

European Union (Withdrawal) Bill:

Progress towards delivering our six objectives

May 2018

Summary

The European Union (Withdrawal) Bill (the Bill) is nearing the end of its passage through Parliament.

In October 2017, we set six objectives for improving the Bill.

In this report, we consider the six objectives in light of the Intergovernmental Agreement (between the Welsh and UK governments), the amended Bill, and the Welsh Government's Supplementary Legislative Consent Memorandum.

We conclude that, whilst considerable progress has been made, our six objectives have not been met in full.

This report is published to help inform the Assembly's debate on the Legislative Consent Motion associated with the Bill, which is due to be considered on 15 May 2018.



Background

We have been working on the Bill, and its preceding White Paper, since March 2017 with a view to ensuring that the implications for Wales, and Welsh devolution, are understood and acted upon by the UK Government.

The White Paper

1. The UK Government published its White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, on 30 March 2017.¹
2. We considered the implications for Wales of this proposed approach and published our report, *The Great Repeal Bill: Implications for Wales*, in June 2017.²
3. This followed consideration of 13 written submissions and two committee hearings.
4. In summary, we set out the following key messages in our report:

Key messages from our report *The Great Repeal Bill: Implications for Wales*

Consultation

The evidence we received indicates that the UK Government has not consulted meaningfully with the Welsh Government and has not consulted at all with the Assembly in relation to its preparations for legislating for Brexit, as set out in the White Paper. This is unacceptable and we expect the incoming UK Government to engage more constructively with both the Welsh Government and the Assembly.

Delegations of powers, controls on the powers and Assembly procedure

We believe that it should be for the Assembly alone to delegate powers to make subordinate legislation to the Welsh Ministers, to set the controls around their use and to establish the scrutiny procedures that should apply to legislation made by the Welsh Ministers, using such powers.

¹ UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017.

² National Assembly for Wales, External Affairs and Additional Legislation Committee, *The Great Repeal Bill: Implications for Wales*, June 2017.

However, in light of the extremely limited timeframe and the scale of the task ahead, the only practical option may be for the UK Parliament to provide for these powers and the controls applicable to them in the Great Repeal Bill.

With regard to procedures, however, the Bill should not restrict the Assembly's ability to determine its own scrutiny procedures.

Should the Bill provide a power for the Welsh Ministers and set controls on the power, then this must be an exception and should not set a precedent. Such provisions must also be subject to the Assembly's legislative consent.

The UK Government must listen and act upon representations made by the Assembly and its committees once the Bill is introduced if it is to secure that consent.

UK-wide policy frameworks

Decisions about future UK-wide policy frameworks must be agreed between the UK Government and the devolved governments and legislatures. They must not be imposed by the UK Government, even on a time-limited basis.

Transparency of the process

As we wrestle with a myriad of issues, ranging from the technical to the constitutional, we must not lose sight of the fact the decisions that are taken during this period will have a direct and lasting effect on people's lives. It is incumbent on us, and all other actors in this process, to ensure that the process is as transparent as possible and that we seek opportunities to facilitate meaningful two-way engagement with stakeholders and citizens.

The House of Commons

5. The European Union (Withdrawal) Bill received its first reading in the House of Commons on 13 July 2017.

6. The Explanatory Notes accompanying the Bill states that:

“The European Union (Withdrawal) Bill repeals the European Communities Act 1972 (ECA) on the day the United Kingdom leaves the European Union.

The Bill ends the supremacy of European Union (EU) law in UK law and converts EU law as it stands at the moment of exit into domestic law. It

also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU.”

- 7.** In response to the introduction of the Bill, we wrote to the Rt Hon David Davis MP, Secretary of State for Exiting the European Union. In this correspondence, we expressed our disappointment that the Bill, as introduced, had not reflected the conclusions of our report on the White Paper.³
- 8.** In a joint endeavour with the Assembly’s Constitutional and Legislative Affairs Committee, we issued a call for further written evidence in July 2017 and held a stakeholder conference to debate the Bill on 18 September 2017.⁴
- 9.** The committees were joined by Welsh stakeholders and leading constitutional and legal experts from across the UK to explore the implications of the Bill for Wales.
- 10.** The Welsh Government laid a Legislative Consent Memorandum (the Memorandum) on 12 September 2017.⁵
- 11.** We took evidence on the Memorandum from the Cabinet Secretary for Finance, Professor Mark Drakeford AM, on 25 September 2017.⁶
- 12.** Building on the above evidence, we developed and agreed six objectives for improving the Bill.

