

Analysis by the Welsh Government: consultation on proposals to give the Welsh Revenue Authority specific criminal powers to tackle devolved tax crime

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1. Introduction

- 1.1 From April 2018, landfill disposals tax (LDT) and land transaction tax (LTT) will replace UK landfill tax (LFT) and stamp duty land tax (SDLT) respectively. The UK taxes are currently collected and managed by HMRC. From April 2018, the collection and management of LDT and LTT will be the responsibility of the Welsh Revenue Authority (WRA).
- 1.2 In July 2017, the Welsh Government launched a 12 week consultation on proposals to give the WRA specific criminal powers to tackle devolved tax crime.
- 1.3 The Tax Collection and Management (Wales) Act 2016 (TCMA) establishes a devolved tax regime to support and enable taxpayer compliance. In the majority of cases, taxpayers are expected to pay the right amount of tax at the right time. There will be occasions however when additional measures will be necessary to ensure compliance.
- 1.4 TCMA already provides the WRA with a comprehensive range of civil investigation and enforcement powers. It is anticipated these powers will be sufficient to tackle the majority of cases where there is non-compliance. However, in certain circumstances, criminal investigation powers may be needed.
- 1.5 HMRC, which currently operates SDLT and LFT in Wales, has access to a wide range of criminal powers and in the last year, HMRC has used these powers in several cases.
- 1.6 The consultation asked for views on the impact on the WRA being provided with specific criminal powers and focussed on 3 thematic areas (covered by 13 questions):
- i. The need to tackle devolved tax offences through the use of criminal powers and the organisations which may be involved in criminal investigation and prosecution (**questions 1-3**)
 - ii. The practical implications of making use of different elements of UK criminal powers legislation (**questions 4-12**) ; and
 - iii. Ensuring appropriate safeguards and governance on the potential use of these powers (**question 13**)

2. Summary of consultation responses

2.1 In total, the Welsh Government received 17 responses from a range of stakeholders from various sectors, all from within Wales. All comments have been considered as part of assessing the outcome of the consultation.

2.2 The table below shows the number of responses by respondent category and a list of respondents is attached at Annex A. All respondents were invited to request anonymity and 4 respondents decided not to disclose their identities.

Respondent Category	Number	Percentage
Businesses	1	6%
Charities	1	6%
Individuals	1	6%
Law Enforcement Agencies	2	12%
Tax Accountants and Professional Bodies	4	23%
Town and Community Councils	8	47%
Total	17	100%

2.3 The table shows the majority of respondents were Town and Community Councils and tax accountants and professional bodies.

2.4 The summary below is presented by question and draws out similarities of views, suggestions, constructive criticism and useful points made. It consists of three sections mirroring the three thematic areas identified in 1.6 above.

2.5 A decision on whether to lay regulations to provide WRA with access to specific criminal powers to tackle devolved tax crime will be made by the Welsh Ministers in 2018.

3. The need to tackle devolved tax offences through the use of criminal powers and the organisations which may be involved in criminal investigation and prosecution (questions 1-3)

Question 1 Do you agree that criminal powers should be made available to help tackle devolved tax crime?

Please provide reasons for your answer and share any comments you wish to make.

3.1 The consultation highlighted a possibility of criminal offences in relation to Welsh devolved taxes in the future. Investigating devolved tax offences with a consistent set of criminal investigation powers will help to ensure Wales is able to tackle these.

3.2 There were 16 respondents to question 1. 14 respondents agreed criminal powers should be made available to tackle devolved tax crime. 2 respondents did not agree with the Welsh Government's proposal, for example the Institution of Civil Engineers Wales Cymru (ICEWC) suggested "there should be no change and the powers should continue to be held by HMRC as they are currently".

Question 2 Do you agree that the Welsh Revenue Authority should be responsible for investigating devolved tax offences?

Please provide reasons for your answer and share any comments you wish to make.

3.3 The consultation highlighted several public bodies in Wales, including local authorities, the NHS, Natural Resources Wales, and the Care and Social Services Inspectorate Wales (CSSIW), currently use criminal powers to conduct investigations in relation to their respective functions.

