

FINANCE COMMITTEE – WELSH TAX ACTS (POWER TO MODIFY) BILL

MEMORANDUM FROM PAUL SILK

1. I have been invited to submit a short memorandum to the Committee to inform its consideration of the Welsh Tax Acts (Power to Modify) Bill.
2. The request to submit evidence comes, as I understand it, for two reasons: that I chaired the UK Government-appointed Commission on Devolution to Wales that in 2012 recommended the devolution of certain taxation powers to Wales; and that I have a long-standing professional interest in parliamentary procedure – as a former Clerk of the then National Assembly for Wales, a clerk in the House of Commons, a former president of the Study of Parliament Group and currently a consultant working with parliaments world-wide.
3. As a citizen in Wales, I continue strongly to support the devolution of taxation powers to the Senedd. Taxation powers empower the Welsh Government and the Senedd but also give them greater responsibility. However, I am in no sense an expert on taxation policy or on the complicated relationship between the devolved taxes and their predecessor taxes in England. I cannot therefore offer the Committee any informed opinion on the circumstances in which the powers proposed to be given by the Bill may need to be used.
4. It is, however, undoubtedly the case that changes to predecessor taxes in England may be taken at short notice, can come into immediate effect and could be extensive. These factors can up-end fiscal planning in Wales if the block grant adjustment increases in consequence of the English changes. Unfortunately we have seen decisions taken in London without consulting Cardiff on many matters that have direct consequences for Welsh Government responsibilities. I can therefore understand the desire by the Welsh Government to be able to respond rapidly and (a word that they use frequently in the context of this Bill) with agility.
5. My concerns about the Bill arise from two considerations: a general concern about the growth in the use of secondary (or “delegated”) legislation, and a particular concern about retrospectivity.
6. The Welsh Government is by no means exceptional in its use of secondary legislation. In the United Kingdom as a whole we have moved a long way from Lord Chief Justice Hewart’s view in 1929 that the use of secondary legislation was part of what he called “the new despotism”. However, there has been a recognition in the Westminster Parliament that the limits of what secondary legislation should cover are being reached, and often exceeded. Two recent Reports from House of Lords Committees pull no punches: *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* from the Delegated Powers and

Regulatory Reform Committee¹ and *Government by Diktat: a call to return power to Parliament* from the Secondary Legislation Scrutiny Committee.² The Legislation, Justice and Constitution Committee in the Senedd has also expressed its concerns about the use of delegated law-making powers for Ministers in Cardiff.³

7. The Hansard Society for Parliamentary Government⁴ has responded to these concerns by launching a major review of Delegated Legislation.⁵ Though this Review only covers Westminster law-making, many of the concerns that the Society identifies apply equally to legislation made by the Welsh Government. Applicable in Wales – and of relevance to the Bill before the Committee – are concerns about the blurring of the boundary between what should go in primary legislation and what should go in delegated legislation; the way in which secondary powers can be used in the future in unexpected ways that the legislature did not anticipate at the time it granted them; the undesirability of powers that enable Ministers to amend or repeal primary legislation by secondary legislation; the truncated consideration of secondary legislation by the legislature (just a 15 minute debate in plenary in the Senedd is usual); and the inability of the legislature to amend secondary legislation.
8. 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) Bill⁶ 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 between providing the Welsh Ministers with ability to respond to external events in a flexible and agile way, and the Senedd’s legislative supremacy”. The Senedd has in many ways been an exemplary legislature, and I hope that it will be so in its control of secondary legislation.
9. The purposes in clause 1(1) of the Bill do constrain Ministers, and the powers under the Bill are more limited than the powers proposed in the original consultation document (albeit that a Senedd “lock” was proposed in that consultation document). It is particularly welcome that there is a reassurance that the regulation-making power will not be used to make “routine policy changes”. However, 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

¹ 12th Report, Session 2021-2

² 20th Report, Session 2021-2

³ <https://research.senedd.wales/research-articles/legislative-consent-in-the-sixth-senedd-the-story-so-far/>

⁴ I declare an interest as a Trustee of the Society

⁵ <https://www.hansardsociety.org.uk/projects/delegated-legislation-review#what-is-the-problem>

⁶ Para 3.18

legislation.⁷ I suggest that the Committee try to imagine the most extreme scenarios in which the powers proposed in the Bill might be used, and only agree to those powers if the Committee is satisfied that secondary legislation is appropriate in those scenarios.

