

Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: operational matters

July 2018



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Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCLA@assembly.wales**

Twitter: **@SeneddCLA**

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July 2018



About the Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Committee Chair:



Mick Antoniw AM

Welsh Labour
Pontypridd

Current Committee membership:



Mandy Jones AM

Independent
North Wales



Dai Lloyd AM

Plaid Cymru
South Wales West



David Melding AM

Welsh Conservatives
South Wales Central

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Recommendations

Recommendation 1. We recommend that the National Assembly's Standing Orders should be amended to provide that the function of making a recommendation as to the appropriate procedure to apply to regulations subject to the sifting process under the 2018 Act is assigned to a committee..... Page 18

Recommendation 2. We recommend that as the Committee assigned the function of sifting regulations under the 2018 Act, we should be required by the National Assembly's Standing Orders to publish the criteria that we will apply to regulations subject to the sifting process..... Page 21

Recommendation 3. If the National Assembly is content for our recommendations as the sifting committee not to be binding, we recommend its Standing Orders should be amended to place a requirement on the Welsh Ministers to explain why they do not agree with our recommendations (as applies to UK Ministers in paragraph 3(7) of Schedule 7 to the 2018 Act). Page 25

Recommendation 4. We recommend that the Leader of the House writes to us before the end of July 2018, providing an update on the number of regulations that will be required to correct deficiencies in retained EU law as a result of the UK's withdrawal from the EU, as well as an update on the number of any other regulations that will need to be made under the 2018 Act. Page 32

Recommendation 5. We recommend that in deciding future committee timetables, consideration is given to the potential need for this Committee, in our role as the sifting committee, to sit longer, and / or on a different day, and / or sit more than once a week in order to scrutinise regulations that will be made under the 2018 Act. Page 32

Recommendation 6. We recommend that the Welsh Government enters into an agreement with us as the sifting committee to cover:

- an early warning system to assist with managing the scrutiny of all subordinate legislation until the end of this Assembly (in 2021);
- the optimum day of laying of proposed negative regulations under the 2018 Act; and
- any other matter that will aid the effective and efficient scrutiny of regulations made under the 2018 Act, especially regulations correcting deficiencies in retained EU law.....Page 36

Recommendation 7. We recommend that the National Assembly's Standing Orders require that, where UK Ministers acting alone in devolved areas lay before the UK Parliament regulations in areas within the legislative competence of the National Assembly or the executive competence of the Welsh Ministers, and where the Welsh Ministers are required to give their consent to the making of those regulations:

- the Welsh Ministers notify the National Assembly within one working day of the regulations being laid; and
- such notification is accompanied by an explanatory memorandum summarising the purpose and impact of the regulations and explaining why the Welsh Ministers have given their consent. Page 40

Recommendation 8. We recommend that the National Assembly's Standing Orders require that, where UK Ministers acting alone lay before the UK Parliament regulations in areas within the legislative competence of the National Assembly or the executive competence of the Welsh Ministers, and where the Welsh Ministers are not required to give their consent to the making of those regulations:

- the Welsh Ministers notify the National Assembly within one working day of the regulations being laid; and
- such notification is accompanied by an explanatory memorandum summarising the purpose and impact of the regulations..... Page 41

Recommendation 9. We recommend that the National Assembly's Standing Orders should be amended to provide a procedure in respect of the provisions contained in section 109A of the *Government of Wales Act 2006*, in particular:

- to require an explanatory memorandum that:
 - summarises the effect of regulations that UK Ministers propose to lay under section 109A(3) of the 2006 Act;
 - makes a recommendation as whether the relevant draft regulations should be subsequently made by UK Ministers;
 - explains the reasons for the recommendation made;
- to require that the Business Committee refers that explanatory memorandum to a committee or committees;

- requires the Welsh Ministers to lay before the National Assembly any written statement provided to UK Ministers (i.e. the statement mentioned in new section 157ZA(2)(b)(ii) of the 2006 Act), no later than one working day after the statement is provided by the Welsh Ministers..... Page 47

Recommendation 10. We recommend that the detail of recommendation 10 applies equally in respect of the provisions contained in section 80 of the *Government of Wales Act 2006*..... Page 47

Recommendation 11. We recommend that the Welsh Ministers are required by the National Assembly's Standing Orders to lay any report, provided to them in accordance with paragraph 4(4) of Part 2 of Schedule 3 to the 2018 Act, within one working day of its receipt..... Page 47

Recommendation 12. When the UK Government repeal or revoke retained EU law restrictions (in respect of legislative and executive competence), we recommend that the Welsh Ministers are required by the National Assembly's Standing Orders to make a written statement:

- that EU law restrictions have been lifted, no later than 7 calendar days after the relevant regulations have been laid;
- that explains the impact of the removal of the restrictions on the competence of the National Assembly or the Welsh Ministers.....Page 48

1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced in the National Assembly our approach is to consider:
 - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

Our approach

3. In February 2018, we published our report *Scrutiny of regulations made under the European Union (Withdrawal) Bill*³ (our first report). It focused predominantly on amendments that we considered should be made to the European Union (Withdrawal) Bill⁴ (the Bill) during its passage, at that time, through the House of Lords. Our first report also stated:

“We may also report at a later date on more operational matters that relate to the scrutiny of subordinate legislation made under the Bill,

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, March 2018

² Functions under Standing Order 21.8 are the responsibility of the External Affairs and Additional Legislation Committee

³ Constitutional and Legislative Affairs Committee, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, February 2018

⁴ European Union (Withdrawal) Bill, HL Bill 79

including where appropriate, any changes that we believe may be needed to the National Assembly's Standing Orders. The final Bill approved by the UK Parliament is also likely to influence these matters.”⁵

4. This report addresses those operational matters.
5. We sought views from organisations and individuals with expertise in this area and received a response from Professor Thomas Glyn Watkin.⁶ We took evidence from Julie James AM, the Leader of the House and Chief Whip (the Leader of the House) on 11 June 2018 to inform the preparation of this report. It also draws on evidence given to us more generally on the Bill by Mark Drakeford AM, the Cabinet Secretary for Finance (the Cabinet Secretary) on 30 April 2018.
6. The House of Commons Procedure Committee published its report on the scrutiny of delegated legislation under *the European Union (Withdrawal) Act 2018*, on the 9 July 2018.⁷

⁵ Constitutional and Legislative Affairs Committee, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, February 2018, paragraph 8

⁶ Evidence from Professor Thomas Glyn Watkin, 21 May 2018.

⁷ House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, Sixth Report of Session 2017-2019, HC 1395, 9 July 2018

2. Background to the European Union (Withdrawal) Act 2018

Passage through the UK Parliament⁸

7. On 13 July 2017, the Bill⁹ received its first reading in the House of Commons. The Bill set out how the current body of European Union (EU) law will be converted into UK law (and become known as retained EU law) upon the UK's withdrawal from the EU. The Bill completed its passage through the House of Commons on 17 January 2018 and the House of Lords on 16 May 2018. Following ping pong,¹⁰ both Houses agreed on the text of the Bill on 20 June 2016 and it received Royal Assent on 26 June 2018, becoming the *European Union (Withdrawal) Act 2018* (the 2018 Act).

Consent of the National Assembly for Wales

8. On 24 April 2018, the Cabinet Secretary wrote to the Rt Hon David Lidington CBE MP, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, confirming that the Welsh Government would support an LCM linked to the Bill.¹¹ The Welsh Government's support followed the UK Government's proposed amendments to clause 11 of the Bill (now section 12 of the 2018 Act), together with the commitments and assurances set out in an Intergovernmental Agreement.¹²

9. On 25 April 2018, the Cabinet Secretary made an oral statement in Plenary that updated the National Assembly on developments in respect of the Bill. The statement further outlined why the Welsh Government felt able to commend the

⁸ Information about the legislative process in the UK Parliament is available on its [website](#)

⁹ [European Union \(Withdrawal\) Bill, HC Bill 5](#)

¹⁰ When a Bill has passed through third reading in both Houses of Parliament it is returned to the first House (where it started) for the second House's amendments (proposals for change) to be considered. Both Houses must agree on the exact wording of the Bill. "Ping-pong" refers to the to and fro of amendments to Bills between the House of Commons and the House of Lords until both Houses reach agreement on the exact wording of the Bill

¹¹ [Letter from the Cabinet Secretary for Finance, Mark Drakeford AM, to the Rt Hon David Lidington CBE MP, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, 24 April 2018](#)

¹² [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#), as of 24 April 2018

Intergovernmental Agreement and the UK Government's proposed amendments to clause 11 of the Bill.¹³

10. On 27 April 2018, the First Minister laid before the National Assembly the Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No.2) on the Bill¹⁴ (the Supplementary LCM). The Supplementary LCM related to the Bill as presented to the House of Lords at first reading (HL Bill 79¹⁵) including amendments tabled for Lords Report and non-government amendments agreed at Lords Report.

