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**Legislation, Justice and Constitution Committee**  
**Welsh Parliament**  
**Cardiff Bay**  
**CF99 1SN**

Tel: **0300 200 6565**

Email: **[SeneddLJC@senedd.wales](mailto:SeneddLJC@senedd.wales)**

Twitter: **[@SeneddLJC](https://twitter.com/SeneddLJC)**

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# The Welsh Government's Legislative Consent Memorandum on the Trade Bill

July 2020



# About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:  
[www.senedd.wales/SeneddLJC](http://www.senedd.wales/SeneddLJC)

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## Committee Chair:



**Mick Antoniw MS**  
Welsh Labour

## Current Committee membership:



**Suzy Davies MS**  
Welsh Conservatives



**Carwyn Jones MS**  
Welsh Labour



**Dai Lloyd MS**  
Plaid Cymru

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# 1. Background

## The UK Government's Trade Bill 2017-19

1. On 7 November 2017 the previous UK Government introduced the Trade Bill 2017-19<sup>1</sup> (the 2017-19 Bill).
2. In summary, the 2017-19 Bill made provision about the Agreement on Government Procurement (GPA), the implementation of certain kinds of existing EU/third country international trade agreements, establishing the Trade Remedies Authority and conferring functions on it, and the collection and disclosure of information relating to trade.
3. The Welsh Government laid a Legislative Consent Memorandum (LCM) in December 2017<sup>2</sup>, and a supplementary LCM in February 2019<sup>3</sup>, in relation to the 2017-19 Bill.
4. We reported on the LCM in March 2018<sup>4</sup> and the Supplementary LCM in March 2019<sup>5</sup>. We also produced a separate report on the Scrutiny of regulations made under the Trade Bill in October 2018.<sup>6</sup>
5. Some of our key concerns expressed in those reports include:
  - the provision of concurrent powers to UK Ministers that could allow them to legislate in devolved areas without seeking the Senedd's consent;
  - the powers for UK Ministers to amend the *Government of Wales Act 2006* without the Senedd's consent;

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<sup>1</sup> [Trade Bill 2017-19](#) (HC Bill 122)

<sup>2</sup> Welsh Government, [Legislative Consent Memorandum, Trade Bill](#), December 2017

<sup>3</sup> Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Trade Bill](#), February 2019

<sup>4</sup> Constitutional and Legislative Affairs Committee, [The Welsh Government's Legislative Consent Memorandum on the Trade Bill](#), March 2018

<sup>5</sup> Constitutional and Legislative Affairs Committee, [The Welsh Government's Legislative Consent Memorandum \(Memorandum No 2\) on the Trade Bill](#), March 2019

<sup>6</sup> Constitutional and Legislative Affairs Committee, [Scrutiny of regulations made under the Trade Bill](#), October 2018

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- the use of the negative procedure for regulations made under clause 1 of the Bill;
- the broad definition under clause 2 of an 'international agreement that mainly relates to trade';
- in clause 1 and clause 2, that UK and devolved Ministers may make such provisions by regulations that 'the authority considers appropriate';
- the sifting mechanism that is applied to subordinate legislation made under the *European Union (Withdrawal) Act 2018* should apply to regulations made under the Trade Bill.

**6.** The then Cabinet Secretary for Economy and Transport, Ken Skates MS, responded<sup>7</sup> to our report on the Scrutiny of regulations made under the Trade Bill on 8 October 2018.

**7.** The Minister for International Relations and the Welsh Language, Eluned Morgan MS, responded<sup>8</sup> to our report on the Supplementary LCM on 25 April 2019.

**8.** Following a late amendment to the Bill in the House of Lords, a further supplementary LCM (the No.3 LCM)<sup>9 10</sup> was laid before the Senedd on 10 May 2019. Due to the short timeframe between the laying of the No.3 LCM and the relevant Plenary debate, we were not in a position to take evidence from the Minister on the LCM or produce a report.

**9.** The No.3 LCM was debated in Plenary on 21 May 2019<sup>11 12</sup>, and the Senedd voted in favour of the 2017-19 Bill being considered further by the UK Parliament.

**10.** Following the dissolution of the UK Parliament for the UK General Election in December 2019, the 2017-19 Bill fell.

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<sup>7</sup> [Letter from the Cabinet Secretary for Economy and Transport](#), 6 December 2018

<sup>8</sup> [Letter from the Minister for International Relations and the Welsh Language](#), 25 April 2019.

<sup>9</sup> Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 3\), Trade Bill](#), May 2019

<sup>10</sup> The Supplementary LCM No3 was laid by the Welsh Government following [correspondence sent by the Chair of the External Affairs and Additional Legislation Committee](#) (7 May 2019)

<sup>11</sup> [Plenary, 21 May 2019, Record of Proceedings](#)

<sup>12</sup> See also [letter to the Minister for International Relations and the Welsh Language](#), 6 June 2019, and [letter from the Minister for International Relations and the Welsh Language](#), 28 June 2019



## The UK Government's Trade Bill 2019-21

**11.** The UK Government's Trade Bill 2019-21<sup>13</sup> (the Bill) was introduced to the House of Commons on 19 March 2020. It is sponsored by the Department for International Trade.

**12.** Some of the main provisions in the 2019-21 Bill include powers to:

- ensure that UK Ministers and Welsh Ministers in areas of devolved competence can implement obligations arising from the UK's accession to the Agreement on Government Procurement (GPA) as an independent member, and not as an EU Member State;
- enable UK Ministers and Welsh Ministers in areas of devolved competence to implement the non-tariff elements of existing EU trade agreements with third countries that have been transitioned as part of the Trade Agreement Continuity programme;
- establish the Trade Remedies Authority (TRA) - a new non-departmental body - which will be responsible for delivering the new UK trade remedies framework;
- allow HM Revenue and Customs (HMRC) to collect information and data on behalf of the UK Government for trade promotion purposes, and powers to establish a data-sharing gateway between HMRC and other public and private bodies.

