Law Derived from the European Union (Wales) Bill: Briefing by Cytûn's National Assembly Policy Officer

This briefing represents the personal assessment of Cytûn's Policy Officer and has not received the approval of Cytûn or its Wales & Europe Working Party

Introduction

The Law Derived from the European Union (Wales) Bill was introduced by Mark Drakeford AM on behalf of the Welsh Government on 7 March 2018 (having been published in draft on 27 February 2018). On 6 March, the Assembly agreed to treat it as an emergency bill. The first plenary debate (Stage 1) was held on March 13 and it completed all its stages by 21 March 2018, just 8 days later. On 17 April 2018, the UK Government's Attorney General announced that he would refer the question whether the Bill would be within the Assembly's legislative competence to the Supreme Court for decision (under section 112 of the Government of Wales Act). The Advocate General for Scotland made a similar announcement with regard to the equivalent Scottish legislation. On 18 April, the Attorney General answered an urgent question on the matter in the House of Commons and the Counsel General for Wales made a statement in the National Assembly.

Popularly known as the 'Welsh Continuity Bill', the Law Derived from the European Union (Wales) Bill seeks to allow the National Assembly for Wales to arrange for legislative continuity as the UK leaves the European Union in regards to areas of law covered by EU legislation which are, in domestic terms, devolved to Wales. It has been introduced due to the Welsh Government's dissatisfaction with the terms of the European Union (Withdrawal) Bill, which began its Report Stage in the House of Lords on 18 April.

In political terms, the Welsh Bill has been supported by the Welsh Government (Welsh Labour/Lib Dem/Independent, which has a small majority, with 31 of the 60 seats in the Assembly) and largely by Plaid Cymru and UKIP in the Assembly. The Welsh Conservatives have opposed it, and the two Independents on the opposition benches have been lukewarm. The Bill has been amended during its passage, and reference to the more significant amendments is made below.

Wales and Scotland[1]

The Welsh and Scottish Governments have worked closely together in seeking to improve the EU (Withdrawal) Bill and in preparing their own devolved legislation. Both governments have stated that amending the Westminster legislation is their preferred option, although Welsh Government ministers have been more ready to refer to their legislation as a "fallback option" (e.g. Julie James AM, Leader of the House, speaking for the Government at Stage 4[2] and Jeremy Miles AM, Counsel General for Wales in his statement[3] on 18 April).

The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill was introduced to the Scottish Parliament on 27 February 2018. It also completed its parliamentary stages on 21 March 2018, and has now been referred to the Supreme Court. The Scottish Bill is longer and more complex than its Welsh counterpart, partly due to the wider reach of the Scottish devolution settlement and partly due to extensive amendments made during its passage.

[1] A House of Commons Library briefing paper issued on 29 March covers the two Bills in much greater detail - http://researchbriefings.files.parliament.uk/documents/CBP-8275/CBP-8275.pdf
[2] Para 483
[3] Para 175

Debate on the Scottish legislation began a week earlier than in Wales (on 7 March 2018), and the debates were much lengthier – a total of almost 9 hours in plenary across the three stages and 14 hours of consideration of amendments by the Finance and Constitution Committee in a session open to all MSPs in the main debating chamber. This compares to less than 3 hours of plenary debate and less than 2 hours in committee across the 4 stages in Wales. In Scotland, three parliamentary committees also scrutinized the Bill whereas in Wales only one did so.

A further difference is that the Presiding Officer of the Scottish Parliament found that the Bill lies outside the Scottish Parliament's competence, because it seeks to legislate now for the use of powers which the Parliament will not possess until after the UK leaves the EU. However, the Scottish Lord Advocate and the Scottish Government have argued that Scottish ministers need (like UK ministers) to be empowered in advance of withdrawal in order to prepare for it legislatively. The Llywydd (Presiding Officer) of the National Assembly for Wales, on the other hand, found the Welsh Bill to be within competence, as it has been "carefully drafted" to ensure that the powers cannot affect any legislation prior to withdrawal. This point of law will clearly be an important aspect of the UK Government's case before the Supreme Court.

In political terms, the (minority SNP) Scottish Government has had to accept a number of amendments altering the terms of the Bill during its passage, some quite significantly. The Bill has received general support from the Scottish Green Party, and qualified support from Scottish Labour and the Scottish Liberal Democrats (although one Liberal Democrat MSP voted against the Bill). The Scottish Conservatives have been fiercely opposed. UKIP is not represented in the Scottish Parliament.

The most notable example of successful amendment of the Scottish bill was the introduction of a new Part 5A giving better protection to environmental principles derived from EU law. When an attempt was made to introduce a similar clause to the Welsh Bill it was opposed by the Welsh Government and the amendment was defeated. These substantive new clauses will make it more difficult for the Scottish Government and Parliament to agree to lose their bill – as similar clauses are most unlikely to be included in the UK Bill – than for the Welsh Government and Assembly to compromise in this way.

The effect of the Welsh Continuity Bill

The main provisions of the Welsh Bill enable Welsh Ministers by regulations to retain and restate the provisions of EU law in Welsh devolved law when the UK leaves the EU, to ensure legislative continuity. In the process, they are empowered to make those changes which are "necessary" so that the law can continue to function – for example, replacing references to EU bodies with references to Welsh bodies, or even creating new ones. This is a narrower power than the UK Bill, which allows UK ministers to make the changes they consider "appropriate" for these purposes.

The regulations made will undergo some scrutiny by the National Assembly. The "affirmative procedure" (which requires an Assembly vote before the regulation can be enacted) will be used in most cases; the more serious provisions will require a "super-affirmative procedure" whereby a draft regulation is first laid for consultation. In both cases, however, the final laid text of the regulation must be accepted or rejected by the Assembly; it cannot be amended by backbench or opposition members. This provides a higher level of scrutiny than envisaged in the EU (Withdrawal) Bill, which applies a "negative procedure" to most regulations – i.e. they will pass automatically unless Parliament proactively rejects them.

