

Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:

Committee Room 1 – Senedd

Meeting date: 16 October 2017

Meeting time: 14.30

For further information contact:

Gareth Williams

Committee Clerk

0300 200 6362

SeneddCLA@assembly.wales

1 Introduction, apologies, substitutions and declarations of interest

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

(Pages 1 – 2)

CLA(5)–23–17 – Paper 1 – Statutory instruments with clear reports

Negative Resolution Instruments

2.1 SL(5)128 – The Education (Supply of Information about the School Workforce) (Wales) Regulations 2017

(Pages 3 – 12)

CLA(5)–23–17 – Paper 2 – Correspondence relating to SL(5)128 – The

Education (Supply of Information about the School Workforce) (Wales)

Regulations 2017

CLA(5)–23–17 – Legal advice note

2.2 SL(5)138 – The Marine Licensing (Delegation of Functions) (Wales) Order 2017

2.3 SL(5)140 – The Education (Hazardous Equipment in Schools) (Removal of Restrictions on Use) (Wales) Regulations 2017



3 Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

3.1 SL(5)130 – The Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2017

(Pages 13 – 22)

CLA(5)–23–17 – Paper 3 – Order

CLA(5)–23–17 – Paper 4 – Explanatory Memorandum

CLA(5)–23–17 – Paper 5 – Report

Composite Negative Resolution Instrument

3.2 SL(5)139 – The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017

(Pages 23 – 29)

CLA(5)–24–17 – Paper 6 – Order

CLA(5)–24–17 – Paper 7 – Explanatory Memorandum

CLA(5)–24–17 – Paper 8 – Report

4 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 but have implications as a result of the UK exiting the EU

Affirmative Resolution Instruments

4.1 SL(5)137 – The Unauthorised Deposit of Waste (Fixed Penalties) (Wales) Regulations 2017

(Pages 30 – 31)

CLA(5)–23–17 – Paper 9 – Report

5 European Union (Withdrawal) Bill 2017

(Pages 32 – 54)

CLA(5)–23–17 – Paper 10 – Letter from the Chair of the External Affairs and Additional Legislation Committee

CLA(5)–23–17 – Paper 11 – Letter from the Chair of the External Affairs and Additional Legislation Committee, Annex 1

CLA(5)–23–17 – Paper 12 – Letter from the Chair of the External Affairs and Additional Legislation Committee, Annex 2

CLA(5)–23–17 – Paper 13 – Letter from the Chair of the External Affairs and Additional Legislation Committee to MPs

6 Paper to note

(Page 55)

CLA(5)–23–17 – Paper 14 – Letter from the Secretary of State for Wales, Stronger Voice for Wales Inquiry

7 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

8 Stronger Voice for Wales

9 Scrutiny of delegated powers in the EU (Withdrawal) Bill: Inquiry

(Pages 56 – 61)

CLA(5)–23–17 – Paper 15 – Scrutiny of delegated powers in the EU (Withdrawal) Bill: Approach to the inquiry

CLA(5)–23–17 – Paper 15 Annex 1 – Letter to the Llywydd

CLA(5)–23–17 – Paper 15 Annex 2 – Letter from the Llywydd

Statutory Instruments with Clear Reports Agenda Item 2

16 October 2017

SL(5)128 – The Education (Supply of information about the School Workforce) (Wales) Regulations 2017

Procedure: Negative

These Regulations impose a duty on schools and local authorities to supply items of data about each member of the school workforce to the Welsh Government when requested to do so. They also specify which items of information should be provided, how they will be used and with whom they may be shared.

Parent Act: Education Act 2005

Date Made: 20 September 2017

Date Laid: 26 September 2017

Coming into force date: 31 October 2017

SL(5)138 – The Marine Licensing (Delegation of Functions) (Wales) Order 2017

Procedure: Negative

This Order delegates the exercise of certain functions of the Welsh Ministers as a licensing authority under the Marine and Coastal Access Act 2009 to the Natural Resources Body for Wales

Parent Act: Marine and Coastal Access Act 2009

Date Made: 27 September 2017

Date Laid: 4 October 2017

Coming into force date: 20 November 2017



SL(5)140 – The Education (Hazardous Equipment in Schools) (Removal of Restrictions on Use) (Wales) Regulations 2017

Procedure: Negative

These Regulations revoke the Education (Schools and Further and Higher Education) Regulations 1989 (“the 1989 Regulations”) (regulation 2). This removes the requirement in the 1989 Regulations—

(a) for maintained schools, non-maintained schools and further education institutions to obtain the Welsh Ministers approval before using for the purposes of instruction certain radioactive substances and certain apparatus; and

(b) for hostels for pupils with special educational needs to be inspected. There are no longer any such hostels in Wales and the requirement for inspection is therefore redundant.

These Regulations also remove the requirement in the Education (Special Educational Needs) (Approval of Independent Schools) Regulations 1994 for independent schools approved under section 347 of the Education Act 1996 to notify the Welsh Ministers in writing before using such substances and apparatus for the purposes of instruction (regulation 3).

Parent Acts: Education Act 1996; Education Act 2002

Date Made: 3 October 2017

Date Laid: 5 October 2017

Coming into force date: 1 November 2017



October 6, 2017

Constitutional and Legislative Affairs Committee
National Assembly for Wales

Dear Chairman, and Honourable Members of the Committee,

SI 2017 No. 940 (W. 233) The Education (Supply of Information about the School Workforce) (Wales) Regulations 2017¹

The Statutory Instrument (SI) No. 940 was laid on September 26 and will take effect on October 31, 2017. We kindly ask for your urgent consideration as it affects school staff in Wales, regards collecting individual personal confidential data at national level for indefinite third-party use.

Public consultation took place over a few weeks in January this year, and received 34 responses. The concerns summarised in the consultation response are yet to be addressed, including interference with the human right privacy, and how purposes will be communicated, real assessment compared to a statistical collection. Assurances given offer little, except to refer to law:

“With regards to concerns over data confidentiality, the Welsh Government reassures respondents that the data collection will be conducted in accordance with the Data Protection Act (DPA) (and the General Data Protection Regulation (GDPR) which will replace the DPA from May 2018) and that individual level data will remain secure throughout the collection and linking process.” (Govt.)

Concerns raised by unions in consultation responses included: *“The summary of proposals and the Regulations need to provide far more clarity and reassurance about how this data will be used, stored and communicated... We can see the benefits of an individual level census if the acknowledged concerns about the use of personal data are addressed. (Union).”²*

“a summary of information could be transferred to the Government, to satisfy statistical requirements without interfering with the individuals’ privacy. (Union).”

The data to be collected on a named basis are confidential and sensitive

(a) gender; (b) date of birth; (c) national insurance number; (d) full name; (e) ethnic group; (f) national identity; (g) official reference number assigned by the Council, as well as in depth data about salary, teaching, training and absence.³

Purposes of the planned impact are generalised and without clear limitation

From FOI⁴ we know that staff personal data in England are already given to third parties, without publication of how these data are handed out, who decides what is distributed for how long, or any oversight of retention, destruction or audit of uses. We believe that teachers should be told their personal confidential data are given to third parties, with a consent mechanism for identifying use.

There is no public transparency in England of how these data are used, and that they are kept on named basis, indefinitely. There is no register published, which and why organisations get the data.

Further, the wording in 7(h) is similarly broad to that of pupil data legislation in England, made in 2012, *“persons conducting research ...which may be expected to be of public benefit.”*

We are concerned that this will open up workforce data to commercial use without consent. This is not to be confused with the risk of data being onwardly sold, which although possible, is prohibited

¹ Statutory Instrument No. 940/2017 <https://www.legislation.gov.uk/wsi/2017/940/made>

² page 9/21 https://consultations.gov.wales/sites/default/files/consultation_doc_files/170814-sor-school-workforce-data-collection-en.pdf

³ See schedule 1 and schedule 2 https://consultations.gov.wales/sites/default/files/consultation_doc_files/170104-draft-regs-en.pdf

⁴ FOI on third party use of England teaching workforce data https://www.whatdotheyknow.com/request/agreement_between_dfe_and_dbs_an?nocache=incoming-1015769#incoming-1015769

in the SI. The legislation wording however does not prevent the use of companies for commercial data analytics for example. Public benefit is open ended, and while may be well intentioned, does not restrict commercial use, and has exposed children's confidential sensitive pupil data and digital identity to thousands of users.