**13.** The 2019-21 Bill is similar in a number of respects to the 2017-19 Bill. However, there are a number of changes of particular relevance to Wales and to our consideration of the Welsh Government's LCM on the 2019-21 Bill:

- clause 1 has been amended to include powers for UK Ministers and the Welsh Ministers in areas of devolved competence to make regulations in relation to a dispute between the United Kingdom and another member of the GPA (see clause 1(1)(b)(ii));
- clause 1(1)(b)(iv) allows an appropriate authority to make regulations to reflect any modifications to the list of central government entities of the UK listed in Annex 1 to the UK's Appendix I to the GPA;

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<sup>13</sup> [Trade Bill 2019-21](#) (HC Bill 120)

- the sunset clause contained in clause 2(8) has reverted to a five year period<sup>14</sup> as originally drafted in the version of the Bill given first reading in the House of Commons in 2017.

## The Welsh Government's Legislative Consent Memorandum

**14.** On 2 April 2020, the Minister for International Relations and the Welsh Language, Eluned Morgan MS, laid before the Senedd an LCM<sup>15</sup> in respect of the Bill.

**15.** The Business Committee agreed that the Legislation, Justice and Constitution Committee, and the External Affairs and Additional Legislation Committee, should report on the LCM by 4 June 2020.<sup>16</sup> The Business Committee subsequently revised the deadline to 1 October 2020<sup>17</sup>

### Provision for which the Senedd's consent is required

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**16.** Paragraphs 6 and 7 of the LCM set out the Welsh Government's assessment of which provisions in the Bill require the Senedd's consent, namely clauses 1 to 4 of, and Schedules 1 to 3 to, the Bill. The LCM notes:

“Consent is required for these provisions because they fall within the legislative competence of the National Assembly for Wales in so far as the powers conferred concern the implementation of aspects of international agreements which relate to non-reserved matters.”<sup>18</sup>

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<sup>14</sup> The 2017-19 Bill was amended to reduce the period the regulations would expire after to three years and to limit their extension to a period or period of no more than three years.

<sup>15</sup> Welsh Government, [Legislative Consent Memorandum, Trade Bill](#), April 2020

<sup>16</sup> Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Trade Bill](#), April 2020

<sup>17</sup> Business Committee, [Revised Timetable for consideration of the Legislative Consent Memorandum on the Trade Bill](#), May 2020, and [Revised Timetable for consideration of the Legislative Consent Memorandum on the Trade Bill](#), June 2020

<sup>18</sup> Welsh Government, LCM, paragraph 7

**17.** Paragraphs 9 to 12 of the LCM set out the reasons for making the provisions for Wales in the Bill. The LCM states:

“The Welsh Government agrees that legislation is necessary to provide clarity and certainty for businesses and consumers in relation to trade now the UK has left the EU.

(...)

We accept there may be instances when it makes sense for the UK Parliament to legislate on devolved areas, but this should only be with the consent of the Devolved Governments.”<sup>19</sup>

**18.** The LCM concludes:

“It is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Bill as the Bill covers both devolved and non-devolved matters. In terms of coherence, the Welsh Government considers that legislating via a UK wide Bill is the most effective and proportionate legislative vehicle for creating an independent trade policy for the UK following the transition period. Devolved areas may be heavily impacted by future trade agreements therefore it is important Welsh interests are adequately reflected in the Trade Bill.”<sup>20</sup>

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<sup>19</sup> Welsh Government, LCM, paragraphs 9 and 10

<sup>20</sup> Welsh Government, LCM, paragraph 14

## 2. Committee consideration

**19.** As a result on the Covid-19 pandemic, we wrote jointly with the External Affairs and Additional Legislation Committee to the Minister with a series of questions on the LCM on 7 May 2020.<sup>21</sup> The Minister replied to our letter on 29 May 2020 and her response is included as an Annex within this report.

### Our view

#### Overview and general observations

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**20.** We are grateful to the Minister for her response to our questions on the Bill.

**21.** The purpose of the Bill and the Welsh Government's involvement in its development is familiar to us, having considered the previous version of the Bill in 2018 and 2019.

**22.** When we considered the first LCM for the 2017-19 Bill, the then Cabinet Secretary for Economy and Transport said that the Welsh Government was making decisions "against a backdrop of a clock that is completely out of [its] control"<sup>22</sup>. It is now evident that speed and time were not in such short supply<sup>23</sup> that it prevented the Welsh Government from having the space to secure legislative provisions in the Bill for more appropriate scrutiny procedures of subordinate legislation made under the Bill by UK Ministers for the Senedd.

**23.** While it may be argued that such comments can be made with the benefit of hindsight, we note that the House of Lords' Constitution Committee, in its recent report *Brexit legislation: constitutional issues*, has made some similar comments about the passage of the 2017-19 Bill. In its report, the Constitution Committee has noted that, in respect of aspects relating to the Trade Remedies Authority, the urgency was not so great that it precluded time to provide for specific details in the primary legislation itself.<sup>24</sup>

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<sup>21</sup> [Letter from the Chair of the External Affairs and Additional Legislation Committee and the Chair of the Legislation, Justice and Constitution Committee to the Minister for International Relations and the Welsh Language](#), 7 May 2020

<sup>22</sup> Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, 12 February 2018, RoP [47]

<sup>23</sup> Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, 12 February 2018, RoP [47]

<sup>24</sup> House of Lords Constitution Committee, 6th Report of Session 2019-21, [Brexit legislation: constitutional issues](#), June 2020

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**24.** The concerns we highlighted in our reports on the legislative consent memoranda for the 2017-19 Bill regarding broad executive powers have been reiterated in reports we have issued on other UK Bills related to the United Kingdom's exit from the European Union. We remain disappointed that our repeated concerns have not been satisfactorily addressed.