11. On 14 May 2018, we published our report on the Supplementary LCM.¹⁶

12. The National Assembly voted to approve a legislative consent motion in relation to the Bill on 15 May 2018.¹⁷

The regulation-making powers in the 2018 Act

13. The 2018 Act splits retained EU law (i.e any law which, on or after exit day, continues to be, or forms part of domestic law) into three categories:

- EU-derived domestic legislation (under section 2 of the 2018 Act);
- Direct EU legislation (under section 3 of the 2018 Act);
- Rights, powers, liabilities etc. that arise under the European Communities Act 1972 (under section 4 of the 2018 Act).

14. The 2018 Act gives the Welsh Ministers regulation-making powers to deal with deficiencies arising from the UK's withdrawal and to implement the withdrawal agreement. The Welsh Ministers can use these regulation-making powers to modify retained EU law, subject to some important limitations. For example, the Welsh Ministers cannot use those powers to modify retained direct EU legislation when the modification would be in breach of restrictions imposed by UK Government regulations (i.e. restrictions imposed on the Welsh Ministers

¹³ [25 April 2018, RoP \[238-362\]](#)

¹⁴ [Welsh Government, *Supplementary Legislative Consent Memorandum \(Memorandum No.2\), European Union \(Withdrawal\) Bill*, April 2018](#)

¹⁵ [European Union \(Withdrawal\) Bill, HL Bill 79](#)

¹⁶ [Constitutional and Legislative Affairs Committee, *Welsh Government's Supplementary Legislative Consent Memorandum \(Memorandum No.2\) on the European Union \(Withdrawal\) Bill*, May 2018](#)

¹⁷ [15 May 2018, RoP \[144-314\]](#)

and the National Assembly in policy areas that are frozen while common frameworks are put in place: see chapter 5 of this report).

15. Section 11 of, and Schedule 2 to, the 2018 Act confer powers on the Welsh Ministers to make regulations that correspond to powers conferred on UK Ministers by sections 8 and 9 of the 2018 Act (but, as mentioned in paragraph 14, the regulation-making powers of the Welsh Ministers are subject to limitations that do not apply to UK Ministers):

- section 8 gives UK Ministers the power to make regulations as they consider appropriate to prevent, remedy or mitigate any failure of retained law to operate effectively or any other deficiency;
- section 9 gives UK Ministers the power to make regulations as they consider appropriate to implement any withdrawal agreement arising as a consequence of Article 50(2) of the Treaty on European Union.

16. Section 14 of, and Schedule 4 to, the 2018 Act provides powers for the Welsh Ministers to make regulations in connection with fees and charges.

17. Section 22 of, and Schedule 7 to, the 2018 Act includes provisions about the scrutiny by the National Assembly of regulations made by the Welsh Ministers under the 2018 Act, including the sifting of those regulations by a committee of the National Assembly.

18. Section 23 of the 2018 Act provides powers for UK Ministers to make regulations in relation to consequential and transitional provisions as they consider appropriate as a consequence of the 2018 Act.

19. With regard to making regulations in devolved areas, the result is that the 2018 Act includes a complex mix of concurrent and joint powers exercisable by the Welsh Ministers and UK Ministers.

20. Table 1 of this report summarises the main powers to make regulations in devolved areas under the 2018 Act.

21. This report considers operational matters related to:

- the application of the sifting process to regulations arising from the 2018 Act;
- the scrutiny of regulations made by UK Ministers acting alone in devolved areas taking account of the terms of the Intergovernmental Agreement;

- the scrutiny of regulations made under section 12 of, and Schedule 3 to, the 2018 Act relating to the freezing of the National Assembly's legislative competence and the Welsh Ministers' executive competence;
- the changes to the National Assembly's Standing Orders (Standing Orders) that we consider necessary to provide certainty and transparency to the way in which regulations are made under the 2018 Act.

22. As regards paragraph 21, we note and agree with the sentiments behind the comments of the First Minister at a session with the External Affairs and Additional Legislation Committee. We believe his comments, made specifically with regard to section 12 of the 2018 Act, have a wider resonance, representing good practice and delivering the wider certainty and transparency that we believe is essential:

“I am open to the idea that Standing Orders should be looked at to see how they can be used in order to provide a structure to something that we're happy to give an assurance on anyway.”¹⁸

¹⁸ External Affairs and Additional Legislation Committee, RoP [12], 14 May 2018

Table 1: Summary of main powers to make regulations in devolved areas under the EU (Withdrawal) Act 2018

Power	Can be exercised by	Section or Schedule	Laid before	Does the sifting process apply under the 2018 Act
To correct deficiencies in retained EU law in devolved areas	UKMs acting alone	Section 8	UKP	Yes
	WMs acting alone	Part 1 of Schedule 2	NAW	Yes
	UKMs and WMs acting jointly	Part 1 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Section 8 (UKMs) Part 1 of Schedule 2 (WMs)	UKP and NAW	Yes
To implement withdrawal agreement in devolved areas	UKMs acting alone	Section 9	UKP	Yes
	WMs acting alone	Part 2 of Schedule 2	NAW	Yes
	UKMs and WMs acting jointly	Part 2 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Section 9 (UKMs) Part 2 of Schedule 2 (WMs)	UKP and NAW	Yes
Consequential and transitional provisions in devolved areas	UKMs acting alone	Section 23	UKP	Yes
Imposing and modifying fees and charges in devolved areas	UKMs acting alone	Schedule 4	UKP	No
	WMs acting alone	Schedule 4	NAW	No
	UKMs and WMs acting jointly	Schedule 4	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Schedule 4	UKP and NAW	No
Regulations to freeze certain areas of retained EU law in devolved areas	UKMs acting alone (but subject to terms agreed in the Intergovernmental Agreement)	Section 12 (i.e. under the new section 109A of the <i>Government of Wales Act 2006</i>) Schedule 3, Part 1 (i.e. under new section 80(8) of the 2006 Act)	UKP (and always subject to affirmative procedure)	No (but before UKMs can lay before UKP, NAW to make a “consent decision” within 40 days)

Key: WMs = the Welsh Ministers. UKMs = UK Ministers. NAW = National Assembly for Wales. UKP = UK Parliament.

3. The sifting of proposed negative regulations

The sifting process in the 2018 Act

Background and evidence

23. Paragraph 4 of Schedule 7 to the 2018 Act provides for a committee in the National Assembly to sift certain regulations that the Welsh Ministers propose to make under the negative procedure¹⁹ (in this report called “proposed negative regulations”) and to recommend the appropriate procedure to be followed. The detail of the sifting process set out in Schedule 7 to the 2018 Act, as it applies to the National Assembly, is as follows:

- all regulations proposed to be made by the Welsh Ministers under the powers in Parts 1 and 2 of Schedule 2 (other than those to be made jointly with UK Ministers), and which the Welsh Ministers consider ought to be made under the negative procedure, shall be laid before the National Assembly;
- within a period of 14 calendar days after laying, the Welsh Ministers may not make the proposed negative regulations (i.e. sign them into law), unless the National Assembly sifting committee has made a recommendation as to the appropriate procedure for the regulations;
- within those 14 calendar days, the National Assembly sifting committee may consider the proposed negative regulations and report its recommendation that the regulations should follow an alternative procedure (such as the affirmative procedure);
- after the 14 calendar days have elapsed (or sooner if the National Assembly sifting committee has made a recommendation) the Welsh Ministers may proceed with the proposed negative regulations under either:
 - the procedure recommended by the National Assembly sifting committee, such as the affirmative procedure (i.e. the instrument requires a debate and a vote in the National Assembly before it may be made and brought into force), or

¹⁹ In our report, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, Category 1 regulations (see paragraph 50)

- the negative procedure (i.e. the instrument is made and may be brought into force, but it will be annulled if the National Assembly resolves to annul it within 40 days of it being laid).

24. In making regulations under the 2018 Act, UK Ministers and the Welsh Ministers have the power to act together either through making joint regulations²⁰ or composite regulations.²¹ The Leader of the House told us that it was her understanding that the sifting mechanism applied to composite regulations.^{22 23}

25. Paragraph 3 of Schedule 7 to the 2018 Act was amended at a very late stage of the legislative process in the UK Parliament. Paragraph 3 of Schedule 7 includes a requirement for UK Ministers to lay a written statement before the UK Parliament if UK Ministers disagree with a recommendation of a sifting committee of either the House of Commons or the House of Lords. The written statement must explain why UK Ministers disagree with the recommendation. No equivalent duty is placed on the Welsh Ministers with regard to regulations sifted by a National Assembly committee.

Our view

26. We welcome the inclusion of the sifting process for a National Assembly committee in the 2018 Act, as recommended in our first report.²⁴

27. We note that the sifting process does not apply to Schedule 4 regulations (imposing and modifying fees and charges) made by UK Ministers. However, it is unclear to us whether the sifting mechanism applies to regulations made by the Welsh Ministers under Schedule 4.

