External Affairs and Additional Legislation Committee

# The Great Repeal Bill White Paper: Implications for Wales

June 2017

**National Assembly for Wales**
External Affairs and Additional Legislation Committee

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# External Affairs and Additional Legislation Committee

The Committee was established on 28 June 2016. On 15 September 2016 its remit was agreed as:

(a) to examine the implications for Wales of the United Kingdom's withdrawal from the European Union and to ensure Welsh interests are safeguarded during the withdrawal process, in any new relationship with the European Union and in the intra-UK post-withdrawal arrangements for relevant policy, finance and legislation;

(b) to coordinate activity across Assembly committees in relation to point (a) above.

(c) to carry out the functions of the responsible committee under Standing Orders 21.8 to 21.11, with a consequential change to the remit of the Constitutional and Legislative Affairs Committee;

(d) to consider any other matter, including legislation, referred to it by the Business Committee.

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**Current Committee membership:**

**David Rees AM (Chair)**
Welsh Labour
Aberavon

**Dawn Bowden AM**
Welsh Labour
Merthyr Tydfil and Rhymney

**Michelle Brown AM**
UKIP Wales
North Wales

**Suzy Davies AM**
Welsh Conservative
South Wales West

**Mark Isherwood AM**
Welsh Conservative
North Wales

**Steffan Lewis AM**
Plaid Cymru
South Wales East

**Jeremy Miles AM**
Welsh Labour
Neath

**Eluned Morgan AM**
Welsh Labour
Mid and West Wales

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# Key messages

The key messages arising from the Committee's conclusions on the White Paper are set out below:

## Consultation

The evidence we received indicates that the UK Government has not consulted meaningfully with the Welsh Government and has not consulted at all with the Assembly in relation to its preparations for legislating for Brexit, as set out in the White Paper. This is unacceptable and we expect the incoming UK Government to engage more constructively with both the Welsh Government and the Assembly.

## Delegations of powers, controls on the powers and Assembly procedure[1]

We believe that it should be for the Assembly alone to delegate powers to make subordinate legislation to the Welsh Ministers, to set the controls around their use and to establish the scrutiny procedures that should apply to legislation made by the Welsh Ministers, using such powers.

However, in light of the extremely limited time frame and the scale of the task ahead, the only practical option may be for the UK Parliament to provide for these powers and the controls applicable to them in the Great Repeal Bill. With regard to procedures, however, the Bill should not restrict the Assembly's ability to determine its own scrutiny procedures.

Should the Bill provide a power for the Welsh Ministers and set controls on the power, then this must be an exception and should not set a precedent. Such provisions must also be subject to the Assembly's legislative consent.

The UK Government must listen and act upon representations made by the Assembly and its committees once the Bill is introduced if it is to secure that consent.

## UK-wide policy frameworks

Decisions about future UK-wide policy frameworks must be agreed between the UK Government and the devolved governments and legislatures. They must not be imposed by the UK Government, even on a time-limited basis.

## Transparency of the process

As we wrestle with a myriad of issues, ranging from the technical to the constitutional, we must not lose sight of the fact the decisions that are taken during this period will have a direct and lasting effect on people's lives.

It is incumbent on us, and all other actors in this process, to ensure that the process is as transparent as possible and that we seek opportunities to facilitate meaningful two-way engagement with stakeholders and citizens.

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[1] Further explanation of subordinate legislation and associated processes is provided on **the Assembly's Subordinate Legislation webpage**.

# Introduction

**1.** In October 2016, the Prime Minister announced that she would give legal effect to the United Kingdom's exit from the European Union through what she termed a "Great Repeal Bill" that would repeal the European Communities Act 1972[2] and "convert the body of existing European Union law into British law". The Prime Minister explained that "by converting the acquis into British law we will give businesses and workers maximum certainty as we leave the European Union".[3]

**2.** Whilst the Prime Minister's decision was debated and scrutinised in the UK Parliament, little was said about the detail of the Bill or the role that was envisaged for devolved governments and legislatures.

**3.** During our first phase of work in the autumn of 2016, we sought initial views on the implications for Wales of the UK Government's approach and drew some conclusions in our first report: Implications for Wales of Exiting the European Union.[4]

**4.** The UK Government published its Great Repeal Bill White Paper, Legislating for the United Kingdom's withdrawal from the European Union, on 30 March 2017 (the White Paper).[5] The White Paper adds more (though not exhaustive) detail about the UK Government's proposed approach.

**5.** Following the publication of the White Paper, we launched our inquiry into the implications for Wales that might flow from the UK Government's approach on 11 April 2017.

**6.** Parliament agreed to hold a General Election on 8 June 2017. Whilst this raised the possibility of the incumbent Government's plans being overturned in the event of an alternative government being formed after the election, we are of the view that any incoming government has to prepare for exiting the European Union and embark on a similar, if not identical, course of legislative action. Adding to this the extremely limited timeframe within which this has to happen, we decided to continue with our inquiry, albeit with some adjustment.

**7.** Our original plans included issuing invitations to the Secretary of State for Exiting the European Union, the Chair of the House of Lords Constitution Committee, and convening a colloquium of Chairs of the 'European' and constitution committees from each of the UK's legislatures. The announcement of a General Election, the dissolution of Parliament and the consequent pre-election period has meant that we have been unable to pursue these avenues. We hope that the UK Government and parliamentary committees are in a position to engage with us soon after the General Election.

**8.** Despite this restriction on the scope of the evidence we could take, we continued with our inquiry. We received 13 written submissions to our call for evidence, adding to the 15 we received during our first phase of work that offered views on the Great Repeal Bill.

**9.** At the outset of our inquiry we wrote to the Llywydd and every Assembly committee to seek their input to our work.

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[2] The European Communities Act 1972 c.68
[3] Speech delivered by the Prime Minister, the Rt Hon Theresa May MP, at the Conservative Party Conference at the ICC, Birmingham in October 2016.
[4] National Assembly for Wales External Affairs Committee, Implications for Wales of leaving the European Unions, January 2017
[5] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union, 30 March 2017*

**10.** On 25 April 2017, the Assembly's Constitutional and Legislative Affairs Committee responded to the House of Commons Procedure Committee inquiry on delegated powers in the Great Repeal.

**11.** On 15 May 2017, we held a public hearing with academic experts and the Cabinet Secretary for Finance and Local Government, Mark Drakeford AM.[6]

[6] External Affairs Committee RoP 15 May 2017

# 01. The UK Government's approach (Chapter 2 of the White Paper)

## What the White Paper says

**12.** The White Paper states that the Great Repeal Bill (hereafter 'the Bill') will do three main things:

> "a. First, it will repeal the ECA [European Communities Act 1972] and return power to UK institutions.
>
> b. Second, subject to the detail of the proposals set out in this White Paper, the Bill will convert EU law as it stands at the moment of exit into UK law before we leave the EU. This allows businesses to continue operating knowing the rules have not changed significantly overnight, and provides fairness to individuals, whose rights and obligations will not be subject to sudden change. It also ensures that it will be up to 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 we have left the EU.
>
> c. 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 once we have left the EU, so that our legal system continues to function correctly outside the EU, and will also enable domestic law once we have left the EU to reflect the content of any withdrawal agreement under Article 50."[7]

### The European Communities Act 1972

**13.** All Members of the European Union (the EU) are required to give effect to EU laws in their territories i.e. in their domestic law. This European law has supremacy over any domestic law passed. For example, if a national parliament passed a law on waste collection which contravened the rules set out in the European Waste Framework Directive then the law passed by the national parliament would be void as the EU Directive has primacy.

**14.** In the UK, it is the European Communities Act 1972 (the ECA) that is the principal piece of UK legislation which gives effect to EU law in the UK. The provisions of the ECA allow both what is known as 'directly applicable' EU law (such as regulations and treaties) and EU law which needs implementing domestically (such as EU Directives) to have effect. It also allows for rulings of the European Court of Justice (CJEU), which has the final word on the interpretation of EUs law, to have supremacy over decisions made by UK courts.

**15.** In its White Paper the UK Government states it needs to repeal the ECA to give 'maximum clarity as to the law that applies in the UK' after its exit from the EU and to ensure that UK law, not EU law, will be supreme after exit.[8]

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[7] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017, paragraph 1.24

[8] Ibid paragraph 2.3

## Converting EU law into domestic law

**16.** The UK Government states that simply repealing the ECA will leave a 'confused and incomplete' legal system.[9] This is for two main reasons. Firstly, the ECA allows some types of EU law to have direct effect in the UK. This includes the EU treaties and EU regulations. This means that they do not need to be written into UK law via pieces of UK legislation to have effect; they automatically apply once they have been ratified or passed. Once the ECA has been repealed, if nothing was done to 'convert' these laws into UK law they would simply cease to have effect in the UK.

**17.** Secondly, there are other types of EU law which need to be implemented domestically in the UK such as EU Directives in areas such as waste, water, nature conservation and marine planning. These types of laws require Member States to pass domestic legislation to implement them. In the UK a large volume of this implementing legislation has been passed, by both UK Ministers for England and devolved ministers for their respective nations, using secondary legislation powers given to them under section 2(2) of the ECA. If the Great Repeal Bill did nothing to 'save' this secondary legislation then when the ECA is repealed this legislation would disappear from the UK's statute books and could no longer be used in the UK.