**25.** We have a significant concern with the Minister's letter to us of 29 May 2020. The Minister's responses, in a number of places, suggest an unsatisfactory level of engagement by the Welsh Government with the UK Government on the Bill.

**26.** The Welsh Government's LCM concludes with the sentence:

“Devolved areas may be heavily impacted by future trade agreement therefore it is important Welsh interests are adequately reflected in the Trade Bill.”<sup>25</sup>

**27.** While we also have concerns with the low bar that 'adequate' implies, it is not clear to us how the Minister has ensured that the interests of Welsh citizens, Welsh businesses, and Welsh democracy are taken account of in the Bill.

**28.** We explore some of these issues further below.

Clause 1 – powers to implement the Agreement on Government Procurement (GPA)

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**29.** When we asked the Minister about the discussions she has had with the UK Government about the breadth of the regulation making power in clause 1, specifically as regards the ability of UK and Welsh Ministers to make regulations for the implementation of the GPA as they consider 'appropriate', the Minister responded by saying:

“We have not had specific conversations regarding the breadth of the regulation making powers within clause 1 with UK Ministers.”<sup>26</sup>

**30.** While we are aware that subsection (1) of clause 1 limits the power to the specific purposes listed, the Minister's answer to our question gives us cause for concern. As we said in our earlier reports on the 2017-19 Bill, the use of “appropriate” is too vague and, as such, the scope of the clause 1 powers remains unreasonably broad.

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<sup>25</sup> Welsh Government, LCM, paragraph 14

<sup>26</sup> Response to Question 2, Annex

- 31.** We would have expected the Minister to have had robust conversations about this regulation-making power for two reasons. The first reason is because the regulation-making power can be exercised by UK Ministers alone without a legislative requirement to consult the Welsh Ministers or Senedd. The second reason is because the then Cabinet Secretary for Economy and Transport, during our scrutiny of the first LCM for the 2017-19 Bill, agreed with us that the word 'appropriate' is too vague. His view was that the use of the regulation-making power should be limited to where Ministers considered it 'necessary'.<sup>27</sup>
- 32.** In our report on the Supplementary LCM No 2 for the 2017-19 Bill, we said that we would welcome an update on what discussions the Welsh Government has had with the UK Government in relation to the unnecessarily vague drafting of the regulation-making powers in the Bill.<sup>28</sup> We have not received an update from the Welsh Government.
- 33.** The issue of granting broad regulation-making powers to the executive is of fundamental importance and we expect the Welsh Ministers to ensure that Welsh democracy is safeguarded by ensuring that executive powers provided in a UK Bill are not excessive.
- 34.** We acknowledge that the Minister has sought some non-legislative commitments from the UK Government in relation to the clause 1 powers. The commitments are discussed later in this report.
- 35.** The Minister's response to question 3 in our letter, regarding why the negative procedure is appropriate for clause 1 regulations, gives us similar cause for concern.
- 36.** While stating that the extent of discretion that could be exercised by either a UK Minister or the Welsh Ministers was "very limited in practice", the Minister's statement that "The decision on Parliamentary procedure was chosen by the UK Government and we have simply reflected that decision"<sup>29</sup> is deeply concerning. It should be for the Welsh Ministers to seek an appropriate procedure attached to the powers it is requesting rather than leaving that to the discretion of the UK Government. It highlights a lack of understanding and acknowledgement of the

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<sup>27</sup> Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee, 12 February 2018, RoP [119]

<sup>28</sup> Constitutional and Legislative Affairs Committee, The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill, March 2019, paragraph 29

<sup>29</sup> Response to Question 3, Annex



importance and need for robust scrutiny by the Senedd of the Welsh Minister's exercise of these powers.

**37.** As we said earlier in paragraph 27 of this report, it is unclear to us how the Minister's responses to our questions display the necessary evidence that the Welsh Government is doing all it can to ensure that Welsh interests are properly reflected in the Bill. We respectively note that Welsh interests may not always align with the approach and decisions of UK Ministers or the non-binding commitments that the Welsh Ministers are seeking to secure.

**38.** Question 4 of our letter referenced the statement in the UK Government's Delegated Powers Memorandum for the Bill, which indicates that the negative procedure was chosen for clause 1 regulations partly because of an apparent need to make those regulations with speed. We asked the Minister whether the made affirmative procedure had been considered as an alternative option.

**39.** The Minister's answer to that question, that the decision was taken by the UK Government and that she is not in a position to comment on the considerations it took when prescribing the procedure, is disappointing for the reasons highlighted above. In particular, it reinforces our concern that the Minister has not had specific conversations regarding the breadth of the regulation making powers within clause 1 with UK Ministers.

**40.** As the Senedd committee that has responsibility for scrutinising all subordinate legislation, we believe that the choice of procedure needs further explanation. Further, given the importance of the clause 1 regulations in respect of implementing the GPA, we believe there is sufficient grounds to warrant the application of a made affirmative procedure. We believe this to be of particular importance should the clause 1 regulation-making power continue to allow Ministers to make regulations as they consider 'appropriate'.

**Recommendation 1.** The Minister should make representations to the UK Government seeking a review of the procedure to be applied to regulations made under clause 1.

**Recommendation 2.** The Minister should write to the Committee notifying us of the outcome of the representations made to the UK Government as a result of recommendation 1.

**Recommendation 3.** The Minister should seek an amendment to the Bill so that the regulation-making power in clause 1 can be exercised when Ministers consider it 'necessary', rather than where Ministers consider it 'appropriate'.

## Clause 2 – powers to implement international trade agreements

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**41.** Regulations made under clause 2 to implement non-tariff measures in international trade agreements can be made by both the UK and Welsh Ministers alone or concurrently and, when that happens, those regulations will be subject to the affirmative procedure in the appropriate Parliament.

