

**Witness Statement of: Helen Anne Lentle**

**No. of Statement: M2B-WG-01/1**

**Exhibits: 124**

**Date of Statement: 25 August 2023**

**UK COVID-19 INQUIRY**

---

**WITNESS STATEMENT OF HELEN ANNE LENTLE**

---

**I, HELEN ANNE LENTLE, WILL SAY AS FOLLOWS:**

1. I give this statement on behalf of the Welsh Government to assist the work of the Covid-19 Inquiry. My statement will address the making of legislation in relation to Wales to deal with Covid-19 and will deal with aspects of paragraphs 53, 54 and 55 of the Request for Evidence under Rule 9 of the Inquiry Rules 2006 Reference - M2B-WG-01.
2. I have been given the responsibility of providing this statement to the Inquiry because of my role as Director of Legal Services and Head of the Legal Profession for the Welsh Government.
3. I attach to my witness statement an index of the exhibits to which I refer in the following paragraphs of my statement.

## **Background**

4. In this statement I will first outline the recent history of devolved law-making in relation to Wales, primarily to outline the path by which the Welsh Ministers' current functions were gained and the scope also of the Senedd's legislative competence. This information will form important context for the explanations provided in the remainder of my statement as regards the Welsh Ministers' powers to propose and shape the content of primary legislation, make subordinate legislation and the procedures they must follow in relation to the making of both primary and subordinate legislation.

*Role of Welsh Government in the proposal and enactment of legislation – context and history*

*Establishment of the National Assembly for Wales – the Government of Wales Act 1998*

5. The National Assembly for Wales was established under the **Government of Wales Act 1998** (GoWA 1998) as a single body corporate with elected Assembly Members meeting for the first time on 12 May 1999. Within this single body corporate was an executive known as the Cabinet or 'Executive Committee' comprised of the Assembly First Secretary and Assembly Secretaries, all appointed from among the Assembly Members.
6. As provided for by section 21 of GOWA 1998, the National Assembly's functions were either:
  - 6.1. transferred to it, or made exercisable by it by virtue of GOWA 1998, or
  - 6.2. conferred or imposed on the Assembly by, or under, GOWA 1998 or another Act of the UK Parliament.

7. In anticipation of the first ordinary election of Assembly Members which took place on 6 May 1999, the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) was made on 10 March 1999 under section 22(2) of GOWA 1998, and it came into force on 1 July 1999. This Order was the first of a series of Orders in Council. It transferred a broad range of functions previously exercised by Ministers of Crown in relation to Wales to the National Assembly in each of the fields specified in Schedule 2 of GOWA 1998, namely:

Agriculture, forestry, fisheries and food.  
Ancient monuments and historic buildings.  
Culture (including museums, galleries and libraries).  
Economic development.  
Education and training.  
The environment.  
Health and health services.  
Highways.  
Housing.  
Industry.  
Local government.  
Social services.  
Sport and recreation.  
Tourism.  
Town and country planning.  
Transport.  
Water and flood defence.  
The Welsh language.

8. Amongst the functions transferred to the National Assembly, or, later, conferred on it by, or under, Acts of the UK Parliament, were functions of making subordinate legislation. For example, the Secretary of State's function of making regulations under section 13 of the Public Health (Control of Disease) Act 1984 was conferred upon the National Assembly by the National Assembly for Wales (Transfer of Functions) Order (S.I. 1999/672). This function, later transferred to the Welsh Ministers (see paragraph 10 below), coupled with other regulation and order making functions conferred on the Welsh Ministers, was relied on by them to enable subordinate legislation to be made in response to the Coronavirus pandemic (see paragraphs 101 to 106 below). For example, enclosed at documents HAL/01 - INQ000087040 and HAL/02 - INQ000087041 are, respectively, copies of the Welsh and English language texts which together comprise the Health Protection (Notification) (Wales) (Amendment) Regulations 2020 (S.I. 2020/232 (W.54) made, in part, in exercise of the regulation making functions in section 13 of the 1984 Act.
  
9. For completeness, in the period between its establishment in the late 1990s and 2007, the National Assembly, under GOWA 1998, had no powers to make primary legislation.

*Establishment of Welsh Government as an executive and National Assembly for Wales as legislature – The Government of Wales Act 2006*

10. In May 2007, following the third National Assembly election, under the **Government of Wales Act 2006** (GoWA 2006) a newly constituted National Assembly was established alongside a separate executive body, initially known as the 'Welsh Assembly Government' a name which was later changed to the 'Welsh Government'. The members of the Welsh Assembly Government were the First Minister, the Welsh Ministers, the Counsel General to the Welsh Assembly Government and the Deputy Welsh Ministers. By operation of section 162 of, and paragraph 30 of Schedule 11 to, GOWA 2006, 'relevant Assembly functions' were transferred to the Welsh Ministers, including the functions of

making subordinate legislation previously conferred on the National Assembly.

11. Section 93 of GoWA 2006 provided that the National Assembly could make its own primary legislation, in a form known as “Measures of the National Assembly” or “Mesurau Cynulliad Cenedlaethol Cymru”, within its ‘legislative competence’. The scope of its legislative competence was specified in section 94 of, and Schedule 5 to, GOWA 2006. Section 94(2) of GOWA 2006 provided that Assembly Measures could, subject to the provisions of Part 3 of GOWA 2006, make any provision that could be made by an Act of Parliament.
12. Schedule 5 was amended by successive Orders in Council, known as ‘Legislative Competence Orders’ or by Acts of the UK Parliament. These powers to make Measures were conferred on the National Assembly in relation to ‘matters’ within defined fields, for example Field 9: Health and Health Services contained matter 9.1 which read as follows:

provision for and in connection with the provision of redress without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales.

13. Twenty two Assembly Measures were passed between 2007 and 2011 across a range of the defined Fields including the NHS Redress (Wales) Measure 2008 (2008 nawm 1) and the Rights of Children and Young Persons (Wales) Measure 2011 (2011 nawm 2).

*National Assembly’s powers to pass Acts of the Assembly*

14. Section 107 of GOWA 2006 made provision for the National Assembly to make laws to be known as ‘Acts of the National Assembly for Wales or Deddfau Cynulliad Cenedlaethol Cymru’, but only if the majority of voters in a referendum

held by virtue of section 103(1) of GOWA 2006 were in favour of the Assembly Act provisions coming into force.

15. After a referendum resulted in a majority of voters being in favour of the provisions coming into force in 2011, from 5 May 2011, the National Assembly gained the powers to pass Assembly Acts where it had legislative competence to do so by virtue of section 108 of, and Schedule 7 to, GOWA 2006. Assembly Acts could, subject to the provisions of Part 4 of GOWA 2006, make any provision that could be made by an Act of Parliament.
16. Section 108 comprised a number of tests to be met to determine whether the National Assembly had the legislative competence to make particular provisions “by Assembly Act”. Take section 108(4)(a) of GOWA 2006. A provision of an Act of the Assembly would fall within that sub-section if it related to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and did not fall within any of the exceptions specified in that part of that Schedule. By way of example, see the subjects listed under paragraph 9, Health and health services:

Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of national health service.

*Exceptions—*

- Abortion.
- Human genetics, human fertilisation, human embryology, surrogacy arrangements.
- Xenotransplantation.
- Regulation of health professionals (including persons dispensing hearing aids).
- Poisons.

- Misuse of and dealing in drugs.
- Human medicines and medicinal products, including authorisations for use and regulation of prices.
- Standards for, and testing of, biological substances (that is, substances the purity or potency of which cannot be adequately tested by chemical means).
- Vaccine damage payments.
- Welfare foods.
- Health and Safety Executive and Employment Medical Advisory Service and provision made by health and safety regulations.

17. Although the subjects listed in Part 1 of Schedule 7 were broader in scope than the legislative competence previously conferred on the National Assembly under section 94 of, and Schedule 5 to, GOWA 2006, both models comprised, in effect, ‘conferred powers’ models of legislative competence for the National Assembly, setting out, in list form, the scope of the Assembly’s legislative competence in terms of subject matter.