**18.** The EU body of law also includes rulings made by the Court of Justice of the European Union (CJEU). The national courts of Member States, including UK Courts, use this case law when deciding on cases in the UK Courts where EU law is applicable. The UK Government states that, in order to provide certainty and clarity over the status of these rulings once the UK leaves the EU, the Great Repeal Bill will require the UK courts to follow rulings made by the CJEU before the day of exit and that relate to the body of EU law converted into UK law on that day. But rulings made by the CJEU after the UK leaves will not have supremacy over decisions made by UK Courts; nor will any rulings of the CJEU on EU law that has not been converted into UK law.

## The case for continuity

**19.** The White Paper states that if the Great Repeal Bill only repealed the ECA and did not convert the body of existing EU law into UK law this would create large gaps in the UK's statute book once the UK leaves the EU.[10] Given the volume of EU law applicable in the UK these gaps could create significant uncertainty for business and citizens. For example, some EU regulations set out requirements on things such as the energy efficiency standards that washing machine or fridge manufacturers have to meet. If these disappeared on the day after the UK leaves the EU, UK businesses could face uncertainty over the standards to which they should be manufacturing products.

**20.** Therefore, the UK Government wishes to, at least initially, preserve this EU law on the day the UK leaves until such time as the UK Parliament and, where relevant, the devolved legislatures have had time to consider and decide if there are pieces of this converted law they would like to amend, repeal or revoke.

[9] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017, paragraph 2.4

[10] Ibid paragraph 1.13

## How the UK Government proposes to transfer EU law

**21.** In its White Paper the UK Government states that EU regulations and laws won't be copied out regulation by regulation into UK law. Instead, the Great Repeal Bill will make clear that the whole body of EU law, as it applies 'the moment before we leave', will be transferred into UK law by the Bill.[11]

**22.** However, the White Paper states that simply converting the body of EU law into UK law and doing nothing else won't be sufficient.[12] That is because there are some parts of current EU law that if transferred would not make sense or be operable once the UK leaves the EU. For example, some of the EU law that will be transferred makes reference to EU institutions that the UK will no longer be a member of or includes references to reciprocal duties or rights with other 'Member States' which may not be applicable. Some practical examples are included on pages 20-21 of the White Paper.[13]

**23.** To that end, the Great Repeal Bill will give UK Ministers secondary legislation powers to amend the body of converted EU law to make it operable or workable on the day the UK leaves. The White Paper states that Ministers in the devolved administrations will get powers "in line with" UK Ministerial powers to make changes to converted "devolved legislation".

**24.** These secondary legislation powers will enable UK Ministers to make changes to existing secondary and primary legislation.

**25.** In addition, the Great Repeal Bill will provide UK Ministers with powers to amend UK law once the UK has left the EU to give effect to any changes required by the withdrawal agreement.

**26.** The use of delegated powers is considered in further detail in the next chapter.

## Charter of fundamental rights

**27.** The White Paper states that "the Charter will not be converted into UK law by the Great Repeal Bill" because:

> "It cannot be right that the Charter could be used to bring challenges against the Government, or for UK legislation after our withdrawal to be struck down on the basis of the Charter."[14]

**28.** The White Paper also states that "the UK's leading role in protecting and advancing human rights will not change"[15] and that:

> "Many of the rights protected in the Charter are also found in other international instruments, notably the European Convention on Human Rights (ECHR), but also UN and other international treaties too. The ECHR is an instrument of the Council of Europe, not of the EU. The UK's withdrawal from the EU will not change the UK's participation in the ECHR and there are no plans to withdraw from the ECHR."[16]

[11] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017, paragraph 2.8
[12] Ibid paragraph 3.3
[13] Ibid pages 20-21
[14] Ibid paragraph 2.23
[15] Ibid paragraph 2.21
[16] Ibid paragraph 2.22

## Responses to the general approach

**29.** In the evidence received, there is broad support for the general approach proposed in the White Paper i.e. that the "three main things" it proposes are necessary steps on the way to exiting the EU.

**30.** The Learned Society for Wales believes that "the need to maintain clarity and stability of law in the United Kingdom after Brexit is both necessary and to be supported".[17] Similar views were received from Cytûn (Churches Together in Wales),[18] the Chartered Institute for Archaeologists[19] and the Law Society.[20]

**31.** The evidence also provided a range of concerns, including the lack of detail contained in the White Paper, devolution aspects and scrutiny.

### Lack of detail

**32.** Professor Craig summarised that "the White Paper has quite a lot in it, and I also think there's a lot that is actually not touched by the White Paper".[21]

**33.** As quoted in the introduction, Professor Craig's view is that:

> "[…] pretty much everything contained in the House of Lords Constitution Committee report will have to be addressed in one way or another in a Bill or draft Bill that comes before Parliament post the election."[22]

**Conclusion 1.** We believe that the House of Lords Constitution Committee's report on the Bill anticipated much of what the White Paper sets out, though in more detail and with greater analysis of its likely implications.

**Conclusion 2.** The lack of detail in the White Paper has posed us difficulties in terms of understanding the full range of implications for the Welsh Government and the Assembly, and for informed work planning to take place.

### Devolution and the role of the devolved legislatures

**34.** Professor Bell observed that the "it [the Bill] is extraordinarily thin on the devolution aspects".[23]

**35.** Paragraph 11 of the Law Society's written submission states that:

> "The White Paper recognises that Parliament will need to be satisfied that the procedures in the Bill for making and approving secondary legislation are appropriate. However there is no acknowledgement that the devolved legislatures have an interest."

**Conclusion 3.** This reflects one of our key concerns about the White Paper. Its failure to consider the role of the devolved legislatures is a significant omission and one that

[17] GRB 03 The Learned Society of Wales, paragraph 2
[18] GRB 04 Cytûn, paragraph 1
[19] GRB 02 The Chartered Institute for Archaeologists, paragraph 1.1.1
[20] GRB 11 The Law Society, paragraph 2
[21] External Affairs Committee RoP 15 May 2017 c.237
[22] Ibid c.237
[23] Ibid c.239

causes us to question the diligence with which devolution issues are being considered by those drafting the Bill.

### Consultation with the Welsh Government and the National Assembly for Wales

**36.** The Welsh Government were not consulted on the contents of the White Paper, despite the significant implications it has for the Welsh Ministers.[24] Nor was the Assembly consulted, despite the fact the Bill is likely to make provision for the delegation of the Assembly's powers to the Welsh Ministers, the controls on those powers and Assembly procedure for considering the legislation needed to give effect to those powers.

**37.** The Learned Society of Wales warns that:

> "Failure to consult with the devolved administrations and work through the detail of the Great Repeal Bill would not only undermine its objectives, but would risk raising major constitutional issues."[25]

**Conclusion 4.** The lack of consultation around the UK Government's plans to legislate for Brexit is unacceptable. We hope that the new UK Government takes these comments seriously and adopts a more positive and constructive approach to working with both the Welsh Government and the Assembly. We hope that colleagues in the UK Parliament will assist us in ensuring that the future UK Government is held to account should the situation fail to improve.

**Conclusion 5.** We expect the UK Government to engage in meaningful discussions with both Welsh Ministers and the Assembly as soon as possible following the General Election to ensure that their views are considered before the Bill is introduced.

**Conclusion 6.** It is likely that the Bill is already being drafted. It should not be introduced before the text of the Bill, as it relates to the Welsh Ministers and the role of the Assembly, has been shared and consulted on with the Welsh Government and the Assembly.

### Charter of fundamental rights

**38.** The Assembly's Equality, Local Government and Communities Committee (the ELGC Committee) is in the midst of an inquiry that includes consideration of the impact of the UK's withdrawal from European Union on human rights protection in Wales.

**39.** It has yet to complete its work, but has drawn our attention to some of the evidence it has received to date.[26]

**40.** Whilst the ELGC Committee welcomes the UK Government's commitment in the White Paper around continuing the protections contained in the Equality Acts, it points to several respondents to its inquiry that have expressed concerns about the proposed removal of the Charter.[27]

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[24] External Affairs Committee RoP 15 May 2017 c.440
[25] GRB 03 The Learned Society of Wales paragraph 8
[26] Letter from the Chair of the ELGC Committee to the Chair of the External Affairs Committee, *Great Repeal White Paper*, 2 June 2017
[27] Ibid

**41.** These include concerns that there are "a range of rights" that are protected by the Charter but not by the Human Rights Act and that whilst rights will be protected at the point of exit, there is a risk that the UK will fall behind the EU framework. [28]

**42.** The ELGC Committee believes "further thinking should be given to ensuring that the UK remains a world leader in human rights protection".[29]

**Conclusion 7.** We urge all actors in this process to pay close attention to the ELGC Committee's conclusions once it completes its inquiry.

[28] Letter from the Chair of the ELGC Committee to the Chair of the External Affairs Committee, *Great Repeal White Paper,* 2 June 2017
[29] Letter from the Chair of the ELGC Committee to the Chair of the External Affairs Committee, *Great Repeal White Paper,* 2 June 2017

# 02. Delegated powers (Chapter 3 of the White Paper)

## The case for delegating power

**43.** The White Paper states that repealing the ECA will remove part of the legal framework under which the UK has operated for more than forty years. The first step to ensuring that its repeal does not leave a holes in the statute book is to provide for the conversion of EU law into domestic law. However, this action alone is insufficient as much of this converted law will not function effectively unless action is taken to correct it.[30]

**44.** As we explained in the previous chapter, this is because there are some parts of current EU law that, if transferred, would not make sense or be operable once the UK leaves the EU. For example, some of the EU law that will be transferred makes reference to EU institutions that the UK will no longer be a member of or includes references to reciprocal duties or rights with other 'Member States' which may not be applicable. Some practical examples are included on pages 20-21 of the White Paper.

