

## **Agenda – External Affairs and Additional Legislation Committee**

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Meeting Venue:

**Committee Room 2 – Senedd**

Meeting date: 11 March 2019

Meeting time: 13.00

For further information contact:

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Committee Clerk

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**At its meeting on 4 March 2019 the Committee resolved under Standing Order 17.42(vi) to exclude the public from item 1 of the meeting**

- 1 Preparing for Brexit – Briefing session with the Wales Audit Office**  
(13.00–13.30) (Pages 1 – 30)  
Mike Usher, Wales Audit Office  
Mark Jeffs, Wales Audit Office
- 2 Introductions, apologies, substitutions and declarations of interest**  
(13.30)
- 3 Preparing for Brexit – scrutiny session with the Counsel General and Brexit Minister**  
(13.30–14.30) (Pages 31 – 40)  
Jeremy Miles AM, Counsel General and Brexit Minister  
Piers Bisson, Welsh Government



**4 Paper to note**

(14.30–14.35)

**4.1 Paper to note 1 – Correspondence from the Counsel General and Brexit Minister to the Chair regarding UK common frameworks – 1 March 2019**

(Pages 41 – 42)

**5 Motion under Standing Order 17.42(vi) to resolve to exclude the public from the remainder of the meeting**

(14.35)

**6 Preparing for Brexit – consideration of evidence**

(14.35–14.50)

**7 Consideration of response to the Constitutional and Legislative Affairs Committee report on the scrutiny of regulations under the European Union (Withdrawal) Act 2018: progress report**

(14.50–15.00)

(Pages 43 – 60)

**8 Scrutiny of international agreements**

(15.00–15.30)

(Pages 61 – 72)

February 2019

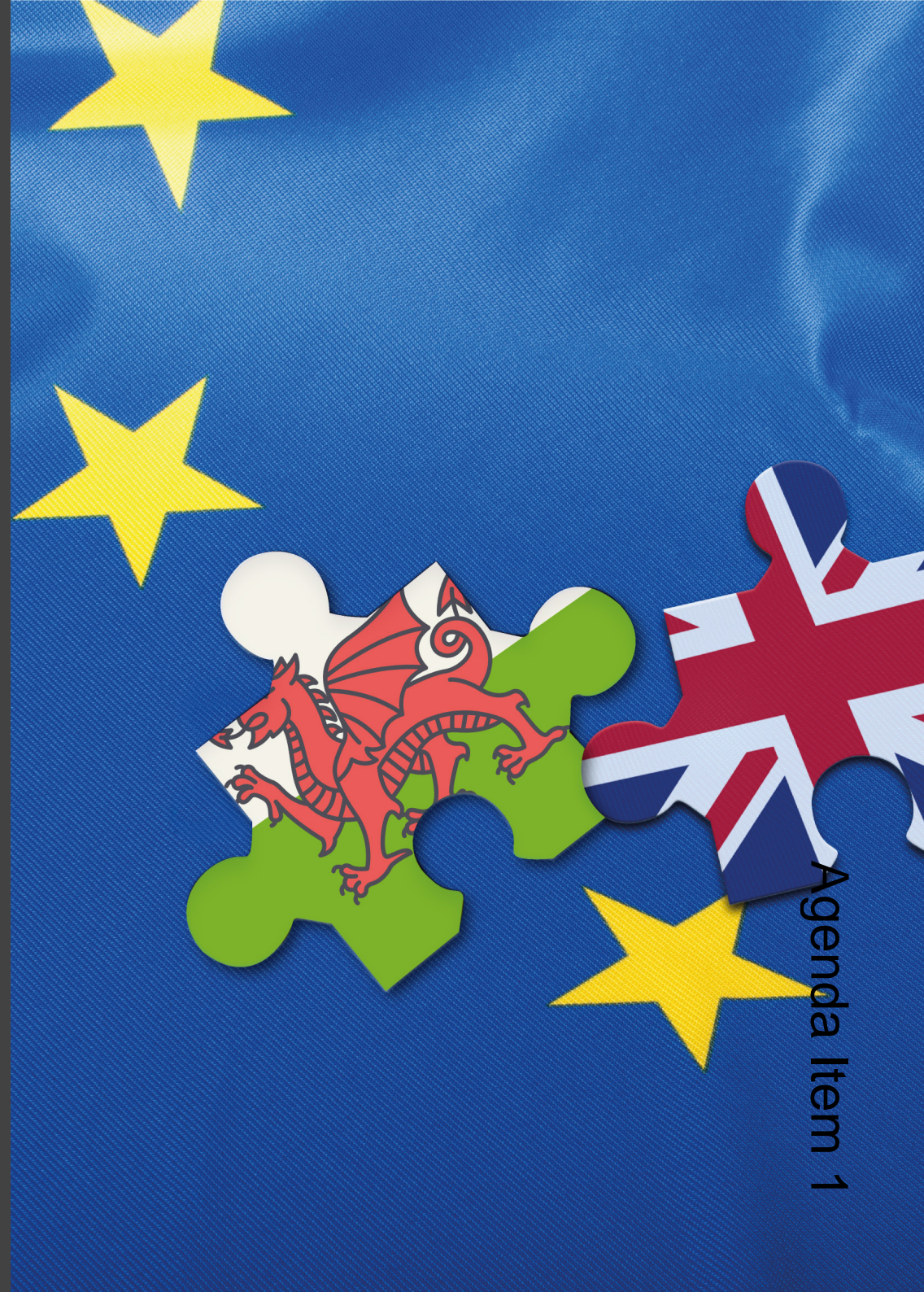
Archwilydd Cyffredinol Cymru  
Auditor General for Wales

# Preparations in Wales for a 'no-deal' Brexit

Part 1  
Page 1



WALES AUDIT OFFICE  
SWYDDFA ARCHWILIO CYMRU



Agenda Item 1

This report has been prepared for presentation to the National Assembly under the Government of Wales Act 2006 and Public Audit (Wales) Act 2004.

The Wales Audit Office study team comprised of Mark Jeffs, Chris Pugh, Emma Woodcock, Adam Marshall, Christine Nash and Nick Davies under the Direction of Mike Usher

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**Mae'r ddogfen hon hefyd ar gael yn Gymraeg.**

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## About this report

1 In autumn 2018, I decided to review Welsh public bodies' arrangements to manage the implications, risks and opportunities of Brexit. In working out the scope of my work, I have been mindful of the Welsh Government's view that the impacts of Brexit on Wales cannot be fully mitigated and that many relevant policy areas are reserved to the UK Government. I am of course also aware of the ongoing political uncertainties about the form of Brexit and that Brexit is a new challenge for all public bodies, so there is no 'off the shelf' map or toolkit of what to do. As such, I do not expect every public body to have exhaustive plans for every implication, risk and opportunity of Brexit.

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In November 2018, we invited the Chief Executives of devolved public bodies in Wales to share with us evidence of their preparations for Brexit. All have now replied, and most also completed a self-assessment. In addition, we have carried out detailed fieldwork looking at the Welsh Government's own preparations and arrangements for Brexit, taking account of its wider leadership role across the Welsh public sector.

When I decided to carry out this work, I originally planned to produce a report in late summer 2019. But I also recognised that I might need to report sooner if a 'no-deal' Brexit (Box 1) in March looked to be a significant probability. With only a very short time to go, Parliament is yet to ratify the Withdrawal Agreement that the UK Government has negotiated with the European Union (EU). The legal position is that the UK will leave the European Union at 11pm on 29 March 2019, regardless of whether the Withdrawal Agreement is ratified. There are several ways in which that could change. But at the time of publication, there is still a significant chance of a 'no-deal' Brexit.

## Box 1: what is a 'no-deal' Brexit?

A 'no-deal' Brexit means that the UK leaves the EU without a Withdrawal Agreement in place. There would be no transition phase or agreement on the future relationship. The UK would stop being part of the single market and customs union and would no longer be part of EU trade agreements with the rest of the world. It would trade on World Trade Organisation rules until it negotiates new trade and customs agreements. As a result, new checks would need to be carried out on goods leaving the UK and those entering, with potential consequences for ports and disruption to supply chains.<sup>1</sup> New arrangements would need to be put in place for industries that currently operate under EU rules and regulatory bodies.

The UK Government, EU and Welsh Government have each produced advice and information<sup>2</sup> setting out the potential consequences of a 'no-deal' Brexit. The UK Government expects to reach agreement with the EU on specific issues to avoid the most disruptive consequences of a 'no-deal' Brexit. In December 2018, the European Commission announced that it would introduce temporary measures in some areas, such as citizens rights, carriage of freight and aviation to mitigate some of the impacts of a 'no-deal' Brexit.

As Auditor General for Wales, I have no view on the political discussions or policy decisions about the form that Brexit should take. But I do have a role in providing assurance on the Welsh public sector's approach to managing the implications of a 'no-deal' Brexit. Given that 29 March is getting ever closer and the window for acting is narrowing, I am setting out in this paper my early views on the evidence I have gathered, together with some key messages for public bodies, to help with their planning in the coming weeks and months.