*‘Reserved powers’ model for making devolved primary legislation – The Wales Act 2017*

18. The **Wales Act 2017** changed the basis on which the legislative competence of the National Assembly was determined, moving from a ‘conferred powers’ model to a ‘reserved powers’ model, which was consistent with the models of legislative devolution adopted earlier for Scotland and Northern Ireland. Rather than specify, by list, the range of subjects in relation to which the National Assembly could legislate, under a ‘reserved powers’ model, the National Assembly could legislate on any matter unless it was expressly prevented from doing so. Therefore, so long as other tests included in section 108A of GOWA 2006 were met, a provision of an Assembly Act would be within the Assembly’s legislative competence if it did not relate to reserved matters in Schedule 7A to GOWA 2006

nor breached any restrictions set out in Part 1 of Schedule 7B to GOWA 2006.

19. The Wales Act 2017 (WA 2017) also made other modifications to provisions of GOWA 2006 of significance to the making of legislation in relation to Wales.

20. For example, section 107(5) of GOWA 2006 had recognised that 'Part 4' of GOWA 2006 (Acts of the National Assembly – latterly Acts of the Senedd) did not affect the power of the UK Parliament to make laws for Wales. Section 2 of WA 2017, made provision about the UK Parliament legislating on devolved matters in relation to Wales. It amended section 107 of GOWA 2006 to insert a new sub-section (6) as follows:

“(6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.”

*Senedd Cymru – The Senedd and Elections (Wales) Act 2020*

21. It should be noted that, under section 2 of the Senedd and Elections (Wales) Act 2020 (2020 anaw 1), the name of the National Assembly for Wales was changed to Senedd Cymru or Welsh Parliament and Acts of the Assembly are now known as Acts of Senedd Cymru or Deddfau Senedd Cymru.

*Role of Welsh Ministers in the proposal and enactment of legislation – primary and subordinate*

*Primary legislation - Acts of Senedd Cymru*

22. An Act of Senedd Cymru is a single legislative instrument comprising a Welsh and an English text, with both language versions having equal standing. Senedd Cymru (the Senedd) can only make laws within its powers, or 'legislative



competence'. The tests for the Senedd's legislative competence are set out in section 108A of GoWA 2006. The Senedd can make any law that does not:

- (a) extend otherwise than only to England and Wales (so the Senedd cannot make laws which are enforceable outside the joint jurisdiction of England and Wales);
- (b) apply, or change functions exercisable, otherwise than in relation to Wales;
- (c) relate to any of the reserved matters listed in Schedule 7A to GoWA 2006;
- (d) breach any of the restrictions in Schedule 7B to GoWA 2006 (e.g. a requirement for Minister of the Crown consent to changing the functions of a reserved authority); or
- (e) breach Convention (human) rights.

23. Each of the tests in section 108A(2) GOWA 2006 are separate and distinct tests. If a provision fails one or more of the tests it will be outside the legislative competence of the Senedd.

24. The Welsh and English texts of all Acts of Senedd Cymru, Acts of the Assembly and Assembly Measures can be found at [legislation.gov.uk](http://www.legislation.gov.uk) under the 'Browse legislation: Wales' tab - <http://www.legislation.gov.uk/browse/wales> .

#### *Introducing a Bill into the Senedd*

25. Bills may be introduced into the Senedd by the Member in charge of the Bill, which in the majority of cases will be a member of the Welsh Government but can be any Member of the Senedd.

26. The Standing Orders of the Senedd make provision for the procedures for introduction, scrutiny and passing of a Bill by the Senedd. Standing order 26 deals with Bill process generally to include processes for Government Emergency Bills (see Standing Orders 26.95 to 26.104). Standing orders 26A

and 26B deal with private and hybrid bill processes respectively and standing order 26C deals with consolidation bill processes.

27. For completeness, I can confirm that, although the Senedd enjoys broad legislative competence in relation to a vast field of policy areas affected by the pandemic, no draft Senedd Bill was introduced to deal with a broad range of health or other issues arising from the Coronavirus pandemic in the same way as the Coronavirus Bill which proceeded through the UK Parliament. Advice submitted by Welsh Government officials to Ministers and dated 6 March 2020 (document HAL/03 - INQ000087042) includes the following:

In view of the scale of the threat presented by the coronavirus outbreak, the pace at which the current situation is developing, and the desirability of a UK-wide response, no separate work has yet been undertaken on a potential emergency devolved Bill for Wales. To formulate the provisions of such a Bill would anyway require that we be able to take into account relevant provisions made for England and other DAs [Devolved Administrations] and would mean that effective legislation for Wales could only be introduced later than for other UK jurisdictions.

28. Although no Senedd Bill was introduced to deal with a broad range of issues arising from the pandemic as referred to above in paragraph 27, on 27 January 2021, the Welsh Elections (Coronavirus) Bill was introduced before the Senedd. Enclosed at documents HAL/04 - INQ INQ000087043 and HAL/05 - INQ000087044 are, respectively, copies of the Welsh and English language texts of the Welsh Elections (Coronavirus) Bill which, together, comprise the Bill, as introduced. This Bill proceeded through the Emergency Bill procedures set out in Standing Orders, was agreed by the Senedd on 10 February 2021 and Royal Assent was given on 16 March 2021.

29. The Welsh Elections (Coronavirus) Act 2021 provided for measures relating to coronavirus to apply to Senedd Cymru elections and Welsh local government by-elections due to take place in 2021. In particular, the measures included:

29.1. Power to postpone the 2021 Senedd general election (which was due to take place on 6 May 2021) for up to 6 months (section 6);

29.2. Power to provide for additional polling days for that election (section 7);

29.3. Power to postpone Senedd by-elections due to be held after 6 May 2021 (section 10);

29.4. Power to postpone Welsh local government by-elections due to be held after 6 May 2021 (section 11).

30. The powers conferred by the Act did not allow an election to be postponed to a date after 5 November 2021.

31. The Act also made provision about the issue of guidance:

31.1. To members of the Welsh Government about the exercise of functions in the period before the Senedd general election (section 4), and

31.2. About election campaigning in the elections covered by the Act (section 9).

32. The Act also changed the Senedd scrutiny procedures that would apply to any orders and rules made by the Welsh Ministers that included provisions on the conduct of elections which applied only to Senedd Cymru elections and Welsh local government by-elections held before 6 November 2021 (section 12).

*Making Primary legislation in relation to Wales other than by Acts of the Senedd*

33. The Welsh Government's approach to legislation is rehearsed in its publicly available "Legislation Handbook". Enclosed at documents HAL/06 INQ000087045 and HAL/07 - INQ000087046 are, respectively, copies of the Welsh and English language texts of the "Legislation Handbook on Assembly Bills".
34. Paragraph 1.8 of the handbook documents the Welsh Government's stated aim which is "*to produce good law: that is, law which is necessary, clear, coherent, effective and accessible*". The handbook also notes the other legislative vehicles which enable the Welsh Government to take forward policies which are not included in its programme of primary legislation, for example, subordinate legislation, and, where appropriate, UK Parliamentary Bills and Transfer of Functions Orders and Orders in Council.
35. The First Minister has established a set of principles relating to devolved provision in UK Bills. The core principle is that primary legislation in devolved areas should be enacted by the Senedd, but there will be circumstances in which it is sensible and advantageous if provision which would be within the Senedd's legislative competence is sought for Wales in Bills of the UK Parliament, with the consent of the Senedd. The principles set out some examples of situations where such an approach would be appropriate:
- when the UK Government's legislative proposal would also be appropriate for Welsh circumstances but there is no time available for similar provisions to be brought forward in the Senedd;
  - where the interconnected nature of the relevant Welsh and English administrative systems mean that it is most effective and appropriate for provision for both to be taken forward at the same time in the same legislative instrument;
  - where the devolved provisions in question are minor or technical and non-contentious;

- where the UK Bill covers both devolved and reserved matters and the UK Parliament route must be taken in order to achieve the policy objective;
- where the legislative competence of the Senedd and/or the powers of the Welsh Ministers would be extended in a way that could not be achieved through a Senedd Act, given the limits on the Senedd's legislative competence.