In England 23 million+ children's identifiable, individual-level personal, confidential and sensitive data from the National Pupil Database are all given out to third parties⁵, including commercial businesses, Fleet Street⁶ and television journalists⁷, and charities.

Given current sensitivity around nationality and workforce, this data merits special attention, and not to be dismissed as simply wanting to know whether the workforce is Welsh or not, for example. For example, up to 1,500 children's personal confidential are being passed from school census data to the Home Office Casework Removals Team in the active⁸ MOU between the DfE and Home Office which only became public knowledge through FOI. The current school census guidance to schools fails to mention any use for immigration purposes⁹. What assurance is given that workforce data will not be used similarly and that any assurance will not change in future?

We believe that this SI needs review with regard to Human Rights, in particular how this will be effectively communicated to the workforce and whether or not any consent mechanism is in place.

Questions

1. Please can you publish the privacy impact assessment (a government mandatory minimum measure since 2008), ¹⁰ and any review of the effect on fundamental human rights? (As also recommended by the Office of the Information Commissioner in March 2017).¹¹
2. How will principles of Data Protection law of fair processing and communicating purposes, data minimisation and retention be met? What plans are there to tell the staff who will have access to their National Insurance and Salary data for example, as well as other personal data. A privacy notice is often insufficient to effectively communicate to individuals affected.
3. Will there be a published third-party register¹² which and why organisations access this data?
4. Is there any independent oversight of the decision making process for data access approvals?
5. We wish assurances that there will not be future access to this database for similar purposes of immigration enforcement such as identifying individuals including 'to effect removal' as current use of pupil data in England¹³, and guarantee of no change of purpose in future.

Thank you for your urgent consideration of review of this Statutory Instrument.

Sincerely,
Jen Persson
Director, defenddigitalme

⁵ Third party pupil data requests (note pre 2016 archived on page) <https://www.gov.uk/government/publications/national-pupil-database-requests-received>

⁶ The Times journalists data access request approved <https://www.whatdotheyknow.com/request/293030/response/723407/attach/5/The%20Times.pdf>

⁷ Newsnight access to sensitive identifying data <https://www.whatdotheyknow.com/request/293030/response/723407/attach/10/BBC%20Newsnight.pdf>

⁸ Number of children's data handed over are not transparent http://defenddigitalme.com/wp-content/uploads/2017/06/HomeOffice_pupilaccess_tracker.pdf

⁹ 2017-18 school census guidance <https://www.gov.uk/government/publications/school-census-2017-to-2018-guide-for-schools-and-las>

¹⁰ See Cabinet Office, Cross Government Actions: Mandatory Minimum Measures, 2008, Section I, 4.4: All departments must "conduct privacy impact assessments so that they can be considered as part of the information risk aspects of Gateway Reviews".

¹¹ ICO response <https://ico.org.uk/media/about-the-ico/consultations/2013679/school-workforce-data-collection-ico-response-20170303.pdf>

¹² A third party use of pupil data in England is published <https://www.gov.uk/government/publications/national-pupil-database-requests-received>

¹³ DfE Home Office pupil data sharing Strategic purposes paragraphs 15.1.1 and 15.1.2 <https://www.whatdotheyknow.com/request/377285/response/941438/attach/5/20161016%20DfE%20HO%20MoU%20redacted.pdf>

By virtue of paragraph(s) vi of Standing Order 17.42

Document is Restricted

Agenda Item 3.1

W E L S H S T A T U T O R Y
I N S T R U M E N T S

2017 No. 946 (W. 235)

CONSTITUTIONAL LAW

**The Government of Wales Act 2006
(Budget Motions and Designated
Bodies) Order 2017**

EXPLANATORY NOTE

(This note is not part of the Order)

This is the second Order designating specified bodies in relation to the Welsh Ministers for the purpose of including within a Budget motion the resources expected to be used by those bodies.

Other specified bodies have previously been designated by the Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2016 (S.I. 2016/1096 (W. 260)).

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to this Order. As a result, it was not considered necessary to carry out a regulatory impact assessment as to the likely costs and benefits of complying with this Order.

W E L S H S T A T U T O R Y
I N S T R U M E N T S

2017 No. 946 (W. 235)

CONSTITUTIONAL LAW

**The Government of Wales Act 2006
(Budget Motions and Designated
Bodies) Order 2017**

Made 26 September 2017

*Laid before the National Assembly
for Wales* 28 September 2017

Coming into force 11 December 2017

The Welsh Ministers make the following Order in exercise of the powers conferred on them by section 126A(2) and (3) of the Government of Wales Act 2006(1).

In accordance with section 126A(6) of that Act the Welsh Ministers have consulted, where they think it appropriate, the Treasury.

Title and commencement

1.—(1) The title of this Order is the Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2017.

(2) This Order comes into force on 11 December 2017.

Designations

2. A body which is listed in the Schedule to this Order is a designated body for the purposes of section 126A of the Government of Wales Act 2006 in relation to the Welsh Ministers(2).

(1) 2006 c. 32. Section 126A was added by section 44(2) of the Constitutional Reform and Governance Act 2010 (c. 25).

(2) By virtue of section 124(3) of the Government of Wales Act 2006 the Welsh Ministers are a “relevant person” for the purposes of section 126A of that Act.

Mark Drakeford

Cabinet Secretary for Finance and Local Government,
one of the Welsh Ministers
26 September 2017

SCHEDULE Article 2
Designated Bodies

DCFW Limited

Innovation Point Limited

Life Sciences Hub Wales Limited

Public Health Wales National Health Service Trust⁽¹⁾

Sector Development Wales Partnership Limited

Velindre National Health Service Trust⁽²⁾

Welsh Ambulance Services National Health Service
Trust⁽³⁾

WGC Holdco Limited

⁽¹⁾ Established by S.I. 2009/2058 (W. 177), article 2.

⁽²⁾ Established by S.I. 1993/2838, article 2.

⁽³⁾ Established by S.I. 1998/678, article 2.

EXPLANATORY MEMORANDUM TO THE GOVERNMENT OF WALES ACT 2006 (BUDGET MOTIONS AND DESIGNATED BODIES) ORDER 2017

This Explanatory Memorandum has been prepared by the Office of the First Minister and Cabinet Office Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2017.

Mark Drakeford
Cabinet Secretary for Finance and Local Government

28 September 2017

1. Description

1.1 The Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2017 (“the Order”) designates bodies in relation to the Welsh Ministers. The purpose of such designation is so that information relating to the resources expected to be used by such bodies can be included within a Budget Motion.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 Section 126A(9) and (10) of the Government of Wales Act 2006 (“GOWA 2006”) provide for the Order to be subject to either the affirmative or the negative resolution procedure.

2.2 The Cabinet Secretary for Finance and Local Government is of the view that the Order be subject to the negative resolution procedure as there are no factors indicating the use of the affirmative procedure. The Order designates bodies for the purposes of including within a Budget motion, information relating to the resources expected to be used by those bodies. Inclusion of the resources of the designated bodies within the Budget Motion will minimise alignment discrepancies between the Budget, Budget Motion and consolidated accounts, but will have no effect on the resource limits of those bodies. The subject matter of the Order can therefore be regarded as administrative as the effect on the Budget will be presentational.

3. Legislative background

3.1 This Order is made by the Welsh Ministers in exercise of the powers conferred on them by section 126A(2) and (3) GOWA 2006. This is the second Order made by the Welsh Ministers under these powers. The first Order was made in November 2016 (S.I. 2016/1096 (W.260)).

3.2 In accordance with section 126A(6) GOWA 2006, the Welsh Ministers have consulted, where they think it appropriate, with HM Treasury.

4. Purpose and intended effect of the legislation

Background

4.1 In March 2015, the Finance Committee of the Fourth Assembly recommended, as part of its inquiry into Best Practice Budget Processes, that “the Welsh Government work closely with the Wales Audit Office to help ensure that the alignment of the budget and the Welsh Government’s

accounts with the Treasury's budget boundary is completed timeously and successfully".

4.2 Under current arrangements, there are 3 main documents which set out the financial position of the bodies funded by the Welsh Consolidated Fund;

- the Budget to plan, monitor and control income and expenditure;
- the Annual Budget Motion (ABM) to gain Assembly approval for income and expenditure; and
- after the year end, the Consolidated Accounts, to report and account for income and expenditure.