28. Our view is that the 2018 Act does not intend to differentiate between Schedule 4 regulations made by the Welsh Ministers and Schedule 4 regulations made by UK Ministers. However, the extremely complex and technical nature of the 2018 Act has led to confusion and a lack of clarity, made worse by the fact

²⁰ In our report, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, Category 2 regulations (see paragraph 50)

²¹ In our report, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, Category 3 regulations (see paragraph 50)

²² CLA Committee, RoP [13], 11 June 2018

²³ Recommendation 6 of our report, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, which related to recommendation 1, stated that Category 1, 2 and 3 regulations should be subject to the sifting mechanism.

²⁴ Recommendation 1 of *Scrutiny of regulations made under the European Union (Withdrawal) Bill*

that many of the devolution provisions in the 2018 Act have been bolted on without proper consideration.

29. The decision as to whether regulations can be made without following the sifting process is not, of course, a decision of the sifting committee. Whether the Welsh Ministers feel they can make Schedule 4 regulations without following the sifting process will be a matter for the Welsh Ministers.

30. The Leader of the House told us that it was too early to say whether they would use powers under Schedule 4.²⁵ However, if the Welsh Ministers do make regulations under Schedule 4 that:

- have not followed the sifting process, but
- we believe should have followed the sifting process,

then we will raise this in the usual reports we prepare in respect of every statutory instrument under Standing Orders 21.2 and 21.3.

31. We consider the different statutory requirements that exist within the 2018 Act for the operation of the sifting process in the UK Parliament and National Assembly in the section headed *Recommendations of the sifting committee being binding* within this chapter.

Sifting Committee

Background and evidence

32. In our first report, we recommended that we should be the sifting committee for the purposes of the 2018 Act and that Standing Orders should be amended accordingly.²⁶ The Welsh Government agreed in principle, noting that this was a matter for the National Assembly to determine, although it stated its belief that it was not necessary for Standing Orders to be amended as a result.²⁷

33. On 5 June 2018, the Business Committee agreed in principle that we should be the sifting committee but “the Leader of the House made clear that her

²⁵ CLA Committee, RoP [90], 11 June 2018

²⁶ Constitutional and Legislative Affairs Committee, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, February 2018, recommendation 5.

²⁷ Letter from Julie James AM, Leader of the House and Chief Whip, 27 March 2018, enclosing the *Welsh Government response to the Constitutional and Legislative Affairs Committee – Scrutiny of regulations made under the European Union (Withdrawal) Bill*.

agreement was subject to the issue of the committee's size and political balance being resolved to her satisfaction".²⁸

Our view

34. We welcome the decision of the Business Committee to agree in principle to that we should be the sifting committee.

35. We consider it appropriate for Standing Orders to be amended to reflect the importance of the sifting function assigned to a National Assembly committee by an Act that is of such constitutional importance. This is because it would:

- aid transparency;
- provide certainty for the committee assigned the sifting function;
- provide a coherent link to other changes in Standing Orders related to the scrutiny of regulations to be made under the 2018 Act;
- be consistent with existing practice in Standing Orders.

36. For these reasons, we do not share the Welsh Government's view that changes to Standing Orders are not required. However, our recommendations below clarify how we believe Standing Orders should be amended.

Recommendation 1. We recommend that the National Assembly's Standing Orders should be amended to provide that the function of making a recommendation as to the appropriate procedure to apply to regulations subject to the sifting process under the 2018 Act is assigned to a committee.

The size of the Committee

Background and evidence

37. In a letter to us of 9 May 2018, the Llywydd sought our views on the size of our Committee, saying:

“Business Managers reflected on the size of your Committee. They acknowledged the advantages of the non-partisan way in which you and your predecessor committee have been able to operate successfully with a small number of Members and an absence of party balance. However, they felt that if the Committee's role expanded to

²⁸ Business Committee minutes, 5 June 2018

include both sifting and scrutiny of primary legislation (as you have indicated you wish it to), its membership might need to change.”²⁹

38. We responded on 24 May 2018, saying that the reasons for change to the existing size of the Committee need to be based on a sound rationale and the implications of such a change clearly understood. We also made ten specific observations that we believed should be taken into account when making a decision about any change to the size of the Committee.³⁰

39. As we indicate above, the Business Committee further considered this issue on 5, 12 and 26 June 2018.

40. On 26 June 2018, the Business Committee decided that our membership should be increased to 6 Members. The minutes stated:

“Business Managers made a decision by majority vote to expand the committee’s membership to 6 Members, and to make it more politically balanced by adding 2 Labour Members to the current membership, before it became the sifting committee under the European Union (Withdrawal) Bill. Paul Davies requested that his objection be minuted.

Business Managers agreed that the membership change should be timed so that it takes effect in parallel to changes to Standing Orders on a sifting committee.”³¹

Our view

41. As we will be the sifting committee for the purposes of the 2018 Act (on the basis of the Business Committee’s decisions on 5 and 26 June 2018, and the increase in our size to 6 Members in due course), our report reflects that position.

42. As we indicated in our letter of 24 May 2018, we and our predecessor Committee operated on the basis of constitutional and legislative principle when making recommendations about the quality of primary and secondary legislation and our aim will be to continue that practice in respect of that function.

²⁹ [Letter from the Llywydd, 9 May 2018](#)

³⁰ [Letter to the Llywydd, 24 May 2018](#)

³¹ [Business Committee minutes, 26 June 2018](#)

Sifting criteria

Background and evidence

43. In our first report, we recommended that the sifting criteria set out in paragraph 35(b) of that report are applied to all relevant regulations to be made under the Bill (as it then was) and laid before the National Assembly, and that the criteria should be set out in the National Assembly's Standing Orders.

44. The sifting criteria set out in paragraph 35(b) of our first report are reproduced below:

- whether there is sufficient clarity and transparency in the memorandum as to why the minister is of the opinion that the negative resolution procedure should apply. If the memorandum is not sufficiently clear and transparent as to why the negative resolution procedure should apply, the sifting committee should be cautious about proceeding with the negative resolution procedure. We note that the clarity and transparency of explanatory material is often a hit or miss experience – where there is a hit, the scrutiny process can be efficient and effective, but where there is a miss, the scrutiny process can be slow and, at times, less robust. We see this as an opportunity to raise standards in explanatory material in general;
- whether the memorandum is sufficiently clear and transparent as to the changes that are being made by the regulations. We would expect the memorandum to be clear and transparent as to what is being changed, why it is being changed and the impact that the change will have;
- whether there has been adequate consultation. Again, we would expect the memorandum to be clear and transparent around consultation;
- whether the memorandum is sufficiently clear and transparent about the impact the regulations may have on equality and human rights. Again, a lack of clarity and transparency will naturally raise suspicion of a proposal to follow the negative resolution procedure;
- whether the regulations raise matters of public, political or legal importance. This gives the committee a general ability to consider the regulations as a whole and to use its experience and expertise to determine the procedure that should apply.

45. In its response to our first report, the Welsh Government stated:

“The Welsh Government recognises that the sifting committee will need to agree criteria by which it performs the sifting process. However, these criteria will need to be consistent with the final framework for the sifting mechanism, and the Assembly needs to maintain some flexibility in this regard. The Welsh Government is therefore not persuaded that the criteria should be included in Standing Orders.”³²

46. When we asked the Leader of the House what the Welsh Government meant by its statement that sifting criteria “will need to be consistent with the final framework for the sifting mechanism”, she told us that:

“We're assuming that it will be set out. So, if we're going to add something to it, we want to be very clear why we would be doing that, whether it's possible, given the final wording of the Act, and whether we're not crossing across with a policy committee.”³³

47. She added:

“... once we see what the final form looks like, then it is, I'm sure, possible to come up with an agreed formula and to see whether there is indeed something we want to add or not add. But, until we see what it is, it's difficult to do that.”³⁴

Our view

48. On reflection, we accept the Welsh Government’s view that the sifting criteria should not be included in Standing Orders. Nevertheless, we do believe that there should be a requirement in Standing Orders for the sifting committee to publish its sifting criteria.

Recommendation 2. We recommend that as the Committee assigned the function of sifting regulations under the 2018 Act, we should be required by the National Assembly’s Standing Orders to publish the criteria that we will apply to regulations subject to the sifting process.

³² [Letter from the Leader of the House, Julie James AM enclosing the Welsh Government response to the Constitutional and Legislative Affairs Committee – Scrutiny of regulations made under the European Union \(Withdrawal\) Bill, 27 March 2018](#)

³³ [CLA Committee, RoP \[85\], 11 June 2018](#)

³⁴ [CLA Committee, RoP \[87\], 11 June 2018](#)

49. In making judgements against the criteria, we identify we are likely to consider whether the explanatory memorandum adequately explains:

- what EU obligations and requirements the regulations relate to;
- whether it disengages from or changes any EU obligations and if so how this is achieved;
- what legislation the regulations are amending and how this is achieved;
- whether EU obligations are being replicated or amended and how this is achieved;
- what, if any, new duties or obligations are being place on any public bodies.

50. In adopting this approach, we wish to emphasise our view that as part of the sifting process, the Welsh Government must clearly and adequately explain why it is making legislative changes. In our view, failure to do so would be a legitimate reason to apply the affirmative procedure to the regulations.