36. The Counsel General and Minister for the Constitution, Mick Antoniw, MS wrote to the Senedd's Legislation, Justice and Constitution Committee on 22 October 2021 setting out these principles. Enclosed at documents HAL/08 - INQ000087047 and HAL/09 - INQ000087048 are, respectively, copies of the letters in Welsh and in English. In a written statement issued on 13 May 2022, the Counsel General and Minister for the Constitution reaffirmed the fundamental position that primary legislation in devolved areas should normally be enacted by the Senedd, but that there can be some circumstances when it is sensible for provision, which is in the Senedd's legislative competence, to be included in UK Parliamentary Bills, with the explicit consent of the Senedd. Enclosed at documents HAL/10 - INQ000087049 and HAL/11 - INQ000087050 are, respectively, copies of the written statement in Welsh and in English.

37. Therefore, although the Senedd now has broad power to legislate in relation to Wales in devolved areas, UK Parliamentary Bills also remain of significance to the Welsh Government, as UK Acts of Parliament can, in certain circumstances, still impact on areas of devolved responsibility.

#### *UK Parliamentary Bills*

38. Devolution Guidance notes, produced by the UK Government, set out for UK Government officials advice on the working arrangements between the UK Government and the devolved governments of the UK, including the Welsh Government. Part 2 of "Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales" (the DGN) makes provision about dealing

with UK Parliament Bills applying in relation to Wales. It records that the doctrine of the sovereignty of Parliament provides that the UK Parliament retains the right to legislate on any area of law for Wales (expressly set out in section 107(5) of GOWA 2006) and that this means that there are two legislatures making provisions applying in relation to Wales. It recognises the potential for overlap and notes the UK Government's political commitment to respect the devolution settlement that gives rise to the Legislative Consent Motion convention.

39. Paragraphs 53 and 54 of the DGN sets out the process to be adopted by UK Government departmental Bill teams when developing Bill policy which gives rise to Welsh devolution issues. Notably, it advises UK Government officials in paragraph 54 to establish contact with the Welsh Government before a Bill team is established and as policy is developed, particularly in the following circumstances:

- (a) overlaps the boundary between what is within the legislative competence of the Assembly and what is not;
- (b) is likely to impact on devolved competence;
- (c) might otherwise impact on devolved areas (for example, if it is likely to affect the resources of DWAs); or
- (d) is likely to prove controversial in terms of relations between the UK government and the Welsh Government.

40. The DGN also advises UK Government Departments to consult the Wales Office if they think such contact is necessary.

41. Paragraphs 55 to 59 document the criteria for including devolved provision in relation to Wales in a UK Parliament Bill. Paragraphs 60 to 63 deal with the process for including devolved provision in a UK Parliament Bill.

42. Paragraphs 64 to 66 in particular set out the process for UK Government officials to work with the Welsh Government on the preparation of instructions to the Office of Parliamentary Counsel (OPC) in relation to proposed devolved provisions. Paragraph 66 of the DGN then covers possible approaches to the drafting of instructions for inclusion in an UK Government Bill in relation to provisions to be included at Welsh Government's request. Two possible approaches are canvassed. The first approach would see Welsh Government legal advisers draft instructions for the lead UK Government department and Wales Office colleagues to agree before they are sent to OPC. The alternative approach is for the lead UK Government to prepare draft instructions for comment by Welsh Government and Wales Office.

*Coronavirus Act 2020 – an Act of the UK Parliament*

43. Public Health England published its "*Exercise Cygnus Report 18 to 20 October 2016*" dated 13 July 2017. A copy of the report is exhibited as HAL/12 - INQ 000205009. The second of the four key learning outcomes identified in the report noted that the introduction of legislative easements and regulatory changes, to assist with the implementation of the response to a worst-case scenario pandemic, should be considered (see pages 7 and 8 of the report).

44. I understand that from mid 2017 onwards, Welsh Government officials had been liaising with officials from the UK Government's Civil Contingencies Secretariat in the UK Cabinet office, the UK Department of Health, Scottish Government and Northern Ireland Executive in relation to the preparation of the draft Pandemic Influenza (Emergency) Bill, proposed to be a bill introduced into the UK Parliament. This liaison led to sharing with Welsh Government officials in early December 2018 of a draft Bill. From that point onwards, exchanges and liaison continued, both between the officials of all four nations working together and, bilaterally between UK Government and Welsh Government officials in relation to provisions sought to apply in relation to Wales. The development of the draft Pandemic Influenza (Emergency) Bill is dealt with in the statement of Neil Surman in this Module.

45. On 3 October 2019, I was copied in to a Ministerial Advice presented to the Minister for Health and Social Services, the Minister for Education and the Deputy Minister for Health and Social Services (enclosed exhibits HAL/13 - INQ000087051, HAL/13B – INQ000087053, HAL/13C - INQ000087054, HAL/13D - INQ000087055, HAL/13E – INQ000087056, HAL/13F – INQ000087057, HAL/13G - INQ000087058, HAL/13H - INQ000087059, HAL/13I - INQ000087060, HAL/13J - INQ000087061, HAL/13K - INQ000087062 and HAL/14 – INQ000087063, there is no exhibit HAL/13A). In particular, in the Ministerial Advice, the Ministers were asked to:

45.1. Agree and approve in principle draft policy instructions relating to provision of powers to enable Welsh Ministers to:

45.1.1. temporarily close educational establishments, including further education but not higher education, and

45.1.2. temporarily close childcare/ early years settings

45.2. note that, subject to their agreement, officials would continue to work with the UK Department of Health and Social Care and Cabinet Office for the Welsh provisions to be inserted into the draft Pandemic Influenza (Emergency) Bill, and

45.3. note that further advice would follow, concerning the need at the time of a pandemic, for a Legislative Consent Motion to allow Wales clauses to be included in the UK Bill.

46. In the period 03 October 2019 to 16 October 2019, as evidenced in the chain of e-mails exhibited at HAL/14 – INQ000087063, the relevant Ministers agreed and approved the draft policy instructions. The chain of e-mails also noted that officials would continue to work with the UK Department of Health and Social Care and Cabinet office to finalise the draft Pandemic Influenza (Emergency) Bill.



47. On 12 February 2020, I can see that the latest draft of the Pandemic Influenza (Emergency) Bill was circulated by e-mail to officials working on the Bill in the devolved governments and UK Cabinet Office, including to lawyers in the Welsh Government Legal Services Department. At the same time, it was noted that UK Government officials were now working at pace to produce a 'coronavirus bill', to include the clauses in the Pandemic Influenza (Emergency) Bill as well as additional clauses. Devolved government officials were invited to consider whether there were any new powers Welsh Ministers may want in relation to Wales and provided an initial response on the proposed new clauses. A copy of this e-mail of 12 February 2020 is exhibited at HAL/15 - INQ000087064 together with its enclosures, HAL/15A, INQ000087065 (a blank spreadsheet for completion) and HAL/15B – INQ000087066 (a draft of the Bill).

48. On 14 February 2020, Welsh Government officials briefed the Minister for Health and Social Services about high level discussions to combine with the draft Pandemic Influenza (Emergency) Bill additional provisions for Coronavirus. An update for the Health and Social Services Minister and the First Minister was sent on 17 February 2020, in advance of a COBR meeting the following day. The update noted that Cabinet Office had requested that devolved governments consider any changes to the existing 'Asks' contained in the Pandemic Influenza (Emergency) Bill and to consider the feasibility of the potential 'Asks' for the combined legislation on Coronavirus. The First Minister and Minister for Health and Social Services were informed that policy leads had undertaken a quick review and their responses against each task was contained in an attached table to be discussed at the COBR meeting the following day. Exhibited as HAL/16 – INQ000231258 is a chain of two e-mails containing both the e-mails of 14 and 17 February 2020, into which I had been copied. Exhibited as HAL/16A – INQ000231259 is the attachment to the e-mail of 17 February 2020.

