

European Union (Withdrawal Agreement) Bill: Legislative consent

This report provides an assessment of the clauses in the UK European Union (Withdrawal Agreement) Bill ('the Bill') that seek to make provision in areas devolved to the National Assembly for Wales and that are, therefore, subject to the legislative consent convention.

This report does not provide a summary of the Bill or any wider commentary on the Withdrawal Agreement that the Bill seeks to implement.

The report is made with a view to informing the Assembly's debate on the legislative consent motion associated with the Bill, currently scheduled for 21 January 2020.



1. Introduction

- 1.** The UK Government and the European Union have agreed the terms on which the UK will leave the European Union. The Withdrawal Agreement and Political Declaration published in October 2019 describe these terms.¹
- 2.** For the UK to leave the European Union on 31 January 2020, on the terms of the Withdrawal Agreement, the UK Parliament must legislate to give effect to the Withdrawal Agreement in domestic law.
- 3.** The UK Government introduced the European Union (Withdrawal Agreement) Bill² on 19 December 2019 to do just that i.e. to give effect to the Withdrawal Agreement in UK law.
- 4.** On our assessment of the Bill, 27 of the Bill's 42 clauses seek to legislate in a way that engages the legislative consent convention.
- 5.** This report provides our assessment of these clauses.
- 6.** For ease of cross referral, we have mirrored the order in which these clauses are presented in the Welsh Government's legislative consent memorandum ('the Memorandum').³

¹ [The Withdrawal Agreement and Political Declaration, Official Journal of the European Union, 12 November 2019](#)

² [The European Union \(Withdrawal Agreement\) Bill \(version introduced in December 2019\)](#)

³ [Welsh Government, Legislative Consent Memorandum: European Union \(Withdrawal Agreement\) Bill, 6 January 2020](#)

A note on this report

This report does not seek to provide a summary of the Bill or any wider commentary on the Withdrawal Agreement itself.

For the reader interested in a wider analysis of the Bill, it might be of interest to note that:

- the latest text of the Bill and associated documentation can be found on [the UK Parliament's website](#); and
- [a summary of the Bill](#) has been published by the Assembly's Research Service.

Additionally, **this report does not** seek to comment on the October 2019 version of the Bill or the clauses that were included in that version but omitted from the December 2019 version of the Bill.

2. Provisions in the Bill for which consent is required

Part 1 – Implementation period

Clauses 1 and 2 – saved law for implementation period (paragraphs 7-9 of the Memorandum)

What these clauses seek to do

- 7.** The first section of the EU (Withdrawal) Act 2018 ('the 2018 Act')⁴ repeals the European Communities Act 1972 ('the ECA')⁵ on exit day.
- 8.** Clauses 1 and 2 of the Bill seek to amend the 2018 Act to 'save' the ECA for the duration of the implementation period.
- 9.** This is because the majority of EU law will continue to apply during this period.

⁴ [The European Union \(Withdrawal\) Act 2019 c.16](#)

⁵ [The European Communities Act 1972 c.68](#)

Why consent is required

10. These clauses modify the legislative competence of the National Assembly for Wales ('the Assembly') in two ways.

11. Firstly, these clauses modify the legislative competence of the Assembly by continuing the requirement to comply with EU law during the implementation period.

12. Secondly, most of the provisions under these clauses become protected from future modification by the Assembly, under paragraph 31 of Schedule 5 to the Bill. As the Welsh Government points out in paragraph 9 of the Memorandum, this is a second and separate modification of the legislative competence of the Assembly.

OUR VIEW

Conclusion 1. Saving the ECA to allow a continuation of the majority of EU law during transition is necessary in the current circumstances.

Conclusion 2. The requirement for the Assembly to comply with EU law during the implementation period is a continuation of an existing constraint on the legislative competence of the Assembly.

Conclusion 3. The modification of the Assembly's competence, through preventing future modification of some of these provisions by the Assembly, is consistent with the approach taken to the 2018 Act.

