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Y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The External
Affairs and Additional Legislation Committee
Bil y Diddymu Mawr / The Great Repeal Bill
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Response to the consultation by the External Affairs Committee of the National Assembly for Wales on the Great Repeal Bill and its implications for Wales.

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The views set out in this response are the authors' personal opinions.

The Great Repeal Bill and the broader legislative approach to Brexit

Question 1.1

1. We note that the UK Government's White Paper states at paragraph 4.4¹ that the UK Government will begin intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. We recognise that it is important that where legal provisions are common to England and Wales, appropriate steps are taken to preserve those provisions outside the UK's membership of the EU. It is equally important that where there are differences in the law in England and Wales, this is recognised and the distinct aspects of the law in Wales are not compromised by efforts to bring everything within the scope of a framework.

¹ Paragraph 4.4, *Legislating for the United Kingdom's withdrawal from the European Union*, White Paper published by the UK Government's Department for Exiting the European Union, March 2017
<https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>

2. We note also that in a report published by the Assembly's External Affairs and Additional Legislation Committee in January 2017, *Implications for Wales of leaving the European Union*, the Committee expressed concern that the UK Government may not fully appreciate how concepts of shared competence have developed in the context of devolution settlements that are rooted in EU membership.² In addition to developing the approach of the Assembly and the Welsh Ministers to the making of legislation in areas of devolved competence, it will be important for the Welsh Ministers to engage with the UK Government to ensure that the position of shared competence are fully understood and taken account of in negotiations over withdrawal from the EU.
3. We share this concern and about several other aspects of the process:
 - 3.1 The process of leaving the EU coincides with a further period of constitutional change for Wales with the implementation of the Wales Act 2017.
 - 3.2 The powers in the Wales Act giving the Assembly powers over its membership will not become operative during the two-year period under Article 50. This means that a legislative corps of only 60 members will have to deal with correction the body of devolved legislation of the UK's withdrawal.
 - 3.3 Inter-governmental structures among the UK administrations and legislatures are one of the least well developed areas of the devolution settlements. In the case of Wales, the focus on getting the Wales Act 2017 on the statute book, has resulted in little progress or attention being paid, certainly by the UK Government, of Chapters 5 and 13 of the Silk Commission's Part II Report.³ On the other hand the need to identify and adopt common standards and competence where it is in the domestic interests of the UK as a whole to do so (for example, the environment), could give fresh impetus to the development of inter-governmental processes in the UK.

² Paragraphs 245 to 264, *Implications for Wales of leaving the European Union*, a report published by the External Affairs and Additional Legislation Committee of the National Assembly for Wales, January 2017
<http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=15911>

³

<http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/files/2014/03/Empowerment-Responsibility-Legislative-Powers-to-strengthen-Wales.pdf>

The granting of delegated powers

Question 2.1

4. The volume of legislation which will be needed to bring the withdrawal from the European Union, including the many technical details and references to institutions of the EU, means that it will be necessary to make use of the negative procedure if all the required legislation is to be made within a reasonable timescale. This needs to be balanced against the need to ensure that there is appropriate scrutiny of legislation and in Wales the need to ensure that the National Assembly for Wales has a role in the scrutiny of legislation made by the Welsh Ministers.
5. We suggest that the Great Repeal Bill should set out criteria which will determine the circumstances in which each of the procedures for making statutory instruments may be used when the statutory instruments are to be made for the purposes of correcting EU derived law. There will inevitably be an element of judgement involved by Ministers in then adopting a legislative route.
6. We recommend a pragmatic approach to primary legislation to give effect to the correction of EU-derived law with any specific arrangements for Wales to be dealt with in the Bill and approved by Legislative Consent Motion.
7. In terms of the balance of power between the Welsh Ministers and the Assembly we think there needs to be a sober recognition of the scale of legislative correction and the shortness of time dictated by the Art. 50 timetable. During the notice period we support the Assembly adopting a “sifting” approach to identify and pull out for special scrutiny instruments thought to make policy changes.
8. However, the number of AM’s available means that special scrutiny will inevitably be very much the exception. Also, an over-concentration on the mechanics of the correction process could divert attention from scrutinising proposals to replace EU competences and institutions with domestic arrangements. It is in this area that the correction process will require policy decisions.
9. Accordingly, we are attracted by the notion that secondary legislation made by Welsh Ministers to correct EU-derived law should be made on a “sunset” basis, which would require subsequent affirmation by the

Assembly once the UK has left the EU. We envisage a relatively long “sunset”, perhaps extending to around ten years from March 2019. During the “sunset” period the Assembly would have the opportunity to consider the body of EU-derived secondary legislation in more detail and under less time pressure. In effect it would be an opportunity for a secondary sift. An advantage of this approach is that most of the “sunset” period would extend beyond the next Welsh General Election, when it is to be hoped that the numbers of AM’s will be significantly augmented.