³ Letter from the Chair of the External Affairs and Additional Legislation Committee to the Secretary of State for Exiting the European Union, 21 July 2017

⁴ Information regarding our evidence gathering can be found on our webpage: [The European Union \(Withdrawal\) Bill and its implications for Wales](#)

⁵ [Welsh Government, European Union \(Withdrawal\) Bill: Legislative Consent Memorandum, 12 September 2017](#)

⁶ [Record of Proceedings, External Affairs and Additional Legislation Committee, 25 September 2017](#)

Our objectives for amending the EU (Withdrawal) Bill

1. Remove the Clause 11 restriction on the devolution settlement.
2. Ensure the Welsh Ministers and the Assembly are responsible for correcting all aspects of EU-derived law in areas of devolved competence.
3. Ensure powers available to the Welsh Ministers under the Bill are strictly limited and far more tightly drawn than those currently set out in the Bill.
4. Prevent UK Ministers from amending aspects of EU-derived law that affect Wales unless reserved.
5. Prevent UK or Welsh Ministers amending the Government of Wales Act using delegated powers.
6. Ensure that the Assembly can set its own scrutiny arrangements.

13. We wrote to Members of Parliament, the UK Government, parliamentary committees and the Welsh Government with our objectives on 10 October 2017.⁷

14. Alongside our objectives, we suggested amendments to the Bill. These amendments were tabled by Stephen Kinnock MP.

15. Whilst our amendments were not agreed, they played a part in the debates on the treatment of devolution in the Bill and, we believe, ensured the important role of the devolved legislatures featured – an aspect of the Bill’s consideration that had hitherto been largely ignored beyond discussions of the Sewel convention.

Our work on the Memorandum

16. We published an interim report on legislative consent, in response to the Memorandum, in December 2017.⁸

17. At that time, we arrived at the following recommendation:

“The Assembly should withhold its consent to the Bill as currently drafted (i.e. as the text of the Bill stands on 11 December 2017). Should

⁷ [Letter from the Chair of the External Affairs and Additional Legislation Committee to Welsh Members of Parliament et al., 10 October 2017](#)

⁸ [National Assembly for Wales, External Affairs and Additional Legislation Committee, *European Union \(Withdrawal\) Bill: Interim report on the Legislative Consent Memorandum*, December 2017](#)

amendments be made at subsequent stages of the scrutiny process then we will carefully examine these amendments before reconsidering our recommendation to the Assembly.”⁹

The House of Lords

18. The Bill had its First Reading in the House of Lords on 18 January 2018.

19. In February 2018, we wrote to a number of members of the House of Lords and relevant committees to communicate our objectives for amending the Bill.¹⁰

20. We wrote again to members of the House of Lords on 23 March 2018 to express our view on recently tabled UK Government amendments to clause 11 of the Bill.¹¹ These amendments were subsequently withdrawn to allow further time for negotiation between governments.

21. On 24 April 2018, the Cabinet Secretary for Finance announced that an agreement on amendments to the Bill had been reached with the UK Government, to the extent that the Welsh Government is now content to recommend that the Assembly grant its legislative consent for the Bill.¹²

22. This agreement, the *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* (the Intergovernmental Agreement”), was confirmed in an exchange of correspondence between the Cabinet Secretary for Finance, Professor Mark Drakeford AM, and the Chancellor of the Duchy of Lancaster, the Rt Hon David Lidington MP. The correspondence included the agreement itself, as well as the associated amendments to the Bill that the UK Government subsequently tabled.¹³

⁹ National Assembly for Wales, External Affairs and Additional Legislation Committee, *European Union (Withdrawal) Bill: Interim report on the Legislative Consent Memorandum*, December 2017 p.8

¹⁰ Letter from the Chair of the External Affairs and Additional Legislation Committee to Members of the House of Lords, 19 February 2018

¹¹ Letter from the Chair of the External Affairs and Additional Legislation Committee to Members of the House of Lords, 23 March 2019

¹² Welsh Government, Press Statement, Welsh Government agrees deal on Brexit Bill that respects devolution, 24 April 2018

¹³ These documents have been published on the UK Government’s website: [European Union \(Withdrawal\) Bill - Agreement between the UK and Welsh governments](#)

23. UK Government amendments to the Bill were tabled on 25 April 2018 and were agreed by the House of Lords on 2 May 2018.¹⁴

24. The Scottish Government was unable to reach agreement with the UK and Welsh Governments. The Scottish Government has not recommended the granting of the Scottish Parliament's legislative consent to the Bill.