13. The 2018 Act amended the Government of Wales Act 2006⁶ to make the whole of the 2018 Act a 'protected enactment' i.e. not modifiable by the Assembly.

14. The Bill specifies a number of sections of the 2018 Act that are released ('excluded provisions') from this more general restriction, including subsections (3) and (4) of the new section 1B to be inserted by clause 2 of the Bill.

Conclusion 4. This has the effect of updating the Assembly's competence in line with the powers granted to Welsh Ministers and is an improvement on the general restriction created by the 2018 Act.

⁶ [The Government of Wales Act 2006 c.32](#)

15. We note that the Welsh Government’s Memorandum does not reflect the detail of this change. In paragraph 9 of the Memorandum, the Welsh Government states, in relation to clause 1 and 2 of the Bill, that *“These clauses will become protected enactments”*.

Conclusion 5. We believe it is important to note that, whilst the majority of the provisions inserted into the 2018 Act by clauses 1 and 2 of the Bill will be protected from future modification by the Assembly, subsections (3) and (4) of the new section 1B (to be inserted into the 2018 Act by clause 2 of the Bill) are excluded from this protection.

Protected enactments and the devolution settlement

The Assembly’s legislative competence is shaped in a number of ways. This includes restricting the Assembly’s ability to modify a relatively small number of laws, regardless of whether they contain provisions that would otherwise be devolved.

The laws subject to this restriction are listed in paragraph 5 of Schedule 7B to the Government of Wales Act 2006.

These laws are referred to as “protected enactments”.

The list of protected enactments includes the European Union (Withdrawal) Act 2018 (‘the 2018 Act’).

The Bill seeks to introduce a number of new clauses to the 2018 Act. In adding provisions to the 2018 Act, the scope of the restriction described above is changed.

A change to the restriction represents a change to the Assembly’s competence. Therefore, when this occurs, we understand that the Welsh Government contends that the Assembly’s legislative consent is required.

The Bill also seeks to free a number of provisions in the 2018 Act from being restricted. It seeks to do this by maintaining the more general restriction on amending the 2018 Act, but listing a number of specific provisions that are excluded from this restriction.

Removing these provisions from restriction changes the restriction on the Assembly’s competence. Again, we understand that the Welsh Government contends that the Assembly’s legislative consent is required in these circumstances.

Clauses 3 and 4 – supplementary powers (paragraphs 10 and 11 of the Memorandum)

What these clauses seek to do

- 16.** These clauses provide UK Ministers and devolved Ministers with a new power, through amendment of the 2018 Act, to make regulations in connection with the implementation period.
- 17.** These powers are wide and could be used by UK Ministers to make provision in devolved areas.
- 18.** The regulation making powers of the devolved Ministers do not extend beyond the limits of the ‘devolved competence’ of a devolved authority as defined in clause 4.

Why consent is required

- 19.** The powers that these clauses seek to confer could be used to implement the Withdrawal Agreement in areas of devolved competence.

OUR VIEW

- 20.** When we considered the 2018 Act at Bill stage, we raised concerns about the breadth of powers available to both UK and the Welsh Ministers.
- 21.** We note that the powers provided by these clauses are similarly broad.
- 22.** However, we also note that they are time limited. They cannot be exercised after the end of the period of two years beginning with the implementation period completion day.
- 23.** In cases where the Welsh Ministers acting alone seek to make regulations that amend, repeal or revoke primary legislation or retained direct principal EU legislation, the regulations will be subject to the affirmative procedure.
- 24.** In all other cases, regulations will be subject to the negative procedure.

Conclusion 6. Given the breadth of these powers, Assembly Members might wish to consider whether the time limitation on these powers, and the scrutiny procedure to be applied, provide a suitable level of control and oversight.

Part 2 – Remaining implementation of withdrawal agreement etc: General

Clauses 5 and 6 – general implementation of the remainder of the Withdrawal Agreement and general implementation of the EEA EFTA and Swiss agreements (paragraphs 12 and 13 of the Memorandum)

What these clauses seek to do

25. These clauses seek to implement the remainder of the Withdrawal Agreement and related, EEA EFTA and Swiss agreements.