The boundaries of each of these documents i.e., the income and expenditure of the bodies which are included, differ for each causing misalignment and, accordingly can make it difficult to understand the links and inter-relationships between them. This can lead to a lack of transparency and understanding of the Welsh Government public expenditure.

4.3 The Annual Budget Motion voted by the National Assembly for Wales was aligned to the Welsh Government core account boundary. This was a different boundary to that used for the Welsh Government Consolidated Accounts and was subsequently different again to the boundary used for the Treasury Budget. The first phase of alignment partially corrected these differences.

4.4 Alignment ensures, so far as is reasonably practical, that the Welsh Government's consolidated accounts use the same boundary for the Annual Budget Motion as that used by HM Treasury for the control of public expenditure. Alignment will mean that the scope of the main control mechanisms is consistent.

Purpose

4.5 The Order designates specified bodies in relation to the Welsh Ministers for the purpose of including within a Budget motion the resources expected to be used by those bodies.

Effect

4.6 The designation of the bodies in the Order will allow closer alignment of the ABM to the existing Welsh Government Consolidated Accounts Boundary. The resources expected to be used by the designated bodies can therefore be included within the ABM replacing the cash funding they receive.

- 4.7 The Order, therefore, aligns the HM Treasury budget boundary to the Budget Motion and the Welsh Government Consolidated Accounts, enabling expenditure to be more easily tracked through the Budget Motion and Consolidated Accounts process. This will provide the benefits of increased transparency and understanding of Welsh public expenditure, making it easier for the Assembly, and the wider public, to understand and challenge spending plans and outturn. In turn, this should contribute to better involvement and awareness of public expenditure in Wales, therefore, indirectly contributing to well-being goals.
- 4.8 The Order leads to a more efficient approach to the impact on scrutiny of the ABM by the Finance Committee and the consolidated accounts by the Public Accounts Committee as variances between budget and outturn will be more consistent. In addition, the number of reconciliations required within the schedules supporting the ABM will be reduced.
- 4.9 There would be no impact on the MEG budgets and limited impact on preparation of the consolidated accounts.
- 4.10 The Order does not amend or consolidate any other piece of legislation.

5. Consultation

- 5.1 The Welsh Government undertook a targeted consultation with the bodies proposed to be included in the Order, from 8th May 2017 to 31st July 2017.
- 5.2 Those responding to the consultation were generally supportive and there were no objections to the principle of designation and alignment.
- 5.3 As a result of the consultation, the Order contains bodies that are considered for consolidation within the WG Consolidated Accounts and are classified to the Central Government Sector.
- 5.5 HM Treasury were consulted in accordance with section 126A(6) GOWA 2006, where a complete list of bodies proposed to be designated was provided.
- 5.6 A third phase of alignment is planned for 2019/20.

6. Regulatory Impact Assessment (RIA)

- 6.1 A Regulatory Impact Assessment has not been prepared to accompany the Order; it is not expected to impose any cost on business, local government or the voluntary sector. This is consistent with the Welsh Ministers' Regulatory Impact Assessment Code for Subordinate Legislation.

6.2 Bodies to be designated in the Order already form part of the Welsh Government budgetary controls and so Welsh Government Groups are already monitoring in-year spending. In addition the Whole of Government Accounts exercise requires the collection of similar outturn data from all public bodies, there should therefore be no material impact on the public sector.

SL(5)130 - The Government of Wales Act 2006 (Budget Motions and Designated Bodies) Order 2017

Background and Purpose

This is the second Order designating specified bodies in relation to the Welsh Ministers for the purpose of including within a Budget motion the resources expected to be used by those bodies.

Procedure

Negative.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

One point is identified for reporting under Standing Order 21.3 in respect of this instrument, in that the Cabinet Secretary for Finance and Local Government had a choice of procedure under sections 126A(9) and 126A(10) and has chosen the negative resolution procedure, which appears to be appropriate (Standing Order 21.3(ii)).

Implications arising from exiting the European Union

No implications arising from exiting the European Union have been identified for reporting under Standing Order 21.3 in respect of this instrument.

Government Response

No government response is required.

Legal Advisers

Constitutional and Legislative Affairs Committee

9 October 2017



 STATUTORY INSTRUMENTS

2017 No. 959

NATIONAL HEALTH SERVICE, ENGLAND & WALES

**The NHS Business Services Authority (Awdurdod
Gwasanaethau Busnes y GIG) (Establishment and Constitution)
(Amendment) Order 2017**

<i>Made</i>	- - - -	<i>3rd October 2017</i>
<i>Laid before Parliament</i>		<i>4th October 2017</i>
<i>Laid before the National Assembly for Wales</i>		<i>4th October 2017</i>
<i>Coming into force</i>	- -	<i>1st November 2017</i>

The Secretary of State, in relation to England, and the Welsh Ministers, in relation to Wales, in exercise of the powers conferred on the Secretary of State by sections 28(2) and 273(1) of the National Health Service Act 2006(a), and the Welsh Ministers by sections 22(2), and 204(1) of the National Health Service (Wales) Act 2006(b) make the following Order.

Citation, commencement and extent

1. This Order—

- (a) may be cited as the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017;
- (b) comes into force on 1st November 2017;
- (c) extends to England and Wales.

Amendment

2. In the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005(c), at article 3 (functions of the Authority), omit paragraphs (h), (i), (j) and (o).

Signed by authority of the Secretary of State for Health.

O'Shaughnessy

-
- (a) 2006, c.41 Section 271 of the National Health Service Act 2006 provides that the functions of a Minister of the Crown under the Act exercised in this Order are exercisable only in relation to England.
 - (b) 2006, c.42. Section 202 of the National Health Service (Wales) Act 2006 provides that functions of the Welsh Ministers under the Act are exercisable only in relation to Wales.
 - (c) SI 2005/2414, to which relevant amendments were made by SI 2006/632. Both the 2005 and the 2006 Orders now have effect as if made under section 28 of the National Health Service Act 2006 in relation to England, and section 22 of the National Health Service (Wales) Act 2006 in relation to Wales, by virtue of section 4 of, and paragraphs 1 and 2 of Part 1 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006 (c. 43).

3rd October 2017

Parliamentary Under-Secretary of State,
Department of Health

Vaughan Gething
Cabinet Secretary for Health, Well-being and Sport, one of the Welsh Ministers
2nd October 2017

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005 (“the principal Order”) in relation to both England and Wales. It removes the obligation on the NHS Business Services Authority (“the BSA”) subject to and in accordance with directions of the Secretary of State to undertake certain of his counter fraud and security management functions in relation to the health service in England. It also removes provision in respect of certain counter fraud functions of the Welsh Ministers that the BSA was required under the principal Order to carry out in relation to the health service in Wales, subject to and in accordance with such directions as might be given by the Welsh Ministers (successors to the National Assembly for Wales for these purposes, by virtue of section 162 of and paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c. 32)).

Article 2 amends article 3 (functions of the BSA) in the principal Order to omit reference to the functions concerned.

A separate statutory instrument, the NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017, makes provision for the establishment of a new body to undertake certain counter fraud functions of the Secretary of State in relation to the health service in England, and includes provision for continuity in relation to the exercise of functions by the new body which were exercisable by the BSA prior to 1st November 2017.

An impact assessment has not been prepared for this instrument as no impact on the costs of business or the voluntary sector is foreseen.

Explanatory Memorandum to ‘The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017.

This Explanatory Memorandum has been prepared by Health & Social Services Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Cabinet Secretary/Minister’s Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of ‘The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017’.

Vaughan Gething AM,

Cabinet Secretary for Health, Well-being and Sport

4 October 2017

1. Description

The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017 (“the Order”) amends The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005 (SI 2005/2414), which established the NHS Business Services Authority (“the NHSBSA”), to remove the NHSBSA’s counter fraud and security management functions in relation to the health service in England and its counter fraud functions in relation to the health service in Wales.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

The NHSBSA is a cross border Special Health Authority that was established by the Secretary of State and the National Assembly for Wales. Both The NHS Business Services Authority (Awdurdod Gwasanaethau y GIG) (Establishment and Constitution) Order 2005’ and The NHS Business Services Authority (Awdurdod Gwasanaethau y GIG) (Establishment and Constitution) (Amendment) Order 2006 (SI 2006/632), were Composite Instruments, made by the Secretary of State and the National Assembly for Wales. It is therefore appropriate that the Order is made as a composite order.