25. On 30 April 2018, we took evidence from Chloe Smith MP, Minister for the Constitution, and Robin Walker MP, Parliamentary Under Secretary of State for Exiting the European Union.¹⁵

26. The Rt Hon Carwyn Jones AM, First Minister of Wales, gave evidence to us on 14 May 2018.¹⁶

27. We have not reflected on the detail of the session with the First Minister in this report due to the timescale available for reporting.

¹⁴ [House of Lords Hansard, Vol. 790, 2 May 2018](#)

¹⁵ [Record of Proceedings, External Affairs and Additional Legislation Committee, 30 April 2018](#)

¹⁶ [Record of Proceedings, External Affairs and Additional Legislation Committee, 14 May 2018](#)

Progress made against our six objectives

Whilst progress has been made in some areas, our six objectives for improving the European Union (Withdrawal) Bill have not been met.

Objective 1: Remove the Clause 11 restriction on the devolution settlement

28. When writing to Members of Parliament about this objective, we explained that it was based on our belief that:

- 1.** UK-wide frameworks should be agreed on a parity of esteem basis between the governments and legislatures of the United Kingdom and not imposed by the UK Government.
- 2.** This was the case even if frameworks were imposed on a time-limited basis.
- 3.** Imposing pan-UK frameworks led to a conflict of interest for the UK Government as it is, in a number of European Union policy areas, acting as the government of England.

29. The amendments agreed between the UK and Welsh Governments, agreed at the House of Lords Report Stage, do not fully meet this objective, or the principles underlying it, even taking into account the terms of the agreement reached between the UK and Welsh Governments on the EU (Withdrawal) Bill (the Bill).

30. With the proposed amendments, **Clause 11 will continue to allow restrictions to be imposed on the Assembly's competence without the Assembly's consent.** The restrictions will be imposed by regulations made by UK ministers and will prevent the Assembly from changing retained EU law in particular policy areas. The UK Parliament will be able to approve these regulations even if the Assembly has refused its consent to them being made.

31. The power to impose these restrictions on the Assembly's competence is time-limited (to a maximum of two years from "exit day"). The restrictions made under the power are also time-limited (to a maximum of five years from their coming into force). However, we have previously expressly stated that time-limits on restrictions would not be enough to meet our concerns.

32. At our meeting on 27 November 2017, the Rt Hon Carwyn Jones AM, First Minister of Wales, appeared to share our view, on the original drafting of the Bill, stating:

“No, we wouldn't accept a sunset clause. Who is to say that it wouldn't be extended ad infinitum in the future? It's a matter of principle here. Either Governments across the UK can trust in themselves and each other to come to sensible agreements across the UK or not, and clause 11 is a clause that, to me, suggests that somehow we can't be trusted.”¹⁷

33. However, we acknowledge that the new amendments to the Bill include 'sunset clauses' that now guarantee the 'freezing' of these powers will be temporary.

34. The concern, expressed by the First Minister (and shared by the Committee) that the time-limit on the restrictions might be “extended ad infinitum” has been reduced. Previously, the Bill gave UK Ministers the power to amend the resulting Act itself, by subordinate legislation intended to implement the Withdrawal Agreement. This power could potentially have allowed time-limits on the restrictions on the Assembly's competence to be extended, on the basis that this was “appropriate” for the purposes of fully implementing that Agreement. The power has been removed by separate UK Government amendments to clause 9 of the Bill. However, the time-limits could still be extended in future by other UK primary legislation. It is to be hoped that the UK Government would respect the existing Sewel Convention with regard to any such legislation, as it would affect the Assembly's competence.

35. We also note that the power to impose restrictions on the Assembly's competence could be repealed before the two-year time-limit. Likewise, restrictions imposed by regulations under that power could be lifted before the five-year deadline. The agreed amendments to Schedule 3 of the Bill (inserting a new Part 1A into it) and new clause 157ZA create incentives for the UK Government to take these steps; these amendments are discussed in more detail later in this report.

36. There remains a lack of clarity and certainty about the areas in which restrictions can be imposed, as these will not be listed on the face of the Bill and some areas are still being discussed.

