NATIONAL ASSEMBLY FOR WALES

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

Inquiry into the powers under the EU (Withdrawal) Bill to make subordinate legislation

Note by Michael Carpenter CB, former Speaker's Counsel, House of Commons

1. Further to the request made on 14 December 2017 by the Chair of the Committee, I am pleased to make these initial submissions. They are drawn from my own experience of scrutiny arrangements in the House of Commons, rather than in the Welsh Assembly. They also draw on my own assessment of the workload likely to arise by reason of the powers arising under the European Union (Withdrawal) Bill, notably under Schedule 2 to the Bill.[1]

2. Although I retired from the service of the House at the end of September 2016, I have been able to consult a number of former colleagues in Westminster and Cardiff on the questions posed in the Chair's letter to me of 14 December 2017. Also by way of general introduction, it is worth noting that the legal advisers to parliaments in the various parts of the UK, as well as the Republic of Ireland, have met regularly for many years to consider matters of general concern. At least within the UK, there is obvious scope for sharing expertise and good practice in relation to the arrangements necessary to give effect to the UK's withdrawal for the European Union.

   Are current scrutiny procedures fit for purpose to undertake effectively the scrutiny of delegated legislation that will be made under the Bill by the Welsh Ministers and laid before the Assembly?

3. The current scrutiny procedures under Standing Order 21 require the Constitutional and Legislative Affairs Committee (CLA) to consider all statutory instruments, or draft statutory instruments which are required by any enactment to be laid before the Welsh Assembly. The CLA must report on whether the Assembly should pay special attention to the instrument or draft on a number of technical grounds. These grounds correspond to those of the Joint Committee on Statutory Instruments, but there are specific additional grounds *viz.* that the instruments or draft uses gender specific language, and that there are inconsistencies between the meaning of the English and Welsh texts, or that it is not made or to be made in both English and Welsh (Standing Order 21.2). The CLA has a discretion (under Standing

[1] References to the Bill are to the Bill as amended in Committee.

Order 21.3) to report on a number of merit-based grounds, including those of political or legal importance or issues of public policy likely to be of interest to the Assembly, or that the instrument is inappropriate in view of changed circumstances, or that the instrument inappropriately implements European Union legislation[2], or that it imperfectly achieves its policy objectives. These broad merit-based grounds are more akin to those of the Secondary Legislation Scrutiny Committee and the Delegated Powers and Regulatory Reform Committee in the House of Lords.[3]

4. The varied scope of the reviews carried out by the several Committees has important consequences for the way business is managed. In the House of Commons, the JCSI is supported by a relatively small (around 3 or 4) team of experienced lawyers,[4] who specialise in legislative work,[5] with other colleagues in the Office of Speaker's Counsel dealing with general legal advice and European Union work. There is a broadly similar pattern in the House of Lords, at least as far as domestic law is concerned, in the team under the Counsel to the Chairman of Committees, but none of these teams has to cope also with language issues. By contrast, the CLA is supported by a team of around 14, any one of which is expected to carry out the generality of work for the Assembly, which will include advice on legislative competence.

5. Questions arise under both systems if there is a need suddenly to deal with a large volume of secondary legislation. In Westminster there is a high degree of specialisation, with the advantages that this can bring, but these come at the price of flexibility. In my own experience, it has been easier to deal with emergencies which may arise in the giving of general legal advice by calling on colleagues dealing with legislative work, than it has been the other way round. For the Assembly, the very generality of the scope of review poses a challenge to those advising the CLA as to whether such review can be sustained in the face of a potential substantial increase in the number of instruments which have to be considered.

6. As far as volume is concerned, it may be noted that during the 4th Assembly (2011-2016) the CLA examined around 522 negative and 123 affirmative instruments, with around 23 instruments made jointly with UK Ministers. In her letter of 4 January 2018 to the Chair, the Leader of the House and Chief Whip explained that had been considering the need to bring

[2] Presumably, this would no longer apply to 'retained EU law' or 'retained general principles of EU law' as defined in Clause 6 of the Withdrawal Bill, but might have some application to anything which may need to be done under any transitional agreement with the EU.
[3] Nevertheless, it does not seem to be a specific function of the CLA to examine whether the delegation of power in primary legislation is appropriate.
[4] Some of which were former Parliamentary Counsel, and all of which were senior departmental lawyers with many years' drafting experience – the 'proverbial poachers turned gamekeepers'.
[5] Including advice to Mr Speaker on certification of Bills as England or England and Wales only, under the EVEL arrangements in Standing Orders.

