

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

EXPLANATION

Whilst the Committee believes that UK-wide frameworks will be necessary in a number of policy areas, it also believes that these should be agreed on a parity of esteem basis between the governments and legislatures of the United Kingdom and not imposed by the UK Government, even on a time-limited basis.

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

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

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

The Institute for Welsh Affairs stated in evidence that:

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

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

AMENDMENTS THAT COULD DELIVER OBJECTIVE 1

AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

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

OBJECTIVE 2: ENSURE THE WELSH MINISTERS AND THE ASSEMBLY ARE RESPONSIBLE FOR CORRECTING ALL ASPECTS OF EU-DERIVED LAW IN AREAS OF DEVOLVED LEGISLATIVE COMPETENCE

EXPLANATION

The most constitutionally appropriate and efficient route to correcting EU law is to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

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

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

Cytûn provided the following assessment in evidence:

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

AMENDMENTS THAT COULD DELIVER OBJECTIVE 2

AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

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

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

EXPLANATION

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

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

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

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

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

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

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

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

The Learned Society for Wales submitted in writing that:

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

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

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

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

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

AMENDMENTS THAT COULD DELIVER OBJECTIVE 3

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

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

Committee suggested amendment 1
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Schedule 2, page 16, line 12, leave out from "as" to "to prevent" in line 13 and insert "is essential".

Committee suggested amendment 2
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Schedule 2, page 16, line 18, leave out "they consider appropriate" and insert "is essential".
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AMENDMENTS TO THE POWERS OF WELSH MINISTERS UNDER THE BILL TO MODIFY RETAINED EU LAW SO AS TO PREVENT BREACHES OF UK INTERNATIONAL OBLIGATIONS

Committee suggested amendment 3
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Schedule 2, page 21, line 38, leave out from "as" to "to prevent" in line 39 and insert "is essential".

Committee suggested amendment 4
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Schedule 2, page 21, line 43, leave out "they consider appropriate" and insert "is essential".
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AMENDMENTS TO THE POWERS OF WELSH MINISTERS UNDER THE BILL TO MODIFY RETAINED EU LAW SO AS TO IMPLEMENT THE WITHDRAWAL AGREEMENT

Committee suggested amendment 5
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Schedule 2, page 24, line 11, leave out from "as" to "for the purposes of" in line 12 and insert "is essential".
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Committee suggested amendment 6
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Schedule 2, page 24, line 16, leave out "they consider appropriate" and insert "is essential".
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AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS TO LIMIT THE GENERAL SCOPE OF MINISTERIAL POWERS UNDER THE BILL, AND WHICH COULD WORK ALONG WITH THE AMENDMENTS SUGGESTED ABOVE

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

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

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

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

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

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

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

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

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

EXPLANATION

As stated against Objective 2 above, the External Affairs Committee believes that the most constitutionally appropriate and efficient route to correcting EU law would be to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

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

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

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

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

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

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

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

AMENDMENTS THAT COULD DELIVER OBJECTIVE 4

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

Committee suggested amendment 7
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Clause 7, page 5, line 7, at end insert-
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“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 1 of Schedule 2.”.
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Committee suggested amendment 8
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Clause 8, page 6, line 30, at end insert-

“() But the power in subsection (1) may not be exercised to make provision for Wales to the extent that that provision would be within the devolved competence of the Welsh Ministers for the purposes of Part 2 of Schedule 2.”.
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NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

Committee suggested amendment 9

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

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

Committee suggested amendment 10

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

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

Committee suggested amendment 11

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

“PART []

WELSH MINISTERS – POWER TO MAKE CONSEQUENTIAL AND TRANSITIONAL PROVISION

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

SIMILAR AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

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

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

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

EXPLANATION

As a point of constitutional principle, the foundation statutes for devolution in Wales should only be amended through the use of primary legislation or, in limited circumstances, through the use of a Section 109 Order (as provided for in the Government of Wales Act 2006 “GoWA”).

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

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

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

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

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

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

AMENDMENTS THAT COULD DELIVER OBJECTIVE 5

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

UK MINISTERS

Committee suggested amendment 12

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

Committee suggested amendment 13

In clause 8, page 6, line 38, at end insert - “, or (e) modify the Government of Wales Act 2006.”.
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Committee suggested amendment 14

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

Committee suggested amendment 15

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

SIMILAR AMENDMENTS ALREADY TABLED IN THE HOUSE OF COMMONS

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

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

WELSH MINISTERS

Committee suggested amendment 16

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

Committee suggested amendment 17

Schedule 2, page 20, line 41, after “5” insert “or”.
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Committee suggested amendment 18

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

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

Committee suggested amendment 19

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

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

Committee suggested amendment 20

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

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

Committee suggested amendment 21

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

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

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

EXPLANATION

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

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

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

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

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

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

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

Professor Bell suggested in writing that:

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

The Institute for Welsh Affairs wrote:

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

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

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

NATIONAL ASSEMBLY FOR WALES
EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE

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

AMENDMENTS THAT COULD DELIVER OBJECTIVE 6

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

Committee suggested amendment 22

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

Committee suggested amendment 23

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

Committee suggested amendment 24

Schedule 7, page 45, line 40, at end insert-
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“Scrutiny of regulations made by Welsh Ministers

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

Committee suggested amendment 25

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