As a Composite Order, the Instrument will not be bilingual and this position has been confirmed previously by the First Minister, to the Constitutional and Legislative Affairs Committee.

3. Legislative background

The Order amends ‘The NHS Business Services Authority (Establishment and Constitution) Order 2005’ (“the principal order”), which established the NHS BSA. The principal Order was amended by ‘The NHS Business Services Authority (Establishment and Constitution) (Amendment) Order 2006’ (“the 2006 Order”).

The amendments made by the 2006 Order required the NHSBSA to exercise the Secretary of State’s counter fraud and security management functions in relation to the health service in England, and certain counter fraud functions of Welsh Ministers in relation to the health service in Wales, subject to and in accordance with directions that might be given by the Secretary of State, in relation to England, and Welsh Ministers, in relation to Wales.

The counter fraud functions that the NHSBSA could exercise in relation to Wales, if directed to do so by the Welsh Ministers, are set out in article 3(j) and are functions in connection with:

“(j) the prevention and detection of fraud in relation to general dental services contracts, personal dental services agreements, pharmaceutical services and local pharmaceutical services in Wales;”

The Secretary of State issued Directions to the NHSBSA to exercise the Secretary of States’ counter fraud and security management functions in relation to the health service in England and funded the establishment of NHS Protect (a division of the NHSBSA) to carry out those functions.

In relation to Wales, there are no current directions to the NHSBSA given by Welsh Ministers requiring them to carry out functions in connection with the counter fraud activities specified at article 3(j) to the principal Order. Instead, the Welsh Ministers have entered into arrangements with the NHSBSA, pursuant to section 83 of the Government of Wales Act 2006, which deal with the discharge of certain counter fraud functions in relation to the health service in Wales. These arrangements are supported by an agreed work plan and an annually negotiated payment value.

Both the principal Order and the 2006 Order were made under the National Health Service Act 1977, but now have effect as if made under section 28 of the National Health Service Act 2006 and section 22 of the National Health Service (Wales) Act 2006, by virtue of section 4 of and paragraph 1, Part 1 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006.

The Secretary of State has the power to make this Order pursuant to sections 28(2) and 273(1) of the National Health Service Act 2006 (c.41). The functions formerly exercised by the Assembly in relation to establishing, and changing the functions of, Special Health Authorities are now functions of the Welsh Ministers by virtue of sections 22(2) and 204(1) of the National Health Service (Wales) Act 2006(c.42), pursuant to which the Welsh Ministers have the power to make this Order.

This Order is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

The Secretary of State for Health (England) has made the decision to establish, from the 1 November 2017, a new (England only) Special Health Authority to provide counter fraud services to the health service in England.

The Order amends the principal Order to remove the counter fraud functions for England (set out at articles 3(h), (i) and (o) of the principal Order) from the NHSBSA. A separate Order made by the Secretary of State for Health transfers the associated staff employed by the NHS Protect Division of the NHSBSA (which is funded by England) to the new NHS Counter Fraud Authority (“the NHSCFA”). From the 1 November 2017, the NHSCFA will be required to exercise the Secretary of State’s counter fraud functions in relation to the health service in England.

As a result of the Secretary of State’s decision to remove the counter fraud functions in relation to England from the NHSBSA and to transfer the associated staff to the new NHSCFA; NHS Protect (the counter fraud division of the NHSBSA) will cease to exist. Therefore, from the 1 November 2017, the NHSBSA will have no staffing resource to perform the specialised counter fraud functions in relation to Wales and the current section 83 arrangement between the Welsh Ministers and the NHSBSA will cease.

The Order therefore also amends the principal Order to remove the NHSBSA’s counter fraud functions for Wales which are set out at article 3(j). On the creation of the new NHSCFA by the Secretary of State, Welsh Ministers will make new arrangements on the 1 November 2017 under section 83 of the Government of Wales Act 2006 with that new authority, for the discharge of

certain counter fraud support functions in relation to the health service in Wales. These arrangements will be supported by an agreed work plan and an annually negotiated payment value. The services that will be provided under the section 83 arrangement with the new NHSCFA will replicate the counter fraud services that are currently provided in relation to Wales under the current section 83 arrangement with the NHSBSA. Therefore, there will be no loss of service to Welsh Ministers or to the NHS in Wales.

5. Consultation

Consultation on this amendment has been undertaken with key stakeholders: the NHSBSA, Velindre NHS Trust who host the NHS Counter Fraud Services Wales team (a division of the NHS Shared Services Partnership) and the Local Health Boards and Trusts in Wales as employers of the Local Counter Fraud Specialists.

No comments on the proposal have been received.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has not been undertaken as this subordinate legislation will not impose any material costs or savings on the public, private or charities and voluntary sector. The annual charge for counter fraud functions provided by the new NHS Counter Fraud Special Health Authority will be consistent with those currently charged to the Welsh Ministers by the NHSBSA.

This legislation has no impact on the statutory duties (sections 77 -79 GOWA 06) or statutory partners (sections 72-75 GOWA 06).

SL(5)139 - The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017

Background and Purpose

This **Order** amends the **NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005** ("the principal Order") in relation to both England and Wales.

This **Order** removes the obligation on the NHS Business Services Authority ("the BSA") subject to and in accordance with directions of the Secretary of State to undertake certain of his counter fraud and security management functions in relation to the health service in England.

This **Order** also removes provision in respect of certain counter fraud functions of the Welsh Ministers that the BSA was required under the principal Order to carry out in relation to the health service in Wales, subject to and in accordance with such directions as might be given by the Welsh Ministers.

Procedure

Composite negative

Technical Scrutiny

One point is identified for reporting under Standing Order 21.2 in respect of this composite instrument (which is laid before both the Assembly and the UK Parliament), in that it is not made in both English and Welsh (Standing Order 21.2(ix)).

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Implications arising from exiting the European Union

None.

Government Response

No government response is required.

Legal Advisers

Constitutional and Legislative Affairs Committee

04 October 2017



Agenda Item 4.1 Authorised Deposit of Waste (Fixed Penalties) (Wales) Regulations 2017

Background and Purpose

Section 33(1)(a) of the **Environmental Protection Act 1990** prohibits, subject to certain exemptions, the deposit of controlled waste or extractive waste in or on any land other than in accordance with an environmental permit. Contravention of section 33(1)(a) is an offence.

These **Regulations** amend the **Environmental Protection Act 1990** to insert a new section 33ZB. This enables Welsh waste collection authorities to issue a fixed penalty notice for small-scale fly-tipping offences. Such fixed penalty notices may be not less than £150 and not more than £400. If no amount is specified, the penalty will be £200. A discount may be applied for early payment.

Procedure

Affirmative

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Implications arising from exiting the European Union

These Regulations form part of "EU-derived domestic legislation" under clause 2 of the European Union (Withdrawal) Bill ("the Bill") as introduced, therefore these Regulations will be retained as domestic law and will continue to have effect in Wales after exit day.

The Bill gives the Welsh Ministers power to modify these Regulations in order to deal with deficiencies arising from withdrawal, subject to certain limitations (for example, the Welsh Ministers will not be able to use this power to do something that is inconsistent with modifications to "retained direct EU legislation" made by UK Ministers under the Bill).

The Bill will not give the Welsh Ministers (or the National Assembly for Wales) power to modify any retained direct EU legislation. Power to modify all retained direct EU legislation is given to UK Ministers; this includes the power to modify retained direct EU legislation in devolved areas without the need for the consent of the National Assembly for Wales or the Welsh Ministers.

Therefore, if UK Ministers use their powers to modify retained direct EU legislation, the power of the Welsh Ministers to modify these Regulations will be limited so that the Welsh Ministers cannot do anything that is inconsistent with the modification made by UK Ministers.

Government Response

No government response is required.





Agenda Item 5

Huw Irranca-Davies AM
Chair of the Constitutional and Legislative Affairs
Committee
National Assembly for Wales

11 October 2017

Dear Huw,

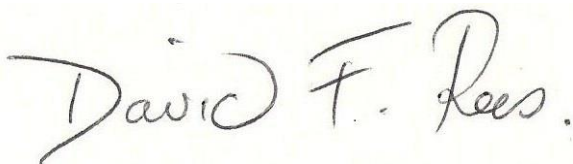
European Union (Withdrawal) Bill

Please find enclosed correspondence I have sent to Members of Parliament in relation to the European Union (Withdrawal) Bill.

