**

**135.** “Tax avoidance” is not defined in the Bill but has been the subject of discussion in evidence with the Finance Committee, with varying views expressed about the need and feasibility of including a definition, not least give its broad meaning.<sup>110</sup>

**136.** Professor Lewis noted that the 2016 TCM Act “already contains a broad general anti-avoidance rule”, noting that “[t]his type of broad rule makes it more difficult for taxpayers to avoid paying tax through finding loopholes in the law”. He also highlighted that the drafting of the Bill is much broader than simply a loophole-closing provision and enables any amendments to be made to protect against tax avoidance. Professor Lewis cited how the power could be used to reverse the burden of proof under the 2016 TCM Act and require the taxpayer rather than the WRA to demonstrate that an arrangement is not artificial.<sup>111</sup> He felt that this “kind of change, one might argue (...) should be done on the floor of the Senedd and not through regulation”<sup>112</sup> and recommended that the Bill should “define more narrowly the types of change that may be made under the anti-avoidance purpose”.<sup>113</sup>

**137.** The WRA noted that the GAAR in the 2016 TCM Act is an effective tool<sup>114</sup> in supporting its activities in counteracting tax avoidance:

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<sup>107</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 27

<sup>108</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 53–54

<sup>109</sup> Letter from the Minister for Finance and Local Government, 11 March, paragraph 55

<sup>110</sup> For example, Finance Committee, Written Evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group, paragraph 3.2; Finance Committee, Written Evidence: WTA 06 Dr Sara Closs-Davies, Bangor University, page 2; Finance Committee, 2 February 2022, RoP [39–42 and 133],

<sup>111</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 5

<sup>112</sup> Finance Committee, 11 February 2022, RoP [69]

<sup>113</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 9

<sup>114</sup> Finance Committee, 2 February 2022, RoP [239]

*"We believe the GAAR is an effective deterrent at present. As I say, avoidance isn't a risk that we currently see within the two devolved taxes. That's not to say that circumstances in the future won't change. Things may arise that require us to take action. But the GAAR is an important tool to have as and when required. But in practice, powers such as the GAAR, they'll be required in very few cases, I think it's important to note, because there are often other more appropriate ways of ensuring compliance and addressing any suspected cases."*<sup>115</sup>

**138.** When asked whether the WRA has encountered any particular situations where the use of the powers proposed in the Bill to protect against tax avoidance (in relation to LTT and LDT) would have been beneficial to the WRA or Welsh taxpayers, the WRA noted that "this scenario has not yet arisen".<sup>116</sup>

**139.** While the Minister agreed with the WRA's assessment that the GAAR is an "effective deterrent", she explained why she believed the additional powers were necessary:

*"I also recognise this legislation is still relatively new. I take the risk of tax avoidance very seriously and the possibility of circumstances changing in the future, for example, changes may be made to the current devolved taxes, and, of course, new devolved taxes may be created, should not be ignored - things may arise that require us to take action very quickly. This Bill offers an opportunity to further strengthen the use of these already effective powers and I think that should be welcomed."*<sup>117</sup>

**140.** We asked the Minister why no definition of tax avoidance was included in the Bill. The Minister told us that:

*"Tax avoidance is artificial or contrived planning (sometimes based on a 'novel' reading of the legislation) that achieves a result not intended by the Senedd. Whereas tax planning, in line with the intent of the provisions, is a perfectly reasonable response to that legislation. (...)*

*The provision refers to "protecting against tax avoidance" and a similarly broad definition is used in section 12 of the Tax Collection and Management Act to describe WRA's main functions in relation to tax avoidance. The Welsh*

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<sup>115</sup> Finance Committee, 2 February 2022, RoP [237]

<sup>116</sup> Finance Committee, 2 February 2022, RoP [242]

<sup>117</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 74

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*Ministers and the WRA are trying to address the same thing here in terms of tax avoidance, and so it is appropriate to describe this in the same terms.*

*The definition in the GAAR will apply broadly to tackle artificial arrangements that create a tax advantage that the Senedd did not intend when enacting the relevant legislation. The GAAR has not yet been tested through the courts and so there is the possibility that there are avoidance arrangements that could fall outside of this definition but to which we'd need to respond to quickly. Aligning the definition in the Bill with that in the GAAR would increase the risk to Welsh finances and fairness for all taxpayers, as the GAAR might not be engaged and there would be a limited ability to respond quickly to close the loophole.*

*Whilst I recognise a precise definition of what constitutes avoidance activity may be attractive, it is not possible to provide that degree of certainty. If defined too narrowly, there is a risk that Welsh Ministers might find the ability to make regulations is too restricted. Also those seeking to bend the rules may structure their affairs in a way that just fell outside of a narrower definition, but would still achieve a tax result which was contrary to the intentions of the Senedd when passing the original legislation.”<sup>118</sup>*

**141.** The Minister also responded to Professor Lewis’s concerns that the power in the Bill could be used to amend the existing anti-avoidance provisions in the 2016 TCM Act to reverse the burden of proof and require a taxpayer to demonstrate that avoidance arrangements are not artificial, instead of the WRA as the law currently requires. The Minister said:

*“It is correct that the power in this Bill could technically be used by the Welsh Ministers to amend elements of the GAAR. However, such changes would still need to pass the ‘necessary’ or ‘appropriate’ test and be in response to an external event, and in the case of made affirmative regulations they would need to be necessary by reason of urgency.*

*It is difficult to see how the conditions for exercising the power would be met for changes to the GAAR as a result of the avoidance activity it is designed to target. In those instances, the response might include a legislative change using the new power, but that would most likely be an amendment to the actual LTT or LDT provisions themselves – closing a perceived ‘loophole’ or*

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<sup>118</sup> Letter from the Minister for Finance and Local Government, 11 March, paragraphs 56 and 58–60

*putting the interpretation beyond doubt. Likewise, it appears unlikely that an amendment to the GAAR provisions themselves would be necessitated as a result of UK budget changes.*

*Where the new power could be used, potentially, is in response to a court decision that found the GAAR legislation to be 'defective' in some manner or supported an interpretation of the GAAR provisions that changed its application beyond what was intended by Senedd, for example taking an unexpected approach to what is meant by 'artificial'. The impact of the decision could make the GAAR less effective, potentially impacting on the WRA's ability to tackle other ongoing avoidance cases. (...)*

*It is, of course also, worth remembering that the changes made will only be brought into force or given permanent effect, if the Senedd approves the regulations. At this stage, I am open to considering whether it would be appropriate for there to be additional restrictions in regards to the ability to make changes to the GAAR and look forward to seeing the Committees recommendations. Members should be aware though, that in the event that a court decision finds the GAAR to be ineffective the agile and flexible route to making the necessary changes will not be available as a result of such an amendment, and in Wales we could have a period without an effective GAAR to protect our tax base."<sup>119</sup>*

**142.** We also asked the Minister whether there are any deficiencies in the WRA's existing powers that would require a further power to "tighten" existing anti-avoidance provisions. In response the Minister said that:

*"The Welsh Government and WRA are not currently aware of any changes that may be required to the devolved taxes to stop any avoidance activity. For both devolved taxes, there is, sadly, always the risk that there will be individual or mass-marketed avoidance activity that the Welsh Government and WRA will wish to stop with immediate effect. This could be because there is a lacuna or gap in the legislation that facilitates the avoidance activity, or, based on the UK experience, a need for clarity to the legislation to make it clear the law operates in a manner that does not permit the avoidance activity. (...)*

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<sup>119</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 63–65 and 67

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*Therefore the introduction of this new power is not intended to address current perceived deficiencies or 'loopholes' in the devolved tax legislation, rather it is to provide an additional tool to protect revenues from unexpected attacks in the future.*

*Furthermore, it is worth recalling that the tools available to the WRA enable it to counteract instances of tax avoidance where a tax advantage has already been sought by the taxpayer. The new power introduced by this Bill will enable Welsh Ministers to make legislative changes to close down opportunities for avoidance before taxpayers attempt to claim such an advantage."<sup>120</sup>*

### **Responding to a change to UK predecessor taxes purpose under section 1(1)(c)**

**143.** The Minister explains in the EM that the Welsh Ministers may need to amend the Welsh Tax Acts if “the UK Government introduces a change to a predecessor tax at short notice and with immediate effect, which could have implications for businesses, the property market, the environment and could also have a direct budgetary impact through the block grant adjustment process.”<sup>121</sup>