**45.** The proposed solution for this is to grant a power to UK Ministers "to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU."[31]

**46.** The White Paper recognises that "similar issues will also exist in legislation that is the responsibility of the devolved legislatures or ministers".[32] To reflect this, it is proposed that the Bill will "give the devolved ministers a power to amend devolved legislation [...] in line with the power held by UK ministers".[33]

**47.** This leaves us with two immediate considerations.

- Is it is appropriate for the UK Parliament to delegate this power to the Welsh Ministers in these circumstances?
- What is the extent of the power to be delegated to the Welsh Ministers?

**48.** The question of controlling the power and applying appropriate procedure are addressed in subsequent sections of this report.

**49.** This section will focus on the appropriateness of the UK Parliament delegating this power to the Welsh Ministers and on the scope of the power to be delegated to the Welsh Ministers.

## The granting of delegated power to the Welsh Ministers

**50.** In common with the Constitutional and Legislative Affairs Committee, our starting point is:

> "[...] that the National Assembly must be the legislature responsible for legislating in devolved areas. This includes passing primary legislation in

[30] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017, paragraph 3.6
[31] Ibid, paragraph 3.7
[32] Ibid paragraph 3.6
[33] Ibid

> devolved areas, and delegating powers to the Welsh Ministers to make subordinate legislation as the National Assembly considers appropriate."[34]

**51.** Without diminishing this important principle, there are practical reasons for considering whether it might be appropriate for the UK Parliament to delegate power to the Welsh Ministers in this instance.

**52.** Additionally, there is a question as to whether the Assembly has the legislative competence to provide the full extent of the proposed power in the White Paper to the Welsh Ministers before the day of Brexit. This is because there is a general restriction on the Assembly's competence (contained in section 108 6(c) of the Government of Wales Act 2006[35]) to prevent it from passing law that is incompatible with EU law, or conferring powers on others to do so. This restriction will continue under the new Welsh devolution settlement once section 3 of the Wales Act 2017[36] is commenced (as a new section 108A 2(e) of the 2006 Act). Welsh Ministers are also prohibited from making subordinate legislation that is incompatible with EU law, under section 80(8) of the Government of Wales Act 2006.

**53.** The Welsh Ministers already hold powers that would allow them to make some of the amendments necessary to ensure that EU-derived law was operable on the day of Brexit. Many of these powers are powers to implement EU law conferred by Designation Orders made under section 2(2) of the ECA.

**54.** In making some of the necessary changes, the Welsh Ministers could still be said to be "implementing" EU law (although the actual purpose of making them would be to prepare for life in the UK once EU law no longer applies there). An example would be replacing "shorthand" references, in Welsh legislation, to definitions set out in EU instruments. In these cases, it would be possible to replace the "shorthand" reference with longer, free-standing text – such as the whole text of the definition given in the EU instrument. That would still implement EU law – just in a slightly different way – and so would be within the Welsh Ministers' powers.

**55.** However, some of the amendments to Welsh legislation which will be needed would take that legislation out of alignment with EU law. For instance, EU law might require that a particular decision was taken by an EU body, such as the European Commission. Those references will not be workable after Brexit. Therefore they will need to be replaced with references to e.g. a Welsh or UK body. That would, in principle, be in conflict with EU law. As set out above, anything incompatible with EU law is outside the Welsh Ministers' powers until the day of Brexit. Likewise, it is outside the Assembly's competence to grant Welsh Ministers the power to do such things until that day.

**56.** On the day of Brexit, however, these restrictions on the Assembly's competence and the Welsh Ministers' powers will become meaningless and void. It is important to note that none of the planned amendments to EU-derived legislation – or the repeal of the ECA – are due to come into force until the day on which the UK actually leaves the EU. This applies both at UK and devolved level. It is because, until then, the UK is bound, by its Treaty obligations, to comply with EU law.

**57.** In that context, therefore, the Assembly's competence and the Welsh Ministers' powers may be interpreted as wide enough to make all the amendments necessary to ensure that Welsh law is

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[34] Letter from the Chair of the Constitutional and Legislative Affairs Committee to the Chairman of the House of Commons Procedures Committee, *Delegated powers in the 'Great Repeal Bill' inquiry*, 25 April 2017
[35] The Government of Wales Act 2006 c.32
[36] The Wales Act 2017 c.4

workable on the day of UK exit. This view would be supported by the fact that the Great Repeal Bill itself will be making provision incompatible with EU law, and giving powers to UK Ministers to do so; yet, until the day of UK exit, EU law remains supreme and any incompatible UK law – primary or secondary – can be struck down by the courts. If the courts would hold back from doing so in the case of UK primary legislation or secondary legislation made by UK Ministers, on the grounds that it is not in force and so cannot be challenged, then they might take the same approach to legislation passed by the Assembly or made by the Welsh Ministers.

**58.** The House of Lords Constitution Committee noted this grey area, reporting that:

> "[…] it is not clear that, under the devolution settlements, the devolved institutions will have the competence to pass legislation making anticipatory amendments to the body of EU law that will be domesticated by the 'Great Repeal Bill' but that has yet to come into effect as UK law."[37]

**59.** Building on the House of Lords report, Professor Craig suggested that the Bill could make provision to remove doubt about the legislative competence of devolved administrations to pass legislation making anticipatory amendments to the body of EU law that will be domesticated.[38] This could be seen as pre-emptively aligning the devolution settlements with the situation that will prevail immediately following Brexit. This may be the UK Government's intention, but the White Paper does not state this unambiguously.

**60.** When asked whether the Assembly should be granted such powers, Professor Craig replied:

> "It seems to me the underlying constitutional logical principle within the devolution legislation suggests that there's an affirmative answer to that question. That would seem to me the logic of what devolution's all about. And particularly when you link devolution with notions of subsidiarity, the two things actually fit and go rather neatly together: you're closer to the problems at hand; you're better placed to decide exactly what changes might be needed to the relevant legislation, which is in your backyard, as it were. So, the whole logic seems to me to indicate that that should be the way forward"[39]

**61.** The Learned Society for Wales and the Wales Governance Centre both flag that the process of delegating power to devolved ministers may require amendment to provisions in the Government of Wales Acts. The Learned Society calls for the Assembly to be fully consulted and for such changes to only be made through primary legislation.[40]

**62.** The Wales Governance Centre believes that such changes must be "subject to National Assembly for Wales consent through application of the Sewel Convention".[41]

**63.** This question about the competence of the Assembly to pass legislation making anticipatory amendments to the body of EU law whilst it still has legal effect should not be confused with the question of the Assembly's competence to legislate in devolved areas once EU law ceases to have

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[37] House of Lords Constitutions Committee, *The 'Great Repeal Bill' and delegated powers*, March 2017, paragraph 116.
[38] External Affairs Committee RoP 15 May 2017 c.301
[39] External Affairs Committee RoP 15 May 2017 c.303
[40] GRB 03 The Learned Society of Wales, paragraph 5.
[41] GRB 13 The Wales Governance Centre, section 1.

effect in the UK. We address this second question in further detail when considering the replacement of EU frameworks in Chapter 3 below.

**Conclusion 8.** Our strong preference is for the control of delegation of powers to the Welsh Ministers to lie with the Assembly, rather than with the UK Parliament. We would expect the UK Parliament to facilitate that constitutional position by removing – in the Great Repeal Bill or elsewhere – any technical doubts about the Assembly's competence to delegate the full extent of the powers necessary before the day of Brexit. Likewise, any doubt about the Welsh Ministers' ability to make all the necessary changes to Welsh law before the day of Brexit, under such powers, should be removed.

**Conclusion 9.** That said, we recognise the scale of the task ahead and the need for there to be no delay in commencing the process of legislating for Brexit. In light of the timescale involved, we see a significant challenge in trying to bring forward separate Assembly legislation. Therefore, including a power for the Welsh Ministers in the Bill may be the only practical option at this stage. If this option is taken, there will again be a need to remove any doubt about the way in which the power can be exercised before the day of Brexit. We emphasise that any provision of this nature would, in our view, require the Assembly's legislative consent.

## Scope of the power for Welsh ministers

**64.** The White Paper proposes a power for devolved ministers "to amend devolved legislation to correct law that will no longer operate appropriately, in line with the power held by UK ministers".[42]

**65.** There term "devolved legislation" used in this sentence is ambiguous and has drawn comment in the evidence we have received.

**66.** Dr Jo Hunt told us that:

> "it's not necessarily clear, when it talks about devolved legislation, whether it's referring to legislation that has been actively passed at a devolved level, or that could be passed at a devolved level."[43]

**67.** The difference between these two interpretations is significant as the narrower definition would only relate to laws passed by the Assembly whilst the broader definition would encompass all laws that fall within devolved competence.