5 My findings come with some significant caveats on the nature of the work I have carried out (Box 2).

- 1 The UK Government has said that it will initially put in place 'transitional simplified procedures' for goods arriving from the EU. The EU has said it will apply its rules to all imports from and all exports to the UK.
- 2 UK Government notices can be found at <https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal>; The Welsh Government's advice and information can be found at <https://beta.gov.wales/preparing-wales>; The EU's December 2018 contingency notice is at [https://ec.europa.eu/info/publications/communication-19-december-2018-preparing-withdrawal-united-kingdom-european-union-30-march-2019-implementing-commissions-contingency-action-plan\\_en](https://ec.europa.eu/info/publications/communication-19-december-2018-preparing-withdrawal-united-kingdom-european-union-30-march-2019-implementing-commissions-contingency-action-plan_en)

## Box 2: caveats on the remit, scope and evidence used to underpin my work

- **Remit:** My work has covered the devolved bodies. Many of the key implications of Brexit relate to non-devolved issues, such as immigration, customs and border control. I have looked at how Welsh public bodies are engaging with UK authorities, but it is not my role to comment on the effectiveness of UK Government arrangements. The National Audit Office has produced several reports on UK Government Departments' preparations for Brexit<sup>3</sup>. The latest of these reports have shown that in some areas that impact Wales, there are likely to be significant challenges in a no-deal scenario. In particular, the National Audit Office's (NAO) October 2018 report on the UK border found that 'If there is no withdrawal agreement, the government has recognised that the border will be 'less than optimal'. [The NAO agrees] with this assessment, and it may take some time for a fully functioning border to be put in place. Individuals and businesses will feel the impact of a sub-optimal border to varying degrees. The government is putting in place coping responses where it can. How effective they will be remains to be seen.'<sup>4</sup>
- **Scope:** Brexit is extremely complex and there remain unknown potential consequences. My work has taken a high-level overview of whether Welsh public bodies have arrangements in place to identify and manage the implications, risks and opportunities. I have not examined in depth or tested the quality and effectiveness of those arrangements nor whether they are likely to work in practice. It would be impractical to carry out such in depth work across all public bodies and all potential areas of risk and opportunity in a reasonable timeframe.
- **Evidence:** Much of the evidence on which I have based my findings was gathered in November and December 2018. The quality of the evidence provided is variable, and some bodies provided only limited detail. I am conscious that events are moving fast, and that further work is being done as planning for a 'no-deal' Brexit gets accelerated. More detail on the methods used in this work is in [Appendix 3](#).



<sup>3</sup> [https://www.nao.org.uk/search/pi\\_area/exiting-the-eu/type/report](https://www.nao.org.uk/search/pi_area/exiting-the-eu/type/report)

<sup>4</sup> National Audit Office, **The UK border: preparedness for EU exit**, (October 2018)



## My overall view and key messages:

- 6 Overall, most public bodies across Wales are clearly taking their 'no-deal' Brexit planning seriously. Many have significantly ramped up their activity since summer 2018, when a 'no-deal' outcome started looking more possible. The Welsh Government has taken a clear lead in planning for a no-deal Brexit, working with the UK Government. However, the picture varies across the Welsh public sector. Some bodies have done a lot of preparation. Others reported that continuing uncertainty meant they had made only limited preparations so far. There are still major challenges and uncertainties that all Welsh public bodies are grappling with. Many bodies are struggling to find the dedicated capacity to plan for Brexit and are undertaking work on top of the day job. The Welsh Government and many public bodies have been clear that it is not possible to fully mitigate the impacts of a 'no-deal' Brexit, especially on the Welsh economy. There is still some considerable way to go to turn the planning into reality, to finalise plans, test arrangements and to make sure that they are resilient. As 'no-deal' planning accelerates and contingency plans start to be activated in the coming weeks, I have set out some key messages for public services across Wales (Figure 1).

Figure 1: Auditor General's key messages for Welsh public services

### Uncertainty cannot be an excuse for inaction, and audit must not be viewed as a barrier to effective planning for Brexit

- **I will not criticise reasonable 'no-deal' Brexit expenditure as wasteful:** It appears there are some concerns that I would give Welsh public bodies a hard time for spending money and time planning for a 'no-deal' Brexit. There is a view that, because the outcome is unclear, and some spending may turn out not to have been required if the 'no-deal' scenario does not materialise, I will criticise that as waste.

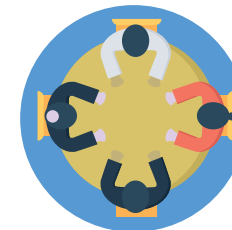


At the end of January 2019, I wrote to all Chief Executives of public bodies, to say clearly that I will not criticise anybody for taking reasonable steps to prepare for and mitigate Brexit related risks. Brexit poses some unprecedented challenges, and opportunities, that must be planned for. As long as a 'no-deal' Brexit remains a possibility, acting to manage potentially significant implications before it becomes too late is not a waste of money.

## Further strengthen and deepen the 'one public service' approach to preparations

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- **Plan together:** One of the positive things I have seen and heard is that Brexit planning has spurred organisations to work across silos and there are many good examples of public services working together to understand and plan for a 'no-deal' Brexit. Nonetheless, there remains scope for greater collaboration in developing and delivering plans to manage common issues and risks. With weeks to go to a possible 'no-deal' Brexit, the Welsh Government has a key role in increasing the frequency with which various national forums meet to ensure a consistent and coherent pan-public service response.



**Share capacity and resources:** Brexit is taking place against the context of an extended period of financial austerity in public services. Many bodies are concerned that they lack the staff and expertise required to plan effectively for, and manage the consequences of, Brexit. In my view, there is scope to share better the capacity and expertise that does exist, both within and between the different sectors in our public service and in partnership with the private and third sectors. Public bodies should also look to the available transition funding to build a shared pool of staff, to help fill the capacity gaps that exist and to work across bodies and sectors.



- **Test plans and learn together:** The UK Government has stated that a 'no-deal' Brexit could create disruption over a six-week period or even longer. Existing civil contingency arrangements are robust but are generally used for short-term emergencies such as extreme weather, and for large one-off events such as the NATO summit in Newport. To the greatest extent possible, I would like to see public bodies build on existing collaborative work to help ensure the continued resilience of national and local contingency plans against longer time-frames. Welsh public bodies should also build on their contacts with other parts of the UK to exchange lessons from planning and testing across the UK.



## Strengthen civic leadership on preparations for a 'no-deal' Brexit

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- **Strengthen scrutiny:** The evidence we received suggests that cabinets, scrutiny committees and boards now need to ramp up their own activity in providing independent and democratic oversight and scrutiny of Brexit planning and action. Across the majority of Welsh public bodies, and with the exception of the Welsh Government itself, Brexit preparations have been led by executive teams with limited non-executive input or challenge.



- **Communicate and engage openly and clearly with the public.** Public bodies across Wales have generally been waiting to engage with the public until they have greater certainty on the outcome of Brexit. However, with the date getting close, it is vital that public bodies start having conversations with the public and key stakeholders, to help avoid unnecessary panic and disruption. Many people are naturally worried about stories about shortages of certain goods. Small changes in individual behaviour such as stockpiling medicines, fuel and food can have significant consequences at a population level. Many EU citizens living and working in Wales will also want to know what will happen to them.



It is crucial that public bodies have a clear, measured and consistent story to tell the public about the potential impacts of a 'no-deal' Brexit, and the plans that are being made. The Welsh Government's online 'Preparing Wales' site provides a helpful starting place and it is now important that all public bodies help to spread those messages to the public and communities that they work with and are available to deal with the public's queries about what will happen.

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## Key findings

- 7 **Public bodies are developing new structures for managing the consequences of Brexit alongside long-standing arrangements.** There are a range of national and regional committees and working groups to deal with specific aspects of Brexit, some of which have been specially created. There are tried and tested national and regional arrangements for civil emergencies and contingency planning. These forums are leading planning for some elements of a 'no-deal' Brexit. However, individual bodies' arrangements vary considerably (Figure 2). In most public bodies, Brexit preparations are largely led by officers. There is a risk of a gap in civic leadership if there is not clear ownership and scrutiny of plans by elected councillors and independent members of boards. The Welsh Government has taken positive steps to engage public service leaders through the Partnership Council, which held a special meeting on Brexit in January 2019. As contingency plans become firmer and we move closer to implementation, I would like to see a further strengthening of scrutiny by councillors in local government and by independent members of boards across NHS Wales and the central government bodies.

Figure 2: arrangements for responding to Brexit across devolved Welsh public services

- **Pan public sector arrangements**

There are separate pan-public sector arrangements for civil contingencies and for what the Welsh Government calls the ‘new normal’ of a different set of post-Brexit rules and systems.

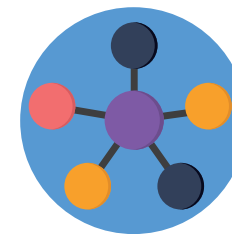
The **Wales Resilience Group** chaired by the First Minister, provides national leadership on civil contingency. It has two sub-groups. The **Wales Resilience Forum** brings together all the emergency services. The **Wales Risk Group** brings together Public Health Wales, the four chairs of the Local Resilience Forums (see description below) and the Welsh Government.

There are several forums on Brexit that involve different parts of the public sector. There include the European Advisory Group, Council for Economic Development; Environment and Rural Affairs Brexit roundtable and a very recently set up Local Government (EU) Preparedness Advisory Panel.

Existing groups are also being used to discuss plans for Brexit, including the Partnership Council, which brings together political leaders from local government and leaders in other public bodies and the third sector, the Workforce Partnership Council, Faith Forum and the Third Sector Partnership Council.

Welsh Government policy divisions have a range of national forums through which they co-ordinate pan-public service action and engagement with other stakeholders to prepare for Brexit in specific policy areas.

The Welsh Local Government Association and the Welsh NHS Confederation both also have arrangements for bringing together bodies within their sectors to share information on planning for Brexit.