49. Although there is no direct evidence currently before me which confirms the content of the e-mail trail I have seen, an e-mail written at the time suggests that

at a meeting of COBR(M) at which the First Minister and Chief Medical Officer for Wales were present on 18 February 2020, in principle, agreement was given to outline bill proposals. Exhibited at HAL/17 INQ000087067 is a copy of that email, dated 20 February 2020, of which I was a copy recipient, and its two enclosures, an Annex of possible clauses HAL/17A – INQ000087068 and a draft timetable for the Bill, at HAL/17B – INQ000087069.

50. The provisions ultimately contained in the Coronavirus Act 2020 primarily fell into five categories:

50.1. **Increasing the available health and social care workforce** – for example, by allowing the temporary registration of suitable NHS staff and social workers, allowing retired staff with the right skills to return to the NHS without a negative impact on their pension and providing additional indemnity cover to key workers as necessary.

50.2. **Easing and reacting to the burden on frontline staff** – for example, by reducing the number of administrative tasks they have to perform, enabling local authorities to prioritise care for people with the most pressing needs, allowing key workers to perform more tasks remotely and with less paperwork.

50.3. **Containing and slowing the virus** – by providing Public Health Officers with powers to help control the spread of coronavirus in the UK and powers in relation to limiting events and gatherings.

50.4. **Managing the deceased with respect and dignity** – by enabling the death management system to deal with potential increased demand for its services.

50.5. **Supporting people** – for example, by allowing individuals to receive Statutory Sick Pay, and supporting businesses, for example by providing powers that will ensure the governments of the UK are able to support the

food industry to maintain supplies.

51. The provisions in the Coronavirus Act 2020 were the result of significant and collaborative work between all four nations and covered a range of matters including specific powers in relation to Wales which could be exercised by the Welsh Ministers. For example, the Bill contained provisions at section 37 of, and Schedule 16 to the Act “*conferring similar powers on the Secretary of State and the Welsh Ministers to direct the temporary closure of an educational institution or registered childcare provider in England or in Wales respectively, or restrict access to them, during the pandemic*”.

*Legislative Consent Motions (LCMs)*

52. The introduction of the Coronavirus Bill into the UK Parliament led to a Legislative Consent Memorandum and Motion being laid before the Senedd.

53. By way of background, Standing Order 29 of the Senedd’s standing orders is entitled “Consent in relation to UK Parliament Bills” and specifies the circumstances where:

53.1. a Legislative Consent Memorandum must be laid before the Senedd and

53.2. a Legislative Consent Motion may be laid and considered by the Senedd.

54. I have highlighted below key elements only of the Standing Order which were relevant to its application to the Legislative Consent Memorandum and Motion laid before the Senedd in relation to the Coronavirus Bill in March 2020.

55. Standing Order 29.1 sets out a definition of a “relevant bill” for the purposes of Standing Order 29:

In Standing Order 29, “relevant Bill” means a Bill under consideration in the UK Parliament which makes provision (“relevant provision”) in relation to Wales:
--

(i) for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd); or

(ii) which modifies the legislative competence of the Senedd.

56. Standing Order 29.2 provides that a member of the government must lay a memorandum (“a legislative consent memorandum”) in relation to:

(i) any UK Government Bill that is a relevant Bill on its introduction to the first House, normally no later than 2 weeks after introduction;

(ii) any UK Private Member’s Bill that was a relevant Bill on introduction and remains a relevant Bill after the first amending stage in the House in which it was introduced, normally no later than 2 weeks after it completes that stage;

(iii) any Bill introduced into the UK Parliament that, by virtue of amendments:

(a) agreed to; or

(b) tabled by a Minister of the Crown or published with the name of a Minister of the Crown in support,

in either House, makes (or would make) relevant provision for the first time or beyond the limits of any consent previously given by the Senedd, normally no later than two weeks after the amendments are

tabled or agreed to

57. Standing Order 29.3 prescribes the content of a legislative consent memorandum as follows:

- (i) summarise the policy objectives of the Bill;
- (ii) specify the extent to which the Bill makes (or would make) relevant provision;
- (iii) explain whether it is considered appropriate for that provision to be made and for it to be made by means of the Bill;
- (iv) where the Bill contains any relevant provision conferring power to make subordinate legislation on Welsh Ministers, set out the Senedd procedure (if any) to which the subordinate legislation to be made in the exercise of the power is to be subject; and
- (v) where a legislative consent memorandum has already been laid in relation to the same provisions in the same Bill, set out how and why the new memorandum differs from the previous memorandum.

58. After a legislative consent memorandum has been laid, acting under Standing Order 29.4, the Business Committee of the Senedd must normally refer any legislative consent memorandum for consideration by a committee or committees and establish and publish a timetable for the committee to consider and report on it.

59. In compliance with Standing Order 29.6, any member of the Senedd may, subject to the provisions of Standing Orders 29.2A and 29.2C table a motion (a

'Legislative Consent Motion' (LCM)) seeking the Senedd's agreement to the inclusion of a relevant provision in a relevant Bill. Standing Order 29.7 provides that the Senedd must consider a LCM which has been tabled. However, Standing Order 29.8 provides that, when a legislative consent memorandum has been referred by the Business Committee for consideration by a committee or committees in accordance with Standing Order 29.4, a related LCM must not be debated until either the committee or committees have reported or the deadline by which the committee is required to report has been reached.

*Legislative consent memorandum– Coronavirus Bill*

60. On 18 March 2020, the Minister for Health and Social Services appeared before the Senedd Health, Social Care and Sport Committee, supported by Welsh Government officials, including two lawyers from the Welsh Government Legal Services Department. An excerpt of the Senedd Record of Proceedings is exhibited at HAL/18 - INQ000066272 together with a copy of the "Public Document Pack" which can be found on the Senedd website for this meeting described as "Papers for this meeting in a pdf pack" and is exhibited at HAL/19 – INQ000239638.
61. The following day, on 19 March 2020, the Coronavirus Bill was introduced into the UK Parliament. The Coronavirus Bill met the definition of a 'relevant Bill' for the purposes of Senedd Cymru Standing Order 29.1 as it made provision in relation to Wales within the legislative competence of the Senedd. Therefore, to comply with Standing Order 29.2, on 24 March 2020, a legislative consent memorandum, signed by Vaughan Gething AM, Minister for Health and Social Services and dated 24 March 2020, was laid before the Senedd. A copy of this memorandum is exhibited at HAL/20 – INQ000087070.
62. The legislative consent memorandum was not referred by the Business Committee for consideration by a committee or committees of the Senedd. The previous day, on 23 March 2020, the Business Committee of the Senedd had met and, in exercise of the discretion afforded to the Committee by Standing Order 29.4, had elected not to refer the LCM for committee scrutiny as noted in the

excerpt below reproduced from the Committee's minutes.

**Item 5.1 Legislative Consent Motion on the Coronavirus Bill**

- [View the background to item 5.1]

**Minutes:**

Business Committee did not refer the LCM for committee scrutiny, due to the pace that the Bill is expected to move through its UK Parliament stages.

Business Managers noted that a Legislative Consent Motion would be tabled for consideration in Plenary tomorrow.

63. The legislative consent memorandum laid by the Minister for Health and Social Services adopted the conventional format for memoranda in compliance with Standing Order 29.3, therefore the memorandum covered the following matters:

63.1. Policy objective of the Bill;

63.2. Summary of the Bill;

63.3. Account of the provisions of the Bill for which the Senedd's consent was required, to include amending provisions;

63.4. Account of the reasons why these provisions, which were within the Senedd's legislative competence, were being included in a Bill of the UK Parliament;

63.5. Financial implications;

63.6. Conclusion setting out a summary of the Welsh Government's position in relation to the Bill.

*Legislation Consent Motion – Coronavirus Bill*

64. On 24 March 2020, the Minister for Health and Social Services tabled a Legislative Consent Motion. It was given the reference NNDM7316 and was moved in the Senedd on the 24 March 2020 as item 14 on the agenda and agreed in accordance with Standing Order 12.36 (Decisions on Motions and Amendments). Below is reproduced the text of the motion taken from the Senedd website together with a link to the Senedd agenda page for that day. That page contains links to the transcript of the record of proceedings for that day and the relevant webcast.