3.4 The consultation went on to say it would be possible for the police in Wales to lead on all elements of investigation of devolved tax offences. However, this would be an additional responsibility for police in Wales and any police action would be dependent on their consideration of a range of other priorities. The consultation concluded the Welsh Government's preferred option is that the WRA investigate devolved tax crime themselves.

3.5 There were 15 respondents to question 2. 13 respondents agreed the WRA should be responsible for investigating devolved tax offences. The main themes related to minimising costs, working with HMRC and police forces and training and development for WRA officers.

NCA said: *“Although not speaking on behalf of the 4 Welsh police forces, the Proceeds of Crime Centre (PoCC) is aware of the increased pressure that PoCA orientated criminal investigations have on police resources and investigations. It was to alleviate this pressure that in 2005 a large number of law enforcement agencies gained PoCA enablement. However, in the early years this put additional pressure on the police to assist, for instance their local authorities to gain experience and raise knowledge of PoCA procedures. Therefore to rely on the police in Wales to effectively take over/lead on tax offences is placing an additional burden on already stretched resources”*

3.6 ICAEW commented: “ 1. Any approach should minimise the costs to Wales;
2. The already considerable expertise in HMRC should be fully utilised;
3. Where possible the current systems and processes should be replicated to avoid reinventing the wheel and to create minimal change/disruption for the taxpayer and the professional advisors and agents; and
4. Consistency with current practice would significantly aid the transition”

3.7 PWC said: *“regardless of which authority investigates any offences relating to devolved taxes offences, we consider it to be important that sufficient training is provided to ensure that actions are efficient and carried out consistently, and we recommend that this is taken into consideration when allocating budgets for such activities” .*

Question 3 Do you think the Crown Prosecution Service should prosecute devolved tax offences to be consistent with HMRC? Or should this be done by the Welsh Revenue Authority?

Please provide reasons for your answer and share any comments you wish to make.

3.8 HMRC’s criminal investigations are currently prosecuted by the Crown Prosecution Service (CPS). TCMA provides that WRA may institute criminal and civil proceedings in England and Wales (section 21). If the WRA is made responsible for investigating devolved tax offences, the WRA will need to make a decision in due course about who will prosecute devolved tax offences uncovered by an investigation: CPS or WRA. Natural Resources Wales, for example, have an internal team that can manage prosecutions on their behalf (in relation to environmental crimes).

3.9 There were 13 respondents to question 3. The recurring theme throughout the responses was there should be a consistent approach to prosecution in England and Wales. Respondents were split over the question; 8 of them were in favour of the CPS prosecuting while 5 suggested giving this responsibility to the WRA.

3.10 NCA highlighted: *“The Crown Prosecution Service has already the expertise for prosecuting these cases for HMRC and there is a case that their resources should be able to deal with the case load generated. Some government agencies have their own dedicated prosecution regime, however, clearly knowledge, capability and proficiency in these matters is essential to ensure that each prosecution is presented professionally”*

3.11 The decision whether the CPS or WRA should prosecute devolved tax offences is a matter for the WRA and a decision will be taken by the WRA as and when appropriate, taking these and other views into account. A number of legal and policy questions will be explored by WRA and CPS in taking this work forward.

4. The practical implications of making use of different elements of UK criminal powers legislation (questions 4-12)

4.1 If the Welsh Ministers decide that WRA should be given powers in relation to criminal investigations then, by virtue of Part 9 TCMA, the Welsh Ministers can make subordinate legislation in relation to:

- The **Police and Criminal Evidence Act 1984**, (PACE): section 185(1) of TCMA provides for an amendment to be made to PACE to provide the Welsh Ministers with the power to make regulations to apply certain provisions of PACE to the investigation of criminal offences conducted by the WRA.
- The **Criminal Justice and Police Act 2001**, (CJPA): section 185(2) of TCMA provides for an amendment to be made to CJPA to provide the Welsh Ministers with the power to make regulations in relation to the provisions in Part 2 of the CJPA, which give investigators certain powers to seize and retain material found during the course of a search.
- The **Proceeds of Crime Act 2002**, (POCA): section 186 of TCMA amends section 453 of POCA so that the Welsh Ministers may make an order to specify that certain powers provided by POCA may be exercised by an “accredited financial investigator” exercising WRA functions.
- The **Regulation of Investigatory Powers Act 2000**, (RIPA): section 187 of TCMA amends RIPA to enable the Welsh Ministers to make an order which prescribes certain persons exercising WRA functions for the purposes of granting authorisations for directed surveillance or covert human intelligence under sections 28 and 29 of RIPA.