51. The approach we intend to take should also help policy committees assess the implications of the regulations more easily.

52. We will look to build on relationships developed during the Interparliamentary Forum on Brexit³⁵ to ensure that the scrutiny of joint and composite instruments is conducted with a shared understanding and approach.

Recommendations of the sifting committee being binding

Background and evidence

53. On 7 March 2018,³⁶ the National Assembly debated our first report. It focused on amendments we believed should be made to the Bill, and addressed

³⁵ The Interparliamentary Forum on Brexit was established in October 2017. It brings together Chairs, Conveners and representatives of Committees scrutinising Brexit-related issues in the Scottish Parliament, National Assembly for Wales, House of Commons and House of Lords in order to discuss and scrutinise the process of the UK's withdrawal from the European Union. Officials from the Northern Ireland Assembly currently attend as observers.

³⁶ [7 March 2018, RoP, \[477-538\]](#)

questions that were raised by the Secretary of State for Wales (the Secretary of State) in a letter to the Llywydd on 16 January 2018³⁷.

54. Our first report made seven recommendations, four of which recommended amendments to the Bill. For that reason, we believed it appropriate to seek the National Assembly's views on those recommendations, and the motion asking the National Assembly to note the committee report also requested that it endorse recommendations 1, 2, 4 and 7. On 7 March 2018, that motion was agreed without objection and the Llywydd wrote to the Secretary of State on 22 March 2018 informing him of the outcome of the debate.³⁸

55. Subsequently, the Leader of the House wrote to us rejecting recommendation 2, namely that the recommendations of the sifting committee should be binding, save where the National Assembly resolves otherwise. Subsequently the Chair of the Committee made a statement in Plenary about the discrepancy in the Welsh Government's position, noting that the Welsh Government did not seek to amend the motion to reflect that position.

56. The Llywydd wrote to the First Minister on 1 May 2018 stating:

“On the substantive matter of the Assembly's position on the sifting committee procedure, I would expect the Government to support, subject to the final text of the Withdrawal Bill and the further detailed work the CLA Committee is currently undertaking, changes to Standing Orders that mean the practical application of any new procedure does reflect the recommendations the Assembly endorsed.”³⁹

57. In a letter to us on 9 May 2018 about a potential review of Standing Orders, the Llywydd noted that Business Managers:

“... decided to focus for the time being on the forthcoming changes to Standing Orders which will be required to implement the provisions about scrutiny of subordinate legislation in the European Union (Withdrawal) Bill. This will include resuming discussion of the difference of opinion between the Assembly and the Welsh Government about whether the sifting committee's recommendations should be binding. As you know, proposals for Standing Order changes can be put to the

³⁷ Letter from the Secretary of State for Wales, Rt Hon Alun Cairns MP to the Llywydd, Elin Jones, AM, *European Union (Withdrawal) Bill*, 16 January 2018

³⁸ Letter from the Llywydd, Elin Jones AM to the Secretary of State for Wales, Rt Hon Alun Cairns MP, 22 March 2018

³⁹ Letter from the Llywydd, Elin Jones AM to the First Minister, Rt Hon Carwyn Jones AM, 1 May 2018

Assembly by simple majority (through weighted voting) decision of the Business Committee, but require support from two thirds of Members voting in Plenary to have effect.”⁴⁰

58. As we noted earlier, the Bill included, at a very late stage, a requirement for UK Ministers to lay a written statement before the UK Parliament if UK Ministers disagree with a recommendation of a sifting committee of either the House of Commons or the House of Lords.⁴¹ In explaining why this was the case, Lord Callanan said:

“I know that it will not have been the intention of the noble Baroness to impinge on the competence or procedures of the devolved Administrations and Parliaments, and I am sure it was not her intention to create an unprecedented position in which devolved legislation made by a devolved Minister should be considered by this Parliament. This could, of course, be solved by some radical changes in the drafting, but the issue has been addressed in our amendment by providing that it applies only to instruments made by UK Ministers before this Parliament. This is doubly important at this late stage in the Bill’s passage, when there is no time to seek supplementary legislative consent from the devolved Assemblies.”⁴²

Our view

59. The purpose of recommendation 2 of our first report was to strengthen the sifting process and make it more meaningful. As such, it was in line with recommendations made by parliamentary committees in Westminster.⁴³

60. While we would have preferred our recommendations on the outcome of our sifting of proposed negative regulations to have been binding on the Welsh Ministers, the 2018 Act places no such requirement on either the Welsh Ministers or the UK Ministers.

61. In our view it would be sensible to ensure parity of approach to scrutiny of the proposed negative regulations to ensure that decisions on who should act in

⁴⁰ [Letter from the Llywydd, Elin Jones AM, 9 May 2018](#)

⁴¹ Paragraph 3 of Schedule 7 to the 2018 Act

⁴² [HL Deb, 18 June 2018, c1868](#)

⁴³ For example, House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 12th Report of the Session 2017-19, HL Paper 73, February 2018, paragraph 58

devolved areas are based on the merits of the regulations in question, rather than the nature of the scrutiny regime to which they would then be subject.

62. We note that late changes to the Bill resulted in a new provision requiring UK Ministers to lay a written statement before the UK Parliament if UK Ministers disagree with a recommendation of a sifting committee. Such provisions were not extended to the National Assembly because according to the UK Government legislative consent could not be achieved in time.

63. In line with our view that there should be parity of approach, we believe that a provision must be included in the Standing Orders to mirror the statutory obligations placed on UK Ministers. It would be absurd for the UK Ministers to be subject to a more rigorous scrutiny procedure when acting in devolved areas than the Welsh Ministers acting in those same areas, particularly because of the lack of time either to acquire the legislative consent to make equivalent provision or for the National Assembly to legislate on procedural matters. Failure to replicate provisions in this way would not only demonstrate poor practice but demonstrate a lack of respect for the National Assembly.

64. We recognise that the National Assembly has made a decision such that recommendations of the sifting committee should be binding. However, in light of the final text of the 2018 Act, we see no reason why the National Assembly cannot reconsider this position should it wish to do so. This could be achieved, for example, through a motion to agree changes to Standing Orders that relate to the operation of the sifting committee.

Recommendation 3. If the National Assembly is content for our recommendations as the sifting committee not to be binding, we recommend its Standing Orders should be amended to place a requirement on the Welsh Ministers to explain why they do not agree with our recommendations (as applies to UK Ministers in paragraph 3(7) of Schedule 7 to the 2018 Act).

14 calendar days for sifting

Background and evidence

65. Paragraph 4 of Schedule 7 to the 2018 Act sets out the process to be followed to sift regulations to be made by the Welsh Ministers. In accordance with that provision, we will have 14 calendar days in which to make a decision.

66. The 2018 Act gives Westminster committees 10 sitting days to carry out a sift. As a consequence of the definition of sitting day, the 10 day sitting period will generally last between 17 and 20 calendar days in the House of Commons.⁴⁴

67. The National Assembly does not use the term “sitting days”. Instead, we have been given 14 calendar days (excluding any time the Assembly is dissolved or in recess for more than four days). This is the maximum period available to us to sift and is considerably shorter than the time that could be available to Westminster committees.

68. We wrote to the Secretary of State about the differences between the time available for sifting by an Assembly committee and those in the UK Parliament.⁴⁵ We also suggested one option as a solution to the problem. In response the Secretary of State told us:

“You are right to point to the different arrangements in the Assembly compared to Westminster. These differences mean that it is not appropriate to define the length of time committees in the Assembly are given to carry out a sift in the same terms as Parliamentary Committees. Following consultation with the Welsh Government we determined that a 14-day period, discounting days on which the Assembly is dissolved or in recess for a period of more than four days, would be an appropriate time period to carry out a sift.”⁴⁶

69. We raised these issues with the Leader of the House, referring to the views of the Secretary of State. She told us:

“It's a matter for the Secretary of State what evidence he gives to the committee. (...) What we've sought to do is to get an amount of time that is doable in the timescale and fits into our procedures, and it's a difficulty because, in procedures, a sitting day definition isn't the same and there are differences of approach, and so on. But we've tried to make sure that we have, effectively, two weeks to get through it, with a view to the committee having the chance to have a good look at it in all

⁴⁴ House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018*, Sixth Report of Session 2017-2019, HC 1395, 9 July 2018, paragraph 57 and Annex 2

⁴⁵ Letter to the Rt Hon Alun Cairns MP, Secretary of State for Wales, *European Union (Withdrawal) Bill*, 11 May 2018

⁴⁶ Letter from the Rt Hon Alun Cairns MP, Secretary of State for Wales, 3 June 2018

the circumstances. I'm not sure that if we'd started with a blank piece of paper this would be where we are, but it's doable, it seems to us."⁴⁷

70. We pursued this issue by asking why the Welsh Government responded to the UK Government on this procedural matter without discussing it with the Llywydd or, this Committee. The Leader of the House told us:

“The UK Government approached us and we've responded as part of a suite of things we were talking about. It's certainly not our intention to cut out either the Assembly itself or the committee, and we certainly would not have set about doing that. I think you need to ask the Secretary of State how we've ended up here. So, what we've done is gone along with the UK Government's approach to this and sought to include everybody as appropriate. So, I would just like to reassure the committee that we entirely don't want any impression of that sort to be given, and obviously it's not a matter for us; we're just all trying to negotiate the best possible procedure here. We have a good relationship with the Commission and we've been working very hard to make sure that this all works as well as it possibly can.”⁴⁸

Our view

71. As we indicated in our first report, without conceding the broader principle that the National Assembly should set its own scrutiny procedures, we accepted that for practical reasons, the 2018 Act would need to delegate powers to the Welsh Ministers to make subordinate legislation and that accordingly it will need to set the procedure attached to those regulation-making powers.