**144.** Both CIPFA and ICAEW agreed with the need for powers related to this purpose. CIPFA commented:

*“...given the changes that are made to stamp duty land tax and a regime around that, we feel it is important that there are tools for Welsh Government to ensure that they can make those changes in response.”<sup>122</sup>*

**145.** ICAEW felt that Welsh Government is beholden to a lot of the changes at the UK level in relation to SDLT, which presents a problem in terms of the operation of LTT.<sup>123</sup>

**146.** Professor Lewis acknowledged the need for a mechanism that enables quick action to be taken in response to action by the UK Government on predecessor taxes, noting “that it makes sense for the change to have effect from the same date as the UK change, and if that date is in the past for the legislation to be retrospective to that extent.”<sup>124</sup>

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<sup>120</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 69 and 71–72

<sup>121</sup> EM, paragraph 3.5

<sup>122</sup> Finance Committee, 2 February 2022, RoP [94]

<sup>123</sup> Finance Committee, 2 February 2022, RoP [96]

<sup>124</sup> Finance Committee, Written Evidence WTA 01 Professor Emyr Lewis, Aberystwyth University, page 6

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**147.** In correspondence with the Committee, the Minister said:

*"This Bill seeks to find the appropriate legislative solution for the current situation on our devolution journey. The relationship between the revenues available to the Welsh Government from our devolved taxes and the effect on our Budget of the UK government's changes to the predecessor taxes is particularly illustrative. That relationship has only recently arisen. It is worth remembering that devolution itself is a relatively recent constitutional change, with our devolved taxes only commencing operation four years ago (and in Scotland only seven years ago)."*<sup>125</sup>

### **Responding to decision of a court or a tribunal purpose under section 1(1)(d)**

**148.** Professor Lewis noted that, as in the case of the anti-avoidance purpose, this is a very broadly drawn provision, allowing the Welsh Ministers to change the Welsh Tax Acts in response to an external challenge to the way in which they operate. He emphasised:

*"The difficulty with this purpose in the Bill is that it is so very broad. It could in theory apply to any provision in the Welsh Tax Acts, apart from those that set up and govern the WRA."*<sup>126</sup>

**149.** Professor Lewis also noted that, again as in the case of the anti-avoidance provision, the drafting of the Bill does not reflect the approach set out in the EM (which states that the regulation making power will not be used to achieve routine policy changes to the devolved Welsh taxes<sup>127</sup>), commenting:

*"Rather it gives the Welsh Ministers the power, should they choose to do so, to achieve routine policy changes, significant or otherwise, and to overturn decisions made in a court of law. In other words, the power to decide who legislates about what, who makes the decision whether a matter should be dealt with by primary or secondary legislation, lies with the Government."*<sup>128</sup>

**150.** ACCA also thought the purpose was "very broad" and "almost a catch-all for anything that happens within this particular area".<sup>129</sup>

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<sup>125</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 29

<sup>126</sup> Finance Committee, Written Evidence WTA 01 Professor Emyr Lewis, Aberystwyth University, page 7

<sup>127</sup> EM, paragraph 3.3

<sup>128</sup> Finance Committee, Written Evidence WTA 01 Professor Emyr Lewis, Aberystwyth University, page 7

<sup>129</sup> Finance Committee, 2 February 2022, RoP [137, 139]

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**151.** When asked about breadth of the power, the Minister told the Finance Committee:

*"I think the provision is deliberately broad to capture all eventualities, because we can't predict at this point the future scenarios where the provision might be used".<sup>130</sup>*

**152.** An official accompanying the Minister confirmed this position, saying "the wide drafting of this provision is intentional", adding that the Welsh Government "cannot predict what future scenarios will come down the line that we might need to use this power for" and concluding that it did not "want to try to restrict the scope of the Bill too narrowly."<sup>131</sup>

**153.** In evidence to the Finance Committee, the WRA said that, in relation to its operation of the devolved tax regime, it had not to date needed to respond to the decision of any tribunals.<sup>132</sup>

**154.** When asked to respond to the fact that the WRA had not yet needed to respond to a tribunal decision, the Minister said:

*"The WRA have not yet identified an issue that will require a legislative change in relation to a tribunal or higher court decision (...) It is also worth emphasising that HMRC have had a very strong record of winning SDLT cases; it is when there is a loss that a legislative change is more likely to be needed. (...)*

*As with my earlier response in relation to protecting against tax avoidance, no necessary legislative response has been identified at the present moment in response to a Tribunal or higher court decision. This purpose test is included to ensure that when such a decision is made the Welsh Ministers can respond in an agile manner (see for example Annex 1 that sets out some of the court decisions that did, or might have, necessitated a legislative change (and perhaps retrospectively))."<sup>133</sup>*

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<sup>130</sup> Finance Committee, 16 February 2022, RoP [93]

<sup>131</sup> Finance Committee, 16 February 2022, RoP [94]

<sup>132</sup> Finance Committee, 2 February 2022, RoP [263]

<sup>133</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 75 and 79

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## **Regulations that modify provisions in the Tax Collection and Management (Wales) Act 2016**

**155.** Section 1 provides that the Welsh Ministers may by regulations modify any provisions in the 2016 TCM Act, with the exception of Part 2 of that Act, as provided by section 2(3)(a) of the Bill. In response to a request from the Committee to explain the circumstances in which this power would be used, the Minister said:

*"It is not feasible at this stage to anticipate every potential future circumstance which may give rise to an amendment to the Tax Collection and Management (Wales) Act 2016 (TCMA), however I have been careful to exclude any potential amendment to the operation of the WRA in Part 2, because that is something that quite rightly ought to be reserved to primary legislation. Part 2 of the TCMA sets out the establishment, membership and operation of the Welsh Revenue Authority.*

*The Explanatory Notes to the TCMA set out the purpose of each Part of the Act and I attach a link to that document for the convenience of the Committee. I should re-iterate here that in the event that a particular circumstance did arise, legislative change would only be possible if one of the four purposes tests was triggered."<sup>134</sup>*

### **Section 2 – Regulations under section 1: supplementary**

**156.** Section 2 supplements the provisions in section 1 and provides a (non-exhaustive) list of permitted uses of the regulation-making power in section 1.

**157.** Section 2(1) provides that regulations made under section 1 may impose LDT or LTT, impose or extend a liability to a penalty and specifically permits the making of regulations that have retrospective effect (as long as the relevant provision does not retrospectively impose or extend a liability to a penalty).

**158.** Provisions in section 2(3) exclude regulations made under the 2017 LDT Act and 2017 LTT Act specifying tax rates and bands from modification by regulations made under section 1.

### **Regulations that impose or extend a liability to a penalty under section 2(1)(b)**

**159.** ICAEW highlighted that a power to make or extend a penalty:

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<sup>134</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 39–40

*"should only be made by way of primary legislation through a Finance Bill type process."*<sup>135</sup>

**160.** ICAEW also said:

*"Regulations may impose or extend a liability to a penalty—that's all it says. What does that mean? How would it apply? And how would that interact with the fact that we've already (...) got the 2016 Act (...) I think it's got 60 or 70 clauses or provisions in relation to penalties and the application of penalties. So, what is this here going to do that's different to what we've already got in our primary legislation? It's not at all clear."*<sup>136</sup>

**161.** Sir Paul Silk also noted that the Welsh Ministers will have the power to make regulations that impose LDT or LTT, or that modify or impose penalties, which would normally be reserved for primary legislation.<sup>137</sup>

**162.** The Minister told the Finance Committee that there are safeguards in place relating to penalties. She noted:

*"...the Bill already provides that penalties can't be imposed with retrospective effect, and then we have section 5 in the Bill, which seeks to protect taxpayers."*<sup>138</sup>

**163.** We asked the Minister about the circumstances in which she could foresee an urgent need to make regulations imposing new, or extending existing, penalties. She said:

*"It is foreseeable that court decisions, for example, could impact on the interpretation of penalty provisions, or the process of applying penalties, in a way which made them less effective or led to unintended consequences. In that respect, I consider it is prudent to retain the ability to make changes to those penalty provisions at speed should the need arise. I do, however, recognise that changes to penalty regimes are relatively rare. Furthermore, for the power in this Bill to be used in this way the situation being addressed would need to meet one of the four purpose tests set out in the Bill, in*

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<sup>135</sup> Finance Committee, Written Evidence: WTA 05 Institute of Chartered Accountants in England and Wales, paragraph 27

<sup>136</sup> Finance Committee, 2 February 2022, RoP [170]

<sup>137</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 9

<sup>138</sup> Finance Committee, RoP [101], 16 February 2022

*addition to the Welsh Ministers being satisfied that such amendments are necessary or appropriate.*"<sup>139</sup>

### **Regulations that make provision that has retrospective effect under section 2(1)(c)**

**164.** Evidence submitted to the Finance Committee expressed concern about the Welsh Government making retrospective tax law by regulations.