*NNDM7316 - Government Debate*

Tabled on 24/03/2020

To propose that the National Assembly for Wales, in accordance with Standing Order 29.6 agrees that provisions in the Coronavirus Bill in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.

A Legislative Consent Memorandum has been laid in Table Office on 24 March 2020 in accordance with Standing Order 29.2.

A copy of the Bill can be found on the UK Parliament website:

Coronavirus Act 2020 - Parliamentary Bills - UK Parliament



*Agenda of plenary hearing at which NNDM7316 LCM Coronavirus Bill was moved*

Agenda for Plenary - Fifth Senedd on Tuesday, 24 March 2020, 10.00

*Reviews of provisions of Coronavirus Act 2020*

65. The Coronavirus Act contained a number of provisions of note from a procedural perspective which included:

- a. a sunset provision under which most of the substantive provisions would expire automatically 2 years after Royal Assent (section 89);
- b. the ability to shorten or extend that expiry date by regulations (section 90);
- c. the ability, by regulations, to turn provisions off and back on again prior to the sunset date (section 88)
- d. an obligation on the Secretary of State to report to Parliament on the status of the Act every two months between Royal Assent and sunset (section 97);
- e. an obligation on the Secretary of State to enable a vote in Parliament every 6 months after Royal Assent on whether provisions outside the devolved competences should remain in force prior to expiry – and an obligation to make regulations to expire those provisions early if the vote were lost (section 98).

66. Section 97 of the Coronavirus Act 2020 set out the procedure for the Secretary of State to report to Parliament every 8 weeks on the status of the provisions in the Act. Section 97 only covered those provisions for which the Secretary of State was responsible, namely the non-devolved provisions in the Act. In assessing whether or not provisions were 'non-devolved' for these purposes, regard was had to section 108A of GOWA 2006 (see paragraphs 22 and 23 above). Prior to

making that report to Parliament, UK Government officials acting on behalf of the Secretary of State, canvassed contributions from the Welsh Government to aid preparation of that report.

67. As regards section 98, in their preparation of the six monthly review, UK Government officials would be expected to seek the views of Welsh Government. For example, at the 12-month review mark, I have seen a number of chains of emails between officials within the Welsh Government which suggest that contact by email was made by UK Government officials with Welsh Government officials to gather information to prepare for the review (see the documents exhibited at HAL/21 – INQ000220801, HAL/22 – INQ000087072 and HAL/23 – INQ000087074, and HAL/24 – INQ000087071) . Workshops with UK Government officials were also attended by Welsh Government officials to discuss reliance placed on the provisions of the Act to date and to canvass the Welsh Government’s views on retention of parts of the Act in future (see the document exhibited at HAL/23 - INQ000087074 being minutes of a workshop held between officials of the UK Government and Welsh Government, to include comments on the draft minutes made by them).

*Subordinate legislation made by the Welsh Ministers*

68. Pivotal to the Welsh Government’s response to the Coronavirus pandemic were the changes made to the law in relation to Wales by subordinate legislation made by, or on behalf of, the Welsh Ministers to implement the Welsh Government’s policies for dealing with the coronavirus pandemic.

69. Subordinate legislation is usually concerned with detailed changes to the law made under powers from an existing Act (or Measure), it is flexible enough to deal quickly with rapidly changing circumstances.

70. Enclosed as documents HAL/25 – INQ000087075, HAL/26 – INQ000087076 and HAL/27 – INQ000087077 are three schedules listing subordinate legislation made by, or on behalf of, the Welsh Ministers in relation to coronavirus in 2020,

2021 and up to the end of May 2022 respectively.

71. The statutory instruments on the list will have been registered with and allocated a unique UK Series number on behalf of, The King's Printer, by His Majesty's Stationery Office, whose functions operate from The National Archives. By way of example, entry 7 on the list for 2020 is the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 and is Statutory Instrument year 2020 UK Series Number 353 and sub-series Number 80 (the sub-series beginning W/Cy is unique to Wales/Cymru). These Statutory Instruments are subject to the Statutory Instruments Act 1946 which contains provision for the numbering, printing, publication, citation, classification, and sale of Statutory Instruments.

72. Some other subordinate legislation on the list is not subject to the Statutory Instruments Act 1946. The Legislative Codes Office in the Welsh Government's Office of the Legislative Counsel have allocated to those other items of non-SI subordinate legislation individual reference numbers which will be used for internal Welsh Government monitoring purposes, and subsequent publication on the Welsh Government website. For example, entry 10 on the list for 2020 is 'Declaration of threat to public health in Wales due to coronavirus' and has been allocated non-statutory instrument subordinate legislation reference number 2020 (WG20-15)).

73. It is possible that some forms of non-statutory instrument subordinate legislation relating to coronavirus may have been made by the Welsh Ministers during the period from January 2020 to May 2022 and not notified to the Legislative Codes Office for allocation of a reference number. By way of example, the NHS (Wales) Act 2006 provides the Welsh Ministers with powers to direct NHS bodies in Wales as to the exercise of their functions (section 12 (LHBs), 19 (NHS Trusts) and 23 (SHAs)). Section 204(3) of the 2006 Act sets out the manner in which directions can be given under the Act. It specifies that certain directions may be made by "*regulations or an instrument in writing*". An instrument in writing could mean a letter or a document. Whilst a majority of directions have been issued formally and recorded by the Welsh Government Codes Office there may be instances where directions provided by means of a letter or document have not

been captured. I cannot say with any certainty what if any, is the extent of that, but I mention it for completeness.

*Powers for Welsh Ministers to make subordinate legislation*

74. Subordinate legislation may be made by the Welsh Ministers (or by officials acting on behalf of the Welsh Ministers) where they are given powers to do so in primary legislation or, far less usually, in other forms of legislation. These powers conferred on the Welsh Ministers to make subordinate legislation are commonly referred to as 'enabling' powers, in effect enabling the Welsh Ministers to make, lawfully, subordinate legislation to change the existing law within the parameters set by the 'enabling' powers. The Act or other legislation which contains the 'enabling' powers will commonly be referred to as the 'parent Act', 'enabling Act' or the 'enabling legislation'.
75. As well as setting out the parameters of how the Welsh Ministers may change the law by making subordinate legislation, the enabling Act or legislation will also make provision about the:
- 75.1. The procedure to be used to make the subordinate legislation, if any, and
  - 75.2. The form which the subordinate legislation will take, for example, a statutory instrument, an order or a direction.
76. By prescribing the procedure to be used, the enabling Act or legislation is also therefore prescribing the process of scrutiny by the Senedd to which the subordinate legislation will be subject.
77. The Standing Order 27 (Subordinate legislation (Other than Subordinate legislation subject to special Senedd procedure)) of the Senedd describes in greater detail what steps Welsh Ministers and the Senedd must take to give effect to each procedure. The Senedd cannot amend or adapt subordinate

legislation which it scrutinises, save in some extremely rare instances.

### *Procedures for making subordinate legislation*

#### *Affirmative procedure*

78. A statutory instrument required to be made under the affirmative procedure must be approved by the Senedd in Plenary before it can be made or brought into effect by the Welsh Ministers. Before the instrument is laid before the Senedd, the Minister will first approve the final draft of the instrument and then agree to lay it in draft before the Senedd.

79. Only if the Senedd agrees a motion debated in Plenary to approve the statutory instrument will the Minister be able to then sign the statutory instrument to make it. The legislation can come into force at any time after the Senedd has agreed to it and it has been made by signature of the Minister.

80. Standing Order 27.7 provides that the motion may not be debated before whichever of the following two events is the sooner:

80.1. The statutory instrument has been laid for 20 calendar days (not counting days in recess periods of more than 4 days), or

80.2. The Legislation Justice and Constitution Committee, Finance Committee (for legislation related to devolved taxes) or any other Committee which has given notice, have considered and reported on the statutory instrument in advance of the debate in Plenary.