The Welsh Bill also provides that the European Union Charter of Fundamental Rights may be used in interpreting the new regulations as it can be in interpreting current EU law. This falls some way short of incorporating the Charter into Welsh law, as many groups – including Cytûn – have asked (and as the

Scottish Bill seeks to do with regard to Scottish law). However, this at least gives some weight to the Charter, which the EU (Withdrawal) Bill explicitly excludes from UK law.

The Bill – like its Scottish counterpart – also seeks to do two things which the EU Withdrawal Bill does not:

1. To require that UK ministers must seek the consent of (and not just consult with) devolved Ministers when making regulations under the EU Withdrawal Bill which trespass on devolved areas. The Scottish Conservatives have queried vigorously whether devolved legislation can impose duties on UK ministers in this way, and this is likely now to be litigated before the Supreme Court.
2. To allow Welsh Ministers after the UK has left the EU to keep Welsh law in line with EU law in some or all devolved areas, and to do so by regulations rather than by primary legislation (Clause 11). The Bill as introduced gave this power to Welsh Ministers in perpetuity – a significant transfer of power from legislature to executive, and a remarkable one given that Wales voted to leave the EU in the 2016 referendum. It was amended during its passage to require a five-yearly review of this power in order for it to be extended. This contrasts with the Scottish legislation, which originally gave this power to Scottish Ministers for five years, with the possibility of renewal for two further periods of five years. During its passage it was amended to give the power to Scottish Ministers for only three years (and that following a further vote in the Scottish Parliament), with the possibility of two one-year renewals. There would be no further renewal after five years, when new primary legislation would be required.

What happens next?

The Welsh and UK Governments continue to insist that they hope that negotiations between the UK, Welsh and Scottish Governments will succeed in agreeing a satisfactory text for the UK's EU Withdrawal Bill which will obviate the need for the Welsh legislation and for a case before the Supreme Court. If agreement is reached, the Welsh bill would be allowed to proceed to Royal Assent, and then be repealed under the power in Clause 22, which was added during the passage of the Bill. This also allows partial repeal, e.g. if the Government wishes to try to retain the Clause 11 power relating to post-exit EU law.

However, the Welsh Government's Explanatory Memorandum[4] says that the Bill could work alongside the EU Withdrawal Bill. This would mean co-operation between the Governments such that UK ministers would deal with EU law in non-devolved areas, and Welsh Ministers in devolved areas. The lack of scrutiny during the passage of the Bill, however, means that little attention has been given as to whether the two pieces of legislation would in practice be fully compatible, nor what might happen if they proved not to be. The Attorney General's statement on 17 April and in the House of Commons on 18 April referred specifically to this aspect as a reason for referral.

At the very least, the referral to the Supreme Court will delay implementation of the Welsh Bill and prevent Welsh Ministers using it to lay any regulations to restate EU law in Wales until the case is resolved. If the Supreme Court finds against some or all of the Bill, it could not be implemented as intended. The Supreme Court judgement in the *Miller* case[5] was unanimous in finding that the sovereignty of the Westminster Parliament means that it can continue to legislate in devolved areas without consent (and thus override devolved legislation), the price to be paid for so doing being political rather than legal.

If the Welsh Bill were to be fully implemented, Julie James AM (Leader of the House) has estimated that about 400 pieces of EU derived legislation would need to be restated under the Bill. The Welsh Government intend that many of these restatements would be grouped into single regulations relating to

[4] Paras 66-71
[5] Paras 136-151

the same topic, and it is envisaged therefore that the workload for the Assembly, while large, would be manageable.

Wider implications

The Scottish Parliament has risen to the challenge of scrutinizing a large piece of constitutional legislation under emergency procedure, sitting in open Committee for many hours to deal with amendments at Stage 2, and with substantial input by a number of its committees. There has also been vigorous debate in Scottish civil society and the Scottish media about its content and implications, as well as about the very lively political exchanges in the Scottish Parliament.

The National Assembly for Wales, by contrast, has failed to offer more than three hours' plenary debate, with less than two hours in one committee. This has served to confirm the findings of the Llywydd's Expert Panel, *A Parliament that Works for Wales*, published in December 2017. The Panel found that the current Assembly of 60 members – 14 of whom comprise the Government with 2 others unable to undertake scrutiny work because they are Llywydd and Deputy – is unable to fulfil effectively the functions of a modern parliament. The Panel recommends that the Assembly be increased to at least 80 and preferably nearer 90 members – comparable to the 90 members of the Northern Ireland Assembly and the 129 Members of the Scottish Parliament.

The lack of indigenous Welsh media employing professional journalists who could examine properly a piece of technical legislation such as this has meant very little public debate, with such debate as there has been online often superficial and ill-informed. Similarly, Welsh civil society has failed almost completely to engage with the Bill in a timely manner, with no committee consultations or hearings to which to submit evidence.

Although the Welsh legislation does provide for rather more scrutiny of the necessary secondary legislation than the equivalent UK legislation (and in some respects more than the Scottish legislation, too) it still involves a transfer of power from legislature to executive. The inclusion of a power to shadow EU law extending well beyond the expiry of the "sunset clauses" limiting use of the powers around EU exit itself makes this transfer particularly notable – and the lack of public comment especially concerning.

With the referral to the Supreme Court meaning that it may never become law, the Law Derived from the European Union (Wales) Bill may yet become a mere footnote in the history of Welsh devolution. On the other hand, whether or not it is ever implemented, it may prove to be a further spur to developing an effective Welsh Parliament.

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