**165.** ACCA noted that "the retrospective legislative approach is the solution of last resort and should be considered when all other options have been exhausted".<sup>140</sup> They cited two types of retrospective legislation: one where people are given adequate notice and are provided with certainty within the tax system and the other (on which they were "perhaps less convinced") where retrospective legislation goes back into the past and actually looks at a previous action or a previous measure.<sup>141</sup>

**166.** Dr Closs-Davies emphasised that "great care and attention is needed to justify making retrospective changes, and such changes should be subject to limited circumstances so as to not create instability and uncertainty within the tax system". She suggested that the Bill should require the Welsh Ministers to give advance notice to stakeholders; this would raise awareness and allow the opportunity to explain and justify the need for retrospective changes to key stakeholders.<sup>142</sup>

**167.** Sir Paul Silk also emphasised the requirement for law to be certain, which he noted is reflected in Welsh legislation:

*"Retrospectivity in any legislation, including primary legislation, has always rightly been regarded with great caution, not least because a cardinal principle of law (as reflected in section 1(2)(d) of the Legislation (Wales) Act 2019) is that law should be certain in its effect. Citizens cannot be certain about the law that applies to their actions if that law does not apply at the time they act, but is retrospective."*<sup>143</sup>

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<sup>139</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 89

<sup>140</sup> Finance Committee, [Written Evidence: WTA 04 Association of Chartered Certified Accountants UK](#), page 2

<sup>141</sup> Finance Committee, 2 February 2022, RoP [144]

<sup>142</sup> Finance Committee, Written Evidence: WTA 06 Dr Sara Closs-Davies, Bangor University, page 3

<sup>143</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 11

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**168.** He also drew attention to the unusual nature of retrospective regulation-making powers by reference to the need for the Counsel General to be consulted on any proposal to introduce secondary legislation with retrospective effect.<sup>144</sup>

**169.** Sir Paul Silk stated that he was not:

*"...aware of any provision in Westminster legislation that gives Ministers power to impose taxation (...) retrospectively by secondary legislation. In respect of retrospectivity, the Senedd may thus be being asked in this Bill to agree to a further ratchet away from best parliamentary practice."<sup>145</sup>*

**170.** He subsequently said:

*"...this would be a first for the Senedd, but not a first that I think the Senedd should be particularly proud of."<sup>146</sup>*

**171.** Professor Lewis also drew attention to uncertainty in the law as a result of retrospective legislation. He noted:

*"This does not necessarily mean that all use of retrospective legislation is invalid – it may or may not be depending on the circumstances and who made it – and carefully handled it can be a useful tool to deal with aggressive tax avoidance posing significant risk to public funds. The potential for unfairness and oppressive behaviour however makes it another area where the closest democratic scrutiny is essential, as is the utmost clarity about the kind of circumstances in which it will be used."<sup>147</sup>*

**172.** Professor Lewis highlighted areas where retrospective legislation could be problematic. He told the Finance Committee:

*"Where I am more concerned is in the context of these very wide-ranging powers that we mentioned, and particularly even though these powers can't be used to impose an additional punishment on taxpayers, they can be used to levy greater taxes on people so that they are liable for taxes where they wouldn't have been. This is contrary to the principle under the law that is recognised as 'the rule of law' (...) If you can change the law in a retrospective*

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<sup>144</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 11, footnote 8

<sup>145</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 13

<sup>146</sup> Finance Committee, 11 February 2022, RoP [98]

<sup>147</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 3

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*or retroactive way, then you can alter the situation so that something that happened the day before yesterday becomes an offence, and something that I did or that you did entirely legally could be turned into an offence and then you could be jailed. So, as we can see, that kind of conduct is the action of a tyrant; it is oppressive conduct.*"<sup>148</sup>

**173.** He added that in circumstances when it does happen, there are clear conditions attached to the change and it "tends to happen through primary legislation rather than secondary legislation."<sup>149</sup>

**174.** Professor Lewis also said that:

*"There are other problems associated with retrospective, retroactive legislation that are particularly problematic for the Senedd and the Welsh Ministers, namely the risk of contravening human rights—those human rights related to property rights, article 1, protocol 1 of the convention, and some other rights too."*<sup>150</sup>

**175.** In written evidence to the Finance Committee, Professor Lewis highlighted specifically how the power to legislate retrospectively in response to a decision of a court or tribunal presents serious potential challenges to the rule of law. He said:

*"Once a court or tribunal has made its decision, then that is the law. If the law is changed so that it is different in future, all well and good, but to change the law retrospectively could have the effect in certain cases of depriving the citizen of an effective remedy. What would be the point of challenging or defending proceedings brought in connection with devolved taxes if the Welsh Ministers were capable through regulations of not only overturning the court's decision for the future, but also invalidating that decision by changing the law in the past? Such an assault on the Rule of Law is unlikely to be regarded by the Courts as reasonable. Since these regulations would be secondary legislation, they would (unlike Acts of the Senedd itself) be open to challenge by judicial review on the grounds that they are unreasonable. Rather than leave it [to] chance, however, it would be preferable (if legislating retrospectively for this purpose is to be permitted at*

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<sup>148</sup> Finance Committee, 11 February 2022, RoP [88]

<sup>149</sup> Finance Committee, 11 February 2022, RoP [90]

<sup>150</sup> Finance Committee, 11 February 2022, RoP [91]

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*all) that it were made clear on the fact of the Act that this cannot be done with effect from a date which is before the date of the Government announcing that it will change the law in the light of the relevant court or tribunal decision.”<sup>151</sup>*

**176.** Professor Lewis also stated that “any retrospective legislation, with the exception of the first category of complying with international law, should be made, or at least approved, on the floor of Senedd.”<sup>152</sup>

**177.** Professor Lewis therefore suggested including the following safeguard in the Bill:

*“Set out legally binding limits on the use of the power to legislate retrospectively – e.g. in the case of anti-avoidance, no further back than the date on which the Government announced in the Senedd its intention to legislate; in the case of responding to a UK Government tax change, no further back than the effective date of that change.”<sup>153</sup>*

**178.** As regards the use of regulations to change the law retrospectively in response to a decision of a court or tribunal, we asked the Minister whether such an approach could be justified and if it amounted to a challenge to the rule of law as Professor Lewis indicated. An official accompanying the Minister said:

*“I think that a lot of the constraint on this power (...) is around taxpayers’ rights or protections that are provided by article 1, protocol 1, of the ECHR (...) So, there is a protection that will always exist.*

*In terms of undermining, or trying to reverse the consequences of, court decisions, I don’t think that that’s actually the intention that we’re looking at here. I think that it’s more to do with trying to improve the legislation following a court decision.”<sup>154</sup>*

**179.** The official accompanying the Minister added that it can also “work so as to provide continued protections for taxpayers”.<sup>155</sup>

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<sup>151</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 7

<sup>152</sup> Finance Committee, 11 February 2022, RoP [96]

<sup>153</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 9

<sup>154</sup> LJC Committee, 14 February 2022, RoP [45-46]

<sup>155</sup> LJC Committee, 14 February 2022, RoP [47]

**180.** We pursued this point by asking about the draft policy statement on retrospection accompanying the Bill. It cites circumstances where “a court decision means the legislation may not be interpreted as intended by the Senedd when it was enacted” as ones where the Welsh Government may make retrospective regulations.<sup>156</sup> We asked whether this implied that the Government is proposing to take a power which would allow it to substitute its view of what the Senedd intended in place of the courts in such circumstances. In response the Minister said:

*“So, I think this might be an area where we could look to the wording in the draft policy statement, to potentially review and clarify. The intention of the statement wasn't to substitute the Government's view of what the law was intended to be with that of the courts', because interpretation of the law can only be carried out by the courts (...) I think that there is also precedent for the approach that we're proposing within UK law. So, section 10(2) of the Human Rights Act 1998 allows a Minister of the Crown to amend primary legislation by using secondary legislation to ensure that primary legislation is compatible with the convention rights in situations where a court has determined that the primary legislation is incompatible. So, there is some precedent for the kind of approach that we are proposing here as well.”<sup>157</sup>*