**42.** We note that paragraph 6 of the Welsh Government's LCM states:

“The international trade agreements potentially covered by this provision will encompass a wide range of policy areas falling within the legislative competence of the National Assembly for Wales, to include agriculture and fisheries.”

**43.** This paragraph of the LCM highlights why the powers to make regulations under clause 2 of the Bill deserve significant attention.

**44.** We note that the Minister has sought non-legislative commitments from the UK Government regarding the use of the powers in clause 2, and this is discussed later in the report.

**45.** Throughout our scrutiny of the 2017-19 Bill, we raised concerns about the scope of the regulation-making powers in the Bill. Our main concern at that time was that the Bill allowed UK Ministers to make regulations that amend the *Government of Wales Act 2006* (the 2006 Act).

**46.** It is regrettable that this power remains in clause 2(6)(a) of the Bill. Despite our repeated concerns when scrutinising the legislative consent memoranda for the 2017-19 Bill, we are alarmed that the Minister, in answer to question 10 in our letter, said that she has not made any representations to the UK Government about this power. Further, we are not reassured by the Minister's statement that the UK Government has not indicated that it is minded to exercise these powers. As a Committee we have repeatedly emphasised that it is important to consider what can be done under a particular legislative provision, and not what a government of the time says it will do with a power.

**47.** The UK Government's ability to amend Wales' key devolution legislation alone via subordinate legislation is not something that should be negotiated using the non-binding practice of despatch box commitments in the UK Parliament.

**48.** We reaffirm, yet again, the constitutional principle that the legislative competence of the Senedd should not be modified by regulations made by the UK Ministers.

**Recommendation 4.** The Minister should seek an amendment to clause 2(6)(a) of the Bill to the effect that it cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*.

**Recommendation 5.** The Minister should seek an amendment to the Bill so that the regulation-making power in clause 2 can be exercised when Ministers consider it 'necessary', rather than where ministers consider it 'appropriate'.

**49.** We note that clause 2(7) of the Bill states that the clause 2 regulation-making powers expire five years after implementation period completion day. However, we also note that the Secretary of State, by regulations made in the UK Parliament, may extend the time during which both UK and the Welsh Ministers may make clause 2 regulations for a further period up to 5 years, without needing to consult the Welsh Ministers or seek the consent of the Senedd.

**50.** The Minister told us that the Welsh Government is content with the five-year period within which the clause 2 powers can be used, describing it as a "reasonable length of time", because of the large number of trade agreements that may need to be implemented.<sup>30</sup>

**51.** We note that the Welsh Government's primary concern on this matter relates to the sunset provision and the Welsh Government's view that there was a need to ensure the UK Government engaged with the devolved administrations before deciding whether and how to extend the sunset provision.<sup>31</sup> The non-legislative intergovernmental commitments sought by the Minister from the UK Government are discussed in the next section of the report.

**52.** We further note that the Welsh Government took the view that the UK Government's engagement with the executive rather than the legislature was appropriate in this case, given that the sunset provision "specifically concerns the exercise of a function conferred on the executive in a narrowly defined set of circumstances"<sup>32</sup>.

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<sup>30</sup> Response to Question 8, Annex

<sup>31</sup> Response to Question 8, Annex

<sup>32</sup> Response to Question 9, Annex

**53.** We do not share this view. Regulations made under clause 2(7) to extend the current period should be subject to consent by the Senedd. We consider this issue further in paragraph 71 below.

#### Clauses 1 and 2 – non-legislative commitments regarding use of concurrent powers

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**54.** In our report on the supplementary LCM No 2 for the 2017-19 Bill we noted the commitments that the Welsh Government had obtained from the UK Government in relation to clauses 1 and 2 of that Bill.<sup>33</sup> We further noted that the commitments would appear to mirror the principles set out in the Intergovernmental Agreement on the European Union (Withdrawal) Bill.<sup>34 35</sup>

**55.** In its LCM, and as mentioned in earlier parts of the report, the Welsh Government states that the UK Government has agreed to re-state commitments it made during the passage of the 2017-19 Bill, as follows:

“That the UK Government will not normally use concurrent powers to legislate in devolved areas without the consent of the Devolved Governments, and never without consulting them.

That the UK Government will not use the powers to introduce new policies in devolved areas and that administrative efficiency will be the primary driver.

Engaging with Devolved Governments before extending the period during which clause 2 powers can be used under the Bill”<sup>36</sup>

**56.** The Minister told us that she has received these assurances in an exchange of letters with a previous UK Government Minister for Trade Policy, and that she had written to the current UK Government Minister for Trade Policy, Greg Hands MP, requesting confirmation that he will honour those assurances.<sup>37</sup>

**57.** We note that the Minister has said that the Welsh Government's recommendation that the Senedd gives its consent to the Bill is based on the UK

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<sup>33</sup> Constitutional and Legislative Affairs Committee, The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill, March 2019

<sup>34</sup> Constitutional and Legislative Affairs Committee, The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill, March 2019

<sup>35</sup> The European Union (Withdrawal) Bill was enacted in June 2018 and became the European Union (Withdrawal) Act 2018.

<sup>36</sup> Welsh Government, LCM, paragraph 10

<sup>37</sup> Response to Question 5, Annex

Government's assurances that it will honour these commitments and, if those commitments are not repeated at the despatch box, that the recommendation will be reconsidered in advance of inviting the Senedd to give legislative consent.

**58.** It is our understanding that the Minister for Trade Policy has repeated some of these commitments during the House of Commons Committee Stage.<sup>38</sup> We would have expected all of the commitments to have been repeated explicitly by the Minister for Trade Policy.

**59.** Nonetheless, we are not content with the Minister's approach of addressing the inadequacies of clauses 1 and 2 by seeking non-legislative commitments from the UK Government. In our view, this is a high risk approach and ultimately, therefore, flawed.