It is based on our previous work on the associated White Paper and the subsequent evidence gathering that we conducted with you and the Constitutional and Legislative Affairs Committee.

I look forward to continuing discussions about how we might coordinate our work on the Bill.

Yours sincerely



David Rees AM

Chair of the External Affairs and Additional Legislation Committee



OBJECTIVE 1: REMOVE THE CLAUSE 11 RESTRICTION ON THE DEVOLUTION SETTLEMENT

EXPLANATION

Whilst the Committee believes that UK-wide frameworks will be necessary in a number of policy areas, it also believes that these 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, even on a time-limited basis.

Clause 11, as drafted, places a new and significant constraint on the devolution settlement and shifts the power dynamic around setting common UK frameworks firmly in the direction of the UK Government. The UK Government has provided no information on how these common frameworks will be agreed, the timetable for agreeing them, or how Parliament and the devolved legislatures will be involved in this process.

This is further complicated by the fact that the UK Government is also, in a number of European Union policy areas, acting as the government of England. This leads to a possible conflict of interest when it comes to imposing pan-UK structures.

Professor John Bell told the Committee that *“Clause 11 is drafted in such a way as to hide the extent of the restriction on the future competences of devolved assemblies.”*

The Institute for Welsh Affairs stated in evidence that:

“It is no-one’s interest for a Withdrawal Bill not to be enacted and provide a legal safety net when the UK leaves the jurisdiction of EU law. However, in its current form, this Bill fails to respect the power already granted to the elected governments in Scotland and Wales, and to respect the democratic legislatures in Northern Ireland, Wales and Scotland.”

Below, the Committee identifies some of the amendments that have already been tabled in the House of Commons that it believes could, if agreed, meet this Objective. Of course, other solutions might present themselves as further amendments are tabled. The Committee intends to monitor the progress of the Bill and may write to Members of Parliament again should alternative means of achieving this Objective be presented.

AMENDMENTS THAT COULD DELIVER OBJECTIVE 1

AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

House of Commons amendments 42, 164 and 165 (with consequential amendments 186 – 195) would appear to meet this objective, if agreed by Parliament.

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

EXPLANATION

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.

The narrower option (as provided for in the Bill) of restricting the involvement of the Welsh Ministers and the Assembly to correcting only EU-derived domestic legislation in devolved areas makes for a less efficient exit process. EU-derived domestic legislation includes UK domestic laws that have already been passed by the UK Parliament or devolved legislatures to implement requirements of EU law.

Welsh Government and Welsh public bodies are responsible for implementing EU law in devolved areas, and have been for 20 years. They hold the knowledge that is required to make sensible corrections to EU law in devolved areas. If UK Ministers were to seek to make corrections in devolved areas, they would need to seek the expert input of the Welsh Government and Welsh public bodies before drafting such corrections. Enabling the Welsh Ministers and the Assembly to correct all aspects of EU-derived law in devolved areas is a more efficient, and constitutionally appropriate, approach to correcting EU-derived law in devolved areas.

Cytûn provided the following assessment in evidence:

“Provisions which permit Ministers of the Crown, in their role as ministers with responsibility for matters in England which are devolved to the other nations, to amend the law in England while ministers in Wales are restricted from amending laws in the same areas in Wales. This creates an unfairness and inequality between the nations of the UK, and could endanger the smooth functioning of the UK single market, the maintenance of which is one of the key policy aims of the Bill.”

AMENDMENTS THAT COULD DELIVER OBJECTIVE 2

AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

House of Commons amendments 166 to 182 would appear to meet this objective, if agreed by Parliament.

OBJECTIVE 3: ENSURE POWERS AVAILABLE TO WELSH MINISTERS UNDER THE BILL ARE STRICTLY LIMITED AND FAR MORE TIGHTLY DRAWN THAN THOSE CURRENTLY SET-OUT IN THE BILL

EXPLANATION

We recognise the case for a power to be delegated to the Welsh Ministers, and that this power will need to be wide in terms of the legislation it applies to. However, **this power must be strictly limited to the uses for which it is intended.**

As many Members of Parliament noted in their contributions at Second Reading, the powers proposed for the executive in this Bill are extraordinarily wide and subject to limited controls.

Unless the Bill is amended to place appropriate constraints on these powers, it risks unbalancing the power dynamic between the executive and the legislature at both a UK and devolved level. In terms of the relationship between Parliament and UK Ministers, the Delegated Powers Scrutiny Committee in the House of Lords found that:

“The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers, allowing them to make major changes beyond what is necessary to ensure UK law works properly when the UK leaves the EU.”

The External Affairs Committee believes that the same is true for the powers proposed, and sought, for Welsh Ministers.

Whilst the Welsh and Scottish Governments have sought to align the powers they would receive under the Bill with those to be granted to UK Ministers, they have not sought to place any limitation on these powers.

They acknowledge, in the explanatory notes that accompany their suggested amendments, that:

“We are aware that there are significant concerns in Parliament about the very broad scope of the Henry VIII powers proposed in the Bill, and would be supportive of amendments which sought to define these more narrowly.”

The Learned Society for Wales submitted in writing that:

“The discretion given to Ministers of the Crown to adjust retained EU law is however very wide. Arguably, it is wider than is necessary. [...] The breadth of the discretion effectively makes it impossible to challenge its exercise other than by internal procedures within the UK Parliament.”

The Committee’s view is that the discretion offered to Welsh Ministers should be limited to only “essential” provision. A note on why the Committee has arrived at this formulation, rather than suggesting “necessary” (as has been proposed in other amendments tabled in the House of Commons) is provided after the committee suggested amendments for this Objective.

Whilst the Committee’s interest is in controlling the powers granted to Welsh Ministers, the mechanics of the Bill make it difficult to achieve without also placing limitations on those available to

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

UK Minsters (and other devolved Ministers). The Committee's preference is to restrict its suggested amendment to the powers delegated to Welsh Ministers. Where possible, this has been done, but has not been practically possible in all instances given how the Bill is constructed.

AMENDMENTS THAT COULD DELIVER OBJECTIVE 3

The Committee has drafted five amendments (numbered 1 – 6 below) that could achieve Objective 3, if tabled.

THE POWER TO MODIFY RETAINED EU LAW SO AS TO ENSURE IT OPERATES EFFECTIVELY AFTER WITHDRAWAL

Committee suggested amendment 1
--

Schedule 2, page 16, line 12, leave out from "as" to "to prevent" in line 13 and insert "is essential".

Committee suggested amendment 2
--

Schedule 2, page 16, line 18, leave out "they consider appropriate" and insert "is essential".
--

AMENDMENTS TO THE POWERS OF WELSH MINISTERS UNDER THE BILL TO MODIFY RETAINED EU LAW SO AS TO PREVENT BREACHES OF UK INTERNATIONAL OBLIGATIONS

Committee suggested amendment 3
--

Schedule 2, page 21, line 38, leave out from "as" to "to prevent" in line 39 and insert "is essential".

Committee suggested amendment 4
--

Schedule 2, page 21, line 43, leave out "they consider appropriate" and insert "is essential".
--

AMENDMENTS TO THE POWERS OF WELSH MINISTERS UNDER THE BILL TO MODIFY RETAINED EU LAW SO AS TO IMPLEMENT THE WITHDRAWAL AGREEMENT

Committee suggested amendment 5
--

Schedule 2, page 24, line 11, leave out from "as" to "for the purposes of" in line 12 and insert "is essential".
--

Committee suggested amendment 6
--

Schedule 2, page 24, line 16, leave out "they consider appropriate" and insert "is essential".
--

AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS TO LIMIT THE GENERAL SCOPE OF MINISTERIAL POWERS UNDER THE BILL, AND WHICH COULD WORK ALONG WITH THE AMENDMENTS SUGGESTED ABOVE

House of Commons amendments 1, 15 and 30-32.