**181.** Section 1 of the [Legislation \(Wales\) Act 2019](#) requires the Counsel General to keep the accessibility of Welsh law, which includes regulations made by the Welsh Ministers, under review. Accessibility includes an assessment of the extent to which regulations are certain in their effect (section 1(2)(d)). We therefore asked if the Minister was concerned that retrospective powers would not assist with the principles of accessibility and certainty. In response the Minister said:

*“I think this sets out really why the statement will be important, in terms of setting out how Welsh Ministers would use the power to make retrospective legislation as is proposed in the Bill. The statement is intended to provide that security to the public and to the Senedd in terms of the power to make regulations with retrospective effect and to provide that certainty that it wouldn't be abused, and the purpose of the statement really is to be open*

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<sup>156</sup> Welsh Government, Statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc.(Power to Modify) Act 20XX, December 2021, paragraph 2.2

<sup>157</sup> LJC Committee, 14 February 2022, RoP [52]

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*about the basis on which the power may be used. But, as I say, I'm open to refining the language and purpose based on these discussions.*"<sup>158</sup>

**182.** The Minister also told the Committee:

*"I do accept, particularly in relation to retrospective legislation, that absolutely should not be something that you would do lightly or without a clear justification."*<sup>159</sup>

**183.** We asked the Minister whether she is aware of any other examples in Welsh or wider UK law where a government has the power to impose retrospective taxes by secondary legislation. In response she said:

*"Despite the fact there are no comparable examples of such legislation in the UK, there are reasons why such legislation is right for Wales in certain circumstances and I contend that those circumstances are appropriately reflected in the four restrictive purpose tests set out within the Bill. It should also be remembered that we are dealing here with tax legislation whose primary impact relates to money paid or payable to the tax authority, rather than, for example necessary restrictions on peoples activities and movement as was the case with the Covid regulations."*<sup>160</sup>

**184.** The Minister also provided examples of where secondary legislation had been used retrospectively to amend primary legislation in policy areas other than taxation.<sup>161</sup>

**185.** We asked the Minister whether, if retrospectively legislating in response to a decision of a court is to be permitted at all, it should at least be limited on the face of the Bill so that the Welsh Government cannot change the law with effect from a date earlier than the date of its announcement. In response the Minister said she noted "the concern around the use of the power to make changes that are to apply retrospectively whether in relation to court decisions or to the other purpose tests." The Minister went on to say:

*"I am open to considering further whether it is appropriate to restrict the ability to legislate retrospectively back only as far as the date of a Welsh Government announcement. In particular, I agree this should be given*

<sup>158</sup> LJC Committee, 14 February 2022, RoP [56]

<sup>159</sup> LJC Committee, 14 February 2022, RoP [25]

<sup>160</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 41

<sup>161</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 44–45

*consideration where a change – that is, a monetary cost – may impact negatively on taxpayers. If taken forward, I consider the 'date of the announcement' should be capable of including more than just the publication of the specific legislation, but also include 'warnings' that taxpayers could reasonably take to indicate that action in a specific area of the legislation will be taken. This policy position would of course be published within the policy statement on retrospective legislation. However (...) I also consider that we need to approach the restriction of the power to legislate retrospectively with caution.*

*In addition, I consider any such restriction should still allow the Welsh Ministers to use the power to make changes with retrospective effect further back than the date of any announcement where that change only reduces the tax charged. This is so that we can make changes to our legislation to reduce our taxpayers liability to pay tax to a date before the announcement, for example if responding to a UK Budget change to make sure that our taxpayers can benefit from the reduction at the same time as taxpayers in England. It will also be desirable to make changes retrospectively where a category of taxpayers may have been inadvertently caught within the charge to tax when that is not the intention. Such a situation may arise where regulations have been made and scrutiny of the regulations, or subsequent events, indicates that a change should be made. By permitting retrospective regulations to be made in these circumstances we would avoid the need to use a Bill to make changes retrospectively at a later date."<sup>162</sup>*

**186.** The Minister provided an example of how this need to 'double' legislate using regulations and a bill has been encountered by the Scottish Government and stated that "[i]n relation to regulations made using the power provided by this Bill I would like to avoid the need to 'double' legislate, especially where the effect of the regulations is to reduce taxpayers liability to a devolved tax."<sup>163</sup>

**187.** The Minister went on to provide theoretical examples of retrospective tax legislation and court challenges in the UK context to illustrate "issues that we will want to ensure are addressed if any further restrictions on the use of the power are included in the Bill".<sup>164</sup>

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<sup>162</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 80-82

<sup>163</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 83

<sup>164</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 84-86 and Annex 1

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### Section 3 – Policy statement: regulations under section 1 that have retrospective effect

**188.** Section 3 requires the Welsh Ministers to publish a statement of their policy with respect to the exercise of the power under section 1 to make regulations that have retrospective effect (by virtue of section 2(1)(c)) within three months of the Bill receiving Royal Assent. It also permits the Welsh Ministers to revise the statement (and requires publication of the revised statement).

**189.** The Minister published a draft policy statement on retrospection when the Bill was introduced.<sup>165</sup>

**190.** Professor Lewis felt that:

*“Such a statement is of course helpful as a counterbalance to the uncertainty which the possibility of retrospective legislation creates. If the government were to make regulations with retrospective effect in a manner which is contrary to the policy statement, then those regulations would be at risk of being struck down by a court.”<sup>166</sup>*

**191.** He added:

*“I recommend in my paper that what is going to be used through the policy statement is placed on the face of the Bill and the Act, for example, the kind of situation where you can't go back in time prior to a statement on the floor of the Senedd with regard to the intention to legislate.”<sup>167</sup>*

**192.** Sir Paul Silk noted that the draft policy statement on retrospection “is welcome and seems perfectly reasonable”; however, he felt it still allowed a degree of discretion to the Welsh Ministers that might be thought undesirable in the case of any retrospective legislation, particularly in taxation legislation. He commented:

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<sup>165</sup> Welsh Government, Statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc.(Power to Modify) Act 20XX Welsh Tax Acts etc. (Power to Modify) Bill: Draft Statement on Retrospection, December 2021

<sup>166</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 8

<sup>167</sup> Finance Committee, 11 February 2022, RoP [94]

*"For example, the draft statement several times uses the words 'likely' and 'possible' – these envisage that there may also be unlikely circumstances where procedures proposed are not, in fact, possible."*<sup>168</sup>

**193.** When Sir Paul Silk was asked whether the Senedd should have a statutory role in approving the policy statement on retrospection and any future changes made to it proposed by the Welsh Government, he responded by saying that it "would be useful, yes, if the statement is formally approved by Members, possibly with the ability for them to amend it."<sup>169</sup>

**194.** ICAEW<sup>170</sup> and CIPFA welcomed the policy statement on retrospection but were concerned about the inclusion of retrospective changes being able to take effect prior to when the changes are announced. CIPFA noted:

*"It needs to be absolutely clear, the statement, that it doesn't go further beyond that [the announcement] for the retrospective application, both practically and, as you say, about the integrity of the tax system."*<sup>171</sup>

**195.** ACCA also agreed that the Senedd should have a role in approving the policy statement on retrospection.<sup>172</sup>

**196.** The Minister said she viewed the statement as a policy statement, which is intended "to give security to the public and the Senedd that the power to make regulations with retrospective effect won't be abused, and also to ensure that we are open about the basis upon which we would use those powers".<sup>173</sup>

**197.** The Minister felt that the Senedd's role should be in scrutinising the regulations rather than the policy statement on retrospection. She noted:

*"What I would say is that the appropriate and important point for the Senedd to have its say is at that point of voting on the regulations in respect of approving them or rejecting them. I think that that is the powerful moment for the Senedd to exercise its authority on it."*<sup>174</sup>

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<sup>168</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 12

<sup>169</sup> Finance Committee, 11 February 2022, RoP [103]

<sup>170</sup> Finance Committee, 2 February 2022, RoP [1535]

<sup>171</sup> Finance Committee, 2 February 2022, RoP [155]

<sup>172</sup> Finance Committee, 2 February 2022, RoP [157]

<sup>173</sup> Finance Committee, 16 February 2022, RoP [148]

<sup>174</sup> Finance Committee, 16 February 2022, RoP [148]

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**198.** She also said that the Welsh Government could “look to the wording” of the policy statement on retrospection in relation to the powers’ interaction with a decision of a court or tribunal.<sup>175</sup>