forward subordinate legislation under the powers conferred on Welsh Ministers by Schedule 2 to the Bill to correct deficiencies in EU-derived domestic legislation within Welsh legislative competence. The Leader explained that over 600 EU-derived domestic legislative instruments had been identified as falling within Welsh legislative competence. Whilst it is not yet clear how many of these will require correction under the Schedule 2 powers, or whether this is to be done by specific or generic instruments, it seems likely that there will be a substantial increase in workload, possibly amounting to several hundred instruments, and that this work may need to be carried out under some pressure of time. Furthermore, if Clause 11 of the Bill is to be amended so as increase the range of 'retained EU law' which may be corrected, it seems likely that the potential workload would be further increased. [6]

7. The timescale within which these Schedule 2 instruments will need to be examined is as yet uncertain. It is, of course, the case that the CLA is normally required to consider and (if necessary) report on any instrument within 20 days of laying, but it is not yet clear when the two year window under Clause 7(7) will commence for the exercise of powers under Schedule 2. A further imponderable may arise under the terms of any transitional agreement with the EU for the withdrawal of the UK.[7] Whilst such an agreement has yet to be negotiated, it seems possible even probable that it will require the continuation of some EU law (as such, including references to EU institutions) during the transition period. If this is the case, then the need for deficiencies in 'retained EU law' to be corrected will correspondingly diminish.

8. A further uncertainty (although not relating specifically to powers under Schedule 2) arises under Clause 11 of the Bill. If this is amended in the direction sought by the devolved parliaments, then this would increase, even if only marginally, the scope for the exercise of devolved competences, and thus the workload of the CLA. Any amendment would be likely to increase the existing complexity of the question of legislative competence, and call for careful and considered advice.[8]

9. In so far as instruments under Schedule 2 are concerned with dealing with deficiencies (as defined in Clause 7 of the Bill), there are some grounds to expect (at last as far as those cases referred to in clause 7(2)(a), (b) and (g) are concerned) that the deficiencies will be

[6] If Clause 11 is amended in the direction sought by the devolved governments, then existing competences in relation to such matters as agriculture and the environment could be exercised more widely, but no particular time constraints would apply.

[7] It is assumed that any transitional agreement can be regarded as a 'withdrawal agreement' for the purposes of the definition in Clause 14(1) of the Bill.

[8] In my written evidence to PACAC in the House of Commons, I suggested an amendment mirroring the provisions of Article 101 of the Treaty on the Functioning of the European Union so that a devolved parliament could not modify, or confer power by subordinate legislation to modify, retained EU law *"where such modification would substantially affect*

adjectival in nature and not involve any substantial policy issues. The cases referred to in Clause 7(2) (c) to (e) will probably be outside Welsh legislative competence in so far as they concern the UK's international relations. It may therefore be reasonable to expect that, in most cases, the review by the CLA will be concerned with the technical issues referred to in Standing Order 21.2.

10. These uncertainties notwithstanding, it seems reasonable to expect that the workload of the CLA will increase substantially in volume and complexity. In my view, this is a question of scale and the management of business, rather than an issue which calls into question the principles set out in the Standing Orders applying to the CLA. I am afraid I do not share the view, expressed by RSPB Cymru in paragraph 21 of its comments on the Bill,[9] that an Assembly Committee should examine in draft all SIs laid before the Assembly as a result of the Bill. Applying what in effect amounts to an affirmative procedure to all instruments seems a disproportionate response to what in most cases will be a technical problem, and would be wasteful of time and resources since it would at least double the effort currently devoted to scrutiny. In my experience, scrutiny is best done when it is selective, otherwise the proverbial wood will not be seen for the trees.

11. If pressed for an opinion, I would say that the current scrutiny procedures are fit for purpose, but that some slight adaptations could usefully be made to deal with any surge of business during the 'window' when the powers under Schedule 2 may be exercised.

<u>Does consideration need to be given to a sifting mechanism for delegated legislation arising from the Bill?</u>

12. In Committee stage of the Bill, amendments were made to include a new paragraph 3 of Part 1 of Schedule 7 to provide for a sifting mechanism by a committee of the House of Commons of instruments made by a Minister of the Crown intending to rely on the negative procedure. The amendments require a Minister of the Crown to make a statement to Parliament that the negative procedure should be used, and to lay a draft of the instrument before the House of Commons together with a memorandum setting out the statement and the Minister's reasons for his opinion. The relevant Commons committee has 10 sitting days within which to make a recommendation on the procedure. It appears from the amendment that if no recommendation is made within that time, the Minister may make the instrument. The procedure is novel and is therefore something of a half-way house between the usual negative procedure and that used for affirmative instruments. It is no doubt intended to cause

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trade or the conditions of competition within the United Kingdom." I have to accept that such an amendment brings complexity of its own.

[9] I should state that I have been an RSPB member for many years.

Ministers to exercise more caution in the use of the negative procedure to make substantial changes in the law. It applies to instruments made by a Minister of the Crown acting alone, or jointly with a devolved authority, but it does not seem to apply to a devolved authority acting alone.