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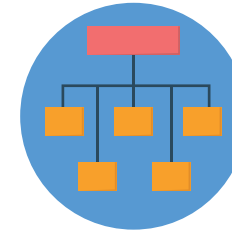
- **Internal Welsh Government arrangements**

The Welsh Government has a governance framework for Brexit preparedness work (see diagram in [Appendix 2](#)).

A Cabinet Sub-Committee on European Transition provides political direction.

The European Transition Officials Group brings together policy leads from across the Welsh Government. The Group has six cross-cutting sub-groups. These cover funding, frameworks, economy, preparedness, communications and legislation.

There are also dedicated Brexit teams in each policy area working on preparations for Brexit, who are liaising with their counterparts around the UK. The European Transition Team organises the overall programme of Brexit work. It checks that work in Wales links to UK wide work, and that progress is being made in line with key milestones.



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- **Regional arrangements**

In their responses, most bodies referred to Brexit civil contingencies preparations taking place through the Local Resilience Forums. These regional bodies have statutory responsibilities under the Civil Contingencies Act 2004. They comprise representatives from devolved bodies and non-devolved services, including the local authorities in the area, Police, Fire, NHS bodies, the armed forces and representatives of national bodies such as Natural Resources Wales and the Welsh Government.



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- **Local arrangements within individual bodies**

The arrangements that individual bodies have put in place vary considerably both within and between different sectors. Some have detailed organisation-wide structures, but some simply had a notional lead official. [Appendix 1](#) sets out the arrangements in different sectors in more detail.



8 **Public services report a lack of capacity to manage Brexit, which is also having a significant knock-on impact on other service areas.** Work to prepare for Brexit needs to be understood in the context of a decade of tight financial settlements and a shrinking public sector workforce. The Welsh Government has created 198 additional new staff roles on fixed-term contracts to work on Brexit. However, in many cases, rather than bring in new people, it is moving existing staff from their normal duties to take up Brexit roles and some of the new recruits will cover vacancies created by people moving to work on priority Brexit roles. Officials report that there are gaps in the delivery of non-Brexit related work. Across the wider public service, very few bodies have taken on new staff to prepare for Brexit. Most are absorbing Brexit preparations within, or on top of, their day jobs. Local government is concerned that sustained financial pressures over the last decade have made councils much more focussed on simply sustaining service delivery. As a result, there are now far fewer staff members who still possess the cross-cutting policy and planning expertise that is needed to prepare for Brexit. In the NHS, my wider audit work has identified ongoing concerns about management capacity in relation to transforming services. This same cadre of management staff is being called on to prepare for and manage the implications of a 'no-deal' Brexit. Most bodies reported to us that their work on Brexit was having an adverse impact on other areas, although they did not quantify or spell out the exact nature of those consequences.

**All bodies have identified the risks and some opportunities of Brexit, but the extent to which they have plans to mitigate those risks varies.** All public bodies have done some work to understand the implications of a 'no-deal' Brexit, especially the risks. The Welsh Government is taking a lead role in identifying and managing national and strategic risks, working with colleagues in the UK Government and the other devolved administrations. While at times, the Welsh Government has found it difficult to get complete or timely information from some UK Government departments, we were told that those working relationships have improved over recent months. The Welsh Government has a detailed programme of work to address the implications of a 'no-deal' Brexit, which links to UK-wide planning. For those projects where it is leading on preparations, the Welsh Government appears to be largely on track against its milestones. The Welsh Government also oversees the use of its EU Transition Fund (Box 3) for a varied range of projects and programmes aimed at helping to prepare Wales for Brexit. The Welsh Local Government Association reported that since we carried out our fieldwork, it has bid into the EU Transition Fund for additional capacity to support corporate co-ordination of Brexit planning across local government. Also, service areas such as social care and environmental health, where there are specific risks, are in the process of preparing bids for additional funding for preparation work.

### Box 3: the EU Transition Fund

In January 2018, the Welsh Government announced a £50 million EU Transition Fund. The fund is intended to help businesses, public services and the third sector to prepare for Brexit, in line with the priorities identified in the Welsh Government's key policy paper on Brexit: 'Securing Wales' Future'.

The Fund focuses on those Brexit-related matters that sit within devolved powers, works alongside existing methods of Welsh Government financial support, and is intended to be available through the transition period to December 2020. The Welsh Government has adopted a flexible approach in considering applications for funding, using broad criteria that can cover a wider range of potential projects.

To date the Welsh Government has allocated approximately half of the £50 million fund across a wide range of proposals. More proposals are currently being developed with potential recipients. Funding approved to date has included the following areas:

- £7.5 million to fund a Business Resilience scheme to aid business in Wales to adapt to a post Brexit business environment;
- £6.0 million for training and up-skilling the workforce in Wales' automotive and aero-industry sectors;
- £5.0 million to support farming, food and fishing sectors post-Brexit;
- £3.5 million support for Welsh Universities to drive international partnerships and promote Wales as a study destination;
- £0.35 million to partner with the Organisation for Economic Co-operation and Development (OECD) to inform the future regional investment approach;
- £0.20 million for research work on likely impacts and implications for the social care workforce;
- £0.21 million to help prepare the health service in Wales for Brexit, including £150,000 for the Welsh NHS Confederation to lead on engagement and communication and £60,000 to Public Health Wales NHS Trust to work on health security;
- £0.15 million for the Welsh Local Government Association to support local authorities with plans and preparedness for Brexit;
- £0.15 million to support the Welsh Council for Voluntary Action to consider how Brexit will impact on community services in Wales.



- 10 Across NHS Wales, individual organisations have been helped in understanding their exposure to risks and possible opportunities by work by Public Health Wales and through work on supply chains related to medical devices and clinical consumables carried out by Deloitte. The NHS is putting place detailed plans, working with UK partners, to manage those risks it has identified.
- 11 In local government, many councils have been using a guide that the Welsh Local Government Association commissioned Grant Thornton to produce. Based on their self-assessments, only a minority of councils had clear plans to deal with the risks they have identified. Some bodies were delaying work until there is greater certainty.
- 12 My overall summaries of the different sectors based on the evidence they supplied are set out in [Appendix 1](#). However, I recognise that many bodies were in the process of accelerating their plans as they completed their self-assessments before Christmas and I would expect that many of those bodies will now be developing clearer and more detailed action plans. [Figure 3](#) sets out the key issues that public bodies have identified. I have not tested whether the plans to address those issues are likely to mitigate the risks in a 'no deal' scenario.

Figure 3: key issues that public bodies have identified

- **Ports:** There are concerns over the impact Brexit could have on Welsh ports due to additional customs and regulatory checks. The key policy areas around ports – such as customs, border control, new ICT systems and immigration – are not devolved. The Welsh Government is working with the UK Government, through the Wales Ports and Airport Border Planning Steering Group, and the relevant local authorities to plan for possible traffic disruption if there is a ‘no-deal’ Brexit.



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The Welsh Government considers Holyhead in Anglesey to be of higher risk than other ports as it is the busiest port in Wales and has less flexibility than the ports in West Wales to manage queues of lorries in the immediate vicinity of the port. The Welsh Government and Isle of Anglesey County Council are developing contingency plans, including plans for ‘holding’ lorries facing delays, in the event of a ‘no-deal’. As well as the extra checks, the Welsh Government and local authorities are also seeking to address broader concerns relating to the wider impact on the local area and economy around the ports, due to the important role they play in providing employment.

- The National Assembly’s External Affairs and Additional Legislation Committee reported<sup>5</sup> in November 2018 on preparedness for Brexit in ports and the Welsh Government responded<sup>6</sup> in January 2019 to the Committee’s recommendations.

5 External Affairs and Additional Legislation Committee, **Preparing for Brexit – follow-up report on the preparedness of Welsh ports**, November 2018

6 Welsh Government, **Written Response by the Welsh Government to the report of the External Affairs Committee entitled Preparing for Brexit: Follow-up report on the preparedness of Welsh Ports**, January 2019

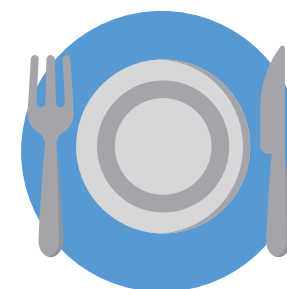
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- **Medical and consumables supply chains:** There has been much speculation about the availability of medicines, in the event of disruption to supply chains at ports and airports. The Welsh Government's Health and Social Services Group has been working with their counterparts across the UK. The UK Government is leading on work with the pharmaceutical industry to develop contingency plans to create a 'buffer' supply of medicines. The Welsh Government advises that individual NHS bodies, care homes and the public should not stockpile medicines and other medical supplies themselves.
  - The Welsh Government and NHS bodies are taking a lead in developing plans to ensure continued supply of consumables and equipment. NHS bodies worked with Deloitte to look at potential risks to supply chains in Wales. The action to manage these risks includes procuring additional warehouse capacity to stockpile supplies.



The NHS in Wales is also working with the rest of the UK to develop contingency plans for other medicines and supplies, such as radioactive isotopes, with a short life-span where stock-piling may not be a solution. The Welsh Government is working with the UK Government on contingency plans, which potentially include extra capacity to fly such medicines and supplies in the event of a 'no-deal' Brexit.

Some NHS bodies told us that the process of reviewing supply chains had positive benefits beyond mitigating risks, as they were now much more aware of wider opportunities to make their supply chains more efficient and effective.