81. A majority of votes in favour is required for the statutory instrument to be approved (unless no Member objects to the motion, in which case the motion will be deemed to be agreed under Standing Order 12.36).

82. If a majority of Members vote against the motion, the legislation is not approved and cannot be made. Should the vote be tied, the Llywydd is required by

Standing Order 6.20 to vote in the negative, following the principle that where no further discussion of a matter is possible, decisions should not be taken without majority support; and the statutory instrument will not be approved.

*Example*

83. An example of a statutory instrument made by the Welsh Ministers in relation to coronavirus and subject to the affirmative procedure appears in entry 108 of the list for 2020, namely The Representation of the People (Electoral Register Publication Date) (Wales) (Coronavirus) Regulations 2020 (S.I. 2020/1064 (W.239)). Enclosed at documents HAL/28 – INQ000087078 and HAL/29 – INQ000087079 are, respectively, copies of the Welsh and English language texts which together comprise the Representation of the People (Electoral Register Publication Date) (Wales) (Coronavirus) Regulations 2020. The Senedd agreed a motion on 29 September 2020 which approved the making of these Regulations which were then made on 30 September 2020 by the Minister.

*Made affirmative*

84. Under the made affirmative procedure, the statutory instrument may come into force on the day it is made by the Minister. However, unless the Senedd agrees a motion to approve the statutory instrument within the timeframe specified in the parent Act, the instrument will cease to have effect.

*Example*

85. An example of a statutory instrument made by the Welsh Ministers in relation to coronavirus and subject to the made affirmative procedure appears in entry 110 of the list for 2020, namely The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 17) Regulations 2020 (S.I. 2020/1079 (W. 242)). The Regulations were made at 13:25 hours on 2 October 2020, then laid before the Senedd that day at 15:50 hours and came into force on 3 October 2020. Exhibited at documents HAL/30 – INQ000087080 and HAL/31 – INQ000087081 are, respectively, copies of the Welsh and English language texts which together

comprise The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) (Amendment) (No. 17) Regulations 2020. The motion to approve the Regulations was moved and agreed on 13 October 2020 by the Senedd meeting in plenary.

*Negative procedure (Subject to annulment)*

86. Where a statutory instrument subject to the negative procedure is made by a Minister on behalf of the Welsh Ministers, the Minister first approves the final draft of the statutory instrument, signs it, and agrees to lay it before the Senedd.
87. The statutory instrument must then be laid before the Senedd.
88. The Senedd can then vote to annul the statutory instrument within a set period. This means that any Member of the Senedd may table a motion seeking the Senedd's agreement to annul the legislation. The Senedd's Business Committee will then decide whether the motion will be debated. Should they agree, they will schedule a debate on the annulment motion in Plenary (usually during non-government time).
89. The motion to annul the statutory instrument requires a majority vote in order to be agreed by the Senedd. If the Senedd votes to annul the legislation, then, while any action already taken under the instrument is lawful, no further action can be taken. Under such circumstances, the government would be obliged to bring forward an instrument under section 5 of the Statutory Instruments Act 1946 to revoke it and effectively remove it from the statute book.
90. Standing Order 27.2 provides that an annulment motion must be debated and voted on within a 40 calendar day period. The 40 day period commences from the date of the statutory instrument being laid before the Senedd, and is sometimes referred to as the annulment period. Of course, this means that a statutory instrument could come into force but later be the subject of a successful annulment motion.

91. Standing Orders do not limit the right of the Welsh Ministers to make and lay subordinate legislation subject to the negative procedure while the Senedd is in recess; however, the annulment period does not include any days when the Senedd is in a recess of more than 4 days. For example, if the subordinate legislation is laid during the Senedd's summer recess, the annulment period begins on the first sitting day in September after laying has taken place.
92. By convention most statutory instruments subject to the negative procedure do not come into force until at least 21 days after they are laid. This convention is commonly referred to as "the 21-day rule", even though it is not a formal rule as such. The convention operates in order to give sufficient notice to those affected by the instrument to allow them to prepare to comply with it before it comes into force. It also allows the Legislation, Justice and Constitution Committee (LJC Committee) a period to scrutinise the instrument in line with Standing Orders 21.2 and 21.3. The 21 days are calculated as 21 calendar days from the date of the statutory instrument being laid before the Senedd. Unlike the annulment period, the 21 day period does include days when the Senedd is in recess, so there is the potential for a considerable period to elapse between coming into force and the end of the annulment period.
93. Statutory instruments may come into force before the end of the 21 day period, but the Statutory Instruments Act 1946 requires notification be given to the Presiding Officer (the Llywydd) drawing attention to the fact that a copy of it has not been laid before the Senedd at least 21 days before the statutory instrument comes into operation and explaining why.

*Example*

94. An example of a statutory instrument made by the Welsh Ministers in relation to coronavirus and subject to the negative procedure appears in entry 112 of the list for 2020, namely The Adoption and Fostering (Wales) (Miscellaneous Amendments) (Coronavirus) Regulations 2020 (S.I. 2020/1082 (W. 244)). The Regulations were made on 5 October 2020, laid on 7 October 2020 and came into force on 1 November 2020. Exhibited at documents HAL/32 –



INQ000087082 and HAL/33 – INQ000087083 are, respectively, copies of the Welsh and English language texts which together comprise the Adoption and Fostering (Wales) (Miscellaneous Amendments) (Coronavirus) Regulations 2020.

95. An example of a statutory instrument made by the Welsh Ministers in relation to coronavirus, subject to the negative procedure and coming into force less than 21 days after it was made appears in entry 111 of the list for 2020, namely The Health Protection (Coronavirus, International Travel) (Wales) (Amendment) (No. 13) Regulations 2020 (S.I. 2020/1080 (W.243)). Exhibited at documents HAL/34 – INQ000087084 and HAL/35 – INQ000087085 are, respectively, copies of the Welsh and English language texts which together comprise the Health Protection (Coronavirus, International Travel) (Wales) (Amendment) (No.13) Regulations 2020. As required under section 11A4 of the Statutory Instruments Act 1946, on 2 October 2020, the Minister for Finance and Trefnydd wrote to the Presiding Officer of the Senedd drawing attention to the fact that a copy of the instrument had not been laid before the Senedd at least 21 days before the instrument came into operation and explaining why. Exhibited at document HAL/36 – INQ000087086 is a copy of the email sent on behalf of the Minister for Finance and Trefnydd, enclosing copies of the letter in both Welsh [HAL/36A - INQ000087088] and English [HAL/36B - INQ000087087] to the Presiding Officer together with the Explanatory Memorandum in Welsh [HAL/36C – INQ000087090] and English [HAL/36D – INQ000087089].

*Key decisions made with regard to the public health and coronavirus subordinate legislation – production of subordinate legislation*

*The devolution settlement - functions of the Welsh Ministers in relation to promotion of health, control of disease and the National Health service generally*

96. Prior to January 2020, a significant proportion of statutory functions in relation to promotion of health, control of disease and health services, including enabling powers to make subordinate legislation, had been either transferred to, or conferred upon, the Welsh Ministers in relation to Wales.

97. In addition, section 58A of GOWA 2006 conferred common law type powers on Welsh Ministers so far as exercisable within 'devolved competence'; these powers are described as executive ministerial functions and they are exercisable both in relation to devolved functions and ancillary to executive functions conferred on Welsh Ministers in reserved areas. "Devolved competence" is defined in section 58A, in that 'within devolved competence' and 'outside devolved competence' are to be read in accordance with subsections (7) and (8) respectively. Subsection (7) provides that it is outside devolved competence to make, confirm or approve subordinate legislation which would be outside the legislative competence of Senedd Cymru. In other words, a provision that section 108A of GOWA 2006 would prohibit from appearing in an Assembly Act is similarly prohibited by section 58(A)(7) of GOWA 2006 from being made by subordinate legislation. Subsection (8) applies to functions other than those relating to making, confirming or approving subordinate legislation. It provides that it is outside devolved competence to exercise such functions if it would be outside the Senedd's legislative competence to include a provision conferring those functions in a Senedd Act.
98. The legislative competence of the Senedd when it comes to health and health services is broad.
99. A small number of areas relating to health are still dealt with at a UK level. These include the regulation of medicines, genetics, fertilisation and embryology.
100. In practice, this means that the Welsh Government is ultimately responsible for promotion of health, control of disease and the National Health Service in Wales. The Welsh Ministers set the high level policy framework and targets for the health service, which are then delivered by the 7 Local Health Boards and 3 NHS trusts in Wales.