NOTE ON THE USE OF "ESSENTIAL" RATHER THAN "NECESSARY" OR "APPROPRIATE"

The amendments suggested above would reduce the current wide discretion for using delegated legislation and limit it to those aspects which are truly unavoidable, by replacing the power to make "such provision as the Minister considers appropriate" with a power to make "such provision as is essential". The discretion is reduced in two ways. First, the word "essential" is, clearly, significantly narrower than the word appropriate. It does indeed focus on what is unavoidable; what must be

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

done in order to make EU-derived law operate effectively after Brexit. Secondly, the amendment would apply an objective test of what is essential, not the test of what a Minister “considers” essential. The latter necessarily includes an element of subjectivity, even with the proviso that the courts will always require Ministers’ consideration to be “reasonable”.

The amendment would limit the discretion for all devolved Ministers. This is simply dictated by the structure of the current Schedule 2.

Other amendments have already been tabled with the same purpose, as regards the powers of UK Government Ministers. However, those amendments seek to replace the word “appropriate” with the word “necessary”. The Committee is of the view that this would still give Ministers too wide a discretion in the context of these extremely broad-ranging Henry VIII powers, and in the extremely important constitutional context of Brexit. This is because the word “necessary” is capable of a range of meanings. True, it can be interpreted as meaning “essential”. But it has also been interpreted by the courts as meaning “proportionate” (notably, in a Human Rights and indeed an EU-law context). And “proportionate” is very little different from the current term, “appropriate”, which has attracted so much criticism from constitutional experts.

The term “essential” has been used in many pieces of Westminster legislation, e.g. the Consumer Rights Act 2015, the Investigatory Powers Act 2016 and the Financial Services and Markets Act 2000 (now amended). In the Acts mentioned, the term is used in a context involving an element of discretion – as it would be in the Bill. Clearly, therefore, Parliament has considered it an appropriate word where the aim is to strictly limit, but not eliminate, discretion.

OBJECTIVE 4: PREVENT UK MINISTERS FROM AMENDING ASPECTS OF EU-DERIVED LAW THAT AFFECT WALES UNLESS RESERVED

EXPLANATION

As stated against Objective 2 above, the External Affairs Committee believes that the most constitutionally appropriate and efficient route to correcting EU law would be 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.

As drafted, the Bill provides UK Ministers with exclusive powers to amend direct EU legislation in devolved areas and concurrent powers with Welsh Ministers to amend EU-derived domestic legislation in devolved areas.

Objective 2 (above) seeks to widen the powers available to Welsh Ministers so that Welsh Ministers can amend direct EU legislation in devolved areas.

This objective 4 seeks to remove the concurrent powers granted to UK Ministers to allow them to amend EU-derived domestic legislation in devolved areas.

This objective goes further than the Welsh Government amendments as it seeks to remove the possibility of UK Ministers amending EU-retained law in devolved areas.

As a mature legislature, the Assembly should not be seeking UK Parliamentary time to address issues for which it is responsible. The Assembly should be responsible for scrutinising legislation for which it is accountable to the electorate for delivering.

The External Affairs Committee believes that all devolved legislatures should be enabled to play their full part in the process of legislating for Brexit.

This approach would not prevent the Welsh Government and UK Government from working together in the preparation of subordinate legislation.

AMENDMENTS THAT COULD DELIVER OBJECTIVE 4

The Committee has drafted five amendments (numbered 7 – 11 below) that could achieve Objective 4, if tabled.

Committee suggested amendment 7
--

Clause 7, page 5, line 7, at end insert-
--

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 1 of Schedule 2.”.
--

Committee suggested amendment 8
--

Clause 8, page 6, line 30, at end insert-

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.
--

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

Committee suggested amendment 9

Clause 9, page 6, line 45 , at end insert -

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.

Committee suggested amendment 10

Clause 17, page 14, line 9, at end insert -

“() But the power in subsections (1) and (3) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.

Committee suggested amendment 11

Schedule 2, page 25, line 31, at end insert-

“PART []

WELSH MINISTERS – POWER TO MAKE CONSEQUENTIAL AND TRANSITIONAL PROVISION

- [] (1) The Welsh Ministers may by regulations make such provision as is essential in consequence of this Act.
- (2) The power to make regulations under sub-paragraph (1) may (among other things) be exercised by modifying any provision made by or under an enactment.
- (3) In sub-paragraph (2), “enactment” does not include-
- (a) primary legislation passed or made after the end of the Session in which this Act is passed, or
 - (b) any provision of the Government of Wales Act 2006.
- (4) The Welsh Ministers may by regulations make such transitional, transitory or saving provision as is essential in connection with the coming into force of any provision of this Act or the appointment of exit day.
- (5) No regulations may be made under this Part unless every provision of them is within the devolved competence of the Welsh Ministers for the purposes of Part 2.”.

SIMILAR AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

House of Commons amendment 89 is similar in intent, but drafted differently for technical reasons.

House of Commons amendments 161 -163 go some way towards the intention of the amendments above to clauses 7, 8 and 9. However, instead of removing UK Ministers’ powers to legislate for Wales in devolved policy areas, these amendments propose making those powers conditional on **the consent of the devolved Ministers** – not the consent of the legislatures.

OBJECTIVE 5: PREVENT UK OR WELSH MINISTERS AMENDING THE GOVERNMENT OF WALES ACT USING DELEGATED POWERS

EXPLANATION

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 “GoWA”).

The Committee has received evidence from a number of sources in relation to both the White Paper and the Withdrawal Bill that emphasise that it should not be possible for the Government of Wales Act 2006 (‘GoWA’) to be amended through the use of delegated powers.

The Withdrawal Bill would currently provide UK Ministers with a power to amend GoWA through the use of subordinate legislation.

The Welsh Government amendments restrict the ability of the UK Government to amend the GoWA through the use of subordinate legislation in most circumstances.

However, the Welsh and Scottish Government amendments allow UK Ministers the ability to amend the GoWA with the consent of Welsh or Scottish Ministers when it comes to implementing a withdrawal agreement.

As a minimum, this should require the consent of the Assembly. However, the more constitutionally appropriate route would be to remove this power altogether and this aligns with the approach taken to the Human Rights Act in the Bill.

AMENDMENTS THAT COULD DELIVER OBJECTIVE 5

The Committee has drafted ten amendments (numbered 12 to 21 below) that could achieve Objective 5, if tabled by a Member of Parliament.

UK MINISTERS

Committee suggested amendment 12

In clause 7, page 6, line 13, after "it," insert - "() modify the Government of Wales Act 2006,".
--

Committee suggested amendment 13

In clause 8, page 6, line 38, at end insert - ", or (e) modify the Government of Wales Act 2006."

Committee suggested amendment 14

In clause 9, page 7, line 8, at end insert - ", or (e) modify the Government of Wales Act 2006."
--

Committee suggested amendment 15

In clause 17, page 14, line 4, at end insert", the Government of Wales Act 2006."

SIMILAR AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

House of Commons amendments 158 and 159 are identical to the first two amendments above, save that the amendments drafted for the Committee's objective protect only the GOWA, not the Scotland Act; the latter has been left for the Scottish Parliament to consider.

House of Commons amendment 160 is similar to the third amendment above, but amendment 160 would allow UK Ministers to modify the GOWA in order to implement the withdrawal agreement, provided that the Welsh Ministers agreed to this. **This is constitutionally unacceptable**, as – for instance - the modifications could include adding new reservations into Schedule 7A to the GOWA: something which could normally only be done with the statutory consent of the Assembly under the procedure in section 109 of the GOWA, or the Assembly's legislative consent to a UK Parliamentary Bill.

WELSH MINISTERS

Committee suggested amendment 16

Schedule 2, page 20, line 25, after "Crown", insert "and excluding any provision that could be made under paragraph 7(2) of Schedule 7B to the Government of Wales Act 2006".

Committee suggested amendment 17

Schedule 2, page 20, line 41, after "5" insert "or".
--

Committee suggested amendment 18

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

Schedule 2, page 20, line 41, leave out “or 7”.

Committee suggested amendment 19

Schedule 2, page 20, line 43, at end insert-

“(f) the provision does not modify the Government of Wales Act 2006.”.

Committee suggested amendment 20

Schedule 2, page 22, line 10, at end insert -

“(f) amend, repeal or revoke the Government of Wales Act 2006.”.

Committee suggested amendment 21

Schedule 2, page 24, line 33, at end insert -

“(h) amend, repeal or revoke the Government of Wales Act 2006.”.

OBJECTIVE 6: ENSURE THAT THE ASSEMBLY CAN SET ITS OWN SCRUTINY ARRANGEMENTS

EXPLANATION

As acknowledged by the powers provided to the Assembly by Government of Wales Act 2006, it is for the Assembly alone, as the democratically accountable institution for Wales, to set its own procedures.