4.2 The consultation concluded that given the nature of devolved taxes, the Welsh Government does not expect the WRA to require access to all the powers set out in these Acts. However, there are some powers the WRA may need in order to be able to investigate devolved tax offences in the same way as HMRC is able to at present.

Question 4 It is proposed the WRA should not be provided with **stop** and **search** powers under the Police and Criminal Evidence Act to conduct a criminal investigation in relation to investigation of devolved tax offences. What are the benefits or disbenefits of the WRA not having these powers?

Please provide examples.

- 4.3 There were 11 respondents to question 4. 8 respondents disagreed with the Welsh Government's proposal of not giving "stop and search" powers to WRA, 3 supported this proposal.
- 4.4 The respondents who disagreed with the Welsh Government's proposal recommended WRA's powers should mirror HMRC's powers to ensure a consistent approach to tackle tax crime in England and Wales and also to make WRA more effective.
- 4.5 The Customs and Excise Management Act 1979 provides HMRC with stop and search powers in respect of the collection of certain excise duties. An example of when these might be used is where the HMRC officer suspects a vessel contains goods in respect of which there is unpaid duty.
- 4.6 However, HMRC does not have access to stop and search powers in relation to landfill tax or stamp duty land tax. Mirroring HMRC in this instance would mean not providing the WRA with stop and search powers, so this remains the Welsh Government's preferred option, if regulations are made and agreed by the National Assembly for Wales.
- 4.7 NCA said: *"The benefit of having full powers to deal with investigations and proceedings can be tempered by having the correct controls in place to ensure powers are used proportionately, with full recorded justification outlining the necessity for such action. As with PoCA which has the embedded controls of a Senior Appropriate Officer (SAO) who has a strategic accountability over money laundering investigations etc., and authorises investigative orders"*.

Question 5 It is proposed that WRA officers be given the power to apply to a justice of the peace for a warrant to enter, search and seize items from premises or search a person found on those premises when investigating devolved tax offences. This will include the power to use reasonable force if necessary in the exercise of that function. What are the benefits or disbenefits of providing WRA with these powers?

Please provide examples

- 4.8 There were 12 respondents to question 5. All respondents agreed with the Welsh Government's proposal that WRA officers should – to maintain consistency with HMRC - be given the power to apply to a justice of the peace for a warrant to enter, search and seize items from premises or search a person found on those premises when investigating devolved tax offences.
- 4.9 4 respondents highlighted the importance of WRA having the same powers as HMRC. NRW said: *"WRA should have the same powers as HMRC, this is*

*important from the point of view of consistency.” and PWC suggested :
“Clearly, suitable safeguards and training in the exercise of warrants would be needed in line with what is currently in place with HMRC” and they added
“resource constraints may make it difficult for the necessary specialist training, experience and expertise to be developed within the WRA. Even if the WRA is provided with these powers there may be a need for the police to support the WRA officers in carrying out such warrants, so the intended time and cost saving may not be fully realised”.*

Question 6 It is proposed that the WRA is not provided with powers to arrest, detain, or question individuals as part of a criminal investigation. What are the benefits or disbenefits of not providing WRA with these powers?

Please provide examples.

4.10 There were 11 respondents to question 6. Respondents were split over this question. 5 respondents supported the proposal of not providing WRA with the powers to arrest, detain or question individuals as part of a criminal investigation. 6 respondents disagreed with the proposal.