72. However, that acceptance did not mean to us that there were any circumstances in which the National Assembly should be excluded from, at the very least, contributing to decisions on the scrutiny procedure that should apply to the exercise of those powers.

73. The Welsh Government has consistently emphasised that procedures relating to scrutiny in the National Assembly are a matter for the National Assembly to determine and the Leader of the House emphasised to us the good relationships the Welsh Government has with Assembly officials.

74. In his letter of the 3 June 2018, the Secretary of State explained that his department had consulted officials in the Assembly Commission about

⁴⁷ CLA Committee, RoP [64], 11 June 2018

⁴⁸ CLA Committee, RoP [66], 11 June 2018

Devolution Guidance Notes and this is just one of many pieces of correspondence between constituent parts of the National Assembly and his office.

75. It is therefore deeply disappointing that neither the Secretary of State nor the Welsh Government thought to consult the Llywydd or this Committee about matters relating to this particular Assembly scrutiny procedure. It is not appropriate for the Welsh Government to be the sole consultee about a specific scrutiny procedure (sifting) to which the Welsh Government itself is subject.

76. Given the relationships that have been built up, we do not think it unreasonable to have expected either the Secretary of State or the Welsh Government to have contacted the Llywydd or this Committee, with a view to finding an appropriate solution. We certainly believe it would have been straightforward to agree a position between the National Assembly, the UK Government and the Welsh Government in a spirit of co-operation and collaboration.

77. The circumstances that have arisen are unfortunate and reflect some complacency on the part of the Secretary of State and the Welsh Government. They are also disrespectful to the National Assembly as a legislature and both executives should ensure that such circumstances do not happen again.

The volume of regulations and the implications for scrutiny

Background and evidence: number of regulations and when first due

78. On 14 December 2017, we wrote to the Leader of the House seeking an estimate of the number of regulations the Welsh Ministers would need to make as a result of the UK's exit from the EU.⁴⁹ The Leader of the House's reply in early January 2018 explained that the Welsh Government was undertaking work that sought to identify the existing legislation and determine whether, and in what way, it might be deficient. The letter also stated that, at that point, over 600 EU-derived domestic legislative instruments that fall within Welsh devolved competence had been identified.

79. On 7 March 2018, the Leader of the House wrote to us with an update, and explained:

“Further analysis (which is ongoing) has reduced this to around 400 instruments that contain deficiencies which are likely to need to be

⁴⁹ Letter to Julie James AM, Leader of the House, *Subordinate legislation as a consequence of the UK exiting the EU*, 14 December 2017.

addressed. It is currently estimated that close to 20 of these would each need to be dealt with by way of a specific 'standalone' correcting instrument, with around 380 capable of being addressed by way of provisions within amalgamated correcting instruments."⁵⁰

80. The Leader of the House also said that the number of instruments required is likely to change based on the number of deficiencies identified within each legislative instrument, the nature of those deficiencies, and the complexity of the solutions necessary in order to correct them.⁵¹

81. On 11 June 2018, we asked the Leader of the House to provide a further update. She told us:

"We think that there are probably around 400 EU-derived domestic legislative instruments that contain deficiencies that need correcting. We haven't identified any further yet, but we're not ruling out that that's not the full suite. Obviously, it's an ongoing process.

... it's very difficult to say exactly how many SIs will be in play, but we aim to have as smooth a process as possible... We want to make sure that everybody is as fully in the picture about where we are, how many SIs there might be in any particular category and what the timescales are as it's humanly possible to make it. But you'll appreciate it's a very fluid position, and we're not fully in the picture. I don't say that as any criticism, as I suspect it's because the officials themselves are not fully in the picture."⁵²

82. The First Minister explained to the External Affairs and Additional Legislation Committee the approach that would be adopted:

"In terms of the approach that I've asked officials to take in Government, my normal approach is where there is legislation, whether it's regulations or secondary legislation, the assumption is that it should be made on a Wales-only basis. In the environmental field, there are lots of England-and-Wales regulations, historically, and I've been keen to move away from that template as being the default template. But I have said to officials that when it comes to a lot of the uncontroversial, technical regulations that may surround Brexit, actually, there may well be scope for that to be done by Parliament and by Whitehall, rather

⁵⁰ Letter from Julie James AM, Leader of the House, 4 January 2018

⁵¹ Letter from Julie James AM, Leader of the House, 7 March 2018

⁵² CLA Committee, [7 and 9], 11 June 2018

than by us, because their capacity is much bigger than ours, unless there is a political or policy reason why we should take the decision that, actually—. A lot of the technical stuff we would expect to be dealt with with our consent by the Whitehall departments.”⁵³

83. In a letter dated 28 June 2018, the Leader of the House confirmed this position.⁵⁴

84. In respect of regulations that could be made under Schedule 4 of the 2018 Act, the Leader of the House told us:

“To be honest, I don't think we've given much, if any, consideration to that at the moment. I think we're grappling with the procedural issues. I honestly don't know. I think it's far too early to say whether we'll use the power at all, never mind to do what.”⁵⁵

85. We have noted the evidence given to the House of Commons Procedure Committee on 2 May 2018 by the Rt Hon Andrea Leadsom MP, Lord President of the Council and Leader of the House of Commons, and Mr Steve Baker MP, Parliamentary Under-Secretary, Department for Exiting the European Union.⁵⁶ During that meeting, the Leader of the House of Commons provided an update on the number of correcting regulations that the UK Government has identified. The Parliamentary Under-Secretary also advised the Procedure Committee that, based on the current (at that time) schedule for the Bill progressing through the UK Parliament, the UK Government would be ready to lay instruments as early as late June 2018.⁵⁷

86. We asked the Leader of the House if, based on the current (at that time) schedule for the Bill's progression through the UK Parliament, she knew when the Welsh Government would begin to lay before the National Assembly regulations to correct deficient retained EU law. The Leader of the House said:

“The short answer to that is 'no', because it largely depends on what parliamentary process now happens. We've all been reading the news about where we are. There are a large number of amendments that were made that we are expecting the Government to try and reverse. I

⁵³ [External Affairs and Additional Legislation Committee, RoP \[128\], 14 May 2018](#)

⁵⁴ [Letter from Julie James AM, Leader of the House, 28 June 2018](#)

⁵⁵ [CLA Committee, RoP \[90\], 11 June 2018](#)

⁵⁶ Steve Baker MP resigned from his position as Parliamentary Under-Secretary on 8 July 2018.

⁵⁷ House of Commons Procedure Committee, [Oral evidence: Exiting the European Union: scrutiny of delegated legislation, HC 386](#), 2 May 2018, Q 199.

don't want to be flip, Chair, but 'how long is a piece of string' kind of comes to mind. We're assuming, worst case scenario, that we fall out with no deal, because we have to assume that, we have to be ready for that, and therefore we'll have them as soon as we're out. So, as early as the autumn, but we'll keep a weather eye on it and we'll keep the committee informed as soon as we have any better information than that."⁵⁸

87. A Welsh Government official added that for regulations that are proposed to be subject to the negative procedure, there was also a need for the sifting mechanism to be established in the UK Parliament and the National Assembly before they could be laid and taken through the formal process.⁵⁹

88. The Leader of the House confirmed that should regulations start coming forward imminently, the required agreements with the UK Government that will underpin the process were in place.⁶⁰

89. A Welsh Government official went on to say:

“Officials are in continuous discussion with UK Government departments, and we are in discussions with Welsh Government departments to try and identify those statutory instruments that can come forward sooner. And, obviously, there will be others that are subject to further discussions with the UK Government, and some are contingent on whatever negotiation is achieved between the UK Government and the EU.”⁶¹

90. The Leader of the House added:

“...we have control over some parts of it, so we will be looking to make sure that the committee has a stream of work using some parts in our control against what the UK is producing to get a workflow going.”⁶²

⁵⁸ [CLA Committee, RoP \[37\], 11 June 2018](#)

⁵⁹ [CLA Committee, RoP \[42\], 11 June 2018](#)

⁶⁰ [CLA Committee, RoP \[46-47\], 11 June 2018](#)

⁶¹ [CLA Committee, RoP \[48\], 11 June 2018](#)

⁶² [CLA Committee, RoP \[49\], 11 June 2018](#)

Our view

91. We note the work being undertaken by the Welsh Government in relation to the number of regulations that will be required to correct deficiencies in retained EU law as a result of the UK's withdrawal from the EU.