**68.** Professor Craig's view is that the UK Government "is thinking of it as legislation in the narrower of the senses."[44]

**69.** The Cabinet Secretary for Finance and Local Government takes the view that it should be the broader interpretation, for both constitutional appropriateness and practicality:

> "I take the view that it should be the second [broader definition], firstly because I think that is the constitutionally proper arrangement, but I just think, just in terms of practicalities, if UK Ministers tried to retain to themselves some

[42] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union,* 30 March 2017, paragraph 4.6
[43] External Affairs Committee RoP 15 May 2017 c.242
[44] Ibid c.294

> powers to deal with legislation that falls within devolved competencies, where will they go to get the advice of the sort that Suzy Davies just asked about? Where will be the body of people be that they can go to find out about the names of potential bodies in Wales with which they could replace? Well, they'd end up coming here to get the advice. So, in a sheerly practical way, I think, when they begin to realise that, they may decide that the simple solution is just to allow the Welsh Ministers, through the National Assembly, to do that wider job."[45]

**Conclusion 10.** We agree with the Cabinet Secretary. 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. The narrower option of restricting the involvement of the Welsh Ministers and the Assembly to correcting only those laws already passed by the Assembly would make for a less efficient exit process. We believe that the scope of the power delegated to the Welsh Ministers will be a factor for the Assembly when considering whether to grant its consent for the UK Parliament to legislate in this area.

**Conclusion 11.** We expect the UK Government to clarify its intentions with regards to scope of the power it proposes for the Welsh Ministers as soon as possible following the General Election.

## Controlling the power

### Substantive controls on the face of the Bill

**70.** Paragraph 3.16 of the White Paper describes the scope of the powers the UK Government believes are needed to make all the necessary corrections to the statute book before leaving the EU. It states that to ensure a smooth and orderly withdrawal the power to enable these corrections will need to allow changes to the full body of EU-derived law, including existing:

- primary legislation;
- secondary legislation; and
- directly applicable EU law (which will be converted into domestic law at the point of Brexit).

**71.** It will also allow the transfer to UK bodies or Ministers of powers that are currently exercised by EU bodies. As acknowledged in the White Paper, this is a wide power "in terms of the legislation to which it can be used to make changes".

**72.** The following paragraph, 3.17, recognises the importance of limiting the purposes for which the power can be used and commits the UK to ensuring that:

> "the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU."

[45] External Affairs Committee RoP 15 May 2017 c.385

**73.** It goes on to state that the UK Government is considering the constraints placed on the existing delegated power in section 2 of the ECA as a possible precedent for constraints on the new powers to be granted.

**74.** In its report, the House of Lords Constitution Committee provided a more thorough appraisal of how an appropriate balance can be struck between the powers and pace needed by Government to complete its legislative task with the need for proper parliamentary oversight.

**75.** It suggests that:

> "a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:
>
> – so far as necessary to adapt the body of EU law to fit the UK's domestic legal framework; and
>
> – so far as necessary to implement the result of the UK's negotiations with the EU."[46]

**76.** The Constitution Committee goes on to suggest that the Bill should:

> "clearly set out a list of certain actions that cannot be undertaken by the delegated powers contained in the Act, as another means of mitigating concerns that may arise over this transfer of legislative competence."[47]

**77.** Later in the report, the Committee makes recommendations about the content of Explanatory Memoranda, including that they should be signed by the relevant Minister to declare that the associated statutory instrument:

> "does no more than necessary to ensure that the relevant aspect of EU law will operate sensibly in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU."[48]

**78.** The House of Lords Constitution Committee also recommended that details of the change being made are set out in the Explanatory Memorandum. It continues to make recommendations that relate to statutory instrument procedure which is addressed in the next section of this report.

**79.** Cytûn endorsed the approach suggested by the House of Lords Constitution Committee, as did Professor Craig:

> "it's an endemic problem and a serious one about ensuring that Assembly Members can exercise some proper scrutiny over these measures. Could I just recommend […] the detailed recommendations that are contained in paragraph 102 of the House of Lords Constitution Committee report are actually pretty helpful as vehicles through which Assembly Members can maintain input."[49]

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[46] House of Lords Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, March 2017 paragraph 50
[47] Ibid paragraph 51
[48] House of Lords Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, March 2017 paragraph 102.
[49] RoP EAALCommittee 15 May 2017 c.315

**80.** The view that the delegated power should be restricted to necessary technical change was expressed by a number those that contributed to our inquiry.

**81.** The Chartered Institute for Archaeologists (CIfA) called for the power to be expressly limited to making technical "rather than substantive changes to current law".[50] In asserting this, CIfA saw defining permitted and prohibited changes as challenging, but that this challenge should be met.[51]

**82.** Wales Environment Link wrote that:

> "The Bill should confine any delegated powers to the purpose of faithful transposition of existing EU directives, to ensure that any policy changes are given the due scrutiny that they require. As much new legislation as possible should be made through primary legislation, in order to give a full and proper oversight role to the National Assembly for Wales."[52]

**83.** Returning to the constraints mentioned in the White Paper (paragraphs 3.16 to 3.18), several respondents to our call for written evidence supported them.[53] However, there was also a view that further safeguards might be necessary[54] and that the Assembly should not be prevented from adding to them.[55]

**84.** Geldards felt that the information in the White Paper on constraints was too general for them to arrive at an informed view as to whether they will be sufficient.[56]

**85.** The White Paper does not make clear how the Bill will limit the scope of subordinate-legislation-making powers to be granted by it. However, it does speak, in a number of places, about the power being confined to the making of "necessary" corrections only to EU-derived law.[57]

**Conclusion 12.** We believe that there is potential for uncertainty if the terms "necessary", "no greater than necessary" or similar are used in the Bill in this context.

**86.** The use of the term "necessary" has been considered in some detail in the context of both Assembly and UK Parliament consideration of the draft Wales Bill and subsequent Wales Bill.

**87.** "Necessary" is a concept capable of a range of meanings.

**88.** The courts might interpret it in an objective way, according to its normal dictionary meaning in English. The Shorter Oxford English Dictionary, for instance, defines it as "that cannot be dispensed with … requisite, essential, needful … requiring to be done, that must be done". In this context, of the grant of a potentially wide power to the executive, that would be the desirable interpretation from our point of view.

**89.** But this is by no means the only way in which the courts interpret the word "necessary". For instance, in the context of the Human Rights Act 1998, "necessary" equates to "proportionate" –

[50] GRB 02 CIfA paragraph 2.1.1
[51] Ibid
[52] GRB 09 WEL paragraph 19
[53] See written submissions from, inter alia, CIfA and Cytûn.
[54] GRB 02 CIfA paragraph 3.1.1
[55] GRB 04 Cytûn (response to Question 3.1)
[56] GRB 05 Geldards paragraph 10.
[57] For example, paragraph 1.21 of the White Paper (UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017).

already a much more flexible concept than "essential" or "that must be done". Moreover, how strictly the courts test the "necessity" – or proportionality – of the State action affecting human rights depends on the kind of right, and the kind of potential breach, in play. In certain contexts, the courts will find the State to be in breach if what it did was "manifestly without foundation". This interpretation of "necessary" could give Ministers considerable latitude.

**90.** The concept of what is "necessary" is interpreted differently again in the EU law context (see the Supreme Court's landmark judgement stating that the approach to proportionality (i.e., the concept of justification or necessity) is different depending on whether the case concerns the European Convention on Human Rights or European Union law).[58]

**Conclusion 13.** The uncertainty about the meaning of the concept of "necessity" is undesirable, particularly in the context of a Bill designed to "give businesses, workers, investors and consumers the maximum possible certainty"[59] about how the law will operate post-Brexit. It is also undesirable in the context of a grant of very wide-ranging powers to the executive.

**Conclusion 14.** This uncertainty could potentially be avoided by the use of a term such as "essential" or "strictly necessary", combined with a statement by the Minister in charge, on the record in Parliament as to the intended narrow scope of the power. This statement should also be reflected in the Explanatory Notes accompanying the Bill.

**91.** In terms of the information that should accompany each statutory instrument, Geldards suggest a procedure separate to the Explanatory Memorandum whereby the Minister laying or introducing the secondary legislation should provide a certificate setting out that the instrument is within competence and identifying it as an EU-law correction measure.[60]

**92.** In the case of a negative resolution procedure, this certificate could be challenged during the period the instrument is before the Assembly. In the case of the affirmative procedure applying, Geldards suggested that the Llywydd could be required to rule on the adequacy of the certificate before the instrument can proceed.[61]

**Conclusion 15.** The power likely to be delegated to the Welsh Ministers is wide and without appropriate constraints it risks unbalancing the power dynamic between the executive and the legislature. 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.

**Conclusion 16.** However, this power must be strictly limited to the uses for which it is intended. We endorse the House of Lords Constitution Committee's call for substantive constraints on the power to be placed on the face of the Bill, and we have set-out some concerns that we have around the use of the term "necessary" above.

**Conclusion 17.** Again, we conclude that the power for the Welsh Ministers would be best granted by the Assembly and the substantive controls on the power should also be set by the Assembly or, at the very least, be subject to the Assembly's consent.

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[58] R (on the application of Lumsdon) v Legal Services Board; Bar Standards Board (Intervener) [2015] UKSC 41
[59] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017, paragraph 1.7
[60] Ibid paragraph 25
[61] Ibid paragraph 26

**Conclusion 18.** Should practical constraints make it necessary for these controls to be set on the face of the Bill , we expect the UK Government to comply with any representations made by the Assembly in relation to these controls.

## Temporal controls on the face of the Bill

**93.** Paragraph 3.25 of the White Paper acknowledges that the powers proposed to be contained in the Bill "do not need to exist in perpetuity" and that the UK Government will "ensure that the power is appropriately time-limited to enact the required changes."[62]

**94.** Turning again to the House of Lords Constitution Committee's report, we find two suggested uses for sunset clauses. The first is to limit the extent of the significant grant of power to ministers. The second is to ensure that laws made in haste using delegated powers under the pressure of the Brexit timeline will be reconsidered by the appropriate legislature and in the most appropriate format to, for example, achieve a more balanced use of primary and secondary legislation.