Why consent is required

26. The Welsh Government’s Memorandum states that clauses 5 and 6 will become “protected enactments”, subsequently modifying the Assembly’s competence as a consequence.

27. Clauses 5 and 6 insert new sections 7A and 7B into the 2018 Act. These new sections are protected from future modification by the Assembly.

28. The UK Government has also stated that these clauses alter the competence of the Welsh Ministers and the Assembly.

OUR VIEW

Conclusion 7. We agree that clauses 5 and 6 alter the Assembly’s competence.

Part 3 – Citizens’ Rights

Clauses 12 to 14 and 16-17 and Schedule 1 – recognition of professional qualifications, co-ordination of social security systems and non- discrimination, equal treatment and rights of workers etc. and powers of devolved authorities under sections 12, 13 and 14 (paragraphs 14 to 22 of the Memorandum)

What these clauses seek to do

29. Part 3 of the Bill relates to the citizens’ rights part of the Withdrawal Agreement.

30. As described in the Welsh Government’s Memorandum, clauses 12 to 14 relate to aspects of the Withdrawal Agreement that “*might require domestic provision to be made to implement the obligations effectively*”.

31. Each of these three clauses provide powers for an “appropriate authority”, which includes the Welsh Ministers when acting within devolved competence (as defined in Schedule 1 to the Bill), to make regulations that implement different aspects of the Withdrawal Agreement, as follows:

- **clause 12** – Chapter 3 of Title II of Part 2 of the Withdrawal Agreement relating to **professional qualifications**;
- **clause 13** – Title III of Part 2 of the Withdrawal Agreement relating to the **co-ordination of social security systems** including **reciprocal healthcare**; and
- **clause 14** – certain provisions of the Withdrawal Agreement relating to **non-discrimination, equal treatment and rights of workers** etc.

32. Schedule 1 sets out how these powers can be exercised by the Welsh Ministers, including when the Welsh Ministers can act independently, when they require Minister of Crown consent and when powers must be exercised jointly or with consultation with UK Ministers.

33. The Welsh Government’s Memorandum states that:

These requirements are based on the legislative competence of the National Assembly and also other existing executive powers of the Welsh Ministers.

34. In terms of the procedure that applies to the making of regulations under these provisions, the approach is similar to the treatment of other powers proposed in the Bill i.e. the affirmative procedure is applied where regulations seek to amend primary legislation or retained directly applicable EU law. The negative procedure applies for any other regulations made using these powers.

35. Clause 16 makes supplementary provisions for the making of regulations in Part 2 of the Bill, including in relation to clause 14.

36. The Welsh Government takes the view that clause 17 is subject to the Assembly’s consent. The UK Government does not list this as a clause requiring the Assembly’s consent.

37. The Welsh Government contends that:

- Clause 17 contains a definition that is used in clause 14.
- Clause 14 is subject to the Assembly's consent.
- Therefore, the Assembly's consent is required for that aspect of clause 17.

Why consent is required

38. Clauses 12 to 14 provide powers to the Welsh Ministers to implement the aspects of Part 2 of the Withdrawal Agreement that intersect with areas of devolved competence.

39. The Welsh Government's Memorandum states that "*it is within the Assembly's competence to make provision which implements the Withdrawal Agreement in devolved areas*".

OUR VIEW

Conclusion 8. We agree with the Welsh Government's assessment that clauses 12-14 and 16 require the Assembly's consent.

Conclusion 9. We agree with the Welsh Government's assessment that clause 17 should be subject to the Assembly's consent, for the reasons set out in the Welsh Government's Memorandum.

Conclusion 10. Assembly Members might wish to consider whether the controls specified in Schedule 1, for the powers provided to the Welsh Ministers under clauses 12-14 and 16, are appropriate.