Scrutiny and control of delegated powers

Question 3.1

10. The information set out in paragraphs 3.16 to 3.25 of the White Paper⁴ on constraints on the use of delegated powers is too general for us to be able to reach an informed view as to whether they will be sufficient. We support the principles that the delegated powers should not be used for legislation to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law and that the delegated powers should be time limited. The constraints set out in Schedule 2 to the European Communities Act 1972 would provide a good basis for constraints on delegated powers but the White Paper simply says that the UK Government will consider whether similar constraints may be suitable for the new power. Accordingly, the UK Government seems to be acknowledging in principle the need for constraints on delegated powers but we would need to see more detail before we could say if they will be sufficient.
11. We also think that the pressure to fill the gaps in the law which will exist if arrangements are not made to convert EU-derived law as we approach the date of departure will place strain on any policy of restraint. Hence our support for a “sunset” approach.

Question 3.2

12. In recognition of the status of the Assembly as a permanent part of the UK’s constitutional arrangements and its role in overseeing legislation made by the Welsh Ministers, it would be appropriate for the Assembly

⁴ Paragraphs 3.16 to 3.25, *Legislating for the United Kingdom’s withdrawal from the European Union*, White Paper published by the UK Government’s Department for Exiting the European Union, March 2017 <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>

to determine the procedures for making and approving secondary legislation where powers are delegated to the Welsh Ministers. However, as a matter of principle there should be some consistency between the procedures used by the UK Government and each of the devolved administrations.

13. That said, it has to be recognised that divergence between the law in Wales and England while increasing rapidly, is still at a relatively early stage. It is this that has influenced our view that the Art. 50 timetable requires a pragmatic approach to the adoption of secondary legislative procedures that are specific to the conversion of EU-derived law and that this points to the use of the Legislative Consent Motion procedure.

Question 3.3

14. We refer to our answer to question 2.1. We suggest that the Great Repeal Bill should set out criteria which will determine the circumstances in which each of the procedures for making statutory instruments may be used when the statutory instruments are to be made for the purposes of withdrawal from the European Union. It will be for each devolved administration to determine its own approach, but we have set out our reasons for believing in a pragmatic approach that follows closely that adopted by Westminster is best suited to Welsh circumstances given the legislative history of much EU-derived legislation no within the Assembly's legislative competence.

Question 3.4

15. The negative and affirmative procedures currently used by the Welsh Ministers to make subordinate legislation should be appropriate and sufficient for the making of legislation subordinate to the Great Repeal Act. In view of the extent of legislation which will need to be made by the UK Government and the Welsh Ministers, we would expect as much legislation as possible to be introduced through the negative procedure. The use of a sifting mechanism could be helpful in providing for an efficient process of identifying which legislation would not be suitable for the negative procedure.
16. However, we would counsel against setting too much store on the effectiveness of the sifting process. Given the number of statutory instruments that the White Paper predicts will need to be corrected, we

think that the Assembly will only have the capacity to pull out and subject to more detailed scrutiny a very small percentage of the whole.

17. We think that three factors need to be borne in mind:
 - 17.1 That the nature of the UK arrangements to replace EU functions are a critical area that could be influential in the development of inter-governmental relations within the UK and the Assembly should be mindful of devoting sufficient resources to this aspect of the withdrawal process.
 - 17.2 Much of the secondary legislation (and indeed primary legislation amended under Henry VIII powers) that is EU derived was initially passed into law under scrutiny procedures which the UK Parliament has repeatedly recognised as insufficient for the volume and detail contained in the secondary legislation and was in any event only capable of limited amendment in any event due to their status as legislation the UK was required to implement by EU Directive.
 - 17.3 Accordingly, we view the adoption of a “sunset” approach as one that ensures that the process of correction is reviewed over time after withdrawal. Of course, we would expect very many of the corrections to be unexceptional and be quickly affirmed, but others can be identified for further scrutiny and, if necessary amended, if they are to survive beyond the “sunset” date.

