

# National Assembly for Wales External Affairs and Additional Legislation Committee inquiry into the Great Repeal Bill: Evidence by the Welsh Government

## Introduction

The Committee has requested a paper on the outgoing UK Government's proposed Great Repeal Bill. The Committee's request predated the Prime Minister's announcement of a General Election on 8 June: in responding, this paper deals with the constitutional principles and practical issues raised by withdrawal from the EU, including planning for the necessary legislation and scrutiny.

Ahead of publication of party manifestos, this paper is informed by the outgoing Government's proposals, and by the statement by the shadow Secretary of State for Exiting the European Union, Keir Starmer MP, on 25 April, setting out the Labour Party's approach to withdrawal from the EU. Notwithstanding the differences in approach to the negotiations and to policy priorities post withdrawal, it seems reasonable to assume that much of the technical legislation necessary to ensure withdrawal would be common to legislation brought forward by either party.

If the outgoing UK Government is returned to power in the June election, we expect them to introduce a Bill based on their White Paper ("Legislating for the United Kingdom's withdrawal from the European Union" Cm 9446). This said that its planned Great Repeal Bill would do three main things:

- First, it will repeal the European Communities Act and return power to UK institutions.
- Second, it will convert EU law as it stands at the moment of exit into UK law before the UK leaves the EU. It will then be a matter for the UK Parliament and, where appropriate, the devolved legislatures, to amend, repeal or improve any piece of EU law (once it has been brought into UK law) at the appropriate time once the UK has left the EU.
- Finally, the Bill will create powers to make secondary legislation. This will enable corrections to be made to the laws that would otherwise no longer operate appropriately, so that the UK's legal system continues to function correctly outside the EU, and will also enable domestic law to reflect the content of any withdrawal agreement under Article 50.

If the Labour Party is returned to power, they have committed to a new White Paper with fresh negotiating priorities for the UK, with specific commitments on devolution, as mentioned below. Whatever the composition of the next UK Government, our working assumption is that it will aim to publish a Bill on EU withdrawal soon after the Queen's Speech in the new Parliament following the General Election.

## Constitutional principle

The Welsh Government's position on the constitutional issues raised by EU exit was set out in our White Paper *Securing Wales' Future*, published in January, and most recently by the First Minister in the Assembly plenary debate on 4 April. We have emphasised that withdrawal from the EU represents a fundamental constitutional change for Wales and the UK as a whole, one that will require new inter-governmental arrangements, based on full

respect for devolution, to enable the development of UK-wide frameworks based on common consent by all four governments.

This position will underpin our response to the legislation for EU exit. In discussions with the outgoing UK Government about its White Paper, we stressed the need for early engagement with us about draft clauses in order to ensure that the legislative mechanisms for withdrawal are designed fully to respect the devolution settlement.

The central purpose of the expected legislation is to convert EU law into domestic law in order to provide continuity and certainty for businesses and employees. But the parts of the White Paper that deal with devolution are ambiguous and give us considerable cause for concern.

In particular Chapter four seems to be based on the premise that powers in areas currently regulated by the EU will revert to Westminster. We challenge this: as a matter of law, the powers will continue to lie where they have fallen since 1999, but will in future be exercisable by the devolved institutions without our having to have regard to EU obligations. That is the position under the devolution legislation, and that position, as was noted in Supreme Court's judgement on the *Miller* case, can only be changed by new primary legislation at Westminster.

The outgoing UK Government envisaged that the Bill would include provisions to replicate the current EU frameworks in domestic law, and promised "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".

But, the White Paper noted that, whilst these discussions are taking place with devolved administrations '[the outgoing UK Government] will seek to minimise any changes to these frameworks'. This could suggest an intention to place new constraints on the devolved legislatures' legislative competence, for an uncertain length of time, which would give us cause for deep concern.

We have emphasised to the outgoing UK Government that any new Westminster legislation purporting to redistribute competences between Whitehall and the devolved institutions would need the Legislative Consent of the devolved legislatures, in accordance with the Sewel Convention.

The Labour Party has committed to a presumption that 'any new powers that are transferred back from Brussels should go straight to the relevant devolved body', and to an approach to Brexit which will be 'part of a radical extension of devolution'.

Given the fundamental constitutional issues raised by EU withdrawal, it is imperative that there is full engagement with the devolved administrations about the relevant legislative provisions. We are pressing for provisions that enable continuity and certainty while respecting the devolution settlement. These provisions must be agreed between governments: we believe this is achievable, with goodwill on both sides.

### **Legislation: preparation and scrutiny**

Given the current political uncertainty, we can at this stage only make assumptions about the implications for legislation to be made or approved by the National Assembly, and for Assembly scrutiny of legislation to be passed at Westminster.

#### National Assembly primary legislation

The need for, and timing of, Assembly legislation to maintain or, in due course, adapt existing EU law in devolved areas will depend on how the expected legislation deals with the objective of minimising change as set out above, and what constraints are introduced on the Assembly's competence. In present circumstances, it is unlikely that early decisions on the need for Assembly legislation will be possible.

The Welsh Government will manage any necessary primary legislation as part of its legislative programme, alongside consideration of its other priorities and resources. In the short term, the capacity implications for the National Assembly in managing scrutiny of primary legislation are likely to be less significant than the requirement for secondary legislation to convert the current body of EU law into workable domestic legislation, as discussed below.