**95.** The Law Society supported the use of sunsetting in the Bill,[63] as did Geldards[64] who also made the point that:

> "[…] 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."[65]

**Conclusion 19.** We believe that placing a time-limit on the power to amend EU-derived law is a necessary pre-requisite to granting such a wide power to the Welsh Ministers. We also recognise that despite the best efforts of the Assembly to bring proportionate scrutiny to bear on this process, the extreme time constraints – particularly towards the end of the process – may inevitably mean that the Assembly is unable to apply the level of scrutiny it would ordinarily expect to apply, to some of the provisions made using this delegated power. Time-limiting these provisions means that they would be reconsidered by the Assembly at an appropriate future date and be subject to a full scrutiny process.

**Conclusion 20.** As with other aspects of the process considered elsewhere in this report, we believe that it should be for the Assembly to determine the controls on the power, including any time limiting. However, we accept that this might be difficult to achieve given the limited time available before Brexit.

**Conclusion 21.** If these time limits are to be defined on the face of the Bill then, in determining any time limit that should apply, those drafting the Bill must be mindful of the Assembly's bilingual arrangements; how any time limit interacts with its electoral cycle and any broader institutional changes that might take place. This points again to the need for meaningful consultation with both the Welsh Government and the Assembly before the Bill is introduced and for the UK Government to comply with representations made by the Assembly in relation to matters that are within the Assembly's competence.

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[62] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017 paragraph 3.25
[63] GRB 11 Law Society paragraph 13
[64] GRB 05 Geldards paragraph 32
[65] Ibid paragraph 29

**Conclusion 22.** We support the suggestion that EU-law correction instruments should be identifiable so that the changes made to the statute book under the pressure of Brexit can be revisited at a suitable point in the future.

**Conclusion 23.** We will await the detail of the Bill before reaching a final view on the time limiting of the proposed power and provisions.

## Statutory Instrument procedure

**96.** Based on the evidence received from the Welsh Government,[66] coupled with information provided by the UK Government in the White Paper,[67] it is possible to arrive at a ball-park estimate of 800-1,000 additional statutory instruments needing to be considered by the Assembly in the (just under) 12-months from Easter 2018.

**97.** Whilst many of these instruments will be making technical changes and require more limited scrutiny, some will be more controversial and are likely to require political judgements to be made in their drafting. For example, taking decisions about replacing European bodies with UK ones or on replacing a reference to a definition currently set out in a piece of European law with a full definition within that piece of UK law. These instruments may require more in-depth scrutiny.

**98.** Additionally, as the legislative approach will be contingent on the exit negotiations, and any transition arrangement that is agreed, there may be a need to make a range of changes late-on in the process under very tight timescales.

**99.** The White Paper appears to suggest that the secondary legislation needed will come in the form of Statutory Instruments and that, consequently, the Statutory Instruments Act 1946 procedures will apply to part of the process.[68] It should be noted though that this does not restrict the Assembly or Parliament in providing for any other procedures to apply.

**100.** The White Paper also appears to suggest that each of the instruments brought forward under the Bill will follow one of two established procedures: the negative or affirmative procedure.[69] The House of Lords Constitution Committee suggested that a form of enhanced procedure should also be considered.[70] Building on the work of the House of Lords Delegated Powers and Regulatory Reform Committee (the DPRRC), it suggests that Parliament and the Government may wish to consider whether it is possible to adopt one of the 11 existing models of enhanced scrutiny procedures identified by the DPRRC, rather than starting from scratch and devising a new enhanced procedure.[71]

**101.** The White Paper closes the section on "Statutory Instrument procedure" by stating "This is the beginning of a discussion between Government and Parliament as to the most pragmatic and effective approach to take in this area".[72]

**102.** No mention is made of a discussion with devolved legislatures.

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[66] External Affairs Committee RoP 15 May 2017 c.365
[67] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017 paragraph 3.19
[68] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017 paragraph 3.21
[69] Ibid
[70] House of Lords Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, March 2017 paragraph 102 (5)
[71] Ibid paragraph 100 .See also the table at the head of page 31 which provides a summary of the 11 types of strengthened scrutiny procedure identified by the DPRRC.
[72] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017 paragraph 3.23

### The Assembly should determine its own procedures

**103.** As with other aspects of the approach set out in the White Paper, the question of whether it is appropriate for Parliament to set Assembly procedure arises.

**104.** The Wales Governance Centre offer a clear view that:

> "It should be for the Assembly to determine the procedures for making and approving secondary legislation where powers are delegated to Welsh Ministers. Details of such measures should not be set out in the Bill"[73]

**105.** Dr Hugh Rawlings, Director of Constitutional Affairs for the Welsh Government reflected on the absence of a reference to the role of devolved legislatures:

> "[…] it [the White Paper] doesn't say anything about the procedure for scrutiny of the exercise of those powers. Now, in some ways, you might think it not a good idea for Parliament to prescribe how this place should decide to exercise its functions of scrutiny, and so there is an argument that says that the Bill, in conferring powers on the Welsh Ministers, ought in some way or other to leave it to the Assembly to decide what is the appropriate scrutiny procedure, and that the Bill itself should not lay down, or purport to lay down, or tell this place how to exercise its powers. That would be inappropriate."[74]

**106.** Geldards recognise the appropriateness of the Assembly determining procedure, but believes "as matter of principle" there needs to be consistency across the UK.[75] It believes the Legislative Consent Motion (LCM) process is the pragmatic approach to adopting secondary legislative procedures that are specific to the conversion of EU-derived law.[76]

**107.** The Llywydd states that:

> "It would be wholly inappropriate for the Bill to set out procedures for the scrutiny of Welsh Government Ministers' secondary legislation, or to constrain the Assembly's ability to make decisions about its own internal scrutiny procedures in any way."[77]

**Conclusion 24.** As a point of constitutional principle, it is for the Assembly to determine the scrutiny arrangements that pertain to the secondary legislation flowing from powers granted to Welsh Ministers. In light of this, the absence of any reference to the role of devolved legislatures in the White Paper could be viewed positively if we were convinced that this omission was made deliberately on the grounds of constitutional appropriateness.

**Conclusion 25.** In our view, it is important that mechanisms agreed to deal with Brexit do not set a precedent. We maintain that it should be for the Assembly alone to determine its procedures.

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[73] GRB 13 Wales Governance Centre paragraph 4 under heading 3.
[74] External Affairs Committee RoP 15 May 2017 c.399
[75] GRB 05 Geldards paragraph 12
[76] Ibid paragraph 13
[77] GRB 14 Llywydd paragraph 11

**Conclusion 26.** 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.

**Conclusion 27.** We believe that the UK Government's commitment in paragraph 3.23 to hold discussions with Parliament should have been extended to include the devolved legislatures.

**Conclusion 28.** Should practical constraints make it necessary for these procedures to be set on the face of the Bill, we expect the UK Government to comply with any representations made by the Assembly in relation to Assembly procedures.

### Sift mechanism

**108.** Building on the work of the House of Lords Constitution Committee, there is an emerging view that some sort of additional sifting mechanism might be needed to cope with the volume and nature of the secondary legislation expected. This would allow the Assembly to determine the procedure that applies to each instrument, adding an additional check on the use of the power.

**109.** Because of the inherent uncertainty attached to legislating for the outcome of ongoing negotiations, relevant ministers will not be in a position to provide a definitive account at the outset of how the power they need to sensibly amend EU-derived law will be used or the volume of legislation that will be needed. To allow the legislature to allow such a significant grant of power to the executive, it will need a mechanisms for maintaining appropriate control and oversight of the use of this power. The substantive and temporal controls set out on the face of the Bill will offer a first tier of control. Establishing a procedure that allows the legislature to reconsider the procedural controls to be applied once the detail of how the power is to be exercised is known offers an important additional control and a degree of transparency to the process.

**110.** The House of Lords Constitution Committee describes a process whereby each statutory instrument is provided to Parliament in draft with an EM that includes, inter alia, a recommended scrutiny procedure e.g. negative, affirmative or some form of strengthened procedure.[78]

**111.** A committee would then consider the draft instrument and determine whether or not the procedure proposed by the Government is appropriate. If it is not, then the committee could determine the level of scrutiny it considers appropriate.[79]

**112.** The White Paper suggests that the mechanistic nature of the conversion of EU law to UK law will result in the majority of instruments following the negative procedure, with the affirmative procedure applying for "more substantive changes". It does not mention the use of any strengthened procedure.[80]

**113.** The House of Lords Constitution Committee's report on the Bill reflects on the "all or nothing" nature of considering statutory instruments,[81] in so far as they cannot be amended when following normal procedures. It suggest that Parliament should have the option of applying a strengthened

[78] House of Lords Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, March 2017 paragraph 102
[79] Ibid
[80] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, 30 March 2017 paragraph 3.22
[81] House of Lords Constitution Committee, *The 'Great Repeal Bill' and delegated powers*, March 2017 paragraph 84

procedure that allows "an opportunity for a statutory instrument to be revised in the light of parliamentary debate"[82] in circumstances where:

> "The relevant committee(s) determines that a statutory instrument laid under the 'Great Repeal Bill' amends EU law in a manner that determines matters of significant policy interest or principle."[83]

**114.** Professor Bell supports publishing the instruments in draft:

> "the most obvious thing is that the regulations are made in draft so that people can discuss them, because […] what is technical and what is policy is not necessarily obvious, and there may be disagreements."[84]