Question 3.4

18. See our comments on question 2.1 in relation to sifting.

Question 3.5

19. There would need to be a body within the Assembly which could carry out a role of oversight of all subordinate legislation relating to implementation of the UK’s withdrawal from the European Union, as well as scrutinising and reporting in detail on legislation which is not considered appropriate for the negative procedure. In view of its well-established role of scrutinising legislation which the Welsh Ministers propose to make, we suggest that the Constitutional and Legislative Affairs Committee of the Assembly should take on this role, but its membership may need to be increased and its working practices reviewed, for example working in sub groups or committees on specific areas. Scrutiny of the use made of the secondary legislative

powers conferred on Ministers by executive devolution is an area we would highlight.

20. The Constitutional and Legislative Affairs Committee would report to the Assembly on the contents of proposed legislation relating to withdrawal from the European Union, in the same way that it currently reports to the Assembly on proposed legislation in accordance with the requirements of the Assembly's Standing Order 21. This would need to take account of any particular criteria which are set for making subordinate legislation relating to withdrawal from the European Union.
21. If the "sunset" approach is adopted as we suggest, the next Assembly may find it appropriate to have a specific ad hoc committee on converted EU derived law.

Question 3.6

22. If it is accepted that the Welsh Ministers should have the power to make secondary legislation on matters within their legislative competence and that the Assembly should be able to determine the procedures for making and approving legislation, this could be reflected in legislation made in Wales.
23. However, if it is accepted, as we have suggested earlier, that there needs to be consistency in the approaches of the devolved administrations, the Great Repeal Bill will need to make provision for such consistency. It will need to identify the criteria which will determine which procedure will be followed by the devolved administrations when making subordinate legislation and the parameters within which the procedures will be implemented. This thinking underlies our view that the scheme for converted EU-derived secondary legislation should be by way of Legislative Consent Motion to the Repeal Bill itself, rather than the Assembly spending further time while the Art. 50 clock is ticking passing a Welsh "Brexit Bill".

Question 3.7

24. The question of what information should be included by the Welsh Ministers in explanatory memoranda accompanying statutory instruments will depend on what legislative constraints are imposed on the use of delegated powers for the correction of EU derived law, as the information will need to reflect that.

25. We are acutely conscious of the constrained timetable imposed by Art. 50 and we suggest that an appropriate procedure would be for there to be a specific procedure, separate to the Explanatory Memorandum. The Minister laying or introducing the secondary legislation should provide a certificate setting out that instrument is within competence and identifying it specifically as an EU-law correction measure.
26. In the case of a negative resolution procedure the certificate can be challenged during the period the instrument is before the Assembly. If it is an affirmative measure the Presiding Officer can be required to rule on the adequacy of the certificate before the instrument can proceed.
27. This process will also clearly label EU-law conversion measures for future scrutiny and affirmation if a “sunset” approach is adopted.

Question 3.8

28. It will be consistent with the principles in the Wales Act 2017 for the detail of such procedures to be set out in full by the Assembly itself in its own Standing Orders.
29. However, if a “sunset” approach to EU-law correction instruments is adopted then it would be preferable to have this legislation enshrined in statute as a distinct type of secondary legislation.

Question 3.9

30. The contents of the Assembly’s Standing Orders are a matter for the Assembly. It would not be necessary for the Great Repeal Bill to include details of these for the reasons set out in the response to the previous question.

Engaging with stakeholders

Question 4.1

31. Stakeholder engagement during the Art. 50 negotiations is likely to be subject to severe time constraints. We recommend that stakeholder engagement focuses on some key areas. We view these as:
 - 31.1 The arrangements to replace EU competencies with UK arrangements.
 - 31.2 Inter-governmental arrangements.

- 31.3 The effects of the correction of EU-derived law on the distribution of powers within the devolution settlements.
32. We commend the notion of applying a general “sunset” approach to “Brexit” legislation made by the Assembly as it will reassure stakeholder of an opportunity for further scrutiny of the conversion of EU-derived law once the UK has left the EU and within a set time frame.