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- **Food supply chains:** The UK Government has recognised that there may be disruption to supplies of some perishable foods in a "no-deal" Brexit scenario. Many food producers and retailers are stockpiling refrigerated goods. However, some imported fresh food with a very short shelf life could get caught up in delays at the UK's ports and airports.
  - Several bodies highlighted to us risks of disrupted food supplies to hospitals, schools, care homes and for meals on wheels. At the time of drafting, planning for potential food shortages was accelerating: some individual bodies were reviewing their food supply chains and developing individual plans and there was some early thinking being done on pan-public service approaches.



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- **Workforce:** There are around 48,400 EU nationals working in Wales (around 3.6% of the workforce). Welsh Government figures show EU nationals make up around 2% of the public sector workforce. That figure varies across different public services. For example, around 7% of medical and dental staff are EU nationals. Most bodies have tried to assess the number of EU staff they employ, although many found it difficult as they do not record the nationality of all staff.
  - There are also concerns, particularly among NHS bodies, about whether there will be mutual recognition of qualifications after Brexit and uncertainty about the impacts of future migration policy on recruitment and retention in areas where there are staff shortages.



In general, public bodies told us that they thought the workforce risks were more medium to long-term and that the risk of staff suddenly leaving in March 2019 was limited. Nonetheless, most said they would keep a watching brief and were seeking to reassure their EU staff.

There were specific concerns expressed to us about some parts of the health and social care sector, which are particularly dependent on EU workers. Social Care Wales has commissioned an in-depth review of the EU social care workforce, using £0.2 million from the Welsh Government European Transition Fund. The review is due to report in March 2019.

- NHS Wales Shared Services Partnership are considering whether there is any significant variation in the levels of non-UK EU nationals employed through agencies.
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- **Financial risks:** Many bodies identified concerns around the nature and financial value of any replacement for European Union funding. Our 2018 reports on the Structural Funds<sup>7</sup> and the Rural Development Programme<sup>8</sup> set out the key issues and show that planning for a ‘no-deal’ scenario has been in place for some time.
- The UK Government has guaranteed to cover Wales’ allocation of EU Funds under the current round of funding, in the event of a ‘no-deal’ Brexit. There remains uncertainty over what will replace EU funds over the longer-term. The Welsh Government and Welsh European Funding Office are doing a lot of work to prepare for whatever new schemes are agreed.
- Several bodies also identified key risks around the wider fiscal impacts of a ‘no-deal’ Brexit, if there is a hit to the economy and a consequent squeeze on public finances. Some also highlighted the risk of increased costs of some supplies, due to changes in the exchange rates and any additional customs duties.



**Legislation:** One of the key challenges for the Welsh Government and National Assembly for Wales is the volume of legislative work required to prepare for Brexit. Many of the laws and regulations that the Welsh Government applies are based on EU laws or refer to the European Union. These laws will need to be amended ahead of Brexit. By early February 2019, 29 Statutory Instruments related to Brexit have been laid for sifting in the National Assembly for Wales. The Welsh Government has hired new staff to deal with Brexit related legislation. The National Assembly for Wales has reprioritised existing staff to work on Brexit and is continuing to closely monitor its capacity to manage the increased legislative workload resulting from Brexit.



- **Agricultural exports:** Some rural authorities and national parks raised immediate concerns about the potential loss of the EU market for lambs that will be born in spring, around the time of Brexit. The Welsh Government is analysing the impacts of a ‘no-deal’ Brexit on the red meat industry, is developing contingency plans and has provided £2.15 million of funding to support the Welsh red meat sector. Some councils are also concerned about the wider implications on the local economy and demand for services if farmers face economic difficulties.



7 Wales Audit Office, **Managing the Impact of Brexit on EU Structural Funds**, August 2018

8 Wales Audit Office, **Managing the Impact of Brexit on the Rural Development Programme in Wales**, November 2018

- 
- **Economic impacts:** One of the key concerns that has been identified by the Welsh Government and some bodies is the wider economic impact of a ‘no-deal’ Brexit on Wales. The Welsh Government has been clear that the negative economic impacts cannot simply be managed away. The Welsh Government provided £7.5 million of funding through the European Transition Fund to set-up the Business Resilience Fund, aimed at assisting businesses to prepare for a different trading relationship after Brexit. From this fund, Business Wales have been assigned £1 million to provide emergency financial support to small and medium-sized businesses in Wales. One local authority told us it had been working with local businesses to understand how they can work with them to manage the risks and exploit any opportunities from Brexit.



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**Wider well-being:** Some public bodies provided evidence about wider risks to well-being.

Public Health Wales has carried out a Health Impact Assessment analysis which assesses Brexit from a Welsh perspective using the public health lens of the social determinants of health and population health and detailed work looking at the potential health and wider well-being implications of Brexit, identifying a range of potential negative impacts as well as opportunities<sup>9</sup>.

- A few local authorities also raised concerns about community cohesion and tensions. The Welsh Government has approved £2 million of additional funding from the Community Facilities Programme to develop community facilities that improve community cohesion.



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9 Public Health Wales, **The Public Health Implications of Brexit in Wales: A Health Impact Assessment Approach**, January 2019

# Appendix 1 – Sector based summaries

## Local government

1. Councils are looking to the Welsh Government and the Welsh Local Government Association (WLGA), for centralised support in preparing for Brexit. The WLGA has received £150,000 funding from the Welsh Government's European Transition Fund to deliver a Brexit Transition Support Programme for Welsh local authorities and has produced briefings and guidance, including guidance to support scrutiny committees. The WLGA has been working with counterparts across the UK to share intelligence on Brexit. Councils have been liaising with the WLGA and the Welsh Government, responding to consultations, attending events and using the WLGA toolkit. However, formal collaboration and sharing of resources between councils has been limited.
2. The structures and processes in place and amount of preparation varies greatly across the sector. While senior leadership teams have general oversight for the preparing for Brexit, very few have dedicated Brexit officers or resources, with work instead being undertaken on top of the day job. Specific and detailed political scrutiny of Brexit preparedness has generally been limited. Brexit features on risk registers considered by Audit Committees, but the detail is varied: some councils have separate Brexit issue logs whilst others have little detail beyond listing Brexit as a risk.

Councils have identified a range of risks but few opportunities. The issues that councils raised generally match those in the main report (Figure 3). However, many councils emphasised that the prolonged period of tight funding settlements made it much more difficult to prepare for the risks they had identified.
4. In general, the Brexit implications that councils identified are short term in nature, although some had considered longer term economic and social impacts. Only a minority of bodies had clear plans in place to mitigate the impacts of Brexit that they identified. Some bodies have expressed the view that preparedness work has been deliberately limited due to the uncertainty surrounding the outcome of Brexit. Some councils have adopted a watch and wait approach, although the pace of preparedness is increasing. The Welsh Local Government Association told us that those authorities that were taking a watch and wait approach have more recently started to take action to progress their planning for a 'no-deal' Brexit.
5. Councils identified the importance of providing consistent outward facing messages concerning Brexit to external stakeholders, and the risk of providing inaccurate information. However, communication to external stakeholders has been limited to date, partly because of the uncertainties surrounding Brexit and the risk of providing inaccurate information. However, communication is now increasing as Brexit nears, and some councils have dedicated Brexit sections on their websites.

## NHS bodies

6. At a European and UK level NHS bodies are represented by the Welsh Government and the Welsh NHS Confederation who participate in various forums that discuss and plan for Brexit. The Welsh Government is working particularly closely with the UK Government on areas, such as medical supplies that have implications for the whole UK.
7. Information from these forums is disseminated to the Health Boards via several Welsh Government led groups, Public Health Wales and Welsh NHS Confederation updates. The Welsh Government's Health and Social Services EU Transition Leadership Group oversees the work of five all-Wales groups covering: supply chain resilience; health security; the NHS Senior Responsible Officers (the leads on Brexit from each NHS body); communications; and civil contingency planning. The supply chain group has been supplemented by health board specific groups who have been tasked with identifying and liaising with local suppliers. In addition to the sector specific groups, NHS bodies take part in forums that bring together all public services; these include the Local Resilience Forum, Regional Partnership Boards and the Public Service Boards.

At local level, each health body has recognised and discussed Brexit within its Executive Team and Board meetings. Some bodies are liaising with their counterparts to continue research and development links. The level of resource inputted varies, with some health bodies setting up Brexit specific task and finish groups. One body [Public Health Wales] will be in receipt of EU transition funding, and therefore have a Brexit specific post. Health bodies rely on their internal governance processes to monitor and scrutinise their arrangements.
9. NHS bodies have identified a range of risks and some opportunities. Some of these are described in the main report, notably medical supplies, food supplies, workforce and wider well-being. Other key issues include:
  - i. research and development: Clinical research, including clinical trials, and innovation are key components of health and social care activity across the UK and healthcare organisations have a long tradition of EU collaborative research.
  - ii. reciprocal healthcare: at present all EU nationals have the right to access healthcare treatment in any of the 28 EU countries. Once the UK leaves the European Union, these reciprocal rights will come to an end, unless both the UK and the EU agree to continue or replace them.



10. NHS bodies are working with some key stakeholders, including other public bodies and those involved in their supply chains. There has been limited engagement with the wider public. Public Health Wales has put information about Brexit on its website. The Welsh NHS Confederation website has a set of Frequently Asked Questions and provides links to the technical notices. But at the time of submitting their evidence, NHS bodies had not pro-actively engaged with the public. At the time of drafting, the Welsh Government was developing a communications plan for sharing messages across the NHS and social care both in respect of messages for professionals and the wider public.
11. NHS bodies report that they face practical challenges in preparing for Brexit. Many reported that ongoing political uncertainty about the final form of Brexit was a challenge, as there are different implications in the different possible scenarios. Many NHS bodies are also concerned that preparing for Brexit is putting pressure on already limited resources, given that most of the staff are undertaking Brexit work on top of the day job.