**115.** He makes the point that this legislative process can be seen as a joint endeavour between the executive and the legislature:

> "There's a lot of technical difficulty particularly transposing the drafting of EU legislation into the typical drafting of Welsh or English legislation and that needs careful attention and can't simply be left to a Minister to do on their own."[85]

**116.** He cautions that "If it's kept quiet in a ministry for a long time and then just appears as a made piece of legislation, we've got no chance".[86]

**117.** The Law Society suggest that "should be possible for secondary legislation to be produced in draft".[87]

**118.** The Cabinet Secretary for Finance and Local Government appeared to support a type of sifting mechanism:

> "[…] the way I would see it happening is that Ministers would let the legislature know which procedure we thought would be proportionate to the piece of legislation in front of the Assembly, but the Assembly will be free to accept or reject Welsh Ministers' advice. So, a Welsh Minister may say, 'I think that these are entirely technical changes and these are ones that you can allow to go through under the negative procedure', but the Assembly would be under no obligation to take the Minister's advice. The Assembly itself, the legislature, would look at that advice and say for itself either, 'Yes, we think that's reasonable', or would say, 'No, actually, we think the affirmative procedure should be deployed here'."[88]

**119.** Geldards struck a more cautionary note when expressing their view of a sift mechanism:

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[82] House of Lords Constitution Committee, *The 'Great Repeal Bill' and delegated powers,* March 2017 paragraph 102
[83] Ibid
[84] External Affairs Committee RoP 15 May 2017 c.307
[85] Ibid
[86] Ibid c.314
[87] GRB 11 The Law Society paragraph 12
[88] External Affairs Committee RoP 15 May 2017 c.397

> "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.
>
> 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."[89]

**120.** The role of Assembly committees in scrutiny (beyond conducting the sift mechanism explored above) was considered by some respondents to our inquiry. Geldards see a significant role for the Constitutional and Legislative Affairs Committee and believe that it may need to be enhanced.[90] They also suggest that "a specific ad hoc committee on converted EU-derived law" might be needed in the next Assembly if the sunset approach is adopted.[91]

**Conclusion 29.** It is difficult to assess whether a strengthened procedure will be necessary before assessing the substantive controls on the power included in the Bill. If the substantive controls are set so as to prevent their use for determining matters of significant policy interest or principle then an instrument that strayed into this area would be reported as ultra vires by a relevant committee.

**Conclusion 30.** That said, the option of applying a strengthened procedure would allow for circumstances where this distinction is not clear cut.

[89] GRB 05 Geldards paragraphs 15-16
[90] Ibid paragraph 19
[91] Ibid paragraph 21

# 03. Devolution (Chapter 4 of the White Paper)

**121.** The six short paragraphs that make Chapter 4 of the White Paper attempt to address the interaction of the UK Government's approach with the devolution settlements. Whilst brief, this chapter is significant and may presage significant inter-UK disagreement over the shape of post-Brexit Britain.

## Paragraph 4.2 – UK Government represents the whole of the UK's interests

**122.** The White Paper states that:

> "At EU level, the UK Government represents the whole of the UK's interests in the process for setting those common frameworks and these also then provide common UK frameworks, including safeguarding the harmonious functioning of the UK's own single market."[92]

**123.** The UK Government's view was disputed by some that contributed to our inquiry. Dr Jo Hunt explained that:

> "We know that the devolved administrations—the devolved bodies—are involved in very many other ways in terms of both feeding through the UK Government line, and also participation in the JMC Europe, but also the more direct engagements that the devolved bodies—the devolved nations—might have. So, we know that there are MEPs that are representatives there from Wales that participate in law making; also, the critical role that has been played by some AMs when they've been representatives on the Committee of the Regions, and the importance of the networking that goes on. What it fails to capture is a lot of that institutional but perhaps more informal networking and that important region-to-region sort of networking that might take place, and those opportunities for the devolveds to feed in. So, there's the formal—both direct and indirect—ways that the devolved nations are involved in law making, but also the informal processes that simply aren't captured there."[93]

**124.** The Cabinet Secretary for Finance and Local Government told us:

> "That description advocates to the UK Government itself an ability to speak entirely on behalf of the whole of the UK without any involvement of the devolved administrations. It doesn't work in—. That isn't how it works, even in practice. In the best part of the system, UK Ministers, whoever that person would be, is speaking on behalf of a shared position that has been worked out between the four administrations."[94]

**125.** Professor Bell explains that the consensus model of government found in the European Union means that there is a role of multiple actors in the process of developing and setting common frameworks:

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[92] UK Government, *Legislating for the United Kingdom's withdrawal from the European Union,* 30 March 2017 paragraph 4.2
[93] External Affairs Committee RoP 15 May 2017 c.248
[94] Ibid c.438

> "European legislation is slow in its development and is based on the model of consensus building, which is radically different from the winner-takes-all model that the Westminster Government operates with the Westminster Parliament. So, it is that consensus building across the Committee of the Regions, the European Economic and Social Committee, the Parliament and the Council of Ministers that is not going to be in any way replicated in the very quick process of legislation that is envisaged in the great repeal Bill."[95]

**126.** From the perspective of local government, the Welsh Local Government Association refers to the role played by the Committee of the Regions in the EU's legislative process, and the fact that no equivalent forum for obtaining the advice of local and regional representatives exists in the UK.[96]

**127.** In our first report, we found that the case for using the EU's approach to subsidiarity as a possible principle from which to develop new intra-UK relationships was put well and merits further consideration. Dr Hunt raised this again, stating:

> "…there's no specific reference in this chapter to the concept of subsidiarity. And if we look at the EU's constitutional principles, we understand how it proceeds. Subsidiarity is one of those principles against which legislation can be tested, and it runs through the activities of the European Union. We have no similar constitutional principle that works outside of that at a UK level."[97]

**128.** The Llywydd, in her response to our inquiry, states that "the important organising principle of subsidiarity should be at the heart of the UK constitution".[98]

**129.** During the second phase of its work, the Silk Commission adopted "subsidiarity and localism" as one of the principles that should underpin its work and concluded that subsidiarity should be one of the tests that any change to the devolution settlement must pass.[99]

**Conclusion 31.** The UK Government's view, as provided in the White Paper, of how EU common policy frameworks are negotiated and agreed fails to acknowledge the role that the devolved governments and legislatures (and, indeed other actors such as local government) have played in shaping these policy frameworks.

**Conclusion 32.** This partial view of how EU common policy frameworks are negotiated and agreed provides a poor foundation if it is to be used as justification for unilateral action to impose UK common frameworks in devolved areas of competence.

**Conclusion 33.** As we concluded in our first report, placing the organising principle of subsidiarity at the heart of new intra-UK relationships merits further consideration.

**130.** The use of the term "democratically-elected representatives" has also drawn comment. As Professor Craig puts it:

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[95] External Affairs Committee RoP 15 May 2017 c.230
[96] GRB 10 WLGA
[97] External Affairs Committee RoP 15 May 2017 c.256
[98] GRB 14 Llywydd paragraph 4
[99] Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales,* March 2014, paragraph 3.4.2

> "you've got this magic phrase at the end of 4.2, 'allowing these rules to be set here in the UK by democratically-elected representatives', it's wonderfully ambiguous, and I think intentionally so."[100]

**Conclusion 34.** The UK Government must make its intentions clear as soon as possible. This should include clarifying what it means by "democratically-elected representatives".

## Replacing EU frameworks

**131.** In our first report on the implications for Wales of exiting the European Union, we started to explore the issue of UK-wide frameworks and acknowledged that there are several areas of policy that might benefit from an agreed UK-wide approach or framework.[101]

**132.** We also explored concepts of shared competence and inter-governmental co-operation.

**133.** We expressed concerns that "Whitehall may not fully appreciate how concepts of shared competence have developed in the context of devolution settlements that are rooted in EU membership.".

**134.** Professor Craig interpreted the UK Government's intentions in Chapter 4 as follows:

> "How I read 4.3, is: 'We need common frameworks in a number of these areas'. Then, the subtext for me is: 'those common frameworks are going to be substantively common and are going to be decided predominantly at the Westminster level'—yes, with consultation with the devolved regions, but I think with Westminster in the driving seat."[102]

**135.** Paragraph 4.4 states that:

> "the Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel we 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. Whilst these discussions are taking place with devolved administrations we will seek to minimise any changes to these frameworks."

**Conclusion 35.** We are concerned that the White Paper suggests that the UK Government is planning to freeze the legislative competence of the Assembly for a period or permanently adjust the devolution settlement to limit the extent to which devolved areas of competence can affect UK-level frameworks.

**Conclusion 36.** The UK Government should clarify its intentions as a matter of urgency. We have been unable to put such questions to UK ministers due to the constraints of the pre-UK general election period.

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[100] Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales,* March 2014, paragraph c.252-4

[101] National Assembly for Wales External Affairs Committee, *Implications for Wales of Leaving the European Union,* January 2017 paragraph 240

[102] External Affairs Committee RoP 15 May 2017 c.258

**Conclusion 37.** To clarify our view of the legal situation, we do not recognise the concept of powers being 'repatriated' from the EU. It is our view that the law provides the Assembly with legislative competence in particular areas and that in some areas EU frameworks constrain this competence. Once the UK exits the EU, these constraints will fall away. For the UK Government to impose UK-wide frameworks in devolved areas of competence it would need to adjust the devolution settlements i.e. narrow the powers currently held by devolved legislatures. The doctrine of Parliamentary sovereignty means that it can do this through the UK Parliament. However, constitutional convention demands, and we insist, that this should happen, if at all, only subject to the consent of the Assembly.