4.11 NRW disagreed with the Welsh Government’s proposal because *“WRA should have the same powers as HMRC and so should have criminal powers to arrest, detain and question individuals. This avoids additional burden on the police”.*

4.12 PWC said: *“As with stop and search powers, it is important that any arrest powers are used proportionately by experienced individuals. The compliance costs around implementation of safeguards and training may outweigh any benefits. The WRA in these instances may be better relying on the police for assistance when required”*

4.13 Given the small number of devolved tax offences expected to be dealt with each year and the even smaller number where arrests may be required, the Welsh Government does not presently believe that it will be proportionate for WRA officers to be trained and otherwise equipped to arrest and detain individuals. If arrests are required it is expected the WRA and/or delegated bodies will work with the police.

Question 7 Should the WRA develop any additional safeguards/ guidance to exercise these powers?

Please provide examples.

4.14 There were 12 respondents to question 7. 9 respondents agreed and 3 disagreed. A number of respondents highlighted the importance of guidance being produced in relation to the use of the powers.

4.15 Some of the respondents (2) highlighted statutory Codes of Practice and mentioned as useful references the Code of Crown Prosecutors and UK Statutory Code of Practice for Regulators, which is based on the recommendations of the Hampton Report. Gelligaer CC said "*Guidance should be prepared for companies, to deter any temptation of committing a crime. If legislation is perceived as weaker, it will be abused*".

Question 8 It is proposed that the WRA be given the extended powers given under the Criminal Justice and Police Act to enhance the powers already provided to it by the Police and Criminal Evidence Act (if these powers are taken). What are the benefits or disbenefits of providing WRA with these powers?

Please provide examples.

4.16 There were 13 respondents to question 8. 12 respondents were in favour of giving WRA the extended powers under the CJPA to enhance the powers already provided by PACE (if these powers are taken). 1 respondent disagreed.

4.17 NRW said: "*CJPA powers should be granted to WRA, to ensure an effective role and consistency with HMRC. These extended powers are complementary to the base powers under PACE and a logical extension if taking PACE powers. Any additional powers that enhance an investigators tool box are welcome*".

Question 9 Should there be any additional powers from PACE/ CJPA conferred on the WRA?

If so, please provide examples.

4.18 There were 10 respondents to question 9. 7 respondents felt no additional powers should be conferred to WRA and 3 provided some suggestions. Gelligaer CC said: "*WRA should have additional powers to levy greater financial penalties*"; NCA said: "*The powers provided to gather evidence etc., if not extended would curtail the ability of officers to conduct their role*" and NRW highlighted: "*if powers of arrest are conferred then we support the use of all parts of PACE applicable to the investigation*".

Question 10 It is proposed that WRA staff are named as an AFI for the

purposes of exercising various powers in POCA in the course of a confiscation or detained cash investigation. It is also proposed that a WRA AFI may also apply for restraint orders and exercise associated powers. What are the benefits and disbenefits of the above?

Please provide examples

4.19 The consultation document explained the Proceeds of Crime Act 2002, (POCA) makes provision for the recovery of assets acquired through criminal conduct. The Act seeks to ensure criminals do not profit from their criminal behaviour which will help to deter individuals from engaging in criminal activity. Furthermore the confiscation of assets reduces the funds available for criminals to fund further criminal enterprises. The use of the various powers in POCA enable HMRC (among other law enforcement agencies) to effectively carry out the following investigations:

- Confiscation investigations;
- Detained cash investigations;
- Money laundering investigations.

4.20 The POCA powers described above may only be exercised by those named in the Act, and “accredited financial investigators” exercising functions on behalf of any law enforcement agency listed in subordinate legislation.

4.21 Section 186 of the Tax Collection and Management (Wales) Act 2016 amends section 453 of POCA so Welsh Ministers will have the power to provide, by secondary legislation, a specified reference in POCA to an accredited financial investigator includes a reference to a person exercising a function of the WRA who falls within a specified description.

4.22 In this way, WRA may be given the ability to exercise some of the powers contained in POCA, as described above by using “accredited financial investigators”. An “accredited financial investigator” (AFI) is a financial investigator accredited by the National Crime Agency in accordance with section 3 of POCA. HMRC does not access POCA powers through the use of accredited financial investigators – its officers are directly conferred powers by the Act.

