

Discussion event

Wales in the UK – legislating in a
changing constitutional context

Background briefing

13 June 2022



Introduction

Making and scrutinising laws in the Sixth Senedd is complex. The introduction of the reserved powers model and the UK's departure from the EU have redrawn the scope of devolved powers. Meanwhile, the UK Government has legislated extensively in devolved areas.

The Committee has taken on and developed new approaches to scrutiny to take these complexities into account. However, it has at times been difficult to understand their cumulative implications.

The Committee is holding this seminar to explore this new landscape and discuss how effective scrutiny approaches can be developed and strengthened.

This background paper outlines:

- the challenge of scrutinising laws for Wales outside the EU in the Sixth Senedd (section 1); and
- how the Committee, and the Senedd as a whole, have approached this challenge so far (section 2).

Section 3 asks for your views on ways to strengthen scrutiny in this new context.

1. The scrutiny challenge

The basis for making laws for Wales has significantly changed in recent years, with the introduction of the reserved powers model in 2017 followed by the UK's exit from the EU in 2020.

The Senedd and Welsh Government no longer need to comply with EU law. However, understanding whether a change to the law is within the powers of the Senedd, and whether there are any practical constraints, now involves asking whether it is:

- reserved, or subject to any other constraint, under the *Government of Wales Act 2006*;
- consistent with the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement;
- consistent with the UK's other international obligations;
- in scope of any of the market access principles in the *United Kingdom Internal Market Act 2020*;
- in scope of any common framework or other intergovernmental agreement.

In making decisions about how to make and scrutinise laws for Wales, the Welsh Government and the Senedd now have to consider a range of issues (some new) including:

- whether to legislate in Wales or consent to Westminster legislation;
- whether to use primary legislation or delegated powers;
- whether to choose to align with, or diverge from, the law in the EU, or in any other part of the UK; and
- how to ensure that the law can be readily accessed and understood.

Understanding this new landscape presents a challenge for parliamentary scrutiny.

The Committee has sought to understand how these new structures are shaping the development of the law in Wales. However, it has at times been difficult to understand their cumulative implications.

Our experience: the Professional Qualifications Act 2022

The Committee considered the Welsh Government's legislative consent memorandum on the UK Professional Qualifications Bill in the autumn of 2021.

During scrutiny, the Committee noted that the Bill's provisions were closely interconnected with new domestic and international arrangements, including:

- international agreements;
- the UK's new immigration system;
- the UK Internal Market Act 2020; and
- the planned common framework on recognition of professional qualifications.

The Committee recommended that, where UK Bills that are the subject of Welsh Government legislative consent memoranda interconnect with domestic and/or international arrangements, the Welsh Government should make this clear and provide details. The Welsh Government agreed to do this.

2. The Committee's approach so far

The Committee has taken on and developed a range of tools to help scrutinise how laws are made in this new landscape.

Understanding the international context

The Senedd routinely considers the impact of international obligations across a broad range of issues, including Brexit, climate change and refugees. As the Welsh Ministers are responsible for their implementation in devolved areas, the Committee plays a key role in this. The Committee's external affairs responsibilities include the scrutiny of non-trade international agreements and UK-EU governance.

International agreements

International agreements are scrutinised via a dedicated process established during the Fifth Senedd. In the Sixth Senedd, the Committee leads on non-trade agreements and the Economy, Trade and Rural Affairs Committee leads on trade agreements.

This Committee considers the impact of agreements on Wales and the role of the Welsh Government in their development. It works closely with the House of Lords International Agreements Committee, with which it shares its findings. Common issues include missing devolution information from explanatory memoranda and where information obtained by the Committee from the Welsh Government differs from that provided by the UK Government.

In the Sixth Senedd, the Committee has considered the impact on Wales of 20 treaties on human rights, data, social security, employment rights, maritime and more.

UK-EU governance

The post-Brexit UK-EU arrangements place extensive duties on the UK which impact daily life in Wales. In devolved areas, the Welsh Government is responsible for their implementation. The Committee has exchanged correspondence with Ministers regarding the impact of the new arrangements, including compliance.