The Bill as drafted would undermine this constitutionally crucial principle by seeking to set, on behalf of the Assembly, the procedures that will apply to scrutiny of secondary legislation. This cannot be right.

In its report on the White Paper, the Committee stated:

“It would be of grave concern to us if the UK Government were to impose procedure on the Assembly, particularly as it has not consulted the Assembly about this.”

The UK Government has not responded to the Committee’s calls for it to engage constructively with the Assembly.

The Withdrawal Bill seeks to impose procedure on the Assembly without any consultation and in the absence of acknowledging the Committee’s view as expressed in its report on the White Paper.

The procedure the UK Government is proposing (principally for Parliament and, by extension, the devolved legislatures) falls far short of the Committee’s expectations, as expressed in its report on the White Paper.

Professor Bell suggested in writing that:

“The provisions on Scrutiny are inadequate. [...] The Bill does not recognise the magnitude of the task and therefore the need to have differently designed procedures to ensure adequate scrutiny. [...] The Bill assumes current procedures will be used, but that is simply not possible. Very serious attention needs to be given to how scrutiny will operate.”

The Learned Society for Wales wrote:

“Corresponding powers are conferred on devolved institutions by clause 10 and schedule 2, meaning that Welsh Government Ministers could also take Henry VIII powers under this Bill should they wish. It would of course be unsatisfactory to see this power replicated in Wales, without action to rebalance the scrutiny mechanisms available to the National Assembly for Wales. **Defects in parliamentary scrutiny ought not to be replicated in Cardiff.**” [Bold added for emphasis]

The External Affairs Committee believes that amendments that enables the Assembly to establish its own scrutiny arrangements would meet this objective.

The Committee has proposed an amendment that would allow the National Assembly for Wales to set scrutiny arrangements through its Standing Orders. The Committee sees this as enabling a

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

pragmatic option for establishing Assembly scrutiny arrangements quickly, but this would not preclude other avenues being pursued to establish scrutiny arrangements.

AMENDMENTS THAT COULD DELIVER OBJECTIVE 6

The Committee had drafted four amendments (numbered 22 to 25 below) that could achieve Objective 6, if tabled.

Committee suggested amendment 22

Schedule 7, page 39, line 42, leave out sub-paragraphs (6) and (7).

Committee suggested amendment 23

Schedule 7, page 41, line 15, leave out sub-paragraphs (10) and (11).

Committee suggested amendment 24

Schedule 7, page 45, line 40, at end insert-
--

“Scrutiny of regulations made by Welsh Ministers

- (1) A statutory instrument containing regulations under this Act of the Welsh Ministers must be made in accordance with the procedures from time to time set out in the Standing Orders of the National Assembly for Wales for the scrutiny of regulations under this Act.
- (2) Sub-paragraph (1) applies to statutory instruments made by the Welsh Ministers acting alone and to statutory instruments made by the Welsh Ministers acting jointly with a Minister of the Crown.
- (3) The Standing Orders of the National Assembly for Wales may set out different procedures for the making of different statutory instruments or for different categories of statutory instruments under this Act and, for the avoidance of doubt, may empower the Assembly or a committee of the Assembly to decide which of those procedures is to apply to an instrument or category of instruments.
- (4) For the purposes of section 11A of the Statutory Instruments Act 1946, and any other provisions of that Act referred to in that section, the provisions set out from time to time in the Standing Orders of the National Assembly for Wales for the scrutiny of regulations under this Act shall be deemed to be provisions of an Act.”.

Committee suggested amendment 25

Schedule 7, page 48, line 14, leave out sub-paragraph (4).
--

LIST OF SUGGESTED AMENDMENTS

Submitted by the External Affairs and Additional Legislation Committee, National Assembly for Wales

European Union (Withdrawal) Bill

Amendment 1

Schedule 2, page 16, line 12, leave out from “as” to “to prevent” in line 13 and insert “is essential”.

Member’s explanatory statement

This amendment limits the power available to a devolved authority to deal with deficiencies in retained EU law arising from withdrawal in such a way that it can only make provision that is essential to that end.

Amendment 2

Schedule 2, page 16, line 18, leave out “they consider appropriate” and insert “is essential”.

Member’s explanatory statement

This amendment limits the power available to a Minister of the Crown acting jointly with a devolved authority to deal with deficiencies in retained EU law arising from withdrawal in such a way that they can only make provision that is essential to that end.

Amendment 3

Schedule 2, page 21, line 38, leave out from “as” to “to prevent” in line 39 and insert “is essential”.

Member’s explanatory statement

This amendment limits the power available to a devolved authority to prevent or remedy a breach of international obligations in such a way that it can only make provision that is essential to that end.

Amendment 4

Schedule 2, page 21, line 43, leave out “they consider appropriate” and insert “is essential”.

Member’s explanatory statement

This amendment limits the power available to a Minister of the Crown acting jointly with a devolved authority to prevent or remedy a breach of international obligations in such a way that they can only make provision that is essential to that end.

Amendment 5

Schedule 2, page 24, line 11, leave out from “as” to “for” in line 12 and insert “is essential”.

Member’s explanatory statement

This amendment limits the power available to a devolved authority to implement the withdrawal agreement in such a way that it can only make provision that is essential to that end

Amendment 6

Schedule 2, page 24, line 16, leave out “they consider appropriate” and insert “is essential”.

Member’s explanatory statement

This amendment limits the power available to a Minister of the Crown acting jointly with a devolved authority to implement the withdrawal agreement in such a way that they can only make provision that is essential to that end.

Amendment 7

Clause 7, page 5, line 7, at end insert –

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 1 of Schedule 2.”.

Member’s explanatory statement

This amendment prevents a Minister of the Crown from making provision to deal with deficiencies in retained EU law arising from withdrawal to the extent that the provision would be within the devolved competence of the Welsh Ministers.

Amendment 8

Clause 8, page 6, line 30, at end insert –

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.

Member’s explanatory statement

This amendment prevents a Minister of the Crown from making provision to prevent or remedy any breach of international obligations to the extent that the provision would be within the devolved competence of the Welsh Ministers.

Amendment 9

Clause 9, page 6, line 45, at end insert –

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.

Member’s explanatory statement

This amendment prevents a Minister of the Crown from making provision to implement the withdrawal agreement to the extent that the provision would be within the devolved competence of the Welsh Ministers.

Amendment 10

Clause 17, page 14, line 9, at end insert –

“() But the power in subsections (1) and (3) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.

Member’s explanatory statement

This amendment prevents a Minister of the Crown from making transitional, transitory or saving provision to the extent that the provision would be within the devolved competence of the Welsh Ministers.

Amendment 11

Schedule 2, page 25, line 31, at end insert –

“PART []

WELSH MINISTERS – POWER TO MAKE CONSEQUENTIAL AND TRANSITIONAL PROVISION

- [] (1) The Welsh Ministers may by regulations make such provision as is essential in consequence of this Act.
- (2) The power to make regulations under sub-paragraph (1) may (among other things) be exercised by modifying any provision made by or under an enactment.
- (3) In sub-paragraph (2), “enactment” does not include-
- (a) primary legislation passed or made after the end of the Session in which this Act is passed, or
 - (b) any provision of the Government of Wales Act 2006.
- (4) The Welsh Ministers may by regulations make such transitional, transitory or saving provision as is essential in connection with the coming into force of any provision of this Act or the appointment of exit day.
- (5) No regulations may be made under this Part unless every provision of them is within the devolved competence of the Welsh Ministers for the purposes of Part 2.”.

Member's explanatory statement

This amendment provides a power to the Welsh Ministers to make consequential and transitional provision within the devolved competence of the Welsh Ministers.

Amendment 12

In clause 7, page 6, line 13, after "it," insert –

“() modify the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment prevents the Government of Wales Act 2006 from being amended by regulation under clause 7.

Amendment 13

In clause 8, page 6, line 38, at end insert –

“, or

(e) modify the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment prevents the Government of Wales Act 2006 from being amended by regulation under clause 8.

Amendment 14

In clause 9, page 7, line 8, at end insert –

“, or

(e) modify the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment prevents the Government of Wales Act 2006 from being amended by regulation under clause 9.