**136.** Professor Craig described this as:

> "Anything about those common frameworks that would run contrary to the fact that an issue is prima facie within your competence would, or could only be pursued legally, on my understanding, if the requisite legal changes were made allowing for Westminster to have, as it were, purchase within your area of a kind that it doesn't presently legally have."[103]

**137.** Professor Bell provided a starker assessment:

> "If a common framework means that we simply transfer competence from the EU to create a regulatory framework to the Westminster Parliament, then you're undermining the framework of devolution as a whole."[104]

**138.** It is possible to interpret paragraph 4.4 as suggesting a temporary imposition of UK-wide frameworks whilst discussions with devolved administrations are held. Dr Jo Hunt cautioned us that "these transitional arrangements may end up being something more than transitional".[105]

**139.** Cytûn warned that there is "an inevitable danger of inadvertent (or deliberate) rebalancing of the devolution settlements".[106] They pointed to the 2011 Assembly referendum and called for it to be respected in the same way as the 2016 referendum on EU membership.[107] They also raised an important point around the distinction between executive (though Cytûn use the term "administrative") and legislative competence and the problems this can cause from the perspective of representation.[108]

**140.** Paragraph 4.5 of the White Paper describes a "significant increase in the decision making power of each devolved administration", rather than an increase in legislative competence. In other words, it appears to focus on the powers of the Welsh Ministers to take decisions, rather than on the competence of the legislature to make the laws which set the framework for those decisions. While welcome as far as it goes, we are concerned about the omission.

**Conclusion 38.** The UK Government's approach, suggested in the White Paper, concerns us and appears unnecessary. The Welsh Government has stated its willingness

[103] External Affairs Committee RoP 15 May 2017 c.278
[104] Ibid c.288
[105] Ibid c.268
[106] GRB 04 Cytûn paragraph 2
[107] Ibid
[108] Ibid paragraph 3

to work with the UK Government to come to an agreed position on UK-wide frameworks and we would hope that the constituent nations of the UK and the UK Government can come to an agreement based on parity of esteem rather than the UK Government imposing its own framework without the consent of the devolved governments and legislatures.

**Conclusion 39.** It is concerning that we are entering into a period of intense negotiation on the future of the United Kingdom apparently without a shared understanding of the law as it exists or the way in which future constitutional relationships within a United Kingdom outside the European Union should be conducted.

## Instability of the Welsh devolution settlement

**141.** The Constitutional and Legislative Affairs Committee (the CLA Committee) has provided us with its declaratory statement "Impact of exiting the European Union on the Devolution Settlement for Wales".[109]

**142.** This statement sets out five principles. In summary they are:

1. The whole process of exiting the EU must always ensure respect for the rule of law.
2. The legislation arising from exiting the EU must be clear, precise and well-drafted.
3. The UK Government's Great Repeal Bill (and other Bills relevant to existing the EU) must be informed by its clear vision for the constitutional construction of the United Kingdom. That vision must be published.
4. The National Assembly must be the legislature responsible for legislating in Wales on non-reserved areas.
5. Where the UK Parliament / Government seeks to legislate through primary / secondary legislation in devolved areas, they must seek the consent of the National Assembly for Wales.

**143.** The statement continues with an analysis of the White Paper's fourth chapter.

**144.** The CLA Committee makes an important observation about the timing of the Great Repeal Bill in the Welsh context:

> "What makes the position particularly uncertain for Wales is that the introduction of the Great Repeal Bill coincides with a changing devolution settlement that is untried and untested. The boundaries of the National Assembly's legislative competence under the reserved powers model are extremely uncertain and therefore, in Wales, the uncertain process of exiting the EU is being built on what are already uncertain foundations.
>
> It has never been more important for the UK Parliament and the UK Government to assert their commitment to devolution in Wales."

**Conclusion 40.** We agree with this statement and draw attention to the added risk that this instability brings to the exit process for Wales.

[109] National Assembly for Wales Constitutional and Legislative Affairs Committee, Declaratory Statement: Impact on the European Union on the Devolution Settlement for Wales, June 2017

**Conclusion 41.** We will engage with our colleagues on the CLA Committee to explore co-ordination of our work on the Great Repeal Bill, once the Bill is introduced.

## Legislative consent

**145.** The First Minister, in his evidence to this Committee on 6 February 2017, outlined his views that a Legislative Consent Motion (LCM) is likely to be needed for the Great Repeal Bill.[110]

**146.** In his statement to the House of Commons on the White Paper on 30 March, the Secretary of State for Exiting the EU, the Rt Hon David Davis MP, stated that the UK Government did not yet know whether or not an LCM would be required as they had not yet decided on a final format for the Bill.[111]

**147.** Professor Craig's view in evidence was that it is "desirable and appropriate".[112]

**148.** In terms of requiring the Assembly's consent to legislative changes brought about using powers provided by the Bill, we received views to suggest that steps could be taken to safeguard the Assembly's role.

**149.** Professor Bell suggested that "there are ways in which some safeguarding of the devolution system ought to be actually written into the great repeal Bill itself."[113]

**Conclusion 42.** Given the likely implications for devolved areas of competence, the devolution settlement and Assembly procedure, we expect the Great Repeal Bill to require the Assembly's legislative consent, though we will need to analyse the Bill once introduced before arriving at a final view.

**Conclusion 43.** Depending on how the Bill is drafted, we may need to consider whether amending the Bill to safeguard the devolution settlement might be necessary.

**150.** On the timing of any LCM in relation to the Great Repeal Bill, the Cabinet Secretary told us that:

> "[…] an LCM would come before the National Assembly either at the end of the autumn term or the very beginning of the spring term of next year. So, December, January."[114]

**Conclusion 44.** This will be too late. We believe that a legislative consent memorandum should be laid as early as possible following the introduction of the Bill and consideration given to the timing of the subsequent legislative consent motion This will maximise the opportunity to seek amendments to the Bill should the Assembly have any concerns about its provisions.

**151.** The Llywydd stated the importance of ensuring that the Assembly's legislative consent procedures are "fit for purpose in the context of Brexit".[115] Further, she raises the prospect of a new legislative consent convention being needed to ensure that "all legislation in devolved areas" requires the Assembly's consent.[116]

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[110] External Affairs Committee RoP 6 February 2017
[111] Hansard 30 March 2017 c.441
[112] External Affairs Committee RoP 15 May 2017 c.333
[113] Ibid c.355
[114] Ibid c.480
[115] GRB 14 Llywydd paragraph 13
[116] Ibid paragraph 14

**152.** She states that:

> "In my view, the existing Legislative Consent convention (Sewel convention), and its manifestations in UK Government Devolution Guidance Notes, are not sufficient safeguards. It is essentially a government to government, rather than a parliament to parliament convention. I do not regard this as appropriate in this context."[117]

**153.** In terms of the Assembly's procedural arrangements, its Standing Order 29 provides for consent in relation to UK Parliament Bills which make provision for any purpose within the Assembly's legislative competence or modify that competence. Standing Order 30A provides for consent in relation to UK Statutory Instruments that seek to amend primary legislation within the legislative competence of the Assembly.

**154.** The Llywydd's evidence makes three points in relation to legislative consent that we wish to address.

**155.** The first is that there is a danger that the current convention would not require Assembly consent to UK Government secondary legislation that seeks to amend other secondary legislation within the legislative competence of the Assembly or the executive competence of Welsh ministers.[118]

**156.** The second is that any legislative consent convention will only carry weight if, as the Llywydd puts it, "the UK Parliament is aware of whether the Assembly has consented or not, and respects the Assembly's decisions".[119]

**157.** The third is that the legislative consent convention should be a parliamentary convention, yet it is largely controlled by governments.[120]

**Conclusion 45.** In our first report we raised the question of whether the Sewel convention needed to be reconsidered.[121] We agree with the Llywydd's assessment and with the principle that the Assembly's consent should be sought for all legislation that makes provision within, or affects, the Assembly's legislative competence.

**Conclusion 46.** The Assembly should consider its legislative consent procedures with a view to ensuring that they are "fit for purpose in the context of Brexit"; to explore how procedures in the UK Parliament take account of the Assembly's decisions on consent; and the practical steps needed to develop a more robust convention between parliaments.

## Inter-governmental Relations

**158.** Whilst we have touched upon the issues surrounding inter-governmental relations in other sections of this report, it is worth reflecting the evidence we received on this from those that contributed to this inquiry.

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[117] GRB 14 Llywydd paragraph 14
[118] Ibid paragraph 13
[119] Ibid paragraph 14
[120] Ibid
[121] National Assembly for Wale External Affairs Committee, *Implications for Wales of Leaving the European Union,* January 2017. See Chapter 13: Beyond the Sewel Convention p.65

**159.** Professor Bell emphasised that to manage this process, a lot of working together of the different administrations will be required.[122]

**160.** Geldards suggested 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".[123]

**161.** Dr Hunt expressed some disappointment that questions need to be raised around protection of the devolution settlements:

> "it seems disappointing that we'd have to think in terms of taking measures to protect the devolution settlement, and that those protections couldn't be reached through inter-governmental and inter-parliamentary discussions and the establishment of some sort of constitutional principles around that."[124]

**162.** On 15 May, the Cabinet Secretary explained that very few conversations were going on during the pre-election period.[125]He also explained the level of discussion that had taken place prior to the General Election being called. In our view, as expressed previously, this was inadequate.