## **Section 4 – Procedure for regulations under section 1**

**199.** Section 4 specifies the applicable Senedd procedure for regulations made under section 1.

**200.** In the statement of policy intent, the Minister explains that:

*“The Bill will permit the Welsh Ministers to make regulations using either the draft or made affirmative procedure. The Welsh Ministers will seek to use the draft affirmative procedure where possible, meaning the regulations can only come into effect once the Senedd has approved the making of them. The Welsh Ministers will use these regulations where there is less immediacy required and there is time for the Senedd to approve the regulations before they are made.*

*However, the Welsh Ministers may use the made affirmative procedure where they consider it necessary by reason of urgency (for example where the regulations will need to have effect immediately or shortly thereafter, and so before a draft affirmative set of regulations could be approved by the Senedd). This will ensure that changes may, where appropriate, come into force as soon as the regulations are made, whilst awaiting Senedd approval. That approval must be given within a maximum period of 60 Senedd calendar days, not including any period in which the Senedd is dissolved or is in recess for more than four days, to enable those regulations to remain in effect.”<sup>176</sup>*

**201.** We have already considered some of these matters earlier in this report.

**202.** Sir Paul Silk told the Finance Committee:

*“The made affirmative procedure (...) is, historically, very, very unusual. It's something that has come along, really, since the coronavirus epidemic. (...)*

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<sup>175</sup> LJC Committee, 14 February 2022, RoP [52]

<sup>176</sup> Welsh Government, Welsh Tax Acts etc. (Power to Modify) Bill (“the Bill”): Policy intent for subordinate legislation to be made under this Bill, December 2021, pages 4-5

*Made affirmatives in the public health emergency made sense. I'd be very cautious about made affirmatives, because, by definition, they're made before they're approved by elected Members. When there is an absolute emergency, as there clearly was during coronavirus, then there is a justification for them. But the justification needs to be made in each case, and allowing this in these circumstances, I hope that Members will at least put the Welsh Government through the machine a little bit to see whether they really can justify the inclusion of made affirmative procedures in this Bill.*<sup>177</sup>

**203.** Sir Paul Silk felt that any retrospective changes should be made through a draft affirmative procedure:

*"The Committee may in particular want to press the Welsh Government as to whether the "urgent" procedure could ever be justified where the regulations are to have retrospective effect, and to propose that such regulations should always be by way of draft affirmative procedure.*<sup>178</sup>

**204.** CIOT's written evidence highlighted the potential limited scrutiny associated with the made affirmative procedure:

*"The use of the made affirmative procedure may limit scrutiny and therefore the opportunity to identify unintended consequences of the measure. It would be helpful to explore in what circumstances ministers envisage they may consider invoking this procedure.*<sup>179</sup>

**205.** During the Minister's first evidence session with the Finance Committee in December 2021, the Minister explained the rationale for the proposed made affirmative regulations and the 60 day scrutiny period, and compared their use to the 1968 Act. She said:

*"And although, in a different legislative context, the use of the 60-day period for made affirmative regulations seeks to provide Ministers with a similar ability to make legislation to that of the UK Government, albeit restricted to those external events, the made affirmative regulations have effects similar to the UK Government's use of resolutions under the Provisional Collection of Taxes Act 1968, which enable changes to be brought into force immediately*

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<sup>177</sup> Finance Committee, 11 February 2022, RoP [107–108]

<sup>178</sup> Finance Committee, Written Evidence: WTA 02 Paul Silk, paragraph 14

<sup>179</sup> Finance Committee, Written Evidence: WTA 03 Chartered Institute of Taxation and Low Incomes Tax Reform Group, paragraph 3.6

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*and scrutinised and voted on subsequently. So, we're seeking a similar kind of power.*<sup>180</sup>

**206.** However, Professor Lewis, in his written evidence to the Finance Committee, questioned whether powers proposed in the Bill could be considered similar to those conferred in the 1968 Act. He noted:

*"...The mechanism in the [Provisional Collection of Taxes] Act is a power of the House of Commons, not of the UK Government, and is a piece of legal glue enabling changes announced by the Chancellor of the Exchequer to come into force quickly. It also ensures that taxes do not lapse. "It [the Act] does not give the Chancellor or any other Minister the power to make changes to primary legislation through regulations, let alone ones which have retrospective effect. In other words, it respects the primacy of Parliament over legislation relating to tax."*<sup>181</sup>

**207.** The Minister explained that "the made affirmative procedure will only be used in cases of urgency" and with "a maximum scrutiny period of 60 days", noting that "we feel that we're trying to maximise the opportunity for scrutiny".<sup>182</sup> She added that "a maximum length of 60 days proposed for this Bill could actually offer 27 additional scrutiny days" compared to a Scottish Government Bill that used an expedited legislation procedure and which was referred to in the Welsh Government's 2020 consultation document.<sup>183</sup>

**208.** The Minister also told us that:

*"The Welsh Government will recommend a date for the vote that reflects the complexity of the legislation. That may be close to the 60 day limit, or it may be a shorter period where, for example, a very minor change is necessitated to the legislation.*

*It is also, of course, open to the Business Committee to propose alternative dates for the debates when it considers that more, or less, time is required for scrutiny before the vote.*<sup>184</sup>

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<sup>180</sup> Finance Committee, 22 December 2021, RoP [229]

<sup>181</sup> Finance Committee, Written Evidence: WTA 01 Professor Emyr Lewis, Aberystwyth University, page 6, footnote 7

<sup>182</sup> LJC Committee, 14 February 2022, RoP [17]

<sup>183</sup> LJC Committee, 14 February 2022, RoP [18].

<sup>184</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 10-11

**209.** When we asked if she had considered the use of a super affirmative procedure, the Minister told us that:

*"I think that the affirmative and made affirmative procedures are appropriate for what's being requested, in the sense that we are talking about a narrow range of things. Compared to how we originally envisaged the Bill in terms of being very broad, what we present now is much more narrow and focused, and I do think that the made affirmative and affirmative as set out is probably the appropriately way to go."<sup>185</sup>*

**210.** The Minister sought to explain the use of the affirmative and made affirmative procedures in the context of the four purpose tests. She explained that the Bill had been drafted specifically to limit the circumstances in which the regulation-making power could be used (compared to the original proposals) saying:

*"The introduction of the four purpose tests significantly constrains the use of the power, which can only be used to respond to the specified external events and – for the draft affirmative procedure - only when Welsh Ministers consider it necessary or appropriate in relation to the four purpose tests. The made affirmative procedure is further constrained and may only be used when considered necessary and in cases of urgency. As such, I consider there are robust and proportionate safeguarding measures in place."<sup>186</sup>*

**211.** The Minister added:

*"I would argue the Senedd has already set a precedent in relation to the made affirmative procedure, by giving the Welsh Ministers powers to make changes to the rates (and where appropriate) the bands that apply to the devolved taxes by made affirmative procedure regulations, without the need for a Senedd lock. The precedent for changes that potentially affect all taxpayers with immediate effect, exercised by made affirmative procedure regulations, has already been provided by the Senedd. The exercise of that power also includes similar protections for taxpayers to those that have been provided by section 5 of the Bill."<sup>187</sup>*

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<sup>185</sup> LJC Committee, 14 February 2022, RoP [96].