The Committee has also noted the challenge of navigating the post-Brexit UK-EU relationship, as set out in the Withdrawal Agreement and Trade and Cooperation Agreement (TCA). The Committee has called on the Welsh Government to improve transparency for informing the Senedd of its role in the post-Brexit relationship.

Common frameworks

Senedd committees consider how international obligations are taken into account by each framework and how they provide for the governments to work together on the negotiation and implementation of future international obligations.

UK Internal Market Act 2020

The Committee monitors the use of powers provided to Welsh Ministers in the UK Internal Market Act 2020 on the operation of the Northern Ireland Protocol in

relation to the UK's internal market. Regulations on border controls considered by the Committee have intersected with these powers, and the Committee continues to monitor this situation and its impact.

Understanding the domestic context

New UK governance

The Committee has sought to develop approaches to understanding new structures for UK governance set up after Brexit and their implications for Welsh law and policy.

To support scrutiny of intergovernmental working, the Committee has negotiated an inter-institutional relations agreement between the Welsh Government and the Senedd.

Parliaments across the UK face similar scrutiny challenges. An Interparliamentary Forum has been re-established to help support scrutiny of intergovernmental working in the new landscape.

UK Internal Market Act 2020

The UK Internal Market Act 2020 means that, in general, goods, services and professional qualifications that can be sold or recognised in one part of the UK should be able to be sold or recognised in any other part.

The Fifth Senedd LJC Committee recommended that this Senedd consider whether the Welsh Government should be required to keep the Senedd updated on how the Act was working.

The Counsel General has told the Committee that the Welsh Government will notify the Senedd when seeking an exclusion from the Act. The Senedd's Climate Committee has corresponded with the Welsh Government about the recent agreement of an exclusion from the Act for single use plastics legislation.

Common frameworks

Common frameworks generally set processes for the governments to work together and decide when to follow the same rules and when to diverge.

Senedd committees have been carrying out scrutiny of common frameworks, alongside counterparts in other UK parliaments. This Committee has maintained

oversight of the scrutiny process, considering issues cutting across the whole common frameworks programme.

The Welsh Government has made some commitments to the Committee on increasing the transparency of the common frameworks, including reporting on how they are working and notifying the Senedd ahead of reviews.

However, committees have raised concerns about how intergovernmental decision-making through common frameworks will affect the role of the Senedd in making laws for Wales. The Welsh Government has said common frameworks will not have any impact on devolved powers.

Intergovernmental agreements

In recent years, the Welsh Government has entered into several intergovernmental agreements with the UK Government to resolve disputes about legislation.

The Fifth Senedd LJC Committee raised concerns about the use of intergovernmental agreements, arguing that they risked bypassing the Senedd. The Welsh Government has said it will avoid using intergovernmental agreements.

Under the inter-institutional relations agreement, the Welsh Government has committed to publishing formal intergovernmental agreements. Intergovernmental agreements are not currently published in one place.

Scrutinising legislation

Primary legislation

The Committee considers Senedd primary legislation and legislative consent memoranda for UK bills.

The UK Parliament has passed extensive primary legislation within devolved competence to set up new governance structures after Brexit. The Welsh Government has recommended against Senedd consent for some of these bills, and sought provision in others.

The Committee has raised concerns about the increasing use of UK bills in devolved areas, arguing that it risks bypassing the role of the Senedd in making laws for Wales and questioning the capacity of the Welsh Government to develop and pass legislation itself. The Welsh Government has published a set of

principles on consenting to the UK Government legislating in devolved areas and set out its response to the UK Government's legislative programme for this parliamentary session.

Secondary legislation

The Committee considers and reports on all relevant Welsh statutory and draft statutory instruments laid in the Senedd, and considers UK statutory instruments notified to the Senedd under Standing Order 30A-C.

Welsh and UK Ministers have taken on a range of powers to make secondary legislation in devolved areas formerly within EU competence.

Under Standing Order 30C, the Welsh Government must notify the Senedd of statutory instruments made by UK Ministers in devolved areas under the EU (Withdrawal) Act 2018. The previous LJC Committee in the Fifth Senedd considered over 200 such notifications, and raised concerns about the extent to which the Welsh Government was consenting to UK instruments. As the process of correcting retained EU law has drawn to its end, numbers of such notifications have fallen.

