

Cynulliad Cenedlaethol Cymru / National Assembly for Wales
Y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The External Affairs and
Additional Legislation Committee
Bil y Diddymu Mawr / The Great Repeal Bill
EAAL(5) GRB 13
Ymateb gan Ganolfan Llywodraethiant Cymru, Prifysgol Caerdydd/ Evidence from
the Wales Governance Centre, Cardiff University

1. The Great Repeal Bill and the broader legislative approach to Brexit

The Great Repeal Bill will repeal the European Communities Act 1972 and convert EU law into UK law to avoid any gaps following Brexit. It will also establish delegated powers so that secondary legislation can be made to amend laws and policies which are redundant or require changing after leaving the EU.

Currently EU law takes effect in Welsh law in a range of ways – through both primary and secondary legislation, through measures adopted in Wales and in London. In respect of the latter, these may be for Wales alone as well as for Wales and England together.

Under s.108(6) of the Government of Wales Act 2006 (GOWA 2006), Acts of the National Assembly for Wales must comply with EU law obligations. This requirement will become redundant following withdrawal from the EU. However, the UK Government makes no mention of repealing this constraint in the White Paper *Legislating for the UK's withdrawal from the EU* despite recognising that similar provisions in other legislation will need 'correcting' following Brexit.

It is currently unknown whether this constraint will be removed entirely or replaced by a corresponding provision to comply with future post-Brexit UK level common frameworks. Whatever the outcome, repeal or amendment of section 108(6) will alter the Assembly's legislative competence. Any such changes to the current devolution settlement, with either new restrictions to conferred powers (under the current regimes) or new reservations (under the Wales Act 2017 regime) must be subject to National Assembly consent through an application of the Sewel Convention, as understood to apply not just to the adoption of legislation in devolved areas, but also to proposed changes to devolved competence. The Supreme Court acknowledged that there is now a practice of tabling LCM in such instances.

The White Paper suggests that powers to correct legislation making references to EU obligations will be exercised by the UK Government. We submit that, as a starting point, it is constitutionally inappropriate for significant changes to competence under the devolution legislation to be made by secondary legislation. It should instead be by primary legislation and be subject to parliamentary control

in Westminster and Wales. This would apply in relation to changes to section 108(6) of GOWA 2006 and the removal (and possible replacement) of the EU law-derived constraints on competence.

Wales is currently in between two devolution dispensations making the context in terms of timing and constitutional amendment very different. The corresponding constraint relating to EU obligations in the Wales Act 2017 will also need amending. In addition, the list of reserved matters is also likely to need amending to give effect to new UK wide common frameworks. Sectoral legislation establishing such common frameworks in areas of devolved competence (eg agriculture and environment) would also raise the prospect of legislative consent motions.

Until we have a clearer idea of these UK common frameworks and what restrictions will be on the law-making and decision making powers of the devolved institutions, it is difficult to determine how converting EU laws into UK law will affect the Welsh devolution settlement.

2. The granting of delegated powers

The White Paper proposes that the Great Repeal Bill gives the devolved ministers a power to amend devolved legislation. This is partly in line with Theresa May's promise that no decisions currently made by devolved administrations will be removed. This may be significant in fields such as agriculture, environment, and transport where devolved administrations have direct responsibilities in implementing EU law domestically. However, it is not entirely clear what the scope of this power would mean for Wales.

Likewise, there is a definitional issue with the term 'devolved legislation' in the White Paper. For example, a narrow reading of the term 'devolved legislation' may imply that Welsh ministers may only amend laws which it, or the National Assembly, has passed. However, there are also EU laws made by the UK government and parliament in devolved areas that apply in Wales. It would not be constitutionally appropriate for the Welsh ministers, or the National Assembly, to be left without any power to influence the process of amending those provisions. The Great Repeal Bill should include the powers for Welsh Government as well as the Assembly to decide whether to repeal/amend/retain EU law in devolved areas, as understood under this broad interpretation. Effective cooperation and coordination between governments of the UK will be essential.