Clause 15 and Schedule 2 – Independent Monitoring Authority for the Citizens' Rights Agreements (paragraphs 23 and 24 of the Memorandum)

What this clause does

40. Clause 15 establishes the Independent Monitoring Authority ('the IMA'). The IMA is being established to monitor the implementation and enforcement of Part 2 of the Withdrawal Agreement relating to Citizens' Rights.

41. The IMA's constitution and functions are set out in Schedule 2 to the Bill.

42. The Welsh Government states in the Memorandum that it had negotiated:

[...] a means for the Welsh Ministers to protect Welsh interests with a role in the appointment of the non-executive member of the IMA with knowledge of conditions in Wales relating to the relevant matters.

43. This is provided for under paragraphs 4 and 5 of Schedule 2 to the Bill.

44. Whilst this provides a role for the Welsh Ministers, it is important to note that the Secretary of State may go ahead and appoint a person even if the Welsh Ministers do not approve the proposed appointment.

45. The Welsh Government appears content with this arrangement;⁷

46. However, the Welsh Government raises a concern about the fact that the Bill enables the transfer of functions of the IMA to other public bodies, with no equivalent role for the Welsh Ministers in appointing a non-executive member being extended to any other public bodies that could potentially take on these functions.

47. In circumstances where the Secretary of State seeks to transfer the functions of the IMA, a number of tests must be satisfied and the Welsh Ministers must be consulted.

Why consent is required

48. Aspects of implementing the citizens' rights aspects of the Withdrawal Agreement fall within the Assembly's legislative competence. Examples include those listed in paragraph 31 of this report.

OUR VIEW

Conclusion 11. We agree that clause 15 requires the Assembly's consent.

Conclusion 12. We welcome the Welsh Government's successful negotiation of a role for Welsh Ministers in the appointment of a non-executive member of the IMA, but note that the Secretary of State may go ahead and appoint a person even if the Welsh Ministers do not approve the proposed appointment.

Conclusion 13. We note the Welsh Government's concern about a possible loss of this role in circumstances where the functions of the IMA are transferred to

⁷ At our meeting on 6 January 2020, the First Minister stated that these arrangement "will hold" and that "good ground" had been made in securing the provisions under paragraph 4 and 5 of Schedule 2 to the Bill, before outlining his concern regarding the 'transfer of functions' issue.

another public body and hope that the UK Government is able to offer further assurance on a continued role for Welsh Ministers in these circumstances before the Assembly debates the legislative consent motion on 21 January 2020.

Part 4 – other subject areas

Clauses 18 and 19 – main power in connection with other separation issues and corresponding power relating to devolved authorities (paragraphs 25 to 28 of the Memorandum)

What these clauses do

49. Clause 18 provides powers for UK Ministers to make provisions as they consider appropriate for the implementation of Part 3 of the Withdrawal Agreement, or for dealing with matters associated with that part of the Withdrawal Agreement.

50. Clause 19 provides equivalent powers for the Welsh Ministers.

Why consent is required

51. Part 3 of the Withdrawal Agreement covers a wide range of matters, including matters that fall within the Assembly’s legislative competence. Clause 19 anticipates this as it seeks to provide implementing powers to the Welsh Ministers.

OUR VIEW

Conclusion 14. We agree that clauses 18 and 19 require the Assembly’s legislative consent.

Conclusion 15. As with the provision of other powers in the Bill, Assembly Members might wish to consider whether they are appropriately framed and controlled.

Clause 20 - financial provision (not included in the Memorandum)

What this clause does

52. This provision is necessary to allow for payments to be made to the EU for the purpose of complying with any Withdrawal Agreement obligations. The clause provides that devolved authorities may incur expenditure in preparation for the making of statutory instruments under the Bill.