¹⁷ [Record of Proceedings, External Affairs and Additional Legislation Committee, 27 November 2018 c.128](#)

37. The Intergovernmental Agreement (paragraph 5) states that this is “*likely*” to be in 24 areas, but that it is “*possible*” that some additional areas will be restricted.¹⁸

The 24 areas where legislation could be required, in whole or in part:

1. Agricultural support
2. Agriculture - fertiliser regulations
3. Agriculture - GMO marketing and cultivation
4. Agriculture - organic farming
5. Agriculture - zootech
6. Animal health and traceability
7. Animal welfare
8. Chemicals regulation (including pesticides)
9. Elements of reciprocal healthcare
10. Environmental quality - chemicals
11. Environmental quality - ozone depleting substances and F-gases
12. Environmental quality - pesticides
13. Environmental quality - waste packaging and product regulations
14. Fisheries management & support
15. Food and feed safety and hygiene law (food and feed safety and hygiene law, and the controls that verify compliance with food and feed law (official controls))
16. Food compositional standards
17. Food labelling
18. Hazardous substances planning
19. Implementation of EU Emissions Trading System

¹⁸ UK Government, [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks, 24 April 2018](#)

20. Mutual recognition of professional qualifications (MRPQ)

21. Nutrition health claims, composition and labelling

22. Plant health, seeds and propagating material

23. Public procurement

24. Services Directive

Other policy areas - which the UK Government believes are reserved (or excepted in the Northern Ireland Act 1998), but are subject to ongoing discussion with the devolved administrations - that could be subject to clause 11 regulations:

25. Food Geographical Indications (protected food names)

26. State aid

38. The Welsh and UK Governments have stated that the 24 areas referred to are those listed as “*subject to more detailed discussion*” in the “Frameworks analysis” agreed between them and provided to the Assembly; and that the possible “*additional*” areas are the 12 listed in the same document as ones which the UK Government believes to be reserved to the UK Parliament.¹⁹ Annex A to the *Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* (contained within the Intergovernmental Agreement) provides this list too.

39. If the maximum scope of the restrictions has been identified and agreed, as this suggests, it could have been set out in the Bill and acted as a back-stop on restrictions.

40. Although the amendments and the Intergovernmental Agreement do not meet Objective 1, they do represent movement in the direction of our views, compared to the drafting of the original clause 11 as introduced into the House of Commons.

41. First, the restriction on the Assembly’s competence is no longer a blanket one applying to all areas affected by EU law, with a power for the UK Government to provide for exceptions. Instead, the default position is that the Assembly’s competence is untouched, but the UK Government has a power to impose restrictions in areas of competence.

¹⁹ UK Government, *Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland*, 9 March 2018.

42. Secondly, some procedural safeguards have been provided by the amendments to the Bill. This would require that, if the Assembly has refused (or simply not given) consent to draft regulations imposing restrictions on its competence, the UK Government must:

- lay a written statement before the UK Parliament explaining why it is still seeking Parliament’s approval for those regulations; and
- lay any statement which the Welsh Government has provided (it would not be obliged to), giving its view as to why the Assembly has not consented.

43. Such regulations would require the approval of both Houses of Parliament via the affirmative procedure.

44. There are weaknesses in this procedural safeguard. The Assembly’s time to consider draft regulations restricting its competence may be short: UK Ministers can lay them in Parliament 40 days after providing the Welsh Ministers with a draft and, although the UK Government must inform the Llywydd that a draft has been provided, they do not have to provide the Llywydd with a copy of the draft itself.

45. The Committee notes the First Minister’s commitment to provide draft regulations and other documents to the Assembly as soon as practicable and his openness to the prospect of amending Standing Orders to provide for this.²⁰

46. Additionally, Welsh Ministers are under no obligation to lay the draft before the Assembly once they receive the draft from a Minister of the Crown.

47. This procedural safeguard is supported, to an extent, by the Intergovernmental Agreement (paragraph 6), which states that the UK Government will “not normally” ask the UK Parliament to approve regulations imposing restrictions on the Assembly’s competence without the Assembly’s consent. For its part, the Welsh Government commits to not withholding recommendations of consent unreasonably.

Conclusion 1. In the absence of further amendment to the Bill, we believe that Assembly procedures should be strengthened. The Assembly, through its Standing Orders, could require Welsh Ministers to lay such draft regulations before the Assembly on the day that they are received. This would maximise the time available for Assembly scrutiny.