**60.** The Bill, once enacted, will have significant and potentially long-term implications for key sectors in Wales, including agriculture, fisheries, health and manufacturing. We acknowledge that the negotiation of UK-wide trade agreements remains a power reserved to the UK Government. However, the Welsh Government will be responsible for implementing those trade agreements in devolved areas in Wales, and we do not believe that non-binding intergovernmental agreements are an effective way to safeguard Welsh interests.

**61.** We are aware of the Welsh Government's general concerns about the nature of its own relationship and interaction with the UK Government in terms of the negotiations for the EU/UK future relationship. On this matter, the Counsel General in his written statement on 18 June 2020<sup>39</sup> said that the Welsh Government remains "deeply frustrated by the lack of any meaningful engagement". That written statement pointed Members to the Counsel General's recent letter to the Chancellor of the Duchy of Lancaster, issued jointly with the Scottish Government's Cabinet Secretary for the Constitution, Europe & External Affairs, which said:

"...we would point out the difference between the quantity of meetings and other contacts between our administrations, and the quality of the engagement.

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<sup>38</sup> [House of Commons, Public Bill Committee, Trade Bill \(Sixth sitting\), 23 June 2020](#)

<sup>39</sup> [Welsh Government written statement: EU/UK Future relationship negotiation stock take](#), 18 June 2020

That is why we remain so dissatisfied with the engagement and why we believed – and still believe – that your approach to this issue failed to respect the position of the devolved governments.”<sup>40</sup>

**62.** While we believe that, on these specific matters, the Counsel General's concerns are warranted, if the Welsh Government has such concerns about the quality of engagement with the UK Government, and believe that the UK Government's recent actions “failed to respect the position of the devolved governments”, it is hard to understand why it is willing to continue to enter into non-binding intergovernmental agreements with the same government.

**63.** The Counsel General's statement reinforces our repeated concerns about the use of intergovernmental agreements. Further, we are concerned that the Welsh Ministers' continued acceptance of such agreements might have the effect of normalising their use, reducing the likelihood of legislative safeguards being agreed and, consequently, weakening the devolution settlement.

**64.** In our report on the Supplementary LCM No 2 on the 2017-19 Bill we said that we would welcome clarification from the Minister on whether she envisages any circumstances in which, should the Welsh Ministers refuse consent, the UK Ministers would still make the regulations. We also asked for clarification on whether there are any exceptions to the commitment that UK Government Ministers will not normally use the powers in devolved areas without Welsh Ministers' consent.<sup>41</sup> The Minister did not address these points during the Plenary debate on the consent motion for the Bill on 21 May 2019<sup>42</sup>, and the concerns remain relevant.

**65.** We have been monitoring the Bill's progress through the UK Parliament. As regards including provision in the Bill requiring the consent of the devolved administrations before the making of clause 1 and 2 regulations, during the House of Commons Committee Stage, and in response to an amendment seeking to achieve this objective<sup>43</sup>, the Minister for Trade Policy said:

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<sup>40</sup> [Letter from Jeremy Miles MS and Michael Russell MSP to the Chancellor of the Duchy of Lancaster](#), 17 June 2020. The issue referred to in the letter is the UK Government's decision not to request an extension to the current transition period.

<sup>41</sup> Constitutional and Legislative Affairs Committee, The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill, March 2019

<sup>42</sup> [Plenary, 21 May 2019, debate on the Supplementary Legislative Consent Memorandum on the Trade Bill](#)

<sup>43</sup> Amendment 8 was not pressed towards a vote and was withdrawn after debate during the Sixth sitting of the Public Bill Committee.



“A statutory consent provision in the Bill would in effect give the devolved Administrations a veto over a reserved matter. This would be highly constitutionally inappropriate and could lead to a situation where international agreements applied in some parts of the UK but not others. This would be a fundamental weakening of our Union and the long-established principle that in the matter of international relations the UK Government negotiate for all parts of the UK.

Our commitment to not normally legislate in areas of devolved competence without consent, and never without consultation, strikes the proper balance between providing sufficient reassurance to the devolved Administrations while preserving international relations as a reserved matter. It is a sincere commitment that we will honour, as we have honoured the commitments made to the devolved Administrations on the Trade Bill 2017-19.”<sup>44</sup>

**66.** We do not share the UK Minister’s assessment regarding the inclusion of a statutory consent provision in the Bill. The implementation of international obligations is a devolved matter and explains why the Welsh Ministers are regarded as an “appropriate authority” and have regulations-making powers under clauses 1 and 2.

**67.** If the UK Government is willing to commit to consult the devolved administrations before it uses the powers in clauses 1 and 2, it is unclear why a legislative duty to consult is not, and cannot, be placed on the face of the Bill. We note that this matter was raised during the House of Commons Committee Stage by way of an amendment to the Bill that would have placed a duty on the UK Government to consult the Joint Ministerial Committee before making regulations under clauses 1 and 2 of the Bill.<sup>45</sup>

**68.** We believe a duty to consult the devolved administrations should be a minimum requirement asked for by the Minister of the UK Government and, in our view, it should be considered as a red line in terms of the Minister’s recommendation on whether or not the Senedd should consent to the making of the relevant provisions in the Bill.

**69.** However, we do not believe that a duty to consult goes far enough and, in this regard, we note that other UK Bills seeking to legislate as a consequence of

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<sup>44</sup> Public Bill Committee, Trade Bill (Sixth sitting), 23 June 2020, column 242. See also [Public Bill Committee Trade Bill \(Seventh sitting\), 25 June](#), columns 269-270

<sup>45</sup> The amendment to insert New Clause 16 was not put to a decision following debate during the Sixth sitting of the Public Bill Committee.

Brexit include concurrent plus powers, for example in relation to the UK Environment Bill. Such powers require the consent of the Welsh Ministers before UK Ministers may make regulations in devolved areas.