53. The Welsh Government did not refer to clause 20 in its Memorandum.

54. Following questions put to the First Minister by the Committee on 6 January 2020, the First Minister wrote to the Committee on 13 January 2020 to say that:

On reflection, we agree that this clause modifies the competence of the Welsh Ministers, and that the consent of the Assembly is needed for this clause.⁸

Why consent is required

55. These provisions modify the competence of the Welsh Ministers.

OUR VIEW

Conclusion 16. We agree that clause 20 requires the Assembly's legislative consent.

Clauses 21 and 22 – main power in connection with Ireland/Northern Ireland Protocol and corresponding power involving devolved authorities (paragraphs 29 and 30 of the Memorandum)

What these clauses do

56. Powers to implement the Protocol on Ireland/Northern Ireland are provided to UK Ministers under clause 21 and equivalent powers are provided to the Devolved Administrations under clause 22.

57. The Welsh Government is concerned that these powers are not restricted so as to prevent the Secretary of State using them to amend the Government of Wales Act 2006 without the Assembly's consent.

Why consent is required

58. These provisions relate to areas of devolved competence.

⁸ Letter from the First Minister to the Chair of the External Affairs and Additional Legislation Committee, 13 January 2020

OUR VIEW

Conclusion 17. We agree that clauses 21 and 22 require the Assembly's legislative consent.

59. When we considered the 2018 Act at Bill stage, we expressed our view that:

[...] the foundation statutes for devolution in Wales should only be amended through the use of primary legislation or, in limited circumstances, through the use of a Section 109 Order (as provided for in the Government of Wales Act 2006).⁹

60. During the course of scrutiny of the 2018 Act at Bill stage, amendments were made to limit a number of powers available to UK and the Welsh Ministers so as to prevent them from using them to amend the Government of Wales Act 2006.

61. In our May 2018 report, *European Union (Withdrawal) Bill: Progress towards delivering our six objectives*, we concluded, as a consequence of amendments to that 2018 Bill being made, that:

Significant progress towards protecting the Government of Wales Act 2006 has been made. However, concerns remain around the UK Government's powers to implement the Withdrawal Agreement.¹⁰

Conclusion 18. We support the Welsh Government's call for the regulation-making powers for implementing the Ireland/Northern Ireland Protocol to be restricted to prevent them being used to amend the Government of Wales Act 2006.

Clauses 25 to 27 – relationship to the European Union (Withdrawal) Act 2018 (paragraphs 31 to 35 of the Memorandum)

What these clauses do

62. Clauses 25 to 27 amend the 2018 Act to take account of the Withdrawal Agreement as follows:

⁹ We first made this statement in our paper '[Six objectives for improving the Withdrawal Bill](#)' that we sent to all Welsh MPs in October 2017. The full extent of our work on the 2018 Act at Bill stage is available from [our website](#).

¹⁰ External Affairs and Additional Legislation Committee, *European Union (Withdrawal) Bill: Progress towards delivering our six objectives*, May 2018

- Clause 25 defers the retention of saved EU law from exit day to the end of the implementation period
- Clause 26 replaces exit day with the end of the implementation period (“IP completion day”) in section 6 of the 2018 Act. Clause 26 also makes some provision about the future interpretation of retained EU law.
- Clause 27 amends section 8 of the 2018 Act to take account of the implementation period.

Why consent is required

63. These clauses seek to amend the 2018 Act and, in doing so, become protected from future modification by the Assembly due to the 2018 Act being a protected enactment.

64. This is an adjustment to the Assembly’s competence under the Government of Wales Act 2006 and, therefore, consent is required.

65. According to the Welsh Government, some of the changes made to the 2018 Act by these clauses “will read through to the Welsh Ministers’ deficiency correcting power” in the 2018 Act.

66. The UK Government has not included clauses 25 and 26 in the list of clauses that it believes require the Assembly’s consent.

OUR VIEW

Conclusion 19. We agree that clauses 25 to 27 require the Assembly’s consent.

Clause 28 – ancillary fee-charging powers (paragraphs 36 to 38 of the Memorandum)

What this clause does

67. Clause 28 seeks to amend the scope of the fee charging powers in Schedule 4 to the 2018 Act, to reflect the new powers inserted into the 2018 Act by the Bill.