13. Whether such a sifting process will apply in the Welsh Assembly will depend on ongoing discussion on the Bill, since it would appear that a sifting mechanism of the sort in paragraph 3 of Part 1 of Schedule 7 could not effected by Standing Order. The mechanism must inevitably have an effect on workload, since it would involve a further process concerned only with the choice of legislative procedure in addition to the normal processes of scrutiny.

14. At a more modest level, it ought to be possible in principle for the Chair of the Committee to make decisions on behalf of the Committee to clear SIs from scrutiny. I am aware that a similar system was applied by the European Union Committee to clear EU documents of lesser importance and was known informally as the 'Chairman's sift'. Such a system was not feasible in the European Scrutiny Committee of the House of Commons, probably because EU matters were so politically divisive and the atmosphere more politically contentious.[10] Whether all members of the CLA should devote their time and effort to examining SIs which contain no technical issues and do no more than make adjectival changes to the law to deal with the consequences of UK withdrawal from the EU is really a matter for them, but it is possible that a more selective system, particularly for Schedule 2 cases, would allow them to concentrate on important issues.

15. The basis on which the Chair decides to clear an unproblematic SI from scrutiny would need to be agreed by Members of the Committee. Presumably, such a change of practice could be effected without a change to Standing Orders if Members were content to follow the Chair's recommendations and ratify his provisional view at their next meeting. Conversely, if the Chair were to act on behalf of the Committee in clearing SIs from scrutiny, it seems likely that some change to Standing Orders would be necessary

16. The type of instrument which could be dealt with by a sift of either kind would be a matter for the Committee, but- for what it is worth- my suggestion would be that it could be used for instruments which were limited to making amendments to retained EU law to correct deficiencies which were merely incidental or consequential to the withdrawal of the UK from the EU. Likely candidates would be adjectival references falling with paragraph 7(2)(a), (b) and (g) of Schedule 2 to the Bill in instruments which did not give rise to any of

[10] Instances where a chairman may take decisions on behalf of a Committee in the House of Commons are quite rare, except where there has been specific agreement by Members.

the reporting grounds in Standing Order 21.2. Such instruments are probably unlikely by their nature to give rise to the sort of considerations listed in Standing Order 21.3. (If they did, a Chair's sift without any ratification by Members would be inappropriate). Another class of candidate might be cases where another devolved parliament or the parliament in Westminster had already cleared a corresponding correcting instrument from scrutiny.

17. As the Bill stands at present, Clause 11 would not permit any, or any significant, expansion of Welsh legislative competence which might otherwise have been inferred from the fact that the EU Treaties would cease to apply to the UK. If the restriction presently in s.11(2) of the Bill on modifying retained EU law were to change, then (in my view) the sifting arrangement might not be appropriate for instruments using any expanded legislative competence which would arise in such areas as agriculture and fisheries, since policy rather than technical issues would be likely to arise, but this is very much a matter for the Committee.

Are there other options that need to be considered?

16. It follows from the above that I consider the existing institutions are able to cope with the increased workload which is likely to arise, and I do not see the need for any new institution or Committee. On the other hand, there is clearly a risk of a large number of correcting instruments being made immediately before exit day (now fixed as 29 March 2019).

17. I understand there is a practice whereby SIs are shown in draft to those advising the Committee. There is a similar practice in Westminster, although it appears to be limited to draft affirmative orders (i.e. drafts of orders which are themselves to be laid in draft) and does not apply to negative orders. This system of peer review has been valuable and has prevented avoidable difficulties later on in the legislative process, but clearly, a balance needs to be struck between Assembly or Parliamentary officials assisting this process, and being seen to have assumed responsibility for the drafting of instruments.

18. A more modest, but still useful, arrangement would be one whereby Welsh Ministers give some kind of advance notice to the Committee of instruments which they propose to make and their relative length and complexity. This could go some way towards avoiding congestion as exit day approaches.

Other matters related to scrutiny

19 It is worth recalling that the Welsh Assembly does not face the difficulties of migrating to a post-Brexit regime alone. The devolution settlements vary across each of Scotland, Wales

and Northern Ireland but there are likely to be common issues arising in each as with the UK Parliament in Westminster. In this context, the informal network of legal advisers to the parliaments and assemblies in the UK and the Republic of Ireland could well be considerable assistance by exchanging best practice in relation to common and shared problems, as indeed they have for over 15 years.

I submit these comments in the hopes they are helpful, but I am conscious that a number of variables still remain to be determined, such as the factors mentioned in the Leader's letter of 4 January 2018 to the Chair, the likely form of Clause 11 of the Bill on restrictions on modifying retained EU law, and whether the procedural sifting mechanism in paragraph 3 of Part 1 of Schedule 7 is to apply to instruments made by Welsh Ministers acting alone. Each of these is likely to have an impact on the workload of the Committee.

Michael Carpenter