**Recommendation 6.** The Minister should seek an amendment to the Bill to secure a requirement on the UK Government to obtain the Welsh Ministers' consent before it makes regulations under clauses 1(1) and 2(1).

**70.** With regards to the second commitment, we take the opportunity to highlight that, in respect of relevant regulations made under the *EU (Withdrawal) Act 2018*, there have been differences of interpretation between us and the Welsh Government on what constitutes new policy.<sup>46</sup> Given that 'new policy' is, therefore, open to interpretation, we are mindful of this particular phrasing being used in a non-legislative commitment on another important matter.

**71.** In terms of the final commitment<sup>47</sup>, that the UK Government will engage with Devolved Governments before extending the period during which clause 2 powers can be used under the Bill, we refer to our comments in paragraph 53 above. It is our view that it would be more appropriate for the consent of the Senedd to be obtained before extending the ability of the Welsh Ministers to exercise executive powers in Wales.

**Recommendation 7.** The Minister should seek an amendment to the Bill to secure a requirement on the UK Government to obtain the Senedd's consent before it makes regulations under clause 2(7).

**72.** We again repeat that we do not believe that non-binding intergovernmental commitments and agreements are an adequate substitute for legislative solutions.

Clauses 1 and 2 – concurrent powers and the impact on the competence of the Senedd

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**73.** The Bill creates new concurrent powers that can be exercised in devolved areas by both the UK and Welsh Ministers. We asked the Minister whether she has had discussions with the UK Government about the impact this has on the

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<sup>46</sup> Constitutional and Legislative Affairs Committee, [Scrutiny of regulations under the European Union \(Withdrawal\) Act 2018: Progress report](#), paragraph 18. See also the [letter from the First Minister to the Llywydd](#), 11 January 2019, and the [letter from the First Minister](#), 11 March 2019

<sup>47</sup> See also paragraph 55

legislative competence of the Senedd, in particular the test set out in paragraph 11 of Schedule 7B to the 2006 Act.

**74.** We welcome the Minister's confirmation that relevant discussions have taken place, and that she anticipates that an Order in Council made under section 109 of the 2006 Act will be brought forward shortly to address the concurrent functions issue that we highlighted.

#### Clauses 1 and 2 – notification of regulations made by UK Ministers

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**75.** In our report on the Supplementary LCM No.2 on the 2017-19 Bill we said that Standing Order 30C should be amended to apply to the Trade Bill, once enacted.<sup>48</sup>

**76.** In her reply to us<sup>49</sup>, the Minister said that, in respect of when Welsh Ministers consent to the making of relevant regulations by the UK Ministers in devolved areas, she thought it would be helpful to consider a review of Standing Order 30C more generally. We note that the Minister did not clarify the position during the debate on the consent motion for the 2017-19 Bill.<sup>50</sup>

**77.** In her letter to us on 29 May 2020, the Minister told us that she will notify us "in due course if the Welsh Ministers consent to any UK Government regulations under clause 1 in devolved areas"<sup>51</sup>.

**78.** We are concerned that the Minister's response, that she will notify us in due course, is vague and open to interpretation.

**79.** Further, and as shown through our scrutiny of LCMs for four different Brexit-related Bills, we are concerned that the Welsh Government's approach to notifying the Senedd of the consenting to and making of important regulations in devolved areas lacks consistency across and within departments, as illustrated below:

- Welsh Ministers consenting to the making of relevant regulations by UK Ministers under the *EU (Withdrawal) Act 2018* – Standing Order 30C procedure;

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<sup>48</sup> Constitutional and Legislative Affairs Committee, The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill, March 2019, paragraph 22

<sup>49</sup> Letter from the Minister for International Relations and the Welsh Language, 25 April 2019

<sup>50</sup> [Plenary, 12 March 2019, Legislative Motion on the Trade Bill](#)

<sup>51</sup> Response to Question 2, Annex

- Welsh Ministers consenting to the making of relevant regulations by UK Ministers under the Fisheries [Act] – Welsh Ministers will write to the Committee;
- Welsh Ministers consenting to the making of relevant regulations by UK Ministers under the Environment [Act] – Welsh Ministers will notify the Committee as per the Standing Order 30C procedure;
- Welsh Ministers consenting to the making of relevant regulations by UK Ministers under the Trade [Act] – Welsh Ministers will notify the Committee in due course.

**80.** We have written to the Welsh Government separately on this matter.

#### Clause 5 – The Trade Remedies Authority

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**81.** In relation to the Trade Remedies Authority, whilst accepting this section of the Bill is not within competence of the Senedd, the Welsh Government's LCM states that the UK Government has also agreed to re-state commitments it made on the operation of the TRA body in Wales during the passage of the 2017-19 Bill.

**82.** These commitments are:

- The Department for International Trade will advise the Devolved Governments when an investigation is opened by the TRA, which will alert them to the need to take a decision on whether or not to register their interest in the case.
- A Devolved Government will be able to register their interest with the TRA and then become a contributor.
- As a contributor, the Devolved Government will be invited by the TRA to submit relevant information, which it will be obliged to take into account in the investigation as appropriate.
- Contributors will also be notified by the TRA of any actions it has taken.
- The Secretary of State will notify the Devolved Governments of the TRA's recommendations at the same time as consulting UK government departments so that they can feed in their views before they make a final decision as to accept or not.
- The TRA's annual report will be shared with the Devolved Governments once it has been received by the Secretary of State and the Devolved

Governments will be able to lay it before their respective legislatures at the same time as the Secretary lays it before the UK Parliament.

- The Secretary of State will seek suggestions of the Devolved Governments as to the optimal way of recruiting TRA non-executive members with regional knowledge, skills and experience.

**83.** The LCM does not set out why these commitments are not included within the Bill, or if they will be included in any other kind of correspondence, written agreement or guidance between either the UK Government and the devolved governments or the TRA and the devolved governments once the TRA is established.