68. These changes become protected from future modification by the Assembly due to the “protected enactment” status of the 2018 Act.

Why consent is required

69. The Welsh Government’s Memorandum states that:

The consent of the Assembly would be required on the basis that this provision modifies the Assembly's legislative competence by virtue of becoming a protected enactment.

OUR VIEW

Conclusion 20. We agree that clause 28 requires the Assembly's legislative consent.

Clause 29 – review of EU legislation during implementation period (paragraphs 39 and 40 of the Memorandum).

What this clause does

70. Clause 29 provides a role for the European Scrutiny Committee in the House of Commons and the EU Committee in the House of Lords in reviewing EU legislation during the transition period.

Why consent is required

71. The Welsh Government states in its Memorandum that because these committees could consider EU legislation which relates to subject matters within the Assembly's legislative competence, the Assembly's consent is required.

72. The UK Government has not listed clause 29 as a clause that it believes requires the Assembly's consent.

OUR VIEW

73. As a committee, we have been considering the question of the Assembly's role in considering EU legislation during the transition, or implementation, period since the summer of 2018. We have written to the UK Government and UK Parliamentary colleagues on several occasions since.

74. We take the view that the Assembly's role in the scrutiny of EU legislation should not be diminished during the implementation period, though we acknowledge that the Assembly's role might need to adjust to the terms of the Withdrawal Agreement.

75. Whilst we welcome the role provided to Westminster's committees under clause 29, we believe it needs to be strengthened through the inclusion of a role

for the relevant committees of the devolved legislatures when the EU legislation being reviewed relates to devolved areas of competence.

76. On 8 January 2020, we wrote to the Secretary of State for Exiting the European Union to make the case for two amendments to clause 29 of the Bill.¹¹

77. The letter is provided in full as annex A to this report, though our core request is repeated below.

78. Currently, the Assembly has a role in considering the compliance of draft EU law with the principle of subsidiarity.

79. This stems from the following provision in Article 6 of Protocol No.2 to the Treaty on the Functioning of the European Union:

It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.¹²

80. This provision will no longer apply once the UK leaves the EU.

81. Clause 29 of the Bill provides for a parliamentary mechanism for reviewing EU legislation during the implementation period. We note that this does not operate on the question of compliance with the principle of subsidiarity. Instead, it is based on the question of whether a piece of EU legislation “raises a matter of vital national interest to the United Kingdom”.

82. The Assembly’s experience of reviewing draft EU law in the past has shown that, on occasion, there have been specific issues of interest to Wales that have arisen that were not identified at a UK level. For example, the possible impact on the Welsh fisheries industry of a ban on driftnet fishing¹³ and changes to organic regulations for Welsh agriculture.¹⁴

¹¹ Letter from the Chair of the External Affairs and Additional Legislation Committee to the Secretary of State for Exiting the European Union, *EU (Withdrawal Agreement) Bill: Revision of EU law during the implementation period*, 8 January 2020

¹² [Treaty on the Functioning of the European Union, Protocol No.2 on the application of the principles of subsidiarity and proportionality, 12008E/PRO/02, 9 May 2008](#)

¹³ See [the Fourth Assembly’s Environment and Sustainability Committees work on this proposal](#) for more information.

¹⁴ Again, see [the Fourth Assembly’s Environment and Sustainability Committees work on this proposal](#) for more information.

83. These issues, by extension, can be considered issues of UK national interest. We contended that the Assembly, in conducting a review of EU legislation with a focus on the areas of policy devolved to it, would add value to the overall UK-wide scrutiny process.

84. Therefore, to ensure that the Assembly's role in reviewing EU law during transition is not diminished, we wish to see an analogous role for the Assembly to be acknowledged in UK law – just as such a role is currently acknowledged in the legal text of the Treaties.