### Welsh Government Sponsored Bodies and associated organisations

12. The range of bodies within this group are diverse and the extent to which Brexit is likely to impact them varies significantly. The extent to which bodies have started to respond to, and prepare for, Brexit is largely dependent upon these expectations.
13. Most bodies are looking to Welsh Government for leadership, although many are collaborating with each other and looking wider for guidance and support; for example, there is evidence of collaboration with sister organisations across the UK.
14. All bodies have done some work to identify the implications of Brexit, both on their own functions, and for the wider sectors they operate in. Some have gone further and begun to take mitigating actions against significant risks, including through use of the Welsh Government's EU Transition Fund.
15. Some implications specific to individual bodies have been identified, and many expressed common concerns about the availability of future funding and the wider economic impact Brexit might have. Problems envisaged include the uncertainty about what Brexit will look like, which is making preparing difficult. Capacity constraints which might hinder the ability to respond quickly to challenges following Brexit is also a concern for many.

## Fire and Rescue Services

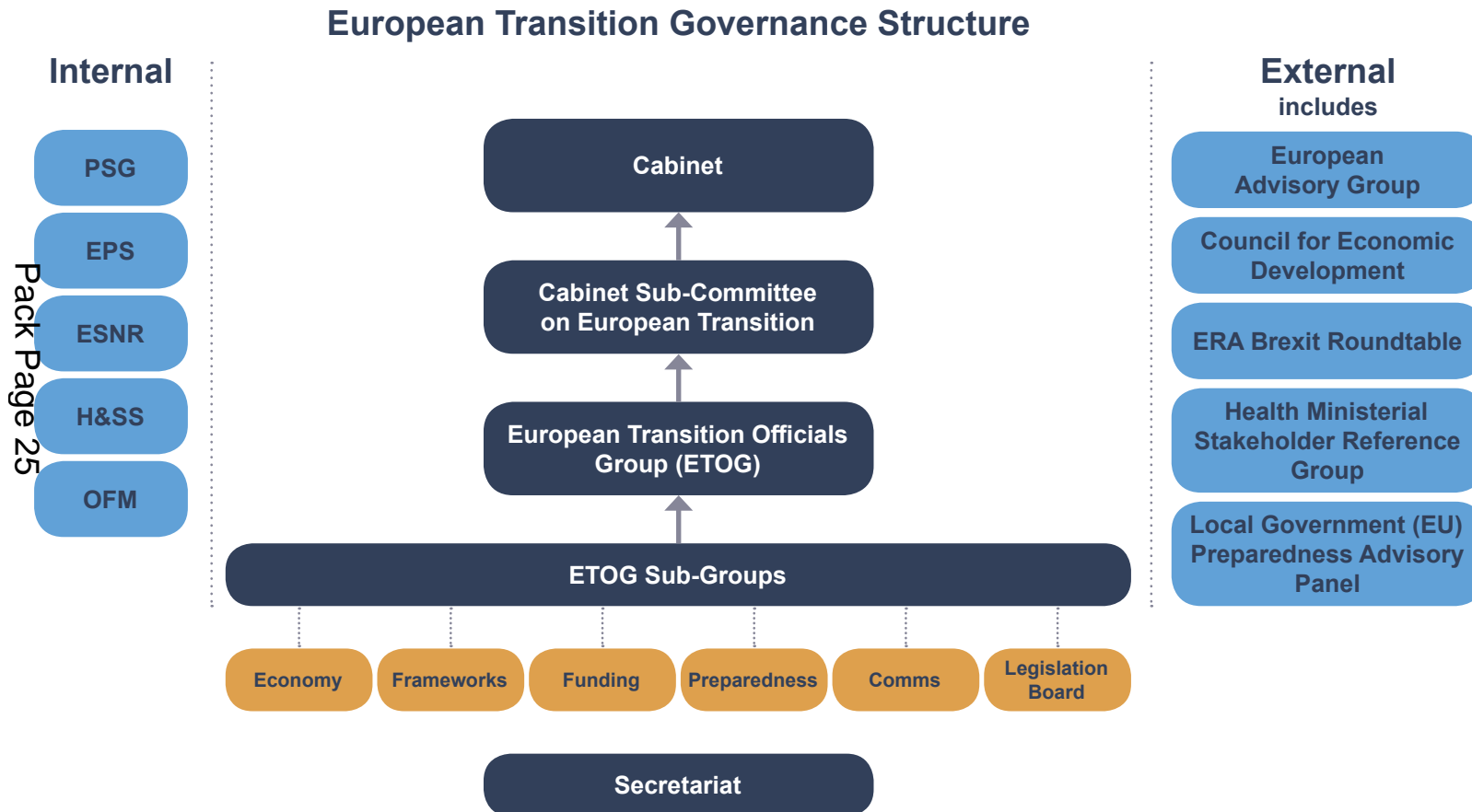
16. Authorities have carried out an analysis of the key risks of a no-deal Brexit in conjunction with the National Fire Chiefs Council. This has highlighted some common risks around the supply of specialist equipment from the EU and increased pressures that might result from delays at ports or the need to assist police, among others.
17. Each of the Services will be affected differently, but all have contingency plans in place and are working as part of the Local Resilience Forums to prepare appropriately.

## National Park Authorities

- Back Page 24
8. Authorities are engaging with Welsh Government Brexit groups and working with each other to identify the implications of Brexit. All authorities see the loss of EU regulation around agriculture and the environment as likely to have an impact, although there is recognition of the opportunity for the Welsh Government to design bespoke replacement policies and programmes to provide most benefit to Wales.
  9. Authorities are concerned about the impact that a reduction in tourism and changes to trade tariffs might have on their ability to raise income after Brexit. They also see the uncertainty and lack of financial resilience as problematic in determining the best action to take to fully prepare for Brexit, and then in responding to the challenges as they become known.

# Appendix 2 – Pan public-sector and Welsh Government arrangements

## Pan public-sector and Welsh Government arrangements<sup>10</sup>



<sup>10</sup> In addition to the structures outlined, the Executive Committee of the Welsh Government meets regularly to focus on EU exit preparedness issues, and EU exit is also a standing item at the Welsh Government Board meetings.

**Cabinet Sub-Committee on EU Transition (CSC-EU)** – provides strategic direction for Welsh Government’s work aimed at securing the best possible outcome for the people of Wales on issues arising from Brexit.

**European Transition Officials Group (ETOG)** – established to develop and implement a coordinated response to Brexit by bringing together policy leads from across Welsh Government departments.

**European Transition Team (ETT)** – responsible for leading on the co-ordination of the Welsh Government’s Brexit position to ensure consistency of approach.

### ETOG Sub-Groups;

**Economy** – going forward the sub-group will focus on coordinating Welsh Government involvement in negotiations on the Future Economic Partnership.

**Frameworks** – sub-group oversees the process of agreeing UK-wide frameworks by engaging with Welsh Government policy leads to ensure a cohesive approach to the development of new frameworks.

**Funding** – sub-group works to coordinate and advise the CSC-EU through the Cabinet Secretary for Finance on the allocation of funding from the EU Transition Fund.

**Preparedness** – sub-group works to ensure Welsh Government departments are as prepared as possible for the practical implications of Brexit.

**Comms** – sub-group considers Welsh Government Brexit communications and headline messages.

**Legislation Board** – sub-group supports and advises Welsh Government departments on their delivery plans for legislative changes as a result of Brexit.

## External groups engaging with Welsh Government:

**European Advisory Group** – advises the Welsh Government on challenges and opportunities for Wales arising from Brexit.

**Council for Economic Development** – brings together representatives from businesses, social enterprises and trade unions to provide advice to inform Welsh Government on policies affecting the economy. The Council has a sub-group – the EU Exit Working Group – which includes a wide range of stakeholder from the business, voluntary and public sectors.

**Environment and Rural Affairs (ERA) Brexit Roundtable** – comprising of stakeholders from across the sector, the group aims to influence policy and programmes relating to Brexit via discussions with Welsh Government, DEFRA and other UK government departments.

**Health Ministerial Stakeholder Reference Group** – involves key health and social care stakeholders through the main representative bodies: Welsh NHS Confederation, WLGA, Association of Directors of Social Services Cymru and Social Care Wales alongside specific groups and organisations such as Public Health Wales, the Royal College of Nurses, the Association of the British Pharmaceutical Industry (ABPI) Cymru Wales, and NHS Chairs and Chief Executives.

**Local Government (EU) Preparedness Advisory Panel** – recently established to coordinate Brexit preparedness work within local government, encourage the sharing of resources and oversee the implementation of the WLGA led Brexit Transition Support Programme.

## Internal operational groups within Welsh Government:

**PSG** – Permanent Secretary's Group

**EPS** – Education and Public Services

**ESNR** – Economy, Skills and Natural Resources

**H&SS** – Health and Social Services

**OFM** – Office of the First Minister

## Appendix 3 – Audit Methods

### Self-assessment and call for evidence

We requested that all the main devolved public sector bodies complete a self-assessment and call for evidence. The self-assessment and call for evidence contained questions relating to Brexit preparedness. Questions included the bodies' arrangements for the identification and management of Brexit, focusing on implications, challenges, monitoring, collaboration and communication. We also requested that the bodies provide any relevant documents to support their responses.

The number of bodies that we issued with a call for evidence and self-assessment, and the number returned completed is set out below. We also received comments from the Welsh Language Commissioner, Future Generations Commissioner, Public Services Ombudsman, Children's Commissioner, and Older People's Commissioner.