92. We note that between 7 March 2018 and 11 June 2018, the Welsh Government's analysis found no further regulations that would need to be made by the Welsh Ministers under the 2018 Act. This seems surprising because of the considerable expansion during that time of the regulation-making powers of the Welsh Ministers to modify retained EU law as a consequence of section 12 of, and Schedule 2 to, the 2018 Act, which expand devolved competence (legislative and executive) over retained EU law.

93. We also note the First Minister's comments indicating that some regulations will be made on behalf of the Welsh Ministers by the UK Ministers, where they are uncontroversial and technical in nature.

94. It would therefore be helpful to receive a further update from the Welsh Government to assist with planning our processes and programming before the end of July 2018.

Recommendation 4. We recommend that the Leader of the House writes to us before the end of July 2018, providing an update on the number of regulations that will be required to correct deficiencies in retained EU law as a result of the UK's withdrawal from the EU, as well as an update on the number of any other regulations that will need to be made under the 2018 Act.

95. It is clear that there is likely to be a significant increase in our workload in order to scrutinise regulations arising from the UK's withdrawal from the EU, as it will be in addition to the scrutiny of non-EU related subordinate legislation, scrutiny of Welsh Government (and potentially non-Government) Bills, work on our own inquiries and the scrutiny of inter-governmental relations.

Recommendation 5. We recommend that in deciding future committee timetables, consideration is given to the potential need for this Committee, in our role as the sifting committee, to sit longer, and / or on a different day, and / or sit more than once a week in order to scrutinise regulations that will be made under the 2018 Act.

Background and evidence: early warning, general notification, and a steady stream

96. Steve Baker MP, the Parliamentary Under-Secretary of State at the Department for Exiting the European Union, has suggested that the UK Government would commit to laying regulations by a certain day of the week, if that would assist the parliamentary sifting committee.⁶³ We asked the Leader of House, whether they were proposing to replicate the UK Government commitment. In response the Leader of the House said:

“Yes, if the UK Government does manage to do such a thing, we have no issue with duplicating it. It will be in our interest to have as largely similar a process as possible, so that we all understand where we are. That will be particularly important where this committee and the UK committee are simultaneously looking at something.”⁶⁴

97. As regards providing advance warning to the sifting committee of regulations to be subject to sifting, the Leader of the House said the Welsh Government were “very keen to give as early a warning as possible to both the Assembly and the committees because we want the work to go smoothly and to be efficient”.⁶⁵

98. Given that time is going to be of the essence, we asked the Leader of the House how we (as the sifting committee) will be notified when regulations that are subject to the sift will be laid, and how other relevant committees will also be notified. The Leader of the House said:

“... we have a very good working protocol with this committee about how we notify. We're assuming we'll do the same thing. So, as soon as we have any indication, we'll be notifying the committee and the Commission. (...) I can only emphasise what I'm saying all the time: it is in everybody's interest to make sure that everybody is as fully informed as possible and that the clock runs as efficiently as possible for all of us. It's certainly not in our interest to make sure that that doesn't happen, so we would be looking to have those good working relationships for

⁶³ House of Commons Procedure Committee, *Oral evidence: Exiting the European Union: scrutiny of delegated legislation*, HC 386, 2 May 2018, Q 176

⁶⁴ CLA Committee, RoP [51], 11 June 2018

⁶⁵ CLA Committee, RoP [58], 11 June 2018

this part of your work as well as for the other SIs that are always dealt with.”⁶⁶

99. In addition to having a system of early, advance warning in place, we are concerned that, as much as is possible, the Welsh Government should be in a position where it can avoid the potential for regulations coming forward in peaks and troughs. We asked the Leader of the House how the Welsh Government’s plans would mitigate against this scenario. The Leader of the House responded:

“... we want to make sure that, if at all possible, we can timetable it in such a way that we have a reasonable stream of work coming through for the committee... Nobody wants to see an enormous mound of stuff and then nothing. So it's just a question of whether we can work out a process that allows us to identify the priority and then get a streamline in place.

... we're in a lot of discussion with the UK Government. It's in their interests not to have peaks and troughs as well, and what we're hoping to do is have a streamlined process where we agree which area we're looking at and how to put that in place. It's a hope and an expectation based on our current communications with them and our interaction. I have no way of absolutely ensuring that, but clearly it's in everybody's interest to ensure that. So, I don't see any reason to be alarmed that it won't be possible to work out a protocol of that sort because, obviously, all the committees will have that problem. The UK committees will have that problem, as well as ours. If there's a sudden influx of, I don't know, 50 of them and then nothing at all for the next six weeks, that's clearly a problem for everybody in terms of the timescale.”⁶⁷

Our view

100. We believe that an early warning system is vital to planning and managing the process of scrutinising regulations made under the 2018 Act, especially those regulations that correct deficiencies in retained EU law. It is particularly important given that:

- the Welsh Ministers and the UK Ministers have the power to act in devolved areas and the impact of the UK Ministers using those powers

⁶⁶ CLA Committee, RoP [72], 11 June 2018

⁶⁷ CLA Committee, RoP [11 and 39], 11 June 2018

in respect of any of the 400 pieces of legislation referred to by the Leader of the House remains uncertain; and

- we only have 14 calendar days in which to sift proposed negative regulations.

101. As matters currently stand, we meet on a Monday. The day of laying of regulations arising from the 2018 Act will be important to maximise the number of committee meetings available for scrutiny, taking account of the need for advice on them to be prepared by our legal advisers. Laying regulations on a Tuesday will generally provide two opportunities to consider regulations at our meetings, while laying on a Friday will provide a single opportunity.

102. As such, if we continue to meet on a Monday perhaps the best day for laying proposed negative regulations would be a Tuesday, although we would look to seek agreement with the Welsh Government on this issue.

103. Our ability to consider proposed negative regulations will depend on the assessment of the regulations by our legal advisers. This in turn will be dependent on:

- the complexity of the regulations;
- the quality of the explanatory memorandum;
- the volume of proposed negative regulations under the Act; and
- the volume of regulations to be scrutinised under Standing Orders 21.2 and 21.3, which will include our normal statutory instrument workload and those arising from the 2018 Act and other Brexit Acts.

104. An early warning system would enable appropriate planning to take place. If the plan is made publically available, stakeholders would have more opportunity to engage with us and subject committees. Such a system should apply to all regulations, not just those subject to sifting.

105. An even flow of regulations, appropriately prioritised would help avoid peaks and troughs, and ensure the most efficient use of resources.

106. We welcome the commitment of the Leader of the House to work with the sifting committee to ensure a fair and effective scrutiny process. We recommend the following approach irrespective of decisions taken by the UK Government.

Recommendation 6. We recommend that the Welsh Government enters into an agreement with us as the sifting committee to cover:

- an early warning system to assist with managing the scrutiny of all subordinate legislation until the end of this Assembly (in 2021);
- the optimum day of laying of proposed negative regulations under the 2018 Act; and
- any other matter that will aid the effective and efficient scrutiny of regulations made under the 2018 Act, especially regulations correcting deficiencies in retained EU law.

Impact on Plenary business

Background and evidence

107. We believe it appropriate to draw attention to the possibility of an increase in the number of regulations subject to the affirmative procedure that will require approval by resolution of the National Assembly in a Plenary sitting. When asked if the Welsh Government was content with how it may need to organise Plenary business, the Leader of the House told us:

“Well, it's a conversation we need to have with the Commission about how to deal with it, but, yes, it's an ongoing and constructive discussion with the Commission. It's obviously in our interest that the Assembly is able to give the right amount of scrutiny and time to this important piece of work. So, it will be something for Business Committee to discuss, for myself and the Llywydd. It's an ongoing discussion—the First Minister and Llywydd—in order to ensure that we get this right and we have the right amount of time.”⁶⁸

Our view

108. We are aware that the National Assembly's Business Committee is undertaking a review of the impact of Brexit on the National Assembly, including Plenary business. We will therefore draw this issue to the attention of the Business Committee.

⁶⁸ CLA Committee, RoP [60], 11 June 2018

Reporting the outcome of sifting

Our view

109. The National Assembly will need to be notified of the outcome of the sifting process for all proposed negative instruments.

110. In relation to all statutory instruments, we have a well-established role to consider and report to the National Assembly against criteria set out in Standing Order 21.2 (for example, matters that might call into question the legality of a statutory instrument or whether a statutory instrument is in both English and Welsh) and Standing Order 21.3 (for example, matters that are likely to be of interest to the National Assembly).

111. If we are content with a statutory instrument, the instrument is referred to as having a clear report. If we are not content, we will issue a report in accordance with the relevant Standing Order. Such reports inform the National Assembly of the issues that arise in relation to the particular statutory instruments.

112. We believe similar procedures should be followed for reporting on the outcome of the sifting process for all proposed negative regulations.

113. It is our intention that clear sifting reports should be laid before the National Assembly, listing the regulations that we believe should remain, and proceed, as negative resolution regulations. Such reports should be laid once a week, as long as a “sift” has taken place that week.