²⁰ Record of Proceedings, External Affairs and Additional Legislation Committee, 14 May 2018

48. Moreover, it strikes us as unfortunate that the Assembly's reasons for withholding consent are to be explained by the Welsh Ministers.

49. Parliament will only see a description of the Assembly's reasons if the Welsh Government provides one; the Bill does not impose a statutory duty on the Welsh Ministers to do so.

Conclusion 2. The Assembly must consider whether Standing Orders need to be amended to require that, in circumstances where the Assembly refuses its consent, the Welsh Ministers must:

- provide a statement to a Minister of the Crown giving the opinion of the Welsh Ministers as to why the Assembly has not agreed to grant its consent; and
- at the same time, lay such a statement before Assembly.

50. The third safeguard for the Assembly's competence, provided by the amendments, is that UK Ministers are placed under a duty to report to the UK Parliament every three months (starting three months after Royal Assent) on progress towards agreeing arrangements to replace restrictions that have been put in place, and arrangements to replace the need for restrictions at all.

51. In practice, this means agreement on common UK frameworks, which will normally be put in place by UK primary legislation (or an agreement that there is no need for frameworks in certain areas). UK Ministers will have to report to Parliament specifically on progress towards removing restrictions that have been put in place and repealing the powers to impose such restrictions. The requirement to report every three months could be considered fairly onerous (although the report will be in writing, rather than by personal appearance) and provides a practical incentive to UK Ministers and civil servants to progress work on common frameworks swiftly.

52. Whilst Ministers of the Crown are required to provide their reports in connection with retained EU law restrictions to the Welsh Ministers, there is no requirement for these reports to be laid before the Assembly.

Recommendation 1. We recommend that the Welsh Ministers lay reports in connection with retained EU law restrictions before the Assembly as soon as they receive them from a Minister of the Crown. Any available legislative or procedural measures available to ensure this should be explored.

53. Moreover, the Intergovernmental Agreement (paragraph 8) confirms that any separate legislation to enshrine such frameworks will be subject to the Sewel convention, requiring the Assembly's consent if it makes provision in devolved policy areas, or affects its competence, even if restrictions have been imposed in those areas.

Recommendation 2. As there is no requirement to notify the Assembly when a specified restriction is repealed or revoked, we recommend that the Welsh Ministers inform the Assembly in such circumstances.

54. Fourthly, the time-limits create a back-stop limitation on the Bill's effect on competence (further UK Parliamentary legislation could of course seek to extend the restriction periods but in principle the Sewel convention would then apply).

55. The intergovernmental agreement also addresses the Committee's third underlying principle for Objective 1: the lack of parity between England and Wales in terms of freedom to deviate from EU law. In the agreement, the UK Government agrees not to introduce legislation for England while the Assembly is unable to do so for Wales.

Recommendation 3. We recommend that the Business Committee considers the case for preparing a new Standing Order to:

- establish procedures for the scrutiny of draft regulations provided to the Welsh Ministers under new Section 109A (6) of the Government of Wales Act 2006 (i.e. regulations to specify a restriction on the Assembly's legislative competence relating to retained EU law);
- establish procedures for the provision of additional information to the Assembly relating to the new Section 109A process, including the UK Ministers' three-monthly reports to Parliament and notification when specified restrictions are repealed or revoked.
- establish legislative consent arrangements for the new Section 109A regulations, including the information to be provided by the Welsh Ministers and how the Assembly's consent decision is communicated to Parliament.

Strengthening scrutiny of the new 'Clause 11' provisions

Conclusion 3. In considering the new Clause 11 provisions, we see a three-pronged approach to strengthening the scrutiny arrangements around the Intergovernmental Agreement and the procedure for placing temporary

restrictions on the Assembly's legislative competence relating to retained EU law.

Conclusion 4. The Assembly must establish stronger arrangements for the Welsh Ministers to:

- lay draft regulations (and other documents provided by Ministers of the Crown to the Welsh Ministers) before the Assembly; and
- provide a statement to a Minister of the Crown in circumstances where the Assembly has not granted legislative consent.

56. As we conclude above, in addition to further amendments to the Bill, a new Standing Order, or a revision of existing Standing Orders, could provide strengthened arrangements.