*Development of subordinate legislation to deal with the coronavirus pandemic*

101. In the early part of 2020, the Secretary of State for Health and Social Care in relation to England and the Welsh Ministers in relation to Wales, made separate

subordinate legislation under, then pre-existing, enabling powers to deal with the threat to public health posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

102. For example,

102.1. the Secretary of State relied upon powers in the National Health Service Act 2006 which are exercisable in relation to England only and powers in the Public Health (Control of Disease) Act 1984 exercisable by the Secretary of State as 'appropriate authority' only as respects England.

102.2. the Welsh Ministers relied on powers in the National Health Service Wales Act 2006 exercisable only in relation to Wales to make similar subordinate legislation and relied upon powers in the 1984 Act transferred to them in 1999 for exercise in relation to Wales or conferred upon them as 'appropriate authority' in respect of Wales by amendments inserted by the Health and Social Care Act 2008.

103. Where reliance was not placed either on enabling powers under the 1984 Act or under Acts relevant to specific sectors of activity (for example, Town and Country Planning Act 1990), reliance was placed on enabling powers under the Coronavirus Act 2020. In all cases, the exercise by the Secretary of State or the Welsh Ministers respectively of these powers was determined by the territorial extent and application of the powers and powers for the introduction of schemes of enforcement were provided for in the parent Act.

*Key decisions with regard to public health and coronavirus legislation and regulations*

104. Individual Welsh Ministers are responsible for making statutory instruments, as well as most other subordinate legislation, within their portfolio. They will decide on the policy and agree to legislate. They will also agree to the method and length of some processes, such as consultation, where policy or other choices must be made, approve final versions of all documents and make (by signing)

statutory instruments, at which point the statutory instrument becomes law even if it may not come into force at that time.

105. Documents HAL/25 – INQ000087075, HAL/26 – INQ000087076 and HAL/27 – INQ000087077 list the items of subordinate legislation, including statutory instruments, made by, or on behalf of, the Welsh Ministers with regard to public health and coronavirus legislation, together with any relevant amendments. These lists also document the legislative processes which applied to different instruments and, therefore, the nature of the Senedd’s scrutiny of each instrument.

106. Documents HAL/37 – INQ000087091, HAL/38 – INQ000087092, HAL/39 – INQ000087093, HAL/40 – INQ000087094, HAL/41 – INQ000087095, HAL/42 – INQ000087096, HAL/43 – INQ000087097 and HAL/44 – INQ000087098 comprise the Welsh and English texts of four reports laid by the Welsh Ministers before the Senedd documenting the subordinate legislation made by them relating to coronavirus, not just legislation which was made under powers contained in the Coronavirus Act 2020.

#### *Impact assessments*

107. Section 76 (Regulatory Impact Assessments) of GOWA 2006, subsection (1), requires Welsh Ministers to make a code of practice setting out their policy on the carrying out of regulatory impact assessments in connection with relevant Welsh subordinate legislation and the carrying out of consultation in connection with regulatory impact assessments.

108. “Relevant Welsh subordinate legislation” is defined in section 72(2)(b) of GOWA 2006 as being “subordinate legislation is relevant Welsh subordinate legislation if it is made by Welsh Ministers, the First Minister or the Counsel General and the statutory instrument (or a draft of the statutory instrument) containing it is required to be laid before the [Senedd]”.

109. Senedd Standing Order 27.1 stipulates that any statutory instrument or draft statutory instrument laid before the Senedd must be accompanied by an Explanatory Memorandum which must include any Regulatory Impact Assessment (RIA) prepared in relation to the instrument.
110. In this context an RIA is “an assessment as to the likely costs and benefits of complying with relevant Welsh subordinate legislation” (see section 76(2)(a) of the Government of Wales Act 2006). Standing Orders do not set out any requirements regarding the content of an RIA.
111. The Welsh Ministers’ policy has been to carry out an RIA except in certain circumstances which include where the relevant Welsh subordinate legislation needs to be put in place quickly to deal with an emergency.

*Welsh Ministers’ Regulatory Impact Assessment Code for Subordinate Legislation 20 October 2009*

112. On 20 October 2009, a revised edition of the Welsh Ministers’ Regulatory Impact Assessment Code for Subordinate Legislation was laid before the National Assembly. Exhibited at document HAL/45 – INQ000087099 is a copy of the Welsh Ministers’ regulatory impact assessment code for subordinate legislation laid on 20 October 2009.
113. The purpose of the code was stated as being to set out the Welsh Ministers’ policy on carrying out regulatory impact assessments in relation to relevant subordinate legislation which they proposed to make, using their own subordinate legislation powers. In that Code, it was stated that the Welsh Ministers’ policy was

..to carry out an RIA - to be included as part of the Explanatory Memorandum that is laid alongside all statutory instruments and draft statutory instruments made/to be made by the Welsh Ministers and which are laid by

them before the Assembly - subject to the following exceptions:

- Where the subordinate legislation does not meet the section 76 criteria, i.e. that it is not made by statutory instrument or required to be laid before the Assembly. *f*
- Where the subordinate legislation simply increases a statutory fee by a predetermined formula (for example, the rate of inflation); *f*
- Where routine technical amendments or factual amendments are required to update regulations etc. that have no major policy impact. *f*
- For Commencement Orders bringing into force primary legislation or Assembly Measures, including such Orders also making consequential provision or savings etc; *f*
- Where the relevant Welsh subordinate legislation is subject to an additional UK Parliament procedure. In those instances, a joint view with the relevant UK Government Department should be taken as to whether a regulatory impact assessment is required.
- Where the relevant Welsh subordinate legislation needs to be put in place quickly to deal with an emergency (e.g. Foot and Mouth or Avian Flu); *f*
- Where relevant Welsh subordinate legislation is made in the exercise of statutory powers granted by an Act or Measure which do not in any way give the Welsh Ministers discretion as to how those powers should be exercised.

*Welsh Ministers' Regulatory Impact Assessment Code for Subordinate Legislation 29 June 2021*

114. On 29 June 2021, the Welsh Ministers' most recent regulatory impact assessment code for subordinate legislation was published with the purpose of setting out the Welsh Ministers' policy on carrying out RIAs in relation to subordinate legislation proposed to be made by them. Enclosed as document HAL/46 – INQ000087100 is a copy of the Welsh Ministers' regulatory impact

assessment code for subordinate legislation laid on 29 June 2021.

115. In that revised code, it was recorded that the Welsh Ministers' policy will be to always carry out an RIA for relevant Welsh subordinate legislation subject to specified exceptions, including:

- Where the subordinate legislation simply increases a statutory fee, tax rate, payment, grant or allowance by a predetermined formula (for example, the rate of inflation).
- Where technical amendments are required to change the wording of the law rather than its purpose or effect.
- Where factual amendments are being made to update subordinate legislation and which do not alter the policy (or its impact) in any significant way or how it is applied in a given situation.
- Where the subordinate legislation is a Commencement Order or Commencement Regulations or Regulations which also make consequential provision or savings (provided the savings are not made by imposing an additional cost on an alternative party), etc.
- Where the delay that would be caused by conducting an RIA would defeat the object of making the legislation in question.
- Where the subordinate legislation is urgently required to:
  - i. negate or mitigate a serious threat to human, animal or plant health or serious damage to property, OR
  - ii. properly respond to circumstances resulting from such a threat.
- Where the subordinate legislation is made in the exercise of statutory powers granted by an Act or Measure which does not in any way give

the Welsh Ministers discretion as to how those powers should be exercised.