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Sector	Number of bodies issues with the call for evidence and self-assessment	Number of responses	Percentage response rate
Local Authorities	22	22	100%
Fire and Rescue Authorities	3	3	100%
National Park Authorities	3	3	100%
Health	11	11	100%
Welsh Government Sponsored Bodies (WGSBs) and wholly owned companies	13	13	100%

## Document reviews

We reviewed a range of documents including:

- Information provided to us to support the call for evidence and self-assessments
- Local and national risk assessments and briefing papers
- Welsh Government guidance and policy documents on Brexit
- Welsh Local Government Association and Welsh NHS Confederation guidance
- UK Government guidance, including the various 'no deal' advice notices
- EU documents and guidance on Brexit planning
- Evidence submitted to Assembly Committee enquiries and Assembly Committee reports

## Interviews

We carried out interviews with the central Welsh Government Brexit team, Welsh Government policy leads, National Assembly for Wales officials, the Welsh Local Government Association, and the Welsh NHS Confederation.

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Jeremy Miles AC/AM  
Y Cwnsler Cyffredinol a Gweinidog Brexit  
Counsel General and Brexit Minister

## Agenda Item 4.1



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref MA-(P) CG/0824/19

David Rees AM,  
Chair of the EAAL Committee  
[David.Rees@assembly.wales](mailto:David.Rees@assembly.wales)

01 March 2019

Dear David,

Thank you for the letter regarding the scrutiny of UK Common Frameworks. First, allow me to reconfirm the Welsh Government's commitment to transparency around Common Frameworks, both in their development and in their future operation, and the vital role of Assembly Committee scrutiny.

As we have previously discussed, the Common Frameworks programme operates on a longer term than much of the other Brexit related activity. These are structures and arrangements, which would need to be in place at the end of the transition period. It is disappointing to say the least that even at this late stage we are still required to make no-deal preparations due to the ongoing uncertainty in Westminster. This has had an effect on the resources available across all governments and timescales for the development of Common Frameworks.

In a number of policy areas, we are coming to the end of the current phase of Common Frameworks development, producing a broad outline agreements mutually developed between the Administrations. The next step will be to engage outside of the Administrations to help develop these outlines into the elements, which will function as the Common Framework, such as memoranda of understanding.

Good progress continues to be made in the 24 priority framework areas and we are hopeful that some of these outlines will be concluded in the near future to enable engagement with stakeholders to take place. Understandably, JMC(EN)'s current focus is on No-Deal planning.

The UK Government produced a provisional analysis of all of the Common Framework policy areas in March 2018. This analysis had been based on preliminary discussions but was produced by the UK Government alone. The governments are now jointly developing an updated analysis which will be published as a tool for scrutiny and further engagement and which is intended to provide details of all the priority policy areas and also to set out the approach we propose to take over a longer timeframe covering the other areas.

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

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

Resource pressures aside, the intergovernmental processes for developing the Frameworks have been broadly effective to date. The future operation of any individual Frameworks, once agreed will need to take into account the content and nature of that particular Framework. However, the current review of the machinery for intergovernmental cooperation will draw on the processes used to date in order to put in place mechanisms, which can work well for the sort of multilateral decision-making which the Frameworks will require and which can provide a basis for decisions to be scrutinised. From the start of the process we have emphasised the need for reporting mechanisms and scrutiny opportunities to be built into these structures. How this scrutiny is undertaken between the different legislatures, and the possible need for new inter-parliamentary structures which mirror those between Administrations, will be worthy of major consideration.

I will be raising the issue of proper parliamentary scrutiny at the next JMC(EN) and would be happy to write back to the Committee.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jeremy Miles'.

**Jeremy Miles AM**

Y Cwnsler Cyffredinol a Gweinidog Brexit  
Counsel General and Brexit Minister

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# Scrutiny of regulations under the European Union (Withdrawal) Act 2018: Progress report

February 2019

## The European Union (Withdrawal) Act 2018

1. The *European Union (Withdrawal) Act 2018*<sup>1</sup> (the 2018 Act) provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation<sup>2</sup> in order to correct deficiencies in UK law that may arise following the UK's departure from the EU.
2. As explained in our guide,<sup>3</sup> the powers permit UK Ministers to act in Wales in devolved areas, i.e. UK Ministers and the Welsh Ministers hold some powers concurrently.
3. In an agreement between the UK and Welsh Governments (the Intergovernmental Agreement),<sup>4</sup> the UK Government commits not to act in devolved areas without the agreement of the Welsh Government. It states:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new

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<sup>1</sup> [European Union \(Withdrawal Act\) 2018](#)

<sup>2</sup> Secondary legislation is also referred to as subordinate or delegated legislation

<sup>3</sup> Constitutional and Legislative Affairs Committee, [Scrutiny of regulations under the European Union \(Withdrawal\) Act 2018: A guide](#), January 2018

<sup>4</sup> [Intergovernmental Agreement on the European Union \(Withdrawal\) Memorandum and the Establishment of Common Frameworks](#)



policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”<sup>5</sup>

4. All regulations to correct deficiencies in EU law, whether made by UK Ministers or the Welsh Ministers, can be identified by the inclusion of the phrase “(EU Exit)” in their title.

## Form of regulations scrutinised

5. As part of its scrutiny of legislation arising from the UK’s exit from the EU, we have been considering the following:

- i. **Regulations made by the Welsh Ministers**

Under the 2018 Act, regulations made by the Welsh Ministers to correct deficiencies in EU law can be subject to the negative procedure or the affirmative procedure.<sup>6</sup> In each case, the particular procedure is determined by the 2018 Act itself.

Regulations which the Welsh Ministers propose to make using the negative procedure are subject to sifting (see our guide for further information about the process followed). Such regulations are being referred to as proposed negatives because they are draft regulations that the Welsh Ministers propose to make formally under the negative procedure. As a result of the sifting process, we may recommend that such regulations are subject to the affirmative procedure rather than the negative procedure. However, there is no obligation on the Welsh Government to accept that recommendation.

Regulations that have been sifted, and those that did not need to be sifted because they were already subject to the affirmative procedure, are then scrutinised by the Committee in accordance with Standing Orders 21.2 and 21.3. The outcome of that scrutiny is reported to the National Assembly.

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<sup>5</sup> Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks, (Second) paragraph 8

<sup>6</sup> The procedures are formally described in Standing Order 27. Standing Orders are available on the National Assembly’s website.

In order to manage the number of regulations that may come forward from the Welsh Ministers, we entered into a [Protocol](#)<sup>7</sup> with the Welsh Government, which provides in particular for notice two weeks in advance of regulations that are likely to come forward.

**ii. Regulations made by UK Ministers acting alone in devolved areas (with consent of the Welsh Ministers)**

UK Ministers are able to make regulations in devolved areas acting alone under sections 8 and 9 of the 2018 Act. However, under the terms of the Intergovernmental Agreement they can only do so with the consent of the Welsh Ministers. Such regulations made by UK Ministers are laid before the UK Parliament only.

New Standing Order 30C (attached at Annex 1) requires that for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement (30C Written Statement) notifying the National Assembly of the regulations in question, normally within 3 working days of them being laid before the UK Parliament.

Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum under Standing Order 30A. Any member may then table a motion to require the National Assembly to formally give consent to the regulations, provided they lay their own memorandum.

For regulations proposed to be made under the negative procedure by UK Ministers in devolved areas and with the Welsh Government's consent, they too will be subject to a sifting process in the UK Parliament.

**iii. Regulations made by UK Ministers acting alone in devolved areas (without the consent of the Welsh Ministers)**

UK Ministers are able to make regulations in devolved areas under section 23 of the 2018 Act, without the consent of the Welsh Government (because regulations made by UK Ministers under section 23 of the 2018 Act fall outside the scope of the Intergovernmental

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<sup>7</sup> *Scrutiny of regulations arising from the UK's exit from the European Union – Protocol between the Welsh Government and the Constitutional and Legislative Affairs Committee of the National Assembly for Wales, October 2018*

Agreement). These regulations will also be laid before the UK Parliament only.

The requirements of Standing Order 30C and Standing Order 30A also apply to such regulations.

These regulations will also be subject to sifting by the relevant UK parliamentary committees.

## Analysis

6. The table below identifies all exit-related regulations in devolved areas considered by this Committee until the end of January 2019 (whether made, or proposed to be made, by the Welsh Ministers or UK Ministers).