114. For those regulations that we recommend should be subject to the affirmative procedure or any other procedure (in accordance with our sifting criteria), individual reports should be laid before the National Assembly.

115. We will ensure that our website links proposed negative regulations to the regulations that are subsequently laid following sifting.

4. The scrutiny of regulations made by UK Ministers in devolved areas

116. The previous chapter considered regulations the Welsh Ministers propose to make under the negative procedure either acting alone or together with UK Ministers and the arrangements for scrutiny that apply.

117. The purpose of this chapter is to consider the procedures that relate to the scrutiny of regulations made by UK Ministers acting alone in devolved areas.

Background and evidence

118. The Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks contained in the Intergovernmental Agreement states that:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”⁶⁹

119. We asked the Leader of the House how the National Assembly would be able to scrutinise regulations made in devolved areas by UK Ministers acting alone. She said:

“... what we're looking to do is establish a protocol where we get as early a warning as possible of anything that's coming through, whether that's going to be a UK one or one that they think is for us... and that we have an early-warning system in place, that we understand the criteria by which they are grouping them, for example, how many instruments will be needed to correct how many deficiencies, and that we share that with the committee as early as humanly possible in the cycle, once we're aware ourselves.”⁷⁰

⁶⁹ Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, as of 24 April 2018, second paragraph 8

⁷⁰ CLA Committee, RoP [11], 11 June 2018

120. When asked whether the National Assembly would be notified about these regulations, she said:

“I would look to have a working protocol between us and the Assembly Commission to keep everybody in the loop about where we were with particular bits of secondary legislation, very much as we do now, in fact. When we become aware that something is going into an Act that might affect Wales, we alert the Commission to that, as appropriate, because we want to take a view on it. So, I think we have some established processes for that. We will have to adapt them. But, in principle, we would want the Assembly to have as much information as possible.”⁷¹

121. A Welsh Government official told us:

“... our understanding is Welsh Ministers would have to give consent to those regulations that UK Ministers were making in devolved areas, and I think the First Minister and Cabinet Secretary for Finance have already committed to a notification process to the Assembly when that consent is given. So, that's the basis on which we're currently working.”⁷²

122. Under section 23 of the 2018 Act, UK Ministers can act in devolved areas, for a period of up to 10 years after exit day, to make regulations as they consider appropriate in consequence of the 2018 Act. The Intergovernmental Agreement does not cover the need for agreement between the UK Ministers and the Welsh Ministers when making such regulations. On this point, the Leader of the House told us that:

“It's true that there aren't any provisions there, but we'd expect to be notified, and we therefore expect to keep the Commission in the loop. Again, I emphasise that I can't see why it would be in the UK Government's interests not to do that, and so why would they not? Clearly, it will cause friction if they don't, and—again, I don't see why they would do that. It's not a bone of contention between us or anybody else, it's just a process. So, my own view is that we will develop a protocol and it will work happily, if they use them...”⁷³

⁷¹ [CLA Committee, RoP \[99\], 11 June 2018](#)

⁷² [CLA Committee, RoP \[104\], 11 June 2018](#)

⁷³ [CLA Committee, RoP \[124\], 11 June 2018](#)

123. In a letter to the Procedure Committee of the House of Commons, as part of its inquiry on similar matters,⁷⁴ we expressed concern that regulations made by the UK Ministers under the then clause 22 of the Bill (now section 23 of the 2018 Act) could impact on devolved matters without our knowledge.⁷⁵

Our view

124. We welcome the commitment given by the current Welsh Government to notify the National Assembly when it gives consent to the UK Ministers to act in devolved areas. This is particularly important given the First Minister's comments that some regulations will be made on behalf of the Welsh Ministers by the UK Ministers where they are uncontroversial and technical in nature.

125. We believe that it is appropriate for Standing Orders to reflect this commitment for two reasons. First, because of the broad powers that UK Ministers have under the 2018 Act to make regulations in devolved areas (see Table 1 of this report). Second, because those regulations could be made after 29 March 2021 and in the next Assembly if the definition of "exit day" in the 2018 Act is amended.

126. In addition, we believe that in the interests of transparency and accountability, notification to the National Assembly should be accompanied by an explanatory memorandum explaining why the Welsh Ministers have given that consent.

Recommendation 7. We recommend that the National Assembly's Standing Orders require that, where UK Ministers acting alone in devolved areas lay before the UK Parliament regulations in areas within the legislative competence of the National Assembly or the executive competence of the Welsh Ministers, and where the Welsh Ministers are required to give their consent to the making of those regulations:

- the Welsh Ministers notify the National Assembly within one working day of the regulations being laid; and
- such notification is accompanied by an explanatory memorandum summarising the purpose and impact of the regulations and explaining why the Welsh Ministers have given their consent.

⁷⁴ [House of Commons Procedure Committee, Exiting the European Union: scrutiny of delegated legislation inquiry](#)

⁷⁵ [Letter to Charles Walker MP, Chair, House of Commons Procedure Committee, European Union \(Withdrawal\) Bill, 11 May 2018](#)

127. We welcome the Leader of the House’s comments regarding section 23 of the 2018 Act and believe that the commitment given should also be reflected in Standing Orders, particularly as such regulations can be made for a period of 10 years after exit day, i.e. they can be made until 29 March 2029 (or longer if the definition of “exit day” in the 2018 Act is amended).

Recommendation 8. We recommend that the National Assembly’s Standing Orders require that, where UK Ministers acting alone lay before the UK Parliament regulations in areas within the legislative competence of the National Assembly or the executive competence of the Welsh Ministers, and where the Welsh Ministers are not required to give their consent to the making of those regulations:

- the Welsh Ministers notify the National Assembly within one working day of the regulations being laid; and
- such notification is accompanied by an explanatory memorandum summarising the purpose and impact of the regulations.

128. We do not believe that the provision of an explanatory memorandum in respect of recommendations 8 or 9 is particularly onerous requirement, given that we would expect the Welsh Government to have undertaken relevant analysis as part of its own internal processes and checks.

5. The scrutiny of regulations made under sections 109A and 80(8) of the *Government of Wales 2006*

Background and evidence

129. Section 12 of the 2018 Act inserts a new section, section 109A into the *Government of Wales Act 2006* (the 2006 Act), which allows restrictions to be imposed on the National Assembly's competence. The restrictions will be imposed by regulations made by UK Ministers (section 109A(3)) and will prevent the National Assembly from changing retained EU law in particular policy areas. The regulations must be laid in draft and approved by a resolution of both Houses of the UK Parliament. Under section 109A(4), this draft must not be laid by UK Ministers unless the National Assembly has made a "consent decision" in relation to the laying of a draft or until 40 days have passed without the Assembly having made such a decision.

130. Under new section 109A(5) of the *Government of Wales Act 2006*, a consent decision is:

- a decision to agree a motion consenting to the laying of the draft;
- a decision not to agree a motion consenting to the laying of the draft; or
- a decision to agree a motion refusing to consent to the laying of the draft.

131. New Section 157ZA of the 2006 Act, inserted by paragraph 43 of Schedule 3 to the 2018 Act requires that where the National Assembly has not consented to the laying of draft regulations under section 109A of the 2006 Act, UK Ministers must lay before the House of Commons and House of Lords any statement provided by the Welsh Ministers giving the opinion of the Welsh Ministers as to why the National Assembly has not made that decision.

132. Under section 109A(6), UK Ministers must provide a copy of the draft regulations to the Welsh Ministers and inform the Presiding Officer that a copy has been provided. However, the Welsh Ministers are under no obligation to lay the draft before the National Assembly once they receive the draft.

133. The terms of the Intergovernmental Agreement state (in respect of what was clause 11 of the Bill and is now section 12 of the Act) that:

Clause 11 Regulations

7. Clause 11 regulations will be made in accordance with the following process, underpinned by provisions in the Withdrawal Bill:

- a. Building on the ‘Deep Dive’ process, which has been a collaborative effort between the governments, discussions will take place between the governments to seek to agree the scope and content of regulations. This process will continue to report into JMC(EN).
- b. Following those discussions between the governments, a UK Minister will formally send draft clause 11 regulations to the relevant devolved administration(s), notifying the relevant Presiding Officer(s) of the relevant devolved legislature(s) that the regulations have been sent.
- c. Where the draft regulations have been developed in line with this agreement, the relevant devolved administration(s) will lay them before their legislature(s) and will not unreasonably withhold an accompanying recommendation to their respective legislature(s) to provide consent.
- d. If the consent of a devolved legislature is not provided within 40 days of the draft regulations being sent to the relevant devolved administration, the UK Minister may decide either not to proceed with the regulations or to ask the UK Parliament to approve the regulations. If a UK Minister decides to proceed with the regulations, the Minister must provide a written statement to the UK Parliament indicating the reasons why, in the Minister’s view, the devolved legislature did not provide consent.
- e. The relevant devolved administration(s) will also provide a written statement to the UK Parliament setting out why, in their view, the consent of their legislature has not been provided.
- f. In these circumstances, the UK Minister may make the regulations where they are approved by the UK Parliament.