85. Simple amendments to the Bill could secure this. For example:

Clause 29, page 33, line 39, after “Commons” insert –

“,and any committee of the devolved legislatures,”

Clause 29, page 34, line 10, after “legislation” insert –

“and has consulted any committee of the devolved legislatures that the EUC considers also has an interest in the EU legislation”

86. These amendments would, as is the case currently, leave any consultation with the devolved legislatures to the discretion of UK parliamentary committees.

Conclusion 21. We believe that clause 29 requires the Assembly's legislative consent.

Conclusion 22. Clause 29 should be amended, as described in this report, to prevent any lessening of the Assembly's current role in the scrutiny of EU legislation during the implementation period.

Clause 36 -repeal of unnecessary or spent enactments (paragraphs 41 to 42 of the Memorandum)

What this clause does

87. As the Welsh Government's Memorandum states, clause 36 repeals certain unnecessary or spent enactments.

88. In the case of the provisions of the 2018 Act being repealed, these are currently protected from modification by the Assembly due to the 2018 Act being a “protected enactment” under the Government of Wales Act 2006.

Why consent is required

89. As elements of the 2018 Act are to be repealed, the Welsh Government interprets this as increasing the legislative competence of the Assembly (as these provisions are no longer protected).

90. The Welsh Government contends that, as the competence of the Assembly is being altered, the Assembly's legislative consent is required.

91. The UK Government has not listed clause 36 as a clause that it believes requires the Assembly's consent.

OUR VIEW

Conclusion 23. We agree that clause 36 requires the Assembly's legislative consent.

Part 5 – general and final provision

Clause 39 – interpretation (paragraphs 43 and 44 of the Memorandum)

What this clause does

92. This is the main interpretation clause of the Bill.

Why consent is required

93. This clause provides interpretation of terms used throughout the Bill, including in areas subject to the Assembly's legislative consent.

94. The UK Government has not listed clause 39 as a clause that it believes requires the Assembly's consent.

OUR VIEW

Conclusion 24. We believe that clause 39 requires the Assembly's legislative consent.

Clause 40 and Schedule 4 – regulations (paragraphs 45 and 46 of the Memorandum)

What this clause does

95. Clause 40 introduces Schedule 4, which contains provision about regulations under the Bill. This includes provision about procedure.

Why consent is required

96. The provision in Schedule 4 covers regulations to be made by the Welsh Ministers and are within the legislative competence of the Assembly.

OUR VIEW

Conclusion 25. We believe that clause 40 requires the Assembly's legislative consent.

Clause 41 and Schedule 5 – consequential provision (paragraphs 47 and 48 of the Memorandum)

What this clause does

97. Clause 41 provides for consequential and transitional amendments to be made as a consequence of the Bill.

Why consent is required

98. These provisions include powers for the Welsh Ministers within areas the Assembly's legislative competence.

OUR VIEW

Conclusion 26. We believe that clause 41 requires the Assembly's legislative consent.

Clause 42 – extent, commencement and short title (not included in the Memorandum)

What this clause does

99. This clause provides the extent, commencement and short title for the Bill.

Why consent is required

100. The commencement power provided by clause 42 is the trigger for the changes specified elsewhere in the Bill to take effect and modify devolved competence.

101. The Welsh Government has not included this clause in its Memorandum, despite the UK Government identifying it as a clause requiring legislative consent.¹⁵

OUR VIEW

Conclusion 27. We believe that clause 42 requires the Assembly's legislative consent.

3. Conclusion

102. In the time available, we have been unable to consider some of the broader concerns that the Welsh Government raises in its Memorandum, particularly as some of these concerns relate to issues now not included in the current Bill.

103. Broadly, many of the concerns we raised regarding the delegation of powers to UK and Welsh Ministers in the 2018 Act remain in relation to this Act¹⁶. However, in light of the practical and political realities, we have decided against restating them in this report.

104. We have, instead, focused on the provisions that require legislative consent with a view to ensuring the Assembly's role in the scrutiny of EU law during the implementation period is not diminished, and the devolution settlement is not adversely affected.