**84.** On 30 April 2019, and in line with our report on the supplementary LCM No.2 on the 2017-19 Bill<sup>52</sup>, the Minister issued a written statement on the UK Trade Remedies Authority, in which the Minister confirmed she had obtained the non-legislative commitments set out above.

**85.** The Minister has also previously said that she is pleased with the progress that has been made with discussions around the TRA, and the commitments that the UK Government has provided.

**86.** We reiterate our concerns expressed earlier in the report that we do not welcome the overdependency on non-legislative commitments being sought through non-binding intergovernmental agreements.

**87.** Further, we believe the process secured whereby the Secretary of State will consult with the Welsh Government on the TRA's recommendations at the same time as consulting UK Government departments does not respect the Welsh Government as the executive in a devolved nation.

**Recommendation 8.** The Minister should seek urgent discussions with the UK Government regarding the commitments made on the operation of the TRA, specifically as regards consulting the Welsh Government on the TRA's recommendations, and seek changes to the agreed commitments so that they properly reflect the Welsh Government's status as the Government in Wales, and not as a department of the UK Government.

**88.** A further example where the Bill does not treat UK Ministers and Welsh Ministers with parity relates to the functions of the TRA, and this is an issue which

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<sup>52</sup> Constitutional and Legislative Affairs Committee, The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Trade Bill, March 2019

we raised in previous reports on the 2017-19 Bill. The TRA must provide advice, support and assistance to the Secretary of State about international trade. If Welsh Ministers need advice or assistance from the TRA in respect of the same matter, the TRA are under no duty to provide that support. This is not satisfactory.

**89.** It is not clear how such procedures will ensure that Welsh interests in international trade are safeguarded, particularly as Welsh Ministers may not be in receipt of the same advice as UK Ministers.

**90.** As we said earlier in the report, we acknowledge the fact that negotiating UK-wide trade agreements remains a power reserved to the UK Government. However, the devolved administrations are responsible for the implementation of trade agreements in devolved areas and this responsibility should be taken into account when the operational model for the TRA is established.

**Recommendation 9.** The Minister should seek urgent discussions with the UK Government regarding the commitments made on the operation of the TRA, specifically as regards a duty on the TRA to provide advice to the Welsh Ministers, and seek changes to the agreed commitments so that they properly reflect the Welsh Government's role in implementing international trade agreements.





Eluned Morgan AC/AM  
Gweinidog y Gymraeg a Chysylltiadau Rhyngwladol  
Minister for International Relations and the Welsh Language

Our ref: MA-EM-1622-20

David Rees MS  
Chair of External Affairs and Additional Legislation Committee  
Welsh Parliament  
Cardiff Bay  
CF99 1SN

[SeneddEAL@assembly.wales](mailto:SeneddEAL@assembly.wales)

Mick Antoniw MS  
Chair of Legislation, Justice and Constitution Committee  
Welsh Parliament  
Cardiff Bay  
CF99 1SN

29 May 2020

Dear David and Mick,

## **Trade Bill: Legislative Consent**

Thank you for your letter of 07 May 2020 seeking further information following the laying of a Legislative Consent Memorandum (LCMemo) relating to the Trade Bill. I am grateful to both your committees for your scrutiny of the Bill and the elements for which legislative consent is being sought. In your letter, you ask a number of questions, I shall address each in turn.

### **Part 1, Clause 1: Implementation of the Agreement on Government Procurement (GPA)**

*Q1: Which Welsh public bodies will the Welsh Government be seeking to include in any revised list in Annex 1 to the United Kingdom's Annex 1 to the GPA?*

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

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1NA

[Gohebiaeth.Eluned.Morgan@llyw.cymru](mailto:Gohebiaeth.Eluned.Morgan@llyw.cymru)  
[Correspondence.Eluned.Morgan@gov.wales](mailto:Correspondence.Eluned.Morgan@gov.wales)

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

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

The UK Government has agreed to update its schedules for the GPA following its accession. The Cabinet Office is leading on this work and has been regularly engaging with Welsh Government officials in relation to potential changes to the public bodies listed in Annex 1. Our expectations at this stage are that the proposed changes will be largely technical in nature, for example changing the names of the bodies listed to reflect their current titles. Hence this is where our work is currently focused.

*Q2: What discussions has the Minister has with UKG about the breadth of the regulation making power in Clause 1, specifically as regards the ability of UK and Welsh Ministers to make regulations for the implementation of the GPA as they consider 'appropriate'*

We have not had specific conversations regarding the breadth of the regulation making powers within clause 1 with UK Ministers. However, sub-clause (1) limits the power to the specific purposes listed, that is only in relation to the accession and membership of the UK to the GPA. To date, we have had good engagement with the UK Government Cabinet Office regarding provision needed under clause 1 which may be needed to implement the GPA. We will continue to engage with the Cabinet Office on this issue and will notify your committees in due course if the Welsh Ministers consent to any UK Government regulations under clause 1 in devolved areas.

*Q3: In light of the fact that the list of Welsh public bodies appears to be in need of revision, and the reference to the need for an update in the Explanatory Notes, why do you consider the negative procedure to be the appropriate procedure for making these regulations?*

The decision on Parliamentary procedure was chosen by the UK Government and we have simply reflected that decision. The reason for the UK Government's view is explained in the Delegated Powers Memorandum, namely the need for speed and the fact that the terms on which the UK accedes to the GPA will also be considered by the UK Parliament under the procedure in the Constitutional Reform and Governance Act 2010.

As the GPA is an international agreement, clause 1 of the Bill cannot be exercised to change any part of that agreement, including Annex 1. That Annex can only be updated in accordance with the process set out in Article XIX to the GPA. Clause 1 powers can then be exercised to implement the UK's international obligations into domestic law. For example, by making amendments to domestic legislation such as the Procurement Contract Regulations 2015 to ensure that the list of central government contracting authorities covered by those regulations is consistent with the UK's obligations under the GPA. As the clause 1 powers could only be exercised to implement obligations arising out of international law, the extent of discretion that could be exercised by UK Ministers or the Welsh Ministers is very limited in practice.