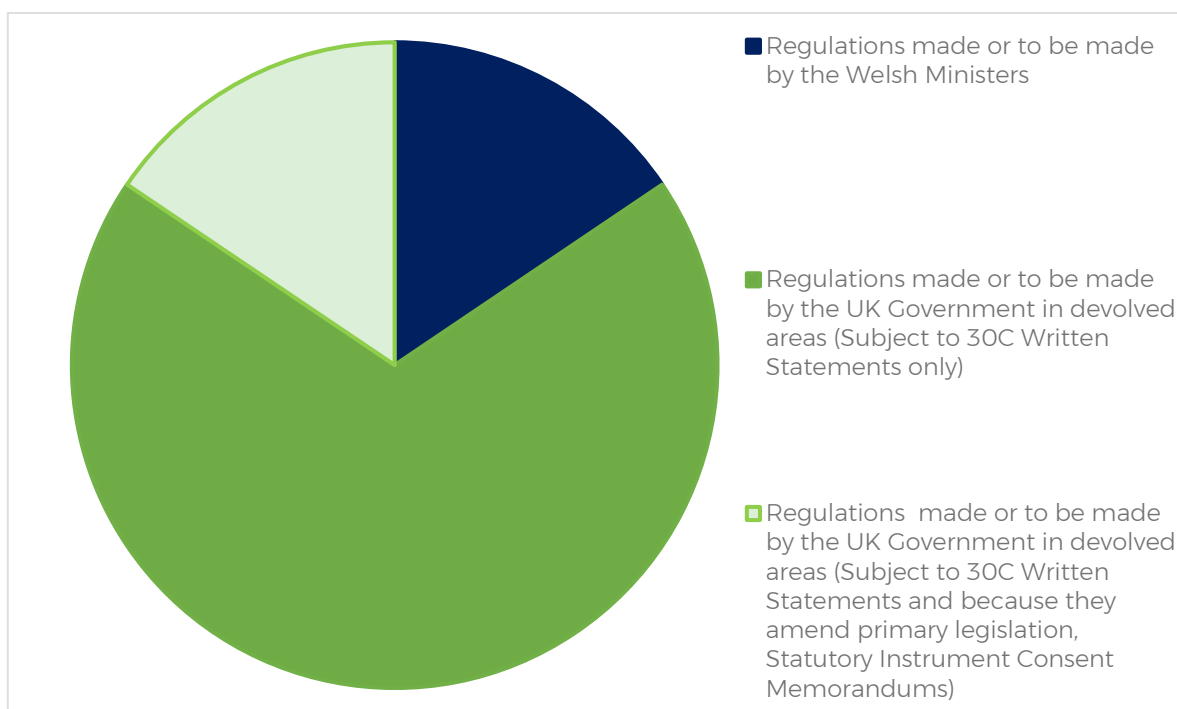
Meeting Date	Proposed negatives scrutinised <sup>8</sup>	Proposed negatives recommended for affirmative procedure?	Brexit regulations scrutinised under SO 21 <sup>9</sup>	Statutory Instrument Consent Memorandums scrutinised	30C Written Statements scrutinised	30C Written Statements with issues reported
5-Nov-2018	0	0	0	2	4 (2 of which SICM-related)	0
12-Nov-018	0	0	0	0	4	0
19-Nov-2018	0	0	0	0	1	1
26-Nov-2018	0	0	0	0	12	3
3-Dec-2018	0	0	0	2	8 (2 of which SICM-related)	0
10-Dec-2018	0	0	0	2	13 (2 of which SICM-related)	4
7-Jan-2019	3	0	0	3	17 (3 of which SICM-related)	6
14-Jan-2019	4	0	0	5	14 (5 of which SICM-related)	3
21-Jan-2019	3	1	0	0	0	0
28-Jan-2019	4	0	0	0	3	2
<b>Total</b>	<b>14</b>	<b>1</b>	<b>0</b>	<b>14</b>	<b>76</b>	<b>19</b>

<sup>8</sup> This does not include proposed negatives laid in January but not due to be sifted until February

<sup>9</sup> This does not include proposed negative regulations sifted by the Committee that have since been made but have yet to be scrutinised by the Committee under Standing Orders 21.2 and 21.3



Some of the information is also represented in the pie chart below.



**7.** All the regulations, and the associated reports on their scrutiny, are available on our [webpages](#).

**8.** As regards our **scrutiny of 30C Written Statements**, we have identified three key issues that have necessitated writing to the Welsh Government seeking clarification. These are as follows:

- We have been concerned at the lack of detailed information contained in written statements, particularly as regards identifying the specific provisions within regulations to which the Welsh Ministers are giving consent. Our letter of 14 January 2019<sup>10</sup> to the Minister for Finance and Trefnydd, to which we look forward to receiving a response in due course, said:

“The Welsh Government’s response states that the Welsh Ministers consider and consent to the statutory instrument (SI) as a whole, rather than confine their consideration to the devolved areas. While that may be the case, we are unclear why the written statement cannot detail the specific provisions for which consent is being given, i.e. which parts of each SI make provision in devolved areas.

For that reason, we would be grateful if you could confirm that the specific provisions for which consent is being given are identified before

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<sup>10</sup> [Letter to the Minister for Finance and Trefnydd, 14 January 2019](#)

the Welsh Ministers make a decision to give that consent to the UK Ministers. In our view this would be necessary to ensure compliance with the intergovernmental agreement relating to the use of concurrent powers.”

- The Welsh Government has consented to the UK Government making negative procedure statutory instruments that restrict the legislative competence of the National Assembly for Wales, without the Assembly having a role. We have written<sup>11</sup> to the Welsh Government about The Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018 and have raised our concerns with the House of Lords Secondary Legislation Scrutiny Committee given the role it has in scrutinising these regulations.<sup>12</sup> We have identified similar concerns with the following 30C written statements:
  - The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019;
  - The Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendments etc) (EU Exit) Regulations 2018;
  - The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019;<sup>13</sup>
  - The Nutrition (Amendment etc) (EU Exit) Regulations 2019.<sup>14</sup>
- We have identified two sets of regulations that appear to be in breach of the Intergovernmental Agreement in that they do not comply with the requirement that the UK Government’s powers under the 2018 Act will not be used to enact new policy in devolved areas; we believe the Welsh Ministers should have made these regulations. We are seeking clarification<sup>15</sup> from the Welsh Government about the approach adopted for these regulations, namely:
  - The Animal Welfare (Amendment) (EU Exit) Regulations 2018;

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<sup>11</sup> [Letter to the Minister for Finance and Trefnydd, 14 January 2019](#)

<sup>12</sup> [Letter to Lord Trefgarne, Chairman, House of Lords Secondary Legislation Scrutiny Committee, 14 January 2019](#)

<sup>13</sup> [Letter to the Minister for Finance and Trefnydd, 31 January 2019](#)

<sup>14</sup> [Letter to the Minister for Finance and Trefnydd, 31 January 2019](#)

<sup>15</sup> [Letter to the First Minister, 14 January 2019](#) and [related correspondence](#)

- The Floods and Water (Amendment etc.) (EU Exit) Regulations 2019.

**9.** Other issues we have identified include:

- incorrect references within the statement to the existing legislation that is being amended;
- lack of clarity within the statement regarding the existing legislative framework and how that impacts on the approach pursued in the regulations;
- lack of clarity within the statement regarding the effect of the amendments being made by the regulations;
- the statement failing to highlight to what degree the National Assembly's legislative competence is effected by the regulations;
- the statement failing to highlight to what degree the Welsh Minister's legislative competence is effected by the regulations;
- the statement appearing to accompany regulations that relate to a non-devolved area;
- the statement containing incomplete details of which regulations are being amended.

**10.** On two occasions the Welsh Government has laid revised 30C written statements related to air quality regulations to correct serious errors.<sup>16</sup>

**11.** As regards **Statutory Instrument Consent Memorandums** laid, the Welsh Government has not tabled any motions seeking the consent of the National Assembly to the regulations that are the subject of the memorandums.<sup>17</sup> The Welsh Government has provided a range of explanations for this approach in correspondence with us:

- not believing a debate on the relevant Statutory Instrument Consent Memorandums would be a productive use of "valuable plenary time";

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<sup>16</sup> [Revised written statement – The Air Quality \(Amendment of Domestic Regulations\) \(EU Exit\) Regulations 2018](#); [Revised written statement – The Air Quality \(Miscellaneous Amendment and Revocation of Retained Direct EU Legislation\) \(EU Exit\) Regulations 2018](#)

<sup>17</sup> [Statutory Instruments requiring Assembly consent \(Statutory Instrument Consent Memorandums\)](#)

- the relevant regulations are restricted to making corrections to deficiencies in law that will arise as a result of the UK leaving the EU;
- the provisions of the relevant regulations are technical in nature, and there is no divergence in policy between the Welsh Government and the UK Government;
- the Welsh Government's interest in the relevant regulations is restricted to operability amendments that will arise as a result of the UK leaving the EU.

**12.** Suzy Davies AM did table a motion in respect of one Statutory Instrument Consent Memorandum<sup>18</sup> (and also laid her own memorandum<sup>19</sup>). As a result, the National Assembly consented to the making of regulations that amended primary legislation within the legislative competence of the Assembly.<sup>20</sup>

**13.** On 4 December 2019, the Llywydd wrote to the First Minister<sup>21</sup> expressing concern on behalf of Committee Chairs at the extent to which UK Ministers are acting on the behalf of the Welsh Ministers. In his response, on 11 January 2019, the First Minister said that:

“If we had taken the decision that all EU Exit legislation in devolved areas was to be made in Wales, then between September 2018 and March 2019 it would have required an additional 200 SIs and 4-6 Bills to be laid in the Assembly. Even if it were possible to suspend all other business of the Government and the Assembly for this period, the Brexit legislation programme would have required six months of the Assembly's and the Government's time to be spent making more legislation than is normally made in a year in Wales. It would only be possible to pass the necessary Bills in that time by following a fast track procedure which would limit their scrutiny by the Assembly.

I currently expect 140-150 UK Government EU Exit SIs to be made in areas devolved to Wales ahead of exit day, though this number is subject to change as SIs are merged or disaggregated and new ones emerge. Almost all of these will require the consent of the Welsh

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<sup>18</sup> In accordance with Standing Order 30A.10

<sup>19</sup> As required by Standing Order 30A.3

<sup>20</sup> RoP, 16 January 2019

<sup>21</sup> [Letter from the Llywydd to the First Minister, 4 December 2018](#)

Ministers through the process set out in the Intergovernmental Agreement.