10. The hoops through which secondary legislation must go to pass the Senedd are, of course, a check on its use. The procedure under Clause 4(2)(a) – the affirmative procedure – does at least ensure Senedd approval before Regulations are made. The option Ministers have to dispense with that prior approval in urgent cases (Clause 4(2)(b)) is one that should be used wholly exceptionally – made affirmatives are a “very unusual procedure historically”.⁸ It is welcome that the Welsh Government has said that the affirmative procedure will be used “where possible” – but this formulation still allows the Government considerable latitude.
11. A particularly controversial aspect of the Bill is that it allows a provision in regulations made under it to have retrospective effect, as long as that provision does not retrospectively impose or extend a liability to a penalty. 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.⁹ 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.
12. Welsh Ministers will be required by the Bill to make a policy statement on their use of retrospectivity, and a draft of that policy statement has been laid before the Senedd. This draft statement is welcome and seems perfectly reasonable, but it still allows a degree of discretion to Ministers that might be thought undesirable in the case of any retrospective legislation, and particularly in taxation legislation. 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. Once again, the Committee might want to contemplate the most extreme circumstances in which the power could be used.

⁷ See, for example, the controversy about the proposal in 2015 to make changes to tax credits by delegated legislation. That the use of secondary legislation in these circumstances remains unusual seems to me to be confirmed by a recent HMRC Policy Paper (<https://www.gov.uk/government/publications/power-to-make-temporary-modifications-of-taxation-of-employment-income/power-to-make-temporary-modifications-of-taxation-of-employment-income>) – see Detailed Proposal – Current Law

⁸ Evidence of First Parliamentary Counsel to House of Lords Secondary Legislation Scrutiny Committee, 20 April 2021, Q7

⁹ The fact that retrospective legislation is very unusual is evidenced by the requirement (in the case of Westminster legislation) that the Law Officers are consulted before it is introduced. This is paralleled in Wales by a requirement to consult the Counsel General on any proposal to introduce secondary legislation with retrospective effect. In the case of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, the Supreme Court quoted with approval the Counsel General’s acceptance of “a need for special justification where a statutory provision has retrospective effect” – UKSC [2015] 3 para 53.

13. The issue of retrospective taxation legislation has long been particularly contentious. A very useful study of Westminster practice on retrospective tax legislation (where practice has relaxed over time but where it remains unusual and controversial) was published by the House of Commons Library in 2020.¹⁰ However, the proposal in respect of retrospectivity in the Welsh Tax Acts (Power to Modify) Bill goes one stage further than has happened at Westminster: I am not aware of any provision in Westminster legislation that gives Ministers power to impose taxation or modify or impose penalties in respect of 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.
14. 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.
15. In conclusion, I suggest that the Committee should satisfy itself that the Welsh Tax Acts (Power to Modify) Bill does nothing that will diminish the accountability of Ministers to the Senedd, or the constitutional supremacy of the Senedd in legislation on devolved matters, or the certainty necessary for the rule of law. The Committee may feel that primary legislation passed expeditiously is preferable to the secondary route for which the Bill provides.
16. More generally, it may also want to satisfy itself that this Bill will not be a precedent for future legislation that would allow the Welsh Government to change the law through delegated powers in areas other than taxation following, say, new international treaty obligations, court decisions or actions of the UK Government – and particularly not to give itself the ability to do so retrospectively.

¹⁰ <https://commonslibrary.parliament.uk/research-briefings/sn04369/>