In addition to the requirements of Standing Order 30A-C, the Welsh Government has said it will lay a written statement every time a UK Minister exercises a delegated legislative power in a devolved area to which the Welsh Ministers have given consent, and to write to the Committee in advance to say that it intends to consent.

Understanding legislation in the new context

The Committee has sought to develop ways of understanding how laws for Wales will work in the complex new domestic and international context.

This complexity risks presenting difficulty for people and businesses in Wales. The Committee has heard concerns that the complexity of the devolution settlement makes it difficult to access and understand Welsh law.

In response to the Committee's scrutiny of the legislative consent memorandum on the Professional Qualifications Bill, the Welsh Government has agreed to provide details about how UK bills within devolved competence connect with domestic and international arrangements (see section 1 above).

Understanding how legislation will develop alignment and divergence

To the extent that their powers allow, the Welsh Government and Senedd now have choices to make about whether to legislate to align with, or diverge from, the EU or any other part of the UK.

The Counsel General said in January 2022 that the Welsh Government aims to maintain, or improve on, EU standards. However, he has also told the Committee that the Welsh Government has no central mechanism for monitoring changes in EU law.

The Committee does not itself monitor changes to EU law, or law in other parts of the UK, and does not routinely consider alignment and divergence as part of its legislative scrutiny.

3. Ways forward: strengthening scrutiny

The complexity of making laws, the consequences of this for the accessibility of the law and the longer term implications for devolution concern this Committee. The citizens of Wales, businesses and civil society organisations should be able easily to understand the laws that place obligations on them and know their rights.

Through the various strands of this Committee's work (detailed above), it has become clear that the landscape within which laws are now made for Wales has become more complex.

The Welsh Government has a programme on the accessibility of Welsh law, but it seems at times to operate without reference to this new complex landscape.

This Committee has not only a duty to scrutinise the making and functioning of law in Wales, but also to ensure it understands and challenges how laws are made to ensure that the Welsh Government considers how the decisions it makes affect the accessibility of the law.

The Committee is keen to hear your views on the issues set out in this paper, and in particular your thoughts on the practical actions the Committee can take to consider and address this complexity, to raise awareness of these new scrutiny challenges, and to increase the accessibility of the law in Wales.

The seminar will take the form of two discussions, on:

- the effects of the UK's withdrawal from the EU on the complexity of the legal landscape in Wales, and in the UK more broadly; and

- the effects of the UK government legislating in devolved areas on the accessibility of law in Wales.

Members may wish to explore the following questions across the two sessions; some overlap is likely.

- What's different about making and scrutinising legislation for Wales outside the EU in the Sixth Senedd?
- What complexities and challenges does that bring?
- What should the aims of, triggers for, and priorities for scrutiny in this new context be?
- To what extent have the Committee and the Senedd as a whole met the challenge of developing scrutiny approaches in this new context? What have they done well and less well?
- Are there other scrutiny approaches that the Committee should be developing?
- How far can domestic and international interparliamentary cooperation strengthen scrutiny? What should the aims of such cooperation be?
- In scrutiny of common frameworks and the UK Internal Market Act 2020, what information should the Committee routinely seek from the Welsh Government?
- In scrutiny of international obligations, including UK-EU arrangements and international agreements, what information should the Committee routinely seek from the Welsh Government?
- In scrutiny of legislation, what information should the Committee seek from the Welsh Government?
- In scrutiny of legislative consent memoranda and UK statutory instruments in devolved areas, what information should the Committee expect from the Welsh Government?
- What are your views on the Welsh Government's principles on its approach to consenting to the UK Government legislating in devolved areas?

- To what extent does the Committee need to understand changes to the law elsewhere in the UK and in the EU to understand the development of alignment and divergence? What would a proportionate approach to this look like?
- How transparent are the new processes for legislating? What could the Committee do to support increased transparency and public understanding?
- What role can the Committee play in ensuring Welsh legislation can be readily accessed and understood in this new context?