134. The Intergovernmental Agreement lists 24 areas that could be subject to restrictions and therefore section 109A regulations, and a further two areas that are subject to ongoing discussions.⁷⁶

135. We asked the Cabinet Secretary for Finance whether the Welsh Government would lay draft regulations before the National Assembly immediately. The Cabinet Secretary for Finance told us:

“... the letter that will come to Welsh Ministers will go out the same day to the Presiding Officer, so the Parliament will be informed at the same timetable as us. I'm quite happy, David, to give an undertaking this afternoon— ... that we would lay them immediately if we were able to.”⁷⁷

136. The Chair of the External Affairs and Additional Legislation Committee, David Rees AM, asked the First Minister on 14 May 2018 whether the Welsh Government will ensure that it will lay all documentation that it receives from the UK Government, “whether that’s regulations, reports or whatever,” before the National Assembly within 24 hours of receiving it. In response, the First Minister said he thought 24 working hours would be reasonable, and went on to say:

“... it wouldn't be appropriate for the withdrawal Bill to specify what Welsh Ministers should do—that's a matter for the Assembly to specify, looking at Standing Orders. But I can give the assurance that, whenever documentation is received by us that is designed for public consumption, it will be shared with the Assembly as soon as possible.”⁷⁸

137. The Leader of the House re-iterated these commitments when she gave evidence to us on 11 June 2018.⁷⁹

138. In response to whether the Welsh Government will lay a memorandum before the National Assembly before seeking a consent decision in relation to draft regulations, the First Minister said:

“Yes. That is the plan, to do that. Clearly, it's in our interests as well that Members are as fully informed as possible before taking decisions.”⁸⁰

⁷⁶ [Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#), as of 24 April 2018, Annex A

⁷⁷ [CLA Committee, RoP \[116-118\], 30 April 2018](#)

⁷⁸ [External Affairs and Additional Legislation, RoP \[119\], 14 May 2018](#)

⁷⁹ [CLA Committee, RoP \[106\], 11 June 2018](#)

⁸⁰ [External Affairs and Additional Legislation, RoP \[125\], 14 May 2018](#)

139. We similarly asked the Leader of the House whether the Welsh Government's views on section 109A regulations, in every occurrence, would be set out in an accompanying explanatory memorandum. The Leader of the House said:

“Yes, absolutely. As I said, we want to make sure that everybody has as much information as possible, and it's important to us that the Government's position is understood when committees are looking at matters, because that assists.”⁸¹

140. UK Ministers must also provide information to both Houses of Parliament explaining the effect of the regulations and, in cases where the National Assembly has not consented to the laying of the draft regulations, the UK Government must explain why they have decided to lay the draft regulations in any event. The UK Government must also lay any statement provided by the Welsh Ministers setting out their opinion as to why the National Assembly has made that decision (by virtue of section 157ZA(2)(b)(ii) of the 2006 Act). However there is no statutory duty on the Welsh Ministers to provide a statement or to lay such a statement before the National Assembly.

141. The 2018 Act enables UK Ministers to repeal (by regulations) the power to impose restrictions on the National Assembly's competence and requires UK Ministers to consider every three months whether the power should be repealed.

142. The 2018 Act requires UK Ministers to report to the UK Parliament every three months on progress towards removing restrictions that have been put in place (i.e. section 109A regulations) and repealing the powers to impose such restrictions. The 2018 Act requires UK Ministers to provide their reports in connection with restrictions to the Welsh Ministers but there is no requirement for these reports to be laid before the National Assembly. Furthermore, there is no requirement to notify the National Assembly when a specified restriction is revoked or when a power to impose a restriction is repealed.

143. We asked the Leader of the House whether the Welsh Government would be happy to lay before the National Assembly the quarterly reports on the powers that impose restrictions as soon as they are received. The Leader of the House told us:

“Yes—well, 'as soon as we receive them', I'm not sure, but as soon as is humanly possible.

...

⁸¹ CLA Committee, RoP [110], 11 June 2018.

You know, it may be 24 hours later or something (...) what we will have to do is work out—once we have certainty about where we're going with all of this stuff, what we'll have to do is work out the procedures and processes that are then agreed. So, at this point, I'm happy to make the commitments that we'll do it, but we need to work out the technical detail of that once we've got the Act and all of its bits on the table in front of us so that we can see in real time, if you like, what that might entail. But I'm happy to commit the Government to doing what's necessary to make that happen.”⁸²

144. The First Minister gave a similar commitment when he gave evidence to the External Affairs and Additional Legislation Committee on 14 May 2018.⁸³

145. When restrictions on legislative competence are repealed or revoked, the First Minister said that the Welsh Government will want to “shout that from the rooftops” and inform the Assembly as quickly as possible.⁸⁴

Our view

146. We welcome the Welsh Government’s commitment to notify the National Assembly when it receives draft regulations under section 109A of the 2006 Act.

147. Standing Orders need to be amended to include a procedure as a consequence of the provisions to be included in section 109A of the 2006 Act. To that effect, we agree with External Affairs and Additional Legislation Committee.⁸⁵

148. We also note that UK Ministers will have the power to make regulations that freeze the Welsh Ministers’ executive competence to make subordinate legislation in respect of retained EU law (i.e. “freezing” the executive competence in the same way that the Assembly’s legislative competence is frozen). These regulations will be made under the amended section 80(8) of the 2006 Act. The same “consent decision” procedure will apply to regulations made by UK Ministers under section 80(8) of the 2006 Act. The procedure for scrutinising section 109A regulations will therefore also need to extend to cover section 80(8) regulations.

⁸² CLA Committee, RoP [112 and 114], 11 June 2018

⁸³ External Affairs and Additional Legislation, RoP [157], 14 May 2018

⁸⁴ External Affairs and Additional Legislation, RoP [123 and 165], 14 May 2018

⁸⁵ External Affairs and Additional Legislation, *European Union (Withdrawal Bill): Progress towards delivering our six objectives*, May 2018

Recommendation 9. We recommend that the National Assembly's Standing Orders should be amended to provide a procedure in respect of the provisions contained in section 109A of the *Government of Wales Act 2006*, in particular:

- to require an explanatory memorandum that:
 - summarises the effect of regulations that UK Ministers propose to lay under section 109A(3) of the 2006 Act;
 - makes a recommendation as whether the relevant draft regulations should be subsequently made by UK Ministers;
 - explains the reasons for the recommendation made;
- to require that the Business Committee refers that explanatory memorandum to a committee or committees;
- requires the Welsh Ministers to lay before the National Assembly any written statement provided to UK Ministers (i.e. the statement mentioned in new section 157ZA(2)(b)(ii) of the 2006 Act), no later than one working day after the statement is provided by the Welsh Ministers.

Recommendation 10. We recommend that the detail of recommendation 10 applies equally in respect of the provisions contained in section 80 of the *Government of Wales Act 2006*.

149. Like the External Affairs and Additional Legislation Committee we believe that procedures are required for the Welsh Ministers to lay before the National Assembly the three monthly reports on progress towards removing retained EU law restrictions mentioned in paragraph 4(4) of Part 2 of Schedule 3 to the 2018 Act, and that the National Assembly is notified when restrictions on the competence of the National Assembly or the Welsh Ministers are lifted under section 109A of the 2006 Act.⁸⁶

Recommendation 11. We recommend that the Welsh Ministers are required by the National Assembly's Standing Orders to lay any report, provided to them in accordance with paragraph 4(4) of Part 2 of Schedule 3 to the 2018 Act, within one working day of its receipt.

⁸⁶ External Affairs and Additional Legislation, *European Union (Withdrawal Bill): Progress towards delivering our six objectives*, May 2018

Recommendation 12. When the UK Government repeal or revoke retained EU law restrictions (in respect of legislative and executive competence), we recommend that the Welsh Ministers are required by the National Assembly's Standing Orders to make a written statement:

- that EU law restrictions have been lifted, no later than 7 calendar days after the relevant regulations have been laid;
- that explains the impact of the removal of the restrictions on the competence of the National Assembly or the Welsh Ministers.

6. Publicity and engagement

150. We will explore how best to publicise our work for the benefit of citizens and how they could usefully engage with us. In January 2018, Professor Thomas Glyn Watkin in his consultation response to our inquiry that led to our first report, suggested:

“Finally, it might be thought appropriate to establish a standing consultation mechanism to enable expert opinion to be taken on the proposed subordinate legislation both at the Assembly and in Westminster. Experts in the devolved policy areas as well as those learned in EU law might be enabled to comment quickly and effectively on proposed SIs for the benefit of the relevant committees.”⁸⁷

151. This is one idea we will consider as we develop our arrangements for scrutinising the regulations and it may be a matter that subject committees may also wish to reflect on.

152. We will publish as much detailed information on our website about the regulations being made under the 2018 Act in a timely manner and will use social media to publicise our work.

⁸⁷ Evidence from Professor Thomas Glyn Watkin, 19 January 2018