57. We will write to the Business Committee to draw its attention to our conclusions in relation to Standing Orders.

Conclusion 5. Assembly Committees, through established inter-parliamentary links, should seek to establish more formalised arrangements for the sharing of information between legislatures. Good inter-parliamentary communication would ensure that this new aspect of the legislative consent convention, a parliamentary convention, does not rest solely on the opinions of governments. We address this point in more detail later in this report.

Conclusion 6. Assembly Committees should consider collectively establishing a scrutiny framework for these regulations to ensure both technical scrutiny and policy knowledge are brought to bear in the timescales available. We address this point in more detail later in this report.

Objective 2: Ensure the Welsh Ministers and the Assembly are responsible for correcting all aspects of EU-derived law in areas of devolved legislative competence

58. We considered that the most constitutionally appropriate and efficient route to correcting EU law would be to ensure that the Assembly and the Welsh Ministers are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

59. In our view, the narrower option, provided for in the Bill as introduced, of restricting the involvement of the Welsh Ministers and the Assembly to correcting only EU-derived domestic legislation in devolved areas made for a less efficient exit process.

60. Whilst the amendments made at House of Lords Report stage do not fully meet our objective, considerable progress towards the objective has been made.

61. The amendments will allow the Welsh Ministers to modify retained directly-applicable EU law, save in areas where restrictions on devolved powers apply under clause 11.

62. The prohibition, in the Bill as introduced, on the Welsh Ministers modifying this directly-applicable EU law – including much of the law relating to the Common Agricultural Policy and Structural Funds – was the biggest difference between UK and Welsh Ministerial powers. The amendments will also allow the Welsh Ministers to delegate some powers to make detailed legislative rules to other bodies (potentially such as Natural Resources Wales). However, the Welsh Ministers will remain unable to make changes in areas in which the Assembly's competence is restricted under clause 11, and some other restrictions on the Welsh Ministers' powers have not been lifted.

Conclusion 7. Whilst Objective 2 has not been met in full, considerable progress towards the objective has been made.

Objective 3: Ensure powers available to the Welsh Ministers under the Bill are strictly limited and far more tightly drawn than those currently set out in the Bill

63. In our view, unless the Bill was amended to place appropriate constraints on Ministerial powers, it risked unbalancing the power dynamic between the executive and the legislature at both a UK and devolved level.

64. However, Government amendments agreed in both the Commons and the Lords will introduce a number of procedural safeguards that were not in the original drafting. Some of these apply to both UK and Welsh Ministers, while others apply only to UK, or UK and other devolved executives.

65. Amendments restricting Ministerial powers were made to the Bill by the UK Government at Commons Committee Stage. The changes made by the UK Government impose requirements on UK Ministers to make explanatory statements in relation to regulations or draft regulations under Clause 7, 8 or 9.

66. The statements will be published and must, in particular, deal with the appropriateness of the regulations and their relationship to equalities legislation as well as providing specified further information. However, this duty to make explanatory statements does not extend to the Welsh Ministers.

67. The House of Commons agreed amendments tabled by the UK Government at Commons Report Stage, restricting the scope of ministerial powers under clause 7, to rectify “deficiencies” in retained EU law, by making the list of deficiencies subject to this power exhaustive rather than illustrative (although the amendments also gave the UK Government a power to add to the list by separate regulations). This narrowing of scope applies to the Welsh Ministers’ equivalent powers also.

68. Amendments have also been agreed during Lords Report Stage to further restrict the exercise of powers by UK Ministers, and the Welsh Ministers’ equivalent powers. For example, their powers cannot be exercised to establish a new public authority or impose or increase fees.

Conclusion 8. Whilst Objective 3 has not been met in full, we recognise that Ministerial powers have been more tightly drawn. However, they remain broad and the Bill delegates significant powers to the executive with limited controls.

Objective 4: Prevent UK Ministers from amending aspects of EU-derived law that affect Wales unless reserved

69. As stated in relation to Objective 2, the most constitutionally appropriate and efficient route to correcting EU law is to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

70. Our fourth objective sought to remove the concurrent powers granted to UK Ministers to allow them to amend EU-derived domestic legislation in devolved areas.