116. The RIA is developed in parallel to an Integrated Impact Assessment (IIA). The Well-being of Future Generations (Wales) Act 2015 (WFGA 2015) provides the framework for the IIA which assesses the social, cultural, economic and environmental impacts (both positive and negative) of policy proposals. To conduct the IIA officials also need to use some of the following full impact assessments: Children's Rights Impact Assessment, Equality Impact Assessment, Rural Proofing Impact Assessment, Data protection Impact Assessment, Welsh Language Impact Assessment, Biodiversity Impact Assessment, Socio-economic Duty Assessment, Justice System Impact Identification.
117. Where two or more pieces of subordinate legislation are closely linked and a single RIA could adequately address each of them, a single RIA may be prepared in respect of all those pieces of subordinate legislation. Where this is the case, the RIA will be included with each Explanatory Memorandum.
118. Where relevant Welsh subordinate legislation was made and contained measures related to the coronavirus pandemic an RIA may not have accompanied an instrument and the reason for not undertaking an RIA prior to the making of relevant Welsh subordinate legislation would be expected to be recorded in any explanatory memorandum required by the Senedd's standing orders to be laid with the instrument. For example, the Explanatory Memorandum dated 7 April 2020 for the Health Protection (Coronavirus Restrictions) (Wales) (Amendment) Regulations 2020 records at paragraph 6:

There has been no regulatory impact assessment in relation to these Regulations due to the need to put them in place urgently to deal with a serious and imminent threat to public health.



119. A collection of impact assessments was subsequently published by the Welsh Government on its Coronavirus (Covid-19) pages and can be read at the following location [Impact assessments: coronavirus | GOV.WALES](#). Enclosed are copies of the documents published in this location HAL/47 - INQ000087101, HAL/48 - INQ000087102, HAL/49 - INQ000087103, HAL/50 - INQ000087104, HAL/51 - INQ000087105, HAL/52 - INQ000087106, HAL/53 - INQ000087107, HAL/54 - INQ000087108, HAL/55 - INQ000087109, HAL/56 - INQ000087110, HAL/57 - INQ000087111, HAL/58 - INQ000087112, HAL/59 - INQ000087113, HAL/60 - INQ000087114, HAL/61 - INQ000087115, HAL/62 - INQ000087116, HAL/63 - INQ000087117, HAL/64 - INQ000087118, HAL/65 - INQ000087119, HAL/66 - INQ000087120, HAL/67 - INQ000087121, HAL/68 - INQ000087122, HAL/69 - INQ000087123, HAL/70 - INQ000087124, HAL/71 - INQ000087125, HAL/72 - INQ000087126, HAL/73 - INQ000087127, HAL/74 - INQ000087128, HAL/75 - INQ000087129, HAL/76 - INQ000087130, HAL/77 - INQ000087131, HAL/78 - INQ000087132, HAL/79 - INQ000087133, HAL/80 - INQ000087134, HAL/81 - INQ000087135, HAL/82 - INQ000087136, HAL/83 - INQ000087137, HAL/84 - INQ000087138, HAL/85 - INQ000087139, HAL/86 - INQ000087140, HAL/87 - INQ000087141, HAL/88 - INQ000087142, HAL/89 - INQ000087143, HAL/90 - INQ000087144, HAL/91 - INQ000087145, HAL/92 - INQ000087146, HAL/93 - INQ000087147, HAL/94 - INQ000087148, HAL/95 - INQ000087149, HAL/96 - INQ000087150, HAL/97 - INQ000087151, HAL/98 - INQ000087152, HAL/99 - INQ000087153, HAL/100 - INQ000087154, HAL/101 - INQ000087155. Some of these assessments were considering actions already taken by the Welsh Ministers in subordinate legislation made during the early months of the pandemic with other assessments being undertaken alongside the relevant instrument. The methodology adopted to produce these impact assessments is covered in detail in the statement of Tom Smithson in this Module. Therefore, I do not propose to address these matters in this statement.

120. These impact assessments considered a range of impacts, to include impacts on groups with protected characteristics, at risk groups and vulnerable groups. For example, documents HAL/100 – INQ000087154 and HAL/101 – INQ000087155 comprise an education IIA assessing the impact of the initial policy decision taken in relation to the provision of education in response to COVID-19.

*Reporting on subordinate legislation made in response to the coronavirus pandemic, to include reliance on powers conferred on the Welsh Ministers by the Coronavirus Act 2020.*

121. Although there were no statutory requirements in the Coronavirus Act 2020 for the Welsh Ministers to report to the Senedd on the status of the Act in relation to Wales, during the consideration of the Legislative Consent Motion on the then Coronavirus Bill on 24 March 2020, the Minister for Health and Social Services gave an undertaking to report on the use of the powers in that Bill on a regular basis. On 19 August 2020, a 'Written Statement by the Welsh Government' entitled "Reporting to the Senedd on the making of Coronavirus-related legislation and use of powers under the Coronavirus Act 2020" and given by the Minister for Health and Social Services, Vaughan Gething MS, was published. Enclosed at document HAL/102 – INQ000087156 is a copy of an email dated 19 August 2020 which was sent to Members of Senedd Cymru enclosing the Welsh and English language texts of that statement [HAL/102A - INQ000087158 and HAL/102B – INQ000087157].
122. This written statement summarises the actions taken by the Welsh Ministers prior to that date to inform Senedd Members of the making of the most important coronavirus-related legislation. The statement goes on to record how Welsh legislation relating to coronavirus made by the Welsh Ministers has been published and made available to the public and documents that the Welsh Ministers' first report to the Senedd on legislation made by them relating to coronavirus has been published (see enclosed documents HAL/37 – INQ000087091 and HAL/38 – INQ000087092). The statement confirms that the report deals with legislation made both under the Coronavirus Act 2020 and other legislation and confirms that the report will be updated periodically. Ultimately, reports to Senedd Cymru were published on four occasions: 19 August 2020, 20 April 2021, 1 October 2021 and 11 April 2022. Copies of these reports are enclosed at documents HAL/37 – INQ000087091, HAL/38 – INQ000087092, HAL/39 – INQ000087093, HAL/40 – INQ000087094, HAL/41 – INQ000087095, HAL/42 – INQ000087096, HAL/43 – INQ000087097 and

HAL/44 – INQ000087098.

*Publication of the Health Protection (Coronavirus Restrictions) (Wales) Regulations, as amended from time to time*

123. In accordance with the requirements of the Statutory Instruments Act 1946, subordinate legislation made by statutory instruments by the Welsh Ministers were published in the usual way by what is now His Majesty's Stationery Office.
124. In addition, Welsh Government established a set of pages on its website 'Coronavirus (COVID-19)' pages on 'Coronavirus and the Law'. These pages featured a number of collections to allow members of the public to navigate the various instruments in force at any given time, to include the principal regulations imposing restrictions on individuals, business and others.
125. The collection entitled 'Coronavirus legislation: restrictions on individuals, business and others – Regulations to impose restrictions on individuals, businesses and others to protect public health' featured not only a copy of the principal regulations in force at any given time, but also copies of versions of the principal regulations that no longer applied and amendment regulations that no longer had effect or had been revoked.
126. As well as featuring a copy of the principal regulations in force, a further copy of the principal regulations was made available to assist readers of the legislation with additions to, and omissions from, the previous version of the principal regulations clearly labelled for illustrative purposes. This version also recorded in a table the history of the principal regulations noting the name of each set of regulations, its statutory instrument number and the date and time when it entered into force. A copy of an example of this document, entitled "The Health Protection (Coronavirus Restrictions) (No.5) (Wales) Regulations 2020, as amended (which now appears under the sub-heading of 'Principal regulations that no longer apply'), and dated 6 May 2022, is enclosed as document HAL/103 – INQ000087159.

## Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief of its truth.

Full name: Helen Anne Lentle

Position or office held: Director of Legal Services, Welsh Government

Signed:

**Personal Data**

Date: 25<sup>th</sup> August 2023