<sup>186</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 14

<sup>187</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 15

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**212.** The Minister also said:

*"I do not consider that any of the four purpose tests should be excluded from the made affirmative procedure or be prevented from having retrospective effect. The purpose tests have been specifically developed to capture scenarios where Welsh Ministers may need to respond to external circumstances and at pace.*

*Taking each of the purpose tests into consideration:*

*In response to changes to 'predecessor' UK taxes (that is, stamp duty land tax or landfill tax) which impact or could impact the amount paid into the Welsh Consolidated Fund – it is clear that we need the ability to respond at pace to such changes and therefore the made affirmative process will, in some circumstances, be appropriate.*

*Similarly, in the case of protecting against avoidance activity in relation to landfill disposals tax and land transaction tax, having the ability to use the made affirmative procedure means that the change can be made with immediate effect. This includes cases where increased clarity in the legislation will put beyond doubt the intended application of the legislative provisions, and potentially benefit taxpayers by stopping the promotion of avoidance opportunities that do not actually exist. Such action has been taken by the UK government to protect tax regimes and taxpayers in the past and I wish to be able to take similar action.*

*For non-compliance with any international obligations it is right that we are prepared for changes to be made - and if such a non-compliance were identified then Welsh Ministers may feel it necessary to introduce a change at pace using the made affirmative procedure and with retrospective effect. Failure to comply could have reputational risks for the Welsh Government and reflect on Wales more generally, impacting on potential inward investment. Failure may also oblige some taxpayers to file their returns in a manner that is contrary to the international obligations, necessitating amendments at a later date when compliance with the international obligation is reflected in our law (assuming the change is made with retrospective effect).*

*Similarly, where a court or tribunal decision identifies an issue that Welsh Ministers consider could benefit from legislative change, or highlights an area*

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*of existing law which could benefit from greater clarification, then it may be necessary for Welsh Ministers to introduce such a change urgently.*

*This Bill seeks to find the appropriate legislative solution for the current situation on our devolution journey. The relationship between the revenues available to the Welsh Government from our devolved taxes and the effect on our Budget of the UK government's changes to the predecessor taxes is particularly illustrative. That relationship has only recently arisen. It is worth remembering that devolution itself is a relatively recent constitutional change, with our devolved taxes only commencing operation four years ago (and in Scotland only seven years ago)."<sup>188</sup>*

**213.** When we asked if the power in the Bill could be used to change existing regulation-making powers in the Welsh Tax Acts and associated approval procedures, the Minister said:

*"I agree that in theory the power in the Bill could be used to change existing regulation making powers or/and associated Senedd approval procedures. However, I consider the possibility to be remote.*

*I cannot envisage a situation where the power provided by the Bill would be used to change any of the existing regulation making powers or/and Senedd approval procedures. Given that one of the four purpose tests must be met to trigger the use of the power, and the use of that power must be 'necessary or appropriate', it is difficult to see how this situation would arise, particularly in relation to the first three purpose tests.*

*In relation to the fourth purpose test, I believe it may be possible that a court decision related to the regulation making powers or/and procedures associated with the approval of regulations could impact on our legislation as a result of a 'surprising' decision. As such, it would be advantageous for the power in the Bill to be capable of use in these circumstances, whether that court decision is made in relation to the Welsh Tax Acts, other UK governments' taxes or other regulation making powers or approval procedures to the extent there is a read across to the Welsh Tax Acts. Again, however, in these circumstances any change would still need to pass the necessary or appropriate test before regulations could be made."<sup>189</sup>*

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<sup>188</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 23–29

<sup>189</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraphs 36–37

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## Section 5 – Regulations ceasing to have effect: supplementary

**214.** Section 5 specifies the effect of provisions in regulations made under the made affirmative procedure where the regulations have ceased to have effect, either by the expiry of the 60 day period for Senedd approval, or earlier as a result of a vote by the Senedd on a motion to approve the regulations which is not passed. It includes safeguards for Welsh taxpayers in the event of “failed” regulations, such as providing that increased tax liabilities or tax penalties attributable to those regulations are treated as never having arisen.

**215.** The Minister explained the benefit of the inclusion of these provisions:

*“...in section 5 of the Bill, we do have those protections for taxpayers (...) If the Senedd decides not to provide approval, then we wouldn't be looking to taxpayers to pay any kinds of fines attached to the previous decision and so on. Taxpayers will be fully protected as a result of section 5 of the Bill.”<sup>190</sup>*

**216.** In correspondence with the Committee, the Minister also said:

*“Where Ministers exercise the power in this Bill using made affirmative procedure regulations, even where those regulations make changes that will have retrospective effect, Section 5 of the Bill provides protection for a taxpayer to reclaim additional tax paid as a result of the regulations. This is different from other made affirmative procedure regulations, especially the recent Covid regulations, in that the effect of the regulations that fail to receive Senedd approval can be unwound – the tax can be reclaimed meaning that the risk in relation to the made affirmative regulations rests with the Welsh Ministers and not our citizens and businesses.”<sup>191</sup>*

### Our view

**217.** As we indicate in the Our view discussion in Chapter 3 of this report, the approach adopted by the Welsh Government in this Bill is not one we favour and would not therefore be our preferred legislative solution.

**218.** In addition, we believe that the justification provided by the Minister for taking the regulation-making power is inadequate. While the Minister and her officials have provided examples of the potential use of the power in the future, they have been largely hypothetical

<sup>190</sup> LJC Committee, 14 February 2022, RoP [99]

<sup>191</sup> Letter from the Minister for Finance and Local Government, 11 March 2022, paragraph 42

and of course do not cover the whole range of what could be achieved by its use. This is heightened by the interplay between sections 1 and 2 of the Bill, which provide for multiple scenarios to be achieved using the power. We note the Minister's intention that the power will not be used for routine policy matters, but, leaving aside the inherent subjectivity in establishing whether a policy is a routine one, that constraint does not appear on the face of the Bill.

**Conclusion 3.** We regret the lack of adequate justification for the Bill's delegation of the regulation-making power to the Welsh Ministers and that the Minister has not demonstrated to our satisfaction what she proposes to do with the power. We are therefore also concerned that the need for the power to be taken at this time (particularly in relation to the tax avoidance and courts or tribunal decision purposes) has not been demonstrated, with too much reliance placed on taking power just in case it may be needed in the future. Our preferred approach of using primary legislation to amend the Welsh Tax Acts would overcome this problem.

**219.** Notwithstanding this, and our view that there should be different arrangements in place in the Seventh Senedd through the use of primary legislation, we set out below how we believe the Bill as introduced could be improved to provide greater control to the Senedd and reduce the breadth of the power being sought by the Welsh Government.

### **Section 1 – powers to modify the Welsh Tax Acts etc.**

**220.** We note that the power in section 1 is to be exercised where modifications are deemed by the Welsh Ministers to be "necessary or appropriate". This power could potentially have an exceptionally broad application. We do not believe that the "necessary or appropriate" test constrains the power as the Minister has suggested because determining what is "appropriate" is subjective and dependent on what the current or any future Minister considers to be an appropriate course of action.

**221.** We also note that the Minister views these as "alternative tests to choose from depending upon the circumstances". What this means in essence is that if the Minister is of the view that regulations are "appropriate" to make, the power is unlocked. The more restrictive test concerning whether something is "necessary" is therefore rendered irrelevant.

**Recommendation 3.** The Minister should provide in advance of the Stage 1 debate, examples of circumstances in which the Minister would be prevented from using the power proposed in section 1 of the Bill as a result of the "appropriate" test.

**222.** Notwithstanding recommendation 3, we believe that the "necessary or appropriate" test does not act to constrain the exercise of the power by the Welsh Ministers in any meaningful

way, either now or in the future. We therefore believe that the “necessary or appropriate” test is redundant and should be removed from the Bill.

**Recommendation 4.** The Minister should table an amendment to remove the “necessary or appropriate” test from section 1 of the Bill.

**223.** We consider below the principle of each of the four purposes contained in section 1 of the Bill. Later sections will consider the specific application of section 2 in the exercise of the power for these purposes and the procedure attached to the making of regulations, in accordance with section 4.

**224.** As regards the power to make regulations under section 1(1)(a) in relation to **compatibility with international obligations** we note that the Welsh Government has provided limited evidence specifying examples of international obligations impacting on the devolved taxes. Nevertheless, we recognise why the power may be needed and are content with its inclusion.

**225.** In relation to the power to make regulations under section 1(1)(b) to **protect against tax avoidance**, we accept that it would be difficult to include a definition of tax avoidance within the Bill. We also support the Minister’s reference to tax avoidance as being “artificial or contrived planning”.

**226.** However, the Bill does not limit the term in this way and we agree with Professor Lewis’s recommendation that the Bill should be amended to define more narrowly the types of change that may be made under the tax avoidance purpose.

**227.** In reaching this view, we note that the WRA has told the Finance Committee that the anti-avoidance deterrent in the GAAR within the 2016 TCM Act is proving an effective deterrent. It also said that a situation has not yet arisen where the power in the Bill to protect against tax avoidance would have been beneficial to the WRA or Welsh taxpayers. We also note that the Minister has told us that she is not currently aware of any changes that may be required to the devolved taxes to stop any avoidance activity. We do not understand therefore why the Minister is so keen to take a power for this purpose when the need for it has not been demonstrated, other than the suggestion of a potential future risk. Taking a power just in case it is needed in the future is not an appropriate justification in our view. It highlights why we believe the Welsh Government should have adopted a different approach in relation to the Bill, based around the use of primary legislation.