- 71.** Our argument for this is that, as a mature legislature, the Assembly should not, in normal circumstances, be seeking UK Parliamentary time to address issues for which it is responsible. Furthermore, the Assembly should be responsible for scrutinising legislation in devolved policy areas.
- 72.** In agreeing this position, we noted that this approach would not prevent the Welsh Government and UK Government from working together in the preparation of subordinate legislation.
- 73.** Amendments agreed to the Bill do not meet this objective. As a result, UK Ministers still have the power to amend retained directly applicable EU law in devolved areas even where no Clause 11 restrictions apply.
- 74.** However, the Intergovernmental Agreement states that the UK Government will “not normally” use its regulation-making powers under the Bill in Welsh devolved policy areas “without the agreement of the devolved administrations” i.e. the Welsh Government.
- 75.** In terms of legislation in devolved areas the Welsh Ministers cannot amend because of clause 11 restrictions, the Intergovernmental Agreement says that the UK Government commits to consulting the Welsh Government before making regulations.

Conclusion 9. Objective 4 has not been met. We are particularly disappointed that no provision for Assembly consent has been made for circumstances where the UK Government wishes to use its regulation-making powers in Welsh devolved policy areas.

Objective 5: Prevent UK or Welsh Ministers amending the Government of Wales Act using delegated powers

- 76.** As a point of constitutional principle, the foundation statutes for devolution in Wales should only be amended through the use of primary legislation or, in limited circumstances, through the use of a Section 109 Order (as provided for in the Government of Wales Act 2006).
- 77.** The amendments agreed at House of Lords Report stage meet this objective in part: UK Ministers will not be able to amend the Government of Wales Act 2006 using their powers under Clause 7 of the Bill (and Clause 8 of the Bill is to be deleted, along with the powers it would have supplied). However, it would still be open to UK Ministers to amend the Government of Wales Act 2006 if this was “appropriate” for implementing the Withdrawal Agreement, or under Clause 17 (power to make consequential etc. amendments). The power under Clause 9

remains of concern, as it is not inconceivable that the UK Government could argue that changes to the reservations or restrictions in Schedules 7A or 7B were “appropriate” in order to safeguard implementation of the Withdrawal Agreement.

78. These agreed changes will also apply to the Welsh Ministers’ equivalent regulation making powers in Schedule 2. As a result, Welsh Ministers will be unable to use their delegated powers to amend Government of Wales Act 2006, unless they could claim that to do so was “appropriate” for implementing the Withdrawal Agreement and the change fell within devolved competence, as defined in the relevant part of the Bill.

Conclusion 10. Objective 5 has not been met in full. Significant progress towards protecting the Government of Wales Act 2006 has been made. However, concerns remain around the UK Government’s powers to implement the Withdrawal Agreement.

Objective 6: Ensure that the Assembly can set its own scrutiny arrangements

79. As a point of constitutional principle, it is for the Assembly to determine the scrutiny arrangements for secondary legislation flowing from powers granted to Welsh Ministers.

80. The Constitutional and Legislative Affairs Committee is leading on developing the detail of the arrangements that should apply. The Assembly unanimously agreed to the key principles which should underpin these arrangements.

81. Amendments to the Bill have been made to give effect, but only in part, to the resolution of the Assembly.

82. The Assembly could set its own scrutiny arrangements in an Assembly Act but there are practical reasons why this may not be possible in the time available for putting in place Brexit-related legislation.

Conclusion 11. We believe that, in the circumstances, giving effect to the Assembly’s preferred scrutiny arrangements through amendments to the Bill offered a pragmatic compromise, but does not detract from our commitment to the principle behind our sixth objective.

Conclusion 12. We are disappointed that the Welsh and UK Governments chose not to implement the full extent of the scrutiny arrangements agreed

unanimously by the Assembly on 7 March 2018²¹, and expect Business Committee to remedy this in its proposals for changes to Standing Orders.

²¹ Record of Proceedings 7 March 2018.

Interparliamentary relations

Working with committees in the other legislatures of the UK has been a longstanding aspect of European scrutiny. Considering the implications of Brexit has intensified and broadened the level of engagement between legislatures. There is an opportunity to build on existing relationships to co-ordinate scrutiny of common UK policy frameworks, to the benefit of all the constituent parts of the United Kingdom.

Subsidiarity and the scrutiny of draft European Union legislation

83. Committees from across the UK's five legislative chambers with responsibility for considering the more formal aspects of European scrutiny have shared information and established mechanisms for the reporting information to one another in particular circumstances.

84. This engagement occurs at official-to-official level, through meetings of the European Committees of the United Kingdom (ECUK) Forum and through exchange of correspondence in more formal circumstances.