Where primary legislation is needed, this will be planned and developed in line with the good practice principles that underpin Welsh Government policy and legislation generally, including option appraisal and consultation and engagement with stakeholders, with a view to achieving legislation that is clear, effective and accessible. The ways of working specified in the Wellbeing of Future Generations Act will inform the development of legislative proposals as they do other policy proposals.

#### National Assembly secondary legislation

The Welsh Government is planning on the assumption that a very substantial amount of Assembly secondary legislation will be required prior to the UK's withdrawal from the EU, as discussed below.

Although it will repeal the European Communities Act 1972, the expected UK legislation is unlikely to repeal very much if any of the law currently giving effect to the UK's membership of the EU; rather, it will, to quote the outgoing UK Government's White Paper, 'convert the corpus of EU law as it stands when we leave the EU into our domestic law'. That corpus of law is currently to be found mainly in primary legislation and in Statutory Instruments made under the authority of the 1972 Act.

But a simple conversion of EU law into domestic law will not be enough, as is explained in chapter three of the White Paper. This is because much of the EU law the UK has observed includes particular provisions that it will be inappropriate to include in domestic law following EU exit; examples include requirements in particular circumstances to follow specified procedures involving EU institutions (for example, to advertise forthcoming large-scale procurements in the Official Journal of the EU) or to send specified information to the Commission.

Therefore it will be necessary to take "corrective" action in respect of these provisions, and either remove them or replace them with amended or new requirements more suited to the operation of the law in domestic circumstances; and these corrections will need to have been made by the time the UK leaves the EU in (we assume) March 2019, so that the law which has been converted into domestic law is fully workable from day one after EU exit.

There will not be sufficient time before March 2019 for the necessary corrective action to be taken by way of Parliamentary (or Assembly) primary legislation. The outgoing UK Government's White Paper proposes that Ministers should be given wide-ranging order-making powers to 'correct' the existing legislation giving effect to the UK's membership of the EU, and make it workable as domestic law, even if the provisions needing correction are to be found in Acts of Parliament. So these will be 'Henry VIII powers', giving Ministers powers by order to amend not only existing secondary legislation but also existing Acts of Parliament.

The outgoing UK Government's White Paper says that

'Legislation that is within the competence of the devolved legislatures or ministers giving effect to EU law will also need to be amended as we leave the EU. We therefore propose that the Bill also gives the devolved ministers a power to amend devolved legislation to correct law that will no longer operate appropriately, in line with the power we propose should be held by UK ministers'.

The precise scope of this is not yet clear but our working assumption is that the Welsh Ministers will be given 'Henry VIII powers' to correct as necessary all existing legislation having effect in Wales, primary and secondary, on subject-matter within the Assembly's legislative competence.

Work is underway to identify the body of primary and secondary legislation within the Assembly's legislative competence which requires correction, and to determine what form the corrections should take. There is no doubt that the volume will be substantial, and the process of identifying and responding to the necessary corrections will be challenging. We will have no option but to manage this by rescheduling other priorities.

There will also be significant challenges for the National Assembly in managing the scrutiny of this legislation. But it should be emphasised that we expect the vast bulk of it to be purely a matter of technical correction, with limited policy implications. Welsh Government officials will work with Assembly Commission staff to assist them in every way possible to plan a manageable and proportionate scrutiny process.

### UK Parliamentary legislation

The expected primary legislation needed to give effect to EU withdrawal will require the legislative consent of the Assembly if, as expected, there are provisions which are within (or which modify) the Assembly's legislative competence. We will aim to manage the Legislative Consent process with a view to ensuring that a Legislative Consent Memorandum is tabled in time to enable effective scrutiny before the Legislative Consent Motion is debated. There may be timetabling issues, depending on the Parliamentary timetable and the extent of amendment during the Bill's progress, but we will manage this in line with previous practice and Standing Order 29.

Similarly, UK secondary legislation, using 'Henry VIII' powers, which amends primary legislation within the Assembly's competence will be subject to the Statutory Instrument Consent process (Standing Order 30A). Although we will work with the Assembly to plan for these as with legislative consent for primary legislation, they may be subject to negative procedure in Parliament and if so, would be made before they are laid. Our expectation is that such secondary legislation would consist of largely technical amendments required to make transposed EU law operable in a domestic (UK, England and Wales or Welsh) context. Moreover, as set out above, we expect that the bulk of this technical secondary legislation will be made by the Assembly, rather than the UK Parliament.

### **Summary and Conclusion**

Whatever the outcome of the General Election, we expect there will be a Bill designed to replicate the extant body of EU law in domestic UK legislation at the point of withdrawal. It is clear that such a Bill and related legislation will give rise to a requirement for substantial Welsh legislation. In the short term this will be primarily technical in nature.

The scope for legislation to give effect to longer term policy choices will depend on decisions yet to be made about the scope and nature of frameworks to replace the EU frameworks which currently constrain a number of devolved areas, including agriculture, fisheries and the environment. The Welsh Government's position is that these frameworks must be the subject of agreement between the four administrations of the UK, and we are pressing for this consensual approach to underpin the draft legislation.

The Welsh Government is currently working to identify the body of secondary legislation needed to ensure continuity and operability at the point of UK withdrawal from the UK. We will work with the Assembly and its staff to facilitate effective and proportionate scrutiny of this legislation as set out above. Longer-term, where primary legislation is needed, this will be prepared and managed as part of the Welsh Government's legislative programme.