4.23 There were 13 respondents to question 10. 11 respondents were supportive of the proposal and 2 disagreed.

4.24 Respondents suggested WRA should carefully consider the implications of training and supporting AFIs.

- 4.25 NRW and another respondent suggested WRA should consider how they might access the Joint Asset Recovery Database (JARD) database, managed by the National Crime Agency (NCA), where information about all criminal investigations is currently collated.

Question 11 It is proposed the WRA should be given powers to undertake directed surveillance for the prevention and detection of crime or the purpose of assessing or collecting tax. What are the benefits or disbenefits of providing the WRA with these powers?

Please provide examples

- 4.26 The consultation explained that the Regulation of Investigatory Powers Act 2000, (RIPA) creates a regulatory framework around the use of surveillance (and related) activities by public authorities. This framework imposes strict rules, checks and balances to ensure these activities strike an appropriate balance between the legitimate purposes they pursue (for example, tax collection) and the public's right to privacy. The Tax Collection and Management (Wales) Act 2016 enables Welsh Ministers to, by secondary legislation, prescribe individuals as persons designated for the purposes of sections 28 and 29 of RIPA who may authorise the use of directed surveillance and covert human intelligence sources.

- 4.27 Directed surveillance means, broadly, surveillance which is covert but not intrusive – for example, does not involve gaining access to a private dwelling or vehicle – and is undertaken for the purposes of a specific investigation or a specific operation, in such a manner as is likely to result in the obtaining of private information about a person. Surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure persons who are subject to the surveillance are unaware it is or may be taking place. Directed surveillance may capture many fact finding activities which are undertaken without the relevant person's knowledge.

- 4.28 There were 12 respondents to question 11. 11 Respondents agreed WRA should be granted these powers and 1 respondent did not agree.

- 4.29 NCA said *“This a common sense approach as a significant proportion of investigations will be proactive and intelligence led. The gathering of intelligence and evidence presupposes that law enforcement has the tools available to achieve the correct result, as clearly the WRA is investigating and attempting to recover monies for the public purse. Senior Appropriate Officers (under PoCA) and those that authorise RIPA record the rationale behind any covert directed action and this is intrusive (albeit the legislative definition) into a person's private life and circumstances, and includes the recording of all justifications under the Human Rights legislation”.*

Question 12 Do you think the WRA should be given powers to use covert human intelligence sources for the prevention and detection of crime or the purpose of assessing or collecting tax?

What are the benefits or disbenefits of providing the WRA with these powers? Please provide examples. What are the benefits or disbenefits of providing the WRA with these powers?

Please provide examples.

- 4.30 The consultation explained a covert human intelligence source means a person who:
- a) Establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);
 - b) They covertly use such a relationship to obtain information or to provide access to any information to another person;
 - c) They covertly disclose information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.
- 4.31 There were 10 respondents to this question. 9 Respondents felt these powers should be granted to WRA to ensure they can deliver an effective role consistent with HMRC and 1 disagreed without specifying any particular reason.
- 4.32 NCA said: *“The use of a CHIS is a vital aspect of law enforcement that can in many respects save substantial time and money in an investigation. Their use is governed by a framework of legislation that not only directs its use but has safeguards for the CHIS handlers (suitably trained) and their controllers who oversee operations and record all actions and decision making”*.
- 4.33 NRW added: *“these powers should be granted to WRA to ensure they can deliver an effective role consistent with HMRC. WRA should only then make use of its CHIS powers when its infrastructure is sufficiently well established to do the work”*.

5. Ensuring appropriate safeguards and governance on the potential use of these powers (question 13)

5.1 The consultation highlighted - in order to protect the public and avoid the misuse of criminal powers - the four pieces of legislation require there to be clear policies and procedures in place to safeguard against their abuse. These policies and procedure currently apply to the Welsh Government and other public bodies where they are able to use criminal powers.

5.2 These statutory safeguards would apply to the WRA and/or any delegated bodies the WRA use for the application of these powers. Any internal procedures will be a matter for the WRA.