- **Primary legislation**

Where EU law has previously been implemented by primary legislation by Wales, for Wales, any changes post Brexit should prima facie be for Wales to

determine. Proposals to replace Welsh primary law by new UK wide provisions would be subject to a Welsh LCM.

As the White Paper indicates, there will be wide use of delegated powers to make corrections to the law following Brexit. Accordingly, changes to Welsh primary legislation might come by means of UK Ministerial secondary legislation. Devolved controls over the use of such powers should be sought, and included in the Great Repeal Bill. Such control mechanisms could differ, depending on the nature of the proposed change, and might include making any amendments or repeal subject to consent by the National Assembly for Wales; making the power exercisable concurrently (or jointly) by Welsh Ministers and UK Ministers of the Crown; or through an informal intergovernmental scheme.

Where EU law has previously been incorporated through primary legislation on a UK wide/ or England and Wales basis in a devolved area, any change in the law instigated by Westminster by means of primary legislation would be subject to the LCM process. However, as indicated in the White Paper, changes to primary legislation might alternatively come by means of UK Ministerial secondary legislation so, again, controls similar to those mentioned above must be sought. Repealing UK-wide or England and Wales legislation in devolved areas without the approval of the devolved administrations risks unforeseen gaps in the statute book.

- **Secondary legislation**

Secondary legislation which has been passed by the Welsh Government under the ECA 1972 should automatically remain in force as Welsh law and it should be for Welsh Government to determine whether to repeal, amend or retain the provisions.

Secondary legislation passed by the UK Government but within the devolved competence of the National Assembly for Wales should remain in force as Welsh law and the power to amend or repeal these instruments should be transferred to the Welsh Government.

Under the existing GOWA, Welsh Ministers require specific designation to implement EU law. However, section 58A of the Wales Act 2017 introduces a general power for Welsh Ministers to implement EU law in devolved areas without specific designation. It will be essential that any power to implement EU law (whether under a designation order or the new section 58A) extends to a power to amend, repeal or retain existing EU derived provisions. For certainty's sake, the Bill should contain this power, and make necessary amendments to

the GOWA. The commitment in the Wales Act extending executive powers over EU derived laws should continue to be respected.

3. Scrutiny and control of delegated powers

The vast use of delegated legislation and the speed they will need to be passed brings into doubt the level of parliamentary scrutiny. There is also no indication in the White Paper of any role for the National Assembly for scrutinising how EU laws are converted. For example, if Welsh ministers are given powers to amend substantial amounts of secondary legislation, it will have a knock-on effect on the National Assembly's timeframe for scrutiny.

There are current soft law procedures and guidelines which could be further utilised for the purpose of Brexit. At a minimum, the Great Repeal Bill should require secondary legislation bringing about substantive changes to competence to be subject to a procedure such as that in Standing Order 30A (along with Devolution Guidance Note 9, para.53-54), which provides for National Assembly consent to UK secondary legislation amending primary legislation in devolved areas.

Strengthening Standing Order 30, which requires Welsh Ministers to notify the National Assembly when UK legislation modifies their powers, should also be explored. Daniel Greenberg has previously noted the weakness with this procedure as it does not allow the views of the National Assembly to be communicated directly to Parliament.¹ We commend the suggestions made by Greenberg as a way of exploring ways of strengthening the relationship between the National Assembly and the UK Parliament, especially in light of the challenges of Brexit.² Interparliamentary relations between Westminster and Assembly committees should be strengthened for more efficient scrutiny of the exercise of delegated powers.

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 procedures should not be set out in the Great Repeal Bill. The negative procedure has been the default position for the implementation of EU measures, which is appropriate given the democratic credentials law making process. However, this lighter touch approach would not be appropriate for all envisaged 'corrections'.

¹ D. Greenberg, 'Submission to the Constitutional and Legislative Affairs Committee of the National Assembly for Wales Inquiry into the Granting of Powers to Welsh Ministers in UK Law' (31 August, 2011) [4.2]

<<http://www.senedd.assembly.wales/mgConvert2PDF.aspx?ID=3062&ISATT=1#search=%22Standing%20Order%2030%22>>

² *ibid.* part 5.

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