85. Currently, the formalised aspect of this relationship relates to the ability of National Parliaments (under Article 5 of the Treaty on European Union ('the TEU')) to issue a reasoned opinion when it has subsidiarity concerns.²² In the case of the United Kingdom, the UK Parliament is the 'National Parliament' for the purposes of the treaty.

86. However, a protocol on the application of the principle of subsidiarity, annexed to the TEU, states that:

"It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers."²³

87. The mechanism established in the United Kingdom involves communication between legislatures should a subsidiarity concern arise.

²² Consolidated version of the Treaty on European Union, Official Journal C 326, 26 October 2012

²³ Article 6 of Protocol (no 2) on the application of the principles of subsidiarity and proportionality, TEU, 2012

88. Committees in the devolved legislatures sift draft European Union legislation to check for any subsidiarity issues relating to their devolved areas of competence.

89. In the case of the Assembly, Standing Order 21.9 provides:

“If a responsible committee considers that draft European Union legislation does not comply with the principle of subsidiarity it may make written representations, on behalf of the Assembly, to the relevant committee of the House of Commons or the House of Lords with a view to having those representations incorporated into a reasoned opinion to be submitted by that committee to the relevant European Union authorities.”²⁴

90. We are about to begin an inquiry into how these arrangements might need to change with the UK’s exit from the EU, with a view to reporting in the autumn.

Conclusion 13. In the context of this report, and recent developments at an intergovernmental level in relation to clause 11, we observe that precedent exists for a more formalised notification process between legislatures.

Conclusion 14. In relation to the new clause 11 arrangements, an agreement between relevant committees of the five UK legislative chambers to provide each other with relevant information in relation to the process would circumvent the need to rely solely on governmental sources to inform this interparliamentary process.

Interparliamentary Forum on Brexit

91. The Interparliamentary Forum on Brexit (‘the Forum’) met for the first time in October 2017. It has met twice since then, in January and March 2018. Future meetings are expected on a quarterly basis.

92. The membership of the Forum includes committees with interests in Brexit, European affairs, constitutional affairs and/or the technical scrutiny of subordinate legislation and delegated powers.

93. The Forum will provide a useful opportunity to explore the role legislatures can play in enhancing the scrutiny of the new Clause 11 provisions.

94. We are aware of the important work that the Constitutional and Legislative Affairs Committee (‘the CLA Committee’) has undertaken in the area of inter-

²⁴ National Assembly for Wales, Standing Orders, March 2018

institutional working, particularly its February 2018 report *UK Governance post-Brexit*.²⁵ The Chair of the CLA Committee, Mick Antoniw AM, is a member of the Forum alongside our Chair, David Rees AM.

Conclusion 15. Our Chair will raise the conclusions we draw in this section of the report for discussion at the next meeting of the Interparliamentary Forum on Brexit.

²⁵ National Assembly for Wales, Constitutional and Legislative Affairs Committee. *UK Governance post-Brexit*, February 2018.

Assembly scrutiny

There may be merit in Assembly Committees considering collectively the establishment of a scrutiny framework for these regulations to ensure both technical scrutiny and policy knowledge are brought to bear in the timescales available.

95. Our remit includes a duty to consider the co-ordination of activity relating to Brexit across Assembly committees.

96. We have not had time to consider this co-ordination in detail, as it relates to future scrutiny of the new clause 11 provisions, and we have not had an opportunity to liaise with other Assembly committees.

Conclusion 16. We believe that there is merit in Assembly Committees considering collectively the establishment of a scrutiny framework for these regulations to ensure both technical scrutiny and policy knowledge are brought to bear in the timescales available.

Future UK Government engagement

We hope that the importance of engaging with devolved legislatures at an early stage is better understood by the UK Government.

97. Throughout our work on the Bill, we have consistently pointed to the fact that many of our concerns with the drafting of the Bill could have been addressed through early and meaningful engagement with the Assembly and its committees.

98. This important role of devolved legislatures appeared to have been acknowledged by the UK Government during debates on the Bill in Parliament and engagement, with this committee at least, has improved to an extent.

Conclusion 17. We hope that the UK Government will seek to engage meaningfully with the Assembly, through its committees, at an early stage when it comes to future Brexit legislation that affects Wales and, in particular, the proposed Withdrawal Agreement and Implementation Bill.