Amendment 15

In clause 17, page 14, line 4, at end insert “or the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment prevents the Government of Wales Act 2006 from being amended by regulation under clause 17.

Amendment 16

Schedule 2, page 20, line 25, after “Crown”, insert “and excluding any provision that could be made under paragraph 7(2) of Schedule 7B to the Government of Wales Act 2006”.

Member's explanatory statement

This amendment, and amendment [17, 18 and 19], prevent the Welsh Ministers from using powers proposed in the Bill (to deal with deficiencies in retained EU law arising from withdrawal) to amend the Government of Wales Act 2006.

Amendment 17

Schedule 2, page 20, line 41, after "5" insert "or".

Member's explanatory statement

This amendment, and amendment [16, 18 and 19], prevent the Welsh Ministers from using powers proposed in the Bill (to deal with deficiencies in retained EU law arising from withdrawal) to amend the Government of Wales Act 2006.

Amendment 18

Schedule 2, page 20, line 41, leave out "or 7".

Member's explanatory statement

This amendment, and amendment [16, 17 and 19], prevent the Welsh Ministers from using powers proposed in the Bill (to deal with deficiencies in retained EU law arising from withdrawal) to amend the Government of Wales Act 2006.

Amendment 19

Schedule 2, page 20, line 43, at end insert—

“(f) the provision does not modify the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment, and amendment [16, 17 and 19], prevent the Welsh Ministers from using powers proposed in the Bill (to deal with deficiencies in retained EU law arising from withdrawal) to amend the Government of Wales Act 2006.

Amendment 20

Schedule 2, page 22, line 10, at end insert—

“(f) amend, repeal or revoke the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment prevents the Welsh Ministers from using powers proposed in the Bill (to comply with international obligations) to amend the Government of Wales Act 2006.

Amendment 21

Schedule 2, page 24, line 33, at end insert—

“(h) amend, repeal or revoke the Government of Wales Act 2006.”.

Member's explanatory statement

This amendment prevents the Welsh Ministers from using powers proposed in the Bill (to implement the withdrawal agreement) to amend the Government of Wales Act 2006.

Amendment 22

Schedule 7, page 39, line 42, leave out sub-paragraphs (6) and (7).

Member's explanatory statement

This amendment, and amendments [23 and 25], remove provisions in the Bill that prescribe scrutiny procedures for the National Assembly for Wales. These amendments, coupled with amendment [24] allow the National Assembly for Wales to set the scrutiny procedures it considers appropriate for the control of powers proposed for the Welsh Ministers under the Bill.

Amendment 23

Schedule 7, page 41, line 15, leave out sub-paragraphs (10) and (11).

Member's explanatory statement

This amendment, and amendments [22 and 25], remove provisions in the Bill that prescribe scrutiny procedures for the National Assembly for Wales. These amendments, coupled with amendment [24] allow the National Assembly for Wales to set the scrutiny procedures it considers appropriate for the control of powers proposed for the Welsh Ministers under the Bill.

Amendment 24

Schedule 7, page 45, line 40, at end insert –

“Scrutiny of regulations made by Welsh Ministers

- [] (1) A statutory instrument containing regulations under this Act of the Welsh Ministers must be made in accordance with the procedures from time to time set out in the Standing Orders of the National Assembly for Wales for the scrutiny of regulations under this Act.
- (2) Sub-paragraph (1) applies to statutory instruments made by the Welsh Ministers acting alone and to statutory instruments made by the Welsh Ministers acting jointly with a Minister of the Crown.
- (3) The Standing Orders of the National Assembly for Wales may set out different procedures for the making of different statutory instruments or for different categories of statutory instruments under this Act and, for the avoidance of doubt, may empower the Assembly or a committee of the Assembly to decide which of those procedures is to apply to an instrument or category of instruments.
- (4) For the purposes of section 11A of the Statutory Instruments Act 1946, and any other provisions of that Act referred to in that section, the provisions set out from time to time in the Standing Orders of the National Assembly for Wales for the scrutiny of regulations under this Act shall be deemed to be provisions of an Act.”.

Member's explanatory statement

This amendment allows the National Assembly for Wales to set the scrutiny procedures it considers appropriate for the control of powers proposed for the Welsh Ministers under the Bill.

Amendment 25

Schedule 7, page 48, line 14, leave out sub-paragraph (4).

Member's explanatory statement

This amendment, and amendments [22 and 23], remove provisions in the Bill that prescribe scrutiny procedures for the National Assembly for Wales. These amendments, coupled with amendment [24] allow the National Assembly for Wales to set the scrutiny procedures it considers appropriate for the control of powers proposed for the Welsh Ministers under the Bill.

The House of Commons
London
SW1A 0AA

10 October 2017

European Union Withdrawal Bill

Dear Member of Parliament,

I am writing to seek your support for the changes to the European Union (Withdrawal) Bill that we, the Assembly's External Affairs Committee, believe are necessary.

These changes are set out as six objectives. These objectives are those of a cross-party committee of the National Assembly for Wales. The External Affairs Committee is, in short, the Assembly's Brexit Committee. It was established by the Assembly to consider the implications for Wales of exiting the European Union and to safeguard Welsh interests in the withdrawal process and in the setting of post-exit arrangements.

The objectives are based on written and oral evidence received from a wide range of stakeholders and have benefitted from the input of constitutional and legal experts from across the United Kingdom. Further information is available from our website. This work builds on the report we published in June 2017 on the White Paper associated with the Withdrawal Bill: *The Great Repeal Bill White Paper: Implications for Wales.*



Before setting-out our objectives, I wish to emphasise again that **we are not, in any way, seeking to frustrate the UK's withdrawal from the EU**. As we stated in our report on the White Paper, we understand the need to retain and convert EU law and to make it operable from the day of exit. Our concern lies in the treatment of the devolution settlement and the lack of engagement with the Assembly, through its committees, in relation to the delegation of powers to Welsh Ministers and the setting of scrutiny arrangements.

We have a formal role in the Assembly's process for considering whether to grant its legislative consent for the Bill.

Parliament's response to the six objectives set-out below will have a significant bearing on whether we recommend that the Assembly grants its consent or not.

Our six objectives are to:

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 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.**

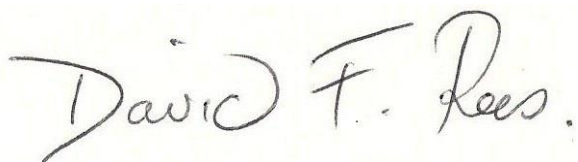
Attached to this letter is a paper that explains each of these objectives and proposals for how they could be met.



Where amendments have already been suggested or tabled by Members of Parliament that we believe could deliver our objectives, then we have indicated this rather than suggesting amendments of our own. Where no such amendments exist, we have suggested amendments that we hope you will consider tabling. We are aware that further amendments are likely to be tabled, including amendments from the UK Government. We will consider these once tabled and hope that they might contribute to meeting our objectives.

Should you require any further information, or wish to discuss these objectives in more detail, then please contact me.

Yours Sincerely,

A handwritten signature in black ink that reads "David F. Rees." The signature is written in a cursive style with a large initial 'D' and 'R'.

David Rees AM, Chair of the External Affairs and Additional Legislation Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Agenda Item 6



Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru

Gwydyr House / Tŷ Gwydyr
London / Llundain
SW1A 2NP

1 Caspian Point / 1 Pwynt Caspian
Cardiff Bay / Bae Caerdydd
CF10 4DQ

www.gov.uk/wales
www.gov.uk/cymru

Huw Irranca-Davies AM
Chair, Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff
CF99 1NA

Ref: 441SUB 17

5 October 2017

Dear Huw,

During my recent evidence session before the Constitutional and Legislative Affairs Committee on 25 September, I agreed to provide the Committee with a list of Cabinet Committees and sub-Committees of which I am a member. I include this information below:

- Parliamentary Business and Legislation Committee
- European Union Exit and Trade Committee
- European Union Exit and Trade (International Trade) sub-Committee
- European Union Exit and Trade (European Affairs) sub-Committee
- Social Reform (Home Affairs) sub-Committee
- Economy and Industrial Strategy (Economic Affairs) sub-Committee

I trust this is of assistance.

Xaws1

Rt Hon Alun Cairns MP
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru

Agenda Item 9

By virtue of paragraph(s) vi of Standing Order 17.42

Document is Restricted

Document is Restricted

Document is Restricted