*Q4: The Delegated Powers Memorandum indicates a need for clause 1 regulations to be able to be made with speed, whether that be, for example, in reaction to the UK's accession to the GPA as an independent member or in response to a dispute with another GPA party. The DPM suggests the negative resolution procedure provides the opportunity for UK and Welsh Ministers to act with that speed. What consideration was given to applying a made affirmative procedure to the regulations-making powers in clause 1?*

As the decision on procedure was taken by the UK Government, I am not in a position to comment on the considerations that it took into account in deciding that it was unnecessary to apply the made affirmative procedure to clause 1.

Although speed has been cited by the UK Government as one of the factors in support of the negative procedure in the Delegated Powers Memorandum, I am not aware of any situations where the regulations would need to be made and brought into force in such an urgent fashion so as to justify the use of the made affirmative procedure. I am satisfied that the negative procedure strikes the right balance in this instance.

### **Expectations of the UK Ministers**

*Q5: Can you please clarify the basis on which the agreement to restate these commitments has been made? For example, was it confirmed in an exchange of letters between Ministers or was it an oral commitment?*

I received assurances in an exchange of letters with the then Minister for Trade Policy, Conor Burns MP, that all commitments made to the Welsh Government during the partial passage of the former Trade Bill would be restated during the passage of the current Bill. I have also raised with and written to Greg Hands MP Minister for Trade Policy requesting confirmation that he will honour the assurances given by his predecessor and that he will repeat these commitments at the despatch box during the Commons stages of the Bill.

*Q6: What action will you take should these commitments not be restated?*

The Welsh Government's recommendation in the Legislative Consent Memorandum that the Senedd consent to the Bill is based on the UK Government's assurances that it will honour the commitments that it previously made in parliament during the partial passage of the original Trade Bill. If those commitments are not repeated at the despatch box, then the recommendation will be reconsidered in advance of inviting the Senedd to give legislative consent. I have made this clear to Greg Hands MP.

*Q7: The Bill creates new concurrent powers that can be exercised in devolved areas by both the Welsh Government and the UK Government. Has the Welsh Government had discussions with the UK Government about the impact this has on the legislative competence of the Senedd, in particular the test set out in paragraph 11 of Schedule 7B to the Government of Wales Act 2006?*

I can confirm that discussions have taken place with the UK Government about the impact of the Bill's provisions on the Senedd's legislative competence. I anticipate that a Section 109 Order will be brought forward shortly and that it will address the concurrent functions issue you have highlighted.

### **Extending the period within which clause 2 powers can be used**

*Q8: Can you confirm that the Welsh Government is content with the five-year period within which these powers can be used?*

You will be aware that the Welsh Government's main request of UK Government in relation to the sunset clause has previously been ensuring that before deciding whether and how to extend the length of the sunset provision it would engage with the Devolved Administrations. I am content with the assurances that the UK Government provided in that respect. In light of the large number of trade agreements that may need to be implemented under this provision, the Welsh Government can appreciate the need for the powers to be available for a reasonable length of time. We are not currently aware of any significant issues with a five-year sunset period.

*Q9: Whilst we note that you are seeking a commitment from UK Ministers to engage with Devolved Governments before extending the period during which clause 2 powers can be used under the Bill, what is your view on the suggestion that any extension of the five-year period should also be subject to the Senedd's consent, insofar as this relates to powers delegated to the Welsh Ministers?*

The scope of the power in clause 2, including the potential for extension of the sunset provision by the Secretary of State has been included as a provision of the Bill for which the Senedd's consent is sought in the Legislative Consent Memorandum which was laid on 2 April 2020.

The Welsh Government took the view that the UK Government's commitments to engage with the executive rather than the legislature were appropriate in this case, given that the issue specifically concerns the exercise of a function conferred on the executive in a narrowly defined set of circumstances.

The Welsh and Scottish Governments' developed a joint set of amendments to the Bill in January 2018 which would have placed a statutory duty on the Secretary of State to consult with the Welsh Ministers and the Scottish Ministers before deciding whether and how to extend the length of the sunset provision. Although those amendments were not accepted, we were able to secure despatch box commitments from the UK Government that it would engage with the devolved administrations before extending the time period within which clause 2 regulations may be made during the partial passage of the original Trade Bill during the 2017-19 Parliamentary session.

On the basis that those commitments are restated during the passage of the current Bill, the Welsh Government has recommended that the Senedd provide consent for the Bill provision.

*Q10: What is your view on the power in clause 2(6)(a) that enables a UK Minister to amend the Government of Wales Act 2006 by regulations? Why do you consider this to be an appropriate power? Have you made representations to the UK Government about this power?*

I am content with the power in clause 2(6)(a) and have not made representations to the UK Government about this specific provision. Although there is no restriction which would prevent a Minister of the Crown from making amendments to the Government of Wales Act 2006 (GoWA), clause 2(6)(a) restricts any amendments to primary legislation, to the extent that a provision satisfies the definition of retained EU law in section 6(7) of the European Union (Withdrawal) Act 2018. Only a very small number of provisions in GoWA have the potential to fall within the scope of that definition and the UK Government has not indicated that it is minded to exercise the clause 2 powers to make any such amendments.

On this basis, I do not consider it necessary to secure a carve out for GoWA from the category of primary legislation which is capable of being amended by a Minister of the Crown under clause 2(6)(a).

I hope the information I have provided in response to your questions is satisfactory.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. E. Morgan'.

**Eluned Morgan MS**

Gweinidog y Gymraeg a Chysylltiadau Rhyngwladol  
Minister for International Relations and the Welsh Language