**163.** During the same session, the Cabinet Secretary described the level of contact between officials, stating that "there has been quite a lot of involvement there, and that continues, even during this pre-election period."[126]

**164.** He also described a degree of variability between UK Government departments in their understanding of devolution:

> "its variable—its variability, I think, is less rooted in differences of willingness than in differences of experience. If you're a department that is used to dealing with devolved administrations, you tend to do this better than if you're a department where you need to think about the devolved aspects, where it's much less part of your daily work."[127]

**Conclusion 47.** We have attempted to investigate the level of structured engagement that is going on between the UK and Welsh Governments, with limited success. We recently wrote to a range of UK Government departments to request details of how Welsh Government officials are being formally and informally engaged in the Whitehall structures created to inform the Brexit process. We received a single collective response from the Wales Office that lacked the detail we requested.

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[122] National Assembly for Wale External Affairs Committee, *Implications for Wales of Leaving the European Union,* January 2017. See Chapter 13: Beyond the Sewel Convention c.266
[123] GRB 05 Geldards paragraph 17.1
[124] Ibid c.350
[125] Ibid c.361
[126] Ibid c.448
[127] Ibid c.455

**Conclusion 48.** We hope that the incoming UK Government will be more candid with us about the level of structured engagement that exists between it and the Welsh Government.

**Conclusion 49.** At present, we are not convinced that there is a structured plan of engagement. Rather, we are left with an impression of ad hoc arrangements dependent on individual contacts.

## Preparing for transition

**165.** Professor Bell suggested that the White Paper sets out a plan for dealing with transition, rather than a more lasting arrangement, saying "I read the consultation paper very much as 'how to deal with the transition; how to get to day one'".[128]

**166.** Professor Craig emphasised the need to consider a staged approach:

> "'When we are focusing on what is going to happen, let's keep clear two crucially distinct stages.' One is the stage that the great repeal Bill is primarily concerned with, which is ensuring there is not a black hole, and ensuring there is smoothness of transition at the date when we leave, and making the changes that are necessary in anticipation of that leaving date. That's all one part. Another part then is who has power to do what in particular substantive policy areas thereafter. And my point about the latter was merely to emphasise that, in Wales, you retain the power that you have under the Government of Wales Act 2006, pursuant to Schedule 7 et cetera, to pass Assembly Acts, subject to the exceptions. And if an area of devolved policy then comes back to Wales because it falls within Schedule 7, and isn't knocked out by any of the exceptions, then my point was actually a substantive constitutional one, which is that you continue to retain that plenary legislative authority, subject to Whitehall's residual power to enact legislation notwithstanding the fact that it's within your competence, and you can make those determinations."[129]

**Conclusion 50.** The UK Government must be clear about its intentions. At present it is unclear whether it is planning to impose restrictions on the Assembly's legislative competence. If it is, it is unclear whether this will be for a time-limited period or on a more permanent basis.

**Conclusion 51.** No change should be made to the Assembly's legislative competence without the consent of the Assembly. We expect detailed engagement with both the Welsh Government and the Assembly, before any legislation is brought forward with clauses that would impact upon the devolution settlement.

## A 'Continuation Bill'

**167.** In our first report we briefly considered the prospect of an Assembly 'Continuation Bill' that could pre-empt any repeal of the ECA and make the Great Repeal Bill unnecessary, as far as devolved policy areas in Wales are concerned.

**168.** Despite recognising some challenges to adopting this approach, we concluded that:

[128] GRB 05 Geldards paragraph c.261
[129] External Affairs Committee RoP 15 May 2017 c.277

> "Once we have had an opportunity to consider the [Great] Repeal Bill, and should our analysis suggest that it encroaches on the devolution settlement, we would support the principle of protecting the devolution settlement through the introduction of a Welsh Continuation Bill."[130]

**169.** Since the publication of our first report, the Assembly has agreed a motion that:

> "Calls on the Welsh Government to bring forward a continuation (Wales) bill in order to uphold Wales's constitution and convert into Welsh law all European legislation related to devolved policy areas."[131]

**170.** During the course of our evidence gathering for our current work on the Bill, we heard from the Cabinet Secretary for Finance and Local Government that:

> "[…] preparation is going on in the terms that there is active thinking happening around a continuity Bill—active work to scope what a Bill would need to contain. My view is that you only need a continuity Bill if you don't get a great reform Bill of the sort that you would wish to see. Our ambition would still be to have a great reform Bill that does the business properly and does it properly for Wales—that it recognises devolved competencies properly and protects and safeguards them."[132]

**171.** He continues:

> "[…] it will be for whoever is in Government in the UK to demonstrate to us that they are intending to go ahead in a way that does properly observe and protect the devolved settlement as it currently exists. If we reached a point where we felt that we could not rely on that being the case, then a continuity Bill is a possible fall-back position, and the Welsh Government is preparing the ground so that if we were in that position, we would be able to move to do so. But it's not the first resort for us—it is a last resort, when we feel that we have run out of the ground that we would like to see there, of the assurances we would be looking for UK Government Ministers to provide."[133]

**Conclusion 52.** We agree with the Cabinet Secretary's position, that a Welsh continuity Bill should be considered as a fall-back position. We share his hope that the UK Government will respect the devolution settlement in its approach to legislating for Brexit and that such a Bill will be unnecessary.

**Conclusion 53.** The Welsh Government must be in a position of readiness so that it can respond quickly should circumstances require it to take legislative action of its own. It must ensure that preparations are made for this possibility.

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[130] National Assembly for Wales External Affairs Committee, *Implications for Wales of leaving the European Union*, January 2017. Paragraph 303.
[131] NNDM6289 in the name of Jane Hutt AM, agreed as amended on 4 April 2017
[132] External Affairs Committee RoP 15 May 2017 c.461
[133] Ibid c.462

# 04. Transparency of the process

**172.** Whilst much of this process will be technical, it is vital that the people of Wales have the opportunity to consider and understand the changes taking place.

**173.** It cannot be forgotten that a central tenet of the campaign to leave the UK was to enhance democratic accountability and this must be honoured in the exit process.

**174.** There is a wide range of specialist expertise within our stakeholder base in Wales that can add significant value to the both the Government's drafting of legislation and the Assembly's scrutiny of them.

**175.** Respondents to our inquiry have called for transparency, early access to possible changes to EU-derived law, and direct participation in the process.

**176.** The Chartered Institute for Archaeologists call for:

> "The Welsh Assembly (working together with the UK Government) should identify and publicise as quickly and precisely as possible changes proposed to environmental legislation affecting Wales and the procedures by which such changes will be considered. Openness and transparency will be crucial to public confidence in the arrangements for transition and will facilitate the constructive engagement of people, stakeholders and organisations in the process."[134]

**177.** Cytûn point to the expertise that stakeholders can bring to the process of considering technical legislation, and suggest that the appointment of "expert panellists" to assist relevant committees could be considered.[135] They also encourage continued engagement throughout the process.[136]

**178.** Wales Environment Link (WEL) point to a need for the issues at play to be highlighted and explained to stakeholder and the public to assist them to feed in to the process:

> "There is also considerable concern around the nature of the use of secondary legislative powers. It is essential that 'technical' legislative change does not result in a reduction in current protections and that careful thought is given to relevant powers of UK and Welsh Ministers. **These issues need to be highlighted and explained to stakeholders, as well as the public more generally, so they can feed into what will undoubtedly be a fast-moving but crucial process.**" [bold added for emphasis][137]

WEL also call for "as much early stakeholder engagement as possible".[138]

Involve[139] and the WCVA[140] emphasised and made suggestions about engagement with stakeholders, communities and individual citizens.

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[134] GRB 02 CIfA paragraph 4.1.1
[135] GRB 04 Cytun paragraph 3.5
[136] Ibid 4.1
[137] GRB 09 WEL paragraph 17
[138] Ibid paragraph 19

**Conclusion 54.** We recognise the critical importance of engaging with stakeholders and citizens throughout the Brexit process, and the vital contribution that they can make.

**Conclusion 55.** As we wrestle with a myriad of issues, ranging from the technical to issues of constitutional importance, we must not lose sight of the fact the decisions that are taken during this period will have a direct and lasting effect on people's lives. It is incumbent on us, and all other actors in this process, to ensure that we aim to drive as much transparency into the process as possible and that we seek opportunities to facilitate meaningful two-way engagement with stakeholders and citizens.

**Conclusion 56.** We, as a committee, are currently devising a communications strategy that will take account of the submissions we have received to date.

[139] GRB 06 Involve
[140] GRB 08 WCVA

# Annex A – Conclusions

# Annex B – Witnesses

The following witnesses gave evidence to the Committee.

| **15 May 2017** | |
|---|---|
| Professor John Bell | University of Cambridge |
| Professor Paul Craig | University of Oxford |
| Dr Jo Hunt | Cardiff University |
| Mr Mark Drakeford AM | Cabinet Secretary for Finance and Local Government |
| Dr Hugh Rawlings | Welsh Government |
| Mr Piers Bisson | Welsh Government |

A transcript of the meeting can be viewed at
**http://senedd.assembly.wales/documents/s63123/15%20May%202017.html?CT=2**

Written evidence is available at:
**http://senedd.assembly.wales/mgConsultationDisplay.aspx?id=261&RPID=1508620510&cp=yes**