The Welsh Ministers only consent to the UK SIs where there is no divergence on policy between Wales and the UK, and on that basis the SIs are not politically sensitive. These SIs are for the purpose of making the corrections so that the statute book will be operable at the point of EU exit and are being made by the UK Government, with the consent of the Welsh Ministers.”<sup>22</sup>

**14.** He also said:

“I understand that the Constitutional and Legislative Affairs Committee is intending to produce a report on the written statements laid so far. I look forward to receiving that report and to considering any improvements the Committee recommends.”<sup>23</sup>

## Commentary

**15.** We had not anticipated the extent to which the UK Government has been acting in devolved areas through primary and subordinate legislation.

**16.** This report focuses mainly on the use of subordinate legislation being made by the UK Government; our views and concerns on the use of primary legislation have been expressed in our reports on the Welsh Government’s Legislative Consent Memorandums laid in respect of the [Agriculture Bill](#)<sup>24</sup> and the [Healthcare \(International Arrangements\) Bill](#)<sup>25</sup>.

**17.** We note the observations of the First Minister expressed in his letter of 11 January 2019. In our view, the concerns expressed relate to the capacity and priorities of the Welsh Government in dealing with the volume of legislation needed to correct the Welsh statute book, rather than the ability of the National Assembly to undertake appropriate scrutiny of that legislation. It is a matter for the Business Committee to determine the way in which the business of the

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<sup>22</sup> [Letter from the First Minister to the Llywydd, 11 January 2019](#)

<sup>23</sup> [Letter from the First Minister to the Llywydd, 11 January 2019](#)

<sup>24</sup> [Constitutional and Legislation Affairs Committee Report. The Welsh Government’s Legislative Consent Memorandum on the Agriculture Bill, January 2019](#)

<sup>25</sup> [Constitutional and Legislation Affairs Committee Report. The Welsh Government’s Legislative Consent Memorandum on the Healthcare \(International Arrangements\) Bill, January 2019](#)

Assembly is conducted and if necessary, to manage any increase in workload that arises from the UK's departure from the EU.

**18.** The First Minister's letter of 11 January states "The Welsh Ministers only consent to the UK SIs where there is no divergence on policy between Wales and the UK, and on that basis the SIs are not politically sensitive". However, this is at odds with the Intergovernmental Agreement which states that "the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency". **We consider this apparent contradiction to be a matter that requires an urgent response from the First Minister.**

**19.** While we accept that the Welsh Government is under time and resource pressure, we believe that it has not got the balance right between permitting the UK Ministers to act on behalf of the Welsh Ministers and making its own legislation.

**20.** Addressing the need to correct the Welsh statute book as a consequence of the UK's exit from the EU is an important function. The National Assembly should have a greater role in scrutinising that process. We believe that the Welsh Government has been too reliant on the UK Ministers to act on the Welsh Ministers behalf and should have taken on responsibility for more of this work itself. As we highlight above, the existing approach has led to the identification of a reduction in the National Assembly's legislative competence *after* consent has been given by the Welsh Ministers. Not only does this represent a change in policy it is also in our view politically sensitive and is therefore difficult to understand on what basis the Welsh Government has consented to the regulations in question.

**21.** Moreover, the general approach being taken is also at odds with the Welsh Government asking for, and being given, the power to make correcting regulations, but then not using it all in respect of retained direct EU law.<sup>26</sup> When the National Assembly agreed the Legislative Consent Memorandum on the 2018 Act,<sup>27</sup> it seems to us that it did so, in part at least, on the basis that the Welsh Government had secured amendments to the Bill that gave the Welsh Ministers additional powers to make regulations.<sup>28</sup> Now, the Welsh Ministers are not using

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<sup>26</sup> Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2) European Union (Withdrawal) Bill, April 2018, paragraph 8, 4<sup>th</sup> bullet point

<sup>27</sup> RoP, 15 May 2018

<sup>28</sup> And given the wording of the Supplementary LCM laid by the Welsh Government on the Bill, it seems that giving these additional powers to the Welsh Ministers was one of the key reasons why the Welsh Government was able to recommend the Assembly consent to the Bill.

those powers extensively (as at 31 January 2019, the Welsh Ministers have made only six sets of regulations under the 2018 Act). Instead, they are relying heavily on UK Ministers to make regulations that correct EU-derived domestic legislation in devolved areas, and they are relying completely on UK Ministers to make regulations that correct direct EU legislation in devolved areas.

**22.** Unless there is a delay to the UK's exit from the EU, we recognise that the adopted approach cannot be changed. However, it remains unclear why this position has arisen.

**23.** We believe the Welsh Government can change its approach to 30C Written Statements. **The quality of these statements and the information they contain must be improved by addressing the concerns we have highlighted in paragraph 9 above.**

**24.** While not the original intention, the Intergovernmental Agreement would appear to have become a mechanism for bypassing the scrutiny of changes in Welsh Government policy. It is also facilitating an apparent reduction, with the consent of the Welsh Ministers, of the legislative competence of the National Assembly.

**25.** On issues of consent, we are also concerned that the Welsh Government is not using the Statutory Instrument Consent Memorandum process as it should be. We have not, to date, commented on whether a Statutory Instrument Consent Memorandum should be subject to a consent motion, because we do not believe that it should become a matter for routine decision by this Committee, particularly when the Welsh Government would be under no obligation to accept any recommendation we make.<sup>29</sup>

**26.** **We believe that all Brexit-related Statutory Instrument Consent Memorandums should be subject to a consent motion tabled by the Welsh Government.** As matters currently stand, the Statutory Instrument Consent Memorandum process is being used as a means for the Welsh Ministers to provide consent by default. To use a relatively familiar analogy, the consent process has taken on the features of the negative procedure process for the consideration of statutory instruments; consent is deemed to have been given

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<sup>29</sup> We have however made a recommendation that motions should be tabled for Statutory Instrument Consent Memorandums laid as a consequence of the UK Government's Healthcare (international Arrangements) Bill. See paragraphs 46-50 and recommendation or our report, The Welsh Government's Legislative Consent Memorandum on the Healthcare (International Arrangements) Bill.

unless an Assembly Member intervenes. That is neither appropriate nor within the spirit of Standing Order 30A.<sup>30</sup>

**27.** In reaching this view, we do not believe that it is appropriate to place the burden for tabling a motion on a backbench Assembly Member, given that they are obliged to table their own Statutory Instrument Consent Memorandum in order to do so. If the Welsh Government is right that such issues are technical and non-controversial, the National Assembly can approve a motion with little or no debate.

**28.** More worryingly, if the Welsh Government has established the principle with the UK Government that the consent of the National Assembly is not generally required, then it is not clear what effect a decision of the National Assembly to vote down a consent motion (ie to refuse consent) would have.

**29.** There is one final observation we would like to make regarding the way in which the Welsh Government is seeking to justify its reasons for consenting to the UK Government acting in devolved areas.

**30.** We have noted that in its Statutory Instrument Consent Memorandums, as justification for why it is appropriate for the regulations to make the relevant provision, the standard form of words tends to be:

“There is no divergence between the Welsh Government and the UK Government on the policy for the amendment. Therefore, making separate SIs in Wales and England would lead to duplication, and unnecessary complication of the statute book. This approach promotes clarity and accessibility during this period of change.”

**31.** Similar wording is used when consenting through the 30C Written Statements process, with the following wording also appearing regularly:

“Consenting to a UK wide SI ensures that there is a single legislative framework across the UK which promotes clarity and accessibility during this period of change. In these exceptional circumstances, the Welsh Government considers it appropriate that the UK Government legislates on our behalf in this instance.”

**32.** This justification on grounds of clarity and accessibility lacks credibility and seems a strange approach to advocate particularly in the context of devolution.

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<sup>30</sup> Business Committee, [Proposed amendments to Standing Orders 29 and 30: Consent in Relation to UK Parliament Bills](#), April 2013



**33.** While we understand the complexities in correcting the statute book because of the UK's exit from the EU and the need for administrative efficiency, we are concerned that the approach being adopted makes the Welsh statute book less accessible. This is a point we made recently in our report on Welsh Government's LCM on the Agriculture Bill)<sup>31</sup> and that also arose in an evidence session on the Welsh Government's Legislation (Wales) Bill,<sup>32</sup> which aims to make legislation more accessible to Welsh citizens.

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<sup>31</sup> Constitutional and Legislation Affairs Committee Report, The Welsh Government's Legislative Consent Memorandum on the Agriculture Bill, January 2019, paragraph 109

<sup>32</sup> CLA Committee, RoP, [5-20], 10 December 2018

## Annex 1

**STANDING ORDER 30C** – Notification in Relation to Statutory Instruments made by UK Ministers in devolved areas under the European Union (Withdrawal) Act 2018 not laid before the Assembly Statutory Instruments Requiring Notification to the Assembly

- 30C.1 In Standing Order 30C, “relevant statutory instrument” means a statutory instrument, or draft statutory instrument, made, or to be made, by a UK Minister acting alone under sections 8, 9 or 23 of, or Schedule 4 to, the European Union (Withdrawal) Act 2018 which contains provision within the legislative competence of the Assembly or the executive competence of the Welsh Ministers. Written Statements in Relation to Relevant Statutory Instruments.
- 30C.2 A member of the government must lay a written statement giving notification of any relevant statutory instrument, normally within three working days of it being laid before the UK Parliament.
- 30C.3 The written statement must:
- i. summarise the purpose of the statutory instrument;
  - ii. specify any impact the statutory instrument may have on the Assembly’s legislative competence and/or the Welsh Ministers’ executive competence; and
  - iii. where the Welsh Ministers consented to UK Ministers making the relevant statutory instruments, explain the reasons why consent was given.

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