5.3 For example, the powers contained in the Police and Criminal Evidence Act 1984 can only be used if certain conditions are met. It will be for the investigator to demonstrate to senior officers and in some cases, a magistrate or judge, that those conditions have been met. If the senior officer, or magistrate/judge, does not think that those conditions are met, the powers cannot be used. Staff will only be able to exercise these powers once they have been trained and authorised to do so.

5.4 The Police and Criminal Evidence Act 1984 also requires the Home Secretary to publish Codes of Practice about the use of powers during a criminal investigation. Section 67 of the Act requires any person conducting a criminal investigation to comply with these Codes of Practice, which will include the WRA when it investigates devolved tax offences. The Codes of Practice are a vital part of the legislative framework governing the way in which a criminal investigation is undertaken.

5.5 In relation to the Regulation of Investigatory Powers Act 2000, the Office of Surveillance Commissioners (OSC) is responsible for keeping under review the exercise and performance of the powers conferred by Part II of the Regulation of Investigatory Powers Act 2000.

5.6 Designated individuals within the WRA who possess the appropriate experience and training would only be able to authorise the use of directed surveillance and a covert human intelligence source in accordance with the provisions set out in the Regulation of Investigatory Powers Act 2000. It should be noted that authorisations cannot be granted unless specific criteria are satisfied, for example, where the person granting the authorisation believes:

5.7 The Proceeds of Crime Act 2002 also contains a significant number of statutory safeguards against any misuse of the powers. The powers contained in the Proceeds of Crime Act 2002 can only be exercised where the qualifying conditions set out in legislation have been met – for example, assets may only be confiscated if the owner of those assets has been convicted of a relevant offence and a Crown Court judge is satisfied that that it is appropriate to do so, having concluded (among other things) that the defendant has engaged in a criminal lifestyle or has benefitted from criminal conduct.

Question 13 In addition to the existing safeguards included in the legislation for the Police and Criminal Evidence Act/ Regulation of Investigatory Powers Act /Proceeds Of Crime Act/ Criminal Justice and Police Act, what further internal safeguards should the WRA consider to ensure that criminal investigation powers are conducted appropriately?

5.8 There were 14 respondents to question 13. The main suggestions were:

- NRW proposed to “*i) produce an officer competencies criteria to demonstrate that its officers have received appropriate training in PACE, their powers under LDT and have competent investigatory skills prior to them obtaining a warrant; ii) provide a scheme of delegation of powers and iii) develop Governance of enforcement action to ensure consistency of approach*” .
- NCA proposed to “*i) provide investigators with the full range of powers currently available to HMRC officers; ii) as well as investigators, invest in a Financial intelligence Unit to conduct PoCA based financial investigations which will enhance the evidential platform; iii) under PoCA legislation a Senior Appropriate officer (SAO) has responsibility for overseeing money laundering, detained cash and confiscation investigations, thus providing a second layer of scrutiny to record rationale on informed decision making; iv) make full use of the PoCA legislation and its investigative orders*” .
- PWC suggested: “*WRA will also need to establish a chain of command that ensures appropriate oversight and review of the work of the officers conducting criminal investigations. The Welsh Government may wish to consider including review of the criminal investigation activities of WRA within an internal audit program to ensure that standards are being adhered to. A joint working policy could be agreed between the WRA and HMRC to ensure that both authorities work together to meet their objectives. This could include arrangements for pooling resources and ensuring consistency of policies for example*”.

5.9 WRA will ensure that these additional suggestions reflected in any further work, should access to criminal powers be granted to the WRA.

Annex A. List of respondents who decided to disclose their identities

1	Abergele Town Council
2	Central Association of Agricultural Valuers (CAAV)
3	Gelligaer Community Council
4	Institute of Chartered Accountants in England and Wales (ICAEW) Wales
5	Llandyfaelog Community Council
6	Llanelli Town Council
7	Mocdre with Penstrowed Community Council
8	National Crime Agency (NCA)
9	National Resources Wales (NRW)
10	NW Police
11	Patrick Jeremy
12	PricewaterhouseCoopers LLP (PWC)
13	Tata Steel