105. We agree with the Welsh Government's assessment of the provisions in the Bill that require the Assembly's legislative consent, with one addition (clause 42), and hope that this report helps inform the Assembly's debate on the legislative consent motion associated with the Bill.

¹⁵ See [Annex A to the UK Government's Explanatory Memorandum](#) for the Bill.

¹⁶ Our work on the 2018 Bill can be found [on our website](#).

Annex A – Letter to the Secretary of State for Exiting the EU regarding clause 29

The Rt Hon. Steve Barclay MP
Secretary of State for Exiting the European Union
Department for Exiting the European Union
9 Downing Street
London
SW1A 2AS

8 January 2020

Dear Secretary of State,

EU (Withdrawal Agreement) Bill: Revision of EU law during the implementation period

The External Affairs and Additional Legislation Committee is currently considering the European Union (Withdrawal Agreement) Bill ('the Bill') and associated issues of legislative consent.

I will write to you next week with our final report on the Bill, which we intend to publish ahead of the Assembly's debate on a legislative consent motion relating to the Bill.

In the meantime, I am writing to make the case for two amendments to clause 29 of the Bill to ensure a role for the Assembly is preserved in the review of EU law during transition.

Currently, the Assembly has a role in considering the compliance of draft EU law with the principle of subsidiarity.

This stems from the following provision in Protocol No.2 to the Treaty on the Functioning of the European Union:

It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

Of course, this provision will no longer apply once the UK leaves the EU.

Clause 29 of the Bill provides for a Parliamentary mechanism for reviewing EU legislation during the implementation period. We note that this does not operate on the question of

compliance with the principle of subsidiarity. Instead, it is based on the question of whether a piece of EU legislation “raises a matter of vital national interest to the United Kingdom”.

The Assembly’s experience of reviewing draft EU law in the past has shown that, on occasion, there have been specific issues of interest to Wales that have arisen that were not identified at a UK level. For example, the possible impact on the Welsh fisheries industry of a ban on driftnet fishing and changes to organic regulations for Welsh agriculture.

These issues, by extension, can be considered issues of UK national interest. We contended that the Assembly, in conducting a review of EU legislation with a focus on the areas of policy devolved to it, would add value to the overall UK-wide scrutiny process.

Therefore, to ensure that the Assembly’s role in reviewing EU law during transition is not diminished, we wish to see an analogous (albeit discretionary) role for the Assembly to be acknowledged in UK law – just as such a role is currently acknowledged in the legal text of the Treaties.

Simple amendments to the Bill could secure this. For example:

Clause 29, page 33, line 39, after “Commons” insert –

“,and any committee of the devolved legislatures,”

Clause 29, page 34, line 10, after “legislation” insert –

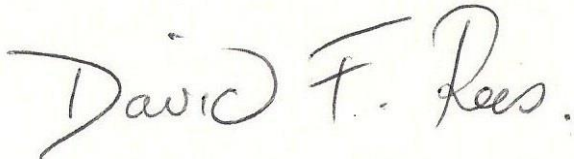
“and has consulted any committee of the devolved legislatures that the EUC considers also has an interest in the EU legislation”

These amendments would, as is the case currently, leave any consultation with the devolved legislatures to the discretion of UK parliamentary committees.

As deadlines for tabling amendments to the Bill in the Commons has passed, we would be grateful if you would consider the possibility of arranging for amendments to be tabled in the House of Lords to give effect to our proposal.

I have copied this letter to the Minister of State in your Department, Lord Callanan. I have also copied this letter to the Counsel General and Brexit Minister, the Secretary of State for Wales, Earl of Kinnoull (as Chair of the European Union Committee in the last Parliament), and the Convener of the Scottish Parliament’s Culture, Tourism, European and External Affairs Committee.

Yours sincerely,

A handwritten signature in black ink that reads "David F. Rees." The signature is written in a cursive style with a period at the end. It is set against a light yellow rectangular background.

David Rees AM

Chair of the External Affairs and Additional Legislation Committee