

Wales in the UK – legislating in a changing constitutional context

Stakeholder event, 13 June 2022:

summary of discussion

July 2022

A new landscape for making laws

Since the late 1990s laws for Wales *have been* made in different places. However, the landscape is again changing.

We are no longer subject to the more stable, rules-based system of the EU; instead, we are concerned by matters of legislative competence and there is a greater reliance on intergovernmental agreements and processes.

There also needs to be a developing understanding of treaties: how they are scrutinised, the implications of revisions, and how the devolved governments are involved in developing negotiating positions and generally kept informed.

As part of this changing landscape, it is clear that the UK Government is committed to divergence from the EU, which has implications for Wales.

This complexity requires significant expertise and resource in the legislatures in order to facilitate scrutiny by Members.

Legislative complexity also impacts on the accessibility of law once it is made and can make it harder to understand the different regulations and policies that apply depending on where you live.



Making and scrutinising laws for Wales in this new landscape

Participants suggested that Brexit has meant there are now less stable expectations about where laws should be made for Wales. Trends are emerging. However, it's not clear whether these trends are bound up with the process of leaving the EU or will come to represent a longer-term shift.

- The UK Government is negotiating new **international treaties**, changing the context in which laws for Wales are made. Devolved governments and parliaments have limited opportunity to influence treaty negotiation processes.
- The **UK Government and Parliament** have legislated more extensively in devolved areas. The EU's legislative process was rules-based and predictable. Routes for the devolved legislatures to influence UK legislation are now less clear, and the legislative consent (Sewel) convention no longer appears to be working effectively.
- UK legislation has granted Ministers extensive **delegated powers** (including Henry VIII powers) in areas previously covered by EU law. Ministers may use these powers to make substantive policy changes with limited consultation. Parliaments have less opportunity to influence secondary legislation. The UK Government's planned Retained EU Law Bill raises the prospect of broad powers for Welsh, and perhaps UK, Ministers to change retained EU law in devolved areas via secondary legislation.
- The governments are making more use of **intergovernmental agreements and other non-legislative instruments**. These can act as a means of bypassing parliamentary scrutiny and can be inconsistent and lacking in transparency.

Participants raised concerns that this represented a shift from Wales to Westminster, and from parliamentary to executive power. This presents a challenge for scrutiny.

Making decisions about alignment and divergence

Participants recognised that the Welsh Government and the Senedd have new choices to make about Welsh law and policy in this new context, and in particular about **alignment and divergence** with the EU, and the rest of the UK.

Deciding whether to align or diverge involves trade-offs between the benefits of making policy and regulatory choices tailored to local needs, and the risks of hindering compliance, efficiency, productivity and competition. Some forms of divergence from the EU could also result in retaliatory action under the level playing field provisions in the Trade and Cooperation

Agreement. Even if the Welsh Government and the Senedd have not initiated divergence, such retaliatory action could impact Wales.

Although the UK Government and the Welsh Government have very different policy approaches to divergence from the EU, in practice the UK Government is passing extensive legislation in devolved areas. This risks the development of an incoherent approach to alignment and divergence in the law in Wales.

Participants suggested that there was a need for the Senedd and Welsh Government to develop ways of monitoring legislation from the EU and from other parts of the UK to understand the development of alignment and divergence, but recognised that this would be a challenge with limited capacity.

Scrutiny of common frameworks could offer one route for monitoring and understanding divergence within the UK. However, many areas of law and policy are not covered by common frameworks, and it's important to understand how alignment and divergence are developing in those areas too.

Improving scrutiny

There was a recognition that there needs to be a change in approach to scrutiny in response to this increasing complexity. Participants suggested that this period of change offered an opportunity to reframe scrutiny processes, but recognised that this would be challenging in the context of limited parliamentary resources. Ideas suggested are set out below:

- **moving scrutiny upstream** by engaging with government early on the development of policy and legislation;
- **engaging early on the negotiation of international agreements** by seeking as far as possible to provide input on negotiating objectives and during the negotiating process;
- **taking a radical new approach to engaging** with the UK Government and UK Parliament during the legislative process by making the Senedd's views clear early on, rather than relying on expressing the Senedd's view late in the legislative process through the legislative consent process;
- **prioritising**, by making it clear what the Senedd wants before legislation is introduced and then defending those principles;

- **shifting more of the scrutiny burden onto government**, by requiring it to provide more detailed information in explanatory material about how legislation is framed by new domestic and international arrangements, as well as legislative competence and human rights compatibility;
- **examining both the policy and legal implications of new legislation**, with support from parliamentary services;
- being more careful about conferring extensive powers on the Welsh Government, and requiring detailed justification for the delegation of powers;
- engaging in more consultation on draft secondary legislation;
- building in parliamentary oversight of non-legislative processes such as common frameworks and intergovernmental agreements;
- learning from scrutiny approaches in other parliaments, such as the Scottish Parliament’s approach to UK Government secondary legislation in devolved areas;
- strengthening interparliamentary cooperation on scrutiny of intergovernmental working and issues of common interest such as alignment and divergence, enabling two-way learning to take place and finding common cause (for example by use of joint committee sessions and through the Interparliamentary Forum);
- making more use of academic resources to inform parliamentary support services, such as the UK in a Changing Europe divergence tracker; and
- seeking to improve transparency and public understanding of the scrutiny process, including by ensuring information remains readily accessible on the Senedd website and engaging more widely via different social media platforms.

Improving the accessibility of the law as it applies in Wales

Participants recognised that the complexity of the devolution settlement and the constitutional landscape outside the EU posed problems for the accessibility of the law. Although complexity is to an extent inevitable, participants generally felt that the situation had worsened:

- Some participants raised concerns that **changes to retained EU law** could cause problems for accessibility and risk legal uncertainty. Key new primary legislation (such as the *UK Internal Market Act 2020* and *Subsidy Control Act 2022*) is so far largely untested in the courts, while the UK Government’s proposed Retained EU Law Bill

raises the prospect of further piecemeal change via secondary legislation. The UK Government's use of the principle of implied amendment in the *Future Relationship Act 2021* also creates problems for accessibility and certainty.

- The **UK Parliament legislating in devolved areas** also poses problems for accessibility, including risking undermining the Welsh Government's ambitions to consolidate and codify of Welsh law and to make legislation bilingually.
- Some participants said that **divergence** between Wales and other parts of the UK, or between Wales and the EU, also creates challenges for accessibility.

Participants discussed what making the law accessible should mean. Some emphasised the importance of making sure practitioners can access the law, so that people and businesses can access advice that is as affordable and legally certain as possible. Others argued for a broader understanding of accessibility, arguing that the law should be something that stakeholders and society as a whole can hope to understand. Participants made suggestions on improving the accessibility of the law, including:

- **changing approaches to the drafting of legislation** to make it less exhaustive and detailed, and so easier to read;
- **introducing the use of extent clauses** as standard in primary and secondary legislation, to make it easier to tell if legislation extends to and applies in Wales;
- **the Senedd proactively considering the implications of UK and Welsh legislation for the accessibility of the Welsh statute book**, and intervening when more accessibility is needed;
- **developing the Law Wales website into a resource that collates UK, Welsh and retained EU law that applies in Wales**, while recognising that this is a major undertaking and commercial providers of legal resources have much more capacity;
- **supporting the Welsh Government's programme of consolidation and codification**, while recognising that it is important also to make law in an accessible way in the first place;
- **supporting the legal sector** to ensure that legal advice is readily available and people can understand and access their rights, in the context of significant cuts to legal aid over the past decade.