**228.** We therefore believe that there is a need to limit the meaning of tax avoidance in this Bill by including a set of principles by which the power should be exercised for this purpose. We acknowledge that the term “tax avoidance” is used in the 2016 TCM Act in the context of

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specifying the WRA's general functions. However, in our view, that does not mean it is appropriate to take a wide Henry VIII power to amend the Welsh Tax Acts in relation to tax avoidance, using the same terminology, without any attempt to limit the extent of that term. By not seeking to constrain the power, the Welsh Government is proposing to take the ability to decide what it wants to legislate for in relation to any tax avoidance activity.

**Recommendation 5.** The Minister should table an amendment to the Bill to limit the meaning of "tax avoidance" in section 1(1)(b) by reference to the general anti-avoidance provisions set out in Part 3A of the *Tax Collection and Management (Wales) Act 2016*.

**229.** We also note that the Minister said the power in the Bill could "technically" be used by the Welsh Ministers to amend elements of the GAAR. We agree with this view; our concern centres on how this power could be exercised, not necessarily by the Minister, but by a different Minister in the future. As we suggest above, the use of the 'necessary or appropriate' test would not be a barrier to amending the GAAR, as it would simply need the Minister to consider such a course of action to be appropriate for the test to be met. Furthermore, we do not accept that the permitted use of the power in reliance on the tax avoidance purpose would, as currently drafted, be limited to responding to external events.

**Recommendation 6.** Subject to recommendation 8, the Minister should table an amendment to the Bill to exclude the general anti-avoidance provisions in Part 3A of the *Tax Collection and Management (Wales) Act 2016* from the scope of the regulation-making power in the Bill.

**230.** We are satisfied with the breadth of the power in relation to responding to **changes to UK predecessor taxes**. We acknowledge the views expressed in evidence of the need to have in place a system for making changes as a consequence of decisions on such taxes made by the UK Government and UK Parliament. However, as before, we are not convinced that the option chosen is better than the use of primary legislation to effect change.

**231.** As with our comments above regarding the breadth of the regulation-making power in relation to anti-avoidance, we have similar concerns in relation to **responding to decision of a court or a tribunal** purpose under section 1(1)(d). This purpose is exceptionally broad and of genuine concern to the Committee.

**232.** In their evidence the Minister and her officials explained that the power was deliberately wide "to capture all eventualities, because we can't predict at this point the future scenarios where the provision might be used" and so as not to "restrict the scope of the Bill too narrowly." Furthermore, the Minister has also acknowledged that the WRA has not yet identified an issue that will require a legislative change in relation to a tribunal or higher court decision but said the



power will ensure that when such a decision is made the Welsh Ministers can respond in an agile manner.

**233.** The Minister's comment that when there is a loss by HMRC in the courts, a legislative change is more likely to be needed suggests that the Welsh Government's response may be to start considering changing the law by regulations and that is a concern. In addition, we re-iterate the point we make in Chapter 3 that it is not for the Welsh Government to decide what a current (or previous) Senedd intended and we do not consider it constitutionally appropriate for the Welsh Government to have the ability to amend primary legislation using subordinate legislation to reflect its own interpretation of the meaning of contested primary legislation.

**234.** We acknowledge that it is perfectly legitimate to change the law in response to a court decision but would contend that it would be expected to achieve such changes through the use of primary legislation.

**235.** The comments that have been expressed in relation to the exercise of the power in the circumstances set out in section 1(1)(d) are deeply troubling and show a disregard for the role of a Senedd as a legislature. The justification for the breadth of the power being sought seems to be: we do not know how or when the power will be used so we need to make it as broad as possible. That is simply not acceptable. We believe that any changes to the law that may need to be made as a consequence of a decision of a court or tribunal, including circumstances where a tribunal finds in favour of a taxpayer, should be achieved through primary legislation.

**Recommendation 7.** Given the potential extent to which the regulation-making power may be exercised in connection with the purpose set out in section 1(1)(d) of the Bill, the absence of a satisfactory explanation for how the power will be used for that purpose and the acknowledgement that a need for the power in such circumstances has not yet arisen, the Minister should table an amendment to remove section 1(1)(d) from the Bill.

**236.** We note the Minister's response to our request to specify the particular circumstances in which it is envisaged that regulations made under section 1 may need to modify each of Parts 1 and 3–10 of the 2016 TCM Act (Part 2 cannot be amended by virtue of section 2(3)(a) of the Bill). The Minister's response that it is "not feasible at this stage to anticipate every potential future circumstance which may give rise to an amendment" is unhelpful. It is regrettable that the Minister has not taken the opportunity as part of our scrutiny to give even theoretical examples of how the power could be used to modify important parts of the 2016 TCM Act. The Minister's response again demonstrates the potential extent of the power in the Bill and the willingness of the Minister to take a power without adequately explaining how she intends to use that power.

**Recommendation 8.** Given that the scope of the regulation-making power proposed in the Bill would enable the Minister, or any future Minister, to modify any of Parts 1 and 3 to 10 of the *Tax Collection and Management (Wales) Act 2016* and in the absence of any justification or examples to explain what the power would or could be used for, the Minister should table an amendment to the Bill such that regulations under section 1 may not amend any provision contained in the 2016 Act.

## **Section 2 – Regulations under section 1: supplementary**

**237.** We have seen significant evidence which points to concerns about the provisions contained in section 2(1) of the Bill.

**238.** Section 2(1)(a) and (b) refers to the imposition of LDT and LTT and the imposition or extension of a liability to a penalty (although we recognise that the list of how the regulation-making power may be used is not exhaustive). However, there is a lack of clarity regarding the circumstances in which regulations made under section 1 may need to impose such taxes or/and penalties by reference to each of the specific purposes listed in section 1. Moreover, we agree with evidence indicating that these changes would benefit from being effected by primary legislation. This is particularly the case because of the lack of clarity around how this power could be used.

**Recommendation 9.** The Minister should, in advance of the Stage 1 debate, set out likely scenarios in which regulations to be made in respect of each of the purposes listed in paragraphs (a) to (d) of section 1(1) of the Bill could:

- impose landfill disposals tax or land transaction tax by virtue of section 2(1)(a);
- impose or extend a liability to a penalty by virtue of section 2(1)(b).

**239.** One of our biggest concerns with the Bill is the provision in section 2(1)(c) that permits regulations under section 1 to make provision that has retrospective effect (provided it does not relate to imposing or extending a liability to penalty).

**240.** Professor Emyr Lewis and Sir Paul Silk have expressed concerns around the impact that the uncertainty created by this provision could have on the rule of law. We note that the Minister has cited the statement under section 3 of the Bill as being important in this regard but, while we welcome the existence of the statement, we do not think that this approach, as currently set out in the Bill, is satisfactory.

**241.** Sir Paul Silk's remark that he was not aware of circumstances at Westminster where subordinate legislation would be used to make tax law retrospectively is notable. . We therefore

agree with his sentiment that such an approach would represent an unwelcome first for the Senedd. We do not agree that this departure from established practice would be “right for Wales in certain circumstances” as suggested by the Minister.

**242.** We note the Minister has said that regulations made in connection with any of the four purpose tests should be capable of having retrospective effect.

**Conclusion 4.** Our preference is that law having retrospective effect should be made using primary legislation.

**243.** While we do not favour the making of retrospective provision by subordination legislation we acknowledge that the Minister has made clear her intention to use such legislation. For that reason, we believe it is imperative that, at the very least, the power to act is limited as suggested by Professor Lewis.

**Recommendation 10.** The Minister should table amendments to the Bill such that the exercise of the regulation-making power in accordance with section 2(1)(c) is constrained:

- as regard the purpose under section 1(1)(b) relating to tax avoidance, such that it cannot take effect earlier than the date on which the Welsh Government announced in the Senedd by statement its intention to legislate;
- as regards the purpose under section 1(1)(c) in relation to changes to a predecessor tax, such that it cannot take effect earlier than the date that the relevant change is made by the UK Parliament (or the UK Government, should that be the case);
- as regards the purpose under section 1(1)(d) relating to the decision of a court or tribunal, such that it cannot take effect earlier than the date on which the Welsh Government announced by statement that it will change the law in the light of the relevant court or tribunal decision (subject to recommendation 7).

**244.** Section 2(3) of the Bill provides that regulations under section 1 may not amend certain regulations made under the Welsh Tax Acts.

**245.** The Minister told us that in theory the power in the Bill could be used to change existing regulation making powers or/and associated Senedd approval procedures in the Welsh Tax Acts, although the possibility is remote. She did however acknowledge circumstances in which regulation-making powers or/and their associated approval procedures could be changed as a result of a “surprising” court decision, with again the application of the Minister’s judgement in relation to the Bill’s “necessary or appropriate” test.

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**246.** If the prospect of making changes to existing regulation-making powers is remote, or as a consequence of a “surprising” court decision, we question the inclusion of the powers, not least because they could be used by a future Minister with different intentions to the Minister. In any event we do not consider it to be constitutionally appropriate for the Welsh Ministers to hold such a power that a Minister has acknowledged could theoretically be used to change existing powers delegated to the Welsh Ministers by the Senedd (or/and their associated approval procedures). In the event that a court were to find a legal deficiency with such delegations in the future, it must be for the Senedd to decide in those circumstances whether to legislate in order to remedy such a deficiency.

**Recommendation 11.** The Minister should table an amendment to the Bill to provide that regulations made under section 1 may not amend existing regulation-making powers (or/and their associated approval procedures) in the Welsh Tax Acts.

### **Section 3 – Policy statement: regulations under section 1 that have retrospective effect**

**247.** We note the proposed duty on the Welsh Ministers to publish a statement of their policy with respect to the exercise of the power under section 1 to make regulations that have retrospective effect.

**248.** We welcome the transparency that the requirement to publish such a statement would offer and the Minister’s publication of a draft of the statement on introduction of the Bill in order to assist the Senedd’s scrutiny.

**249.** However, we have concerns that the proposed approach in section 3 would be weak in the event that recommendation 10 is not accepted and restrictions are not placed on the face of the Bill regarding the making of retrospective provision. Section 3 requires the Welsh Ministers to publish the statement within three months of the Bill receiving Royal Assent. But under the provision as drafted, the Senedd will have no control over the content of that statement, or any future revisions to it. For example, the Minister would be free to publish a statement bearing little or no resemblance to the draft policy statement on retrospection introduced with the Bill following the delegation of the regulation-making power in section 1. This is of particular concern given that the proposed ability to make regulations retrospectively is not currently limited on the face of the Bill (other than to prevent such regulations retrospectively imposing or extending penalties).

**250.** The Minister has indicated that there should be no role for the Senedd in approving the statement, suggesting that the “powerful moment” for the Senedd to exercise its authority is when deciding whether to approve regulations under section 1 of the Bill.

**251.** We respectfully disagree with this view. While we acknowledge that policy formulation is generally a matter for the Welsh Government, the statement will set out the circumstances in which the proposed power may be used retrospectively, potentially in ways that may be regarded as controversial. Given the enabling nature of this Bill, the content of the policy statement on retrospection is inextricably linked to the Senedd's decision as to whether it is appropriate to delegate the power to the Welsh Ministers at all (insofar as it relates to its exercise with retrospective effect). That the Senedd could ultimately decide to reject regulations made under the power proposed in the Bill is not an adequate safeguard.

**252.** We accordingly believe that the policy statement on retrospection should be laid before, and approved by, the Senedd before having effect. Additionally, the power in section 1 should only be exercised retrospectively in compliance with a policy statement on retrospection which has been approved by the Senedd.

**Recommendation 12.** In the event that recommendation 10 is not accepted, the Minister should table amendments to the Bill:

- to provide that the policy statement for regulations to be made under section 1 that have retrospective effect (and any future revisions to the statement) must be laid before, and approved by, the Senedd in addition to being published;
- to provide that the power in section 1 may only be exercised retrospectively in accordance with a policy statement approved by the Senedd.

#### **Section 4 – Procedure for regulations under section 1**

**253.** We note that regulations under the Bill will be subject to either the draft affirmative or the made affirmative procedure.

**254.** We believe that in scrutinising any regulations made under this Bill, the time made available for Senedd scrutiny needs to reflect that they will relate to taxation and Senedd Committees should be permitted time to take evidence prior to reporting. We note that the ability for that to happen was acknowledged in our evidence session with the Minister and her officials. However, we note that the provisions within the Bill as drafted do not provide any guarantees to enable this to happen.

**255.** Under Standing Order 21, the draft affirmative procedure only provides 20 days for scrutiny and reporting by Committees.

**Recommendation 13.** The Minister should, in advance of the Stage 1 debate, explain why a super affirmative procedure was not included in the Bill to enable Senedd Committees to have

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enough time to take evidence when scrutinising regulations that may be made under section 1 of the Bill.

**256.** We recognise that the made affirmative procedure can be an appropriate procedure to use in certain, albeit limited, circumstances. However, we are concerned that its increasing use in place of the draft affirmative procedure could see it become a more routine and established procedure, when the justification for such an approach has not been demonstrated.

**257.** As we have mentioned in Chapter 3, we note that the Minister has argued that the Senedd has already set a precedent in relation to the use of the made affirmative procedure by the Welsh Ministers in relation to devolved taxes. Further to the discussion in Chapter 3, we wish to reinforce our views on the use of the made affirmative procedure.

**258.** It is not always appropriate to rely on a supposed precedent as a means of justifying the use of the made affirmative procedure, not least in the absence of any other justification. This is particularly the case in tax law and in circumstances where its use is proposed instead of primary legislation.

**259.** As the Minister has indicated, devolved Welsh taxes are in their infancy. As their use becomes more established and more frequent, it makes sense to respond to the changes in circumstances by reviewing the way in which tax law is made.

**260.** That is one of the reasons why we have suggested that the use of this Bill as a mechanism to change tax law is misguided and should have heralded a different, more respectful approach to legislating. In particular, the Acts passed by the Fourth Assembly and Fifth Senedd respectively should not be seen as a blueprint for the way in which a future Senedd should legislate in relation to tax law, particularly as the need to legislate on such law becomes more frequent and relevant matters evolve and become more complex.

**261.** Similarly, the use of the made affirmative procedure should not be seen as a precedent for the use of that procedure in future Bills as a means to amend existing primary legislation by subordinate legislation (either in relation to tax or other policy areas), when the use of further primary legislation would be the more appropriate option. In each case, the procedure chosen should be based on the individual merits and circumstances of the intended use.

**262.** Given our overall view on this Bill, we view the use of the made affirmative to amend primary legislation with concern.

**263.** While we note that the made affirmative procedure will apply where the Welsh Ministers are of the opinion that it is necessary by “reason of urgency”, this phrase is not defined and is therefore at the discretion of what the Welsh Ministers consider to be urgent.

**Recommendation 14.** The Minister should, in advance of the Stage 1 debate, clarify what would constitute “by reason of urgency” when choosing to use the made affirmative procedure under section 4 of the Bill.

**Recommendation 15.** Explanatory Memoranda accompanying regulations subject to the made affirmative procedure must set out full justification for the need to act urgently.

**264.** We also note that by virtue of section 4(5) of the Bill, a vote on whether or not to approve the regulations must take place *during* the 60 day-period and there are no other constraints on when that vote should take place. The lack of constraints therefore creates a risk that such a debate may be scheduled without Senedd Committees conducting meaningful (or indeed any) scrutiny. We do not believe that this would be in the interests of good law-making. In our view, there should be a commitment from the Welsh Government to provide adequate opportunity for scrutiny, including the taking of evidence if necessary, prior to the holding of a vote to approve the regulations. We believe this to be an essential safeguard for the use of the made affirmative procedure.

**Recommendation 16.** The Minister should table an amendment to the Bill to introduce a minimum period of 28 days within the 60 day period referred to in section 4(5) of the Bill to provide Senedd Committees with time to scrutinise regulations subject to the made affirmative procedure before a vote on such regulations can take place.

**Recommendation 17.** If the Bill is enacted, the Senedd’s Standing Orders should be amended to require a minimum period of 28 days after the making of regulations subject to the made affirmative procedure before a vote on such regulations can take place.

**265.** We do not believe it appropriate that retrospective regulations made in connection with the purposes concerning either tax avoidance or decisions of courts or tribunals should be made using the made affirmative procedure.

**Recommendation 18.** The Minister should table an amendment to the Bill such that regulations to be made in accordance with section 1(1)(b) or section 1(1)(d) which have retrospective effect should be subject to the draft affirmative procedure only (subject to recommendation 7).

## **Section 5 – Regulations ceasing to have effect: supplementary**

**266.** We welcome the inclusion of section 5 in the Bill and the protection it provides to taxpayers in the event that regulations subject to the made affirmative procedure are not approved by the Senedd.