

The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal Agreement) Bill

January 2020

1. Background

The UK Government's European Union (Withdrawal Agreement) Bill

1. The UK Government's European Union (Withdrawal Agreement) Bill¹ (the Bill) was introduced to the House of Commons and given its first reading on 19 December 2019. It is sponsored by the Department for Exiting the European Union.
2. The main purpose of the Bill is to implement the Withdrawal Agreement, agreed between the UK and the European Union on 17 October 2019, so that it has legal effect in domestic law.
3. The explanatory notes to the Bill (as introduced) state that it will also be “the vehicle for the Government to give effect to the EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein, and the Swiss Citizens' Rights Agreement between the UK and Switzerland.”
4. The explanatory notes state:

“The Bill amends the EU (Withdrawal) Act 2018 to ensure it reflects the terms of the Withdrawal Agreement. The Bill also creates powers to

¹ European Union (Withdrawal Agreement) Bill



make secondary legislation, where appropriate, to enable the Withdrawal Agreement to be implemented domestically.”²

5. The notes also state:

“It includes amendments to the Northern Ireland Act 1998 in relation to rights, safeguards and equality of opportunity protections contained in the Belfast (Good Friday) Agreement 1998.

(...)This Bill also includes provision relating to facilitating access for Northern Ireland goods to the market in Great Britain, as well as further provision to ensure no alteration to the arrangements for North-South co-operation can occur as a result of this Bill.”³

6. The Bill passed the House of Commons stages, unamended, on 9 January 2020.⁴

7. The Bill had its first reading in the House of Lords on 9 January 2020.

8. On 9 January 2020, the House of Lords Delegated Powers and Regulatory Reform (DPRR) Committee published its report on the Bill.⁵ On 14 January 2020, the House of Lords Constitution Committee published its report on the Bill.⁶

9. Committee Stage in the House of Lords ended on 16 January 2020. The House of Lords is scheduled to complete Report Stage and Third Reading by 21 January 2020.

The Welsh Government's Legislative Consent Memorandum

10. On 6 January 2020 the First Minister, the Rt Hon Mark Drakeford AM, laid before the National Assembly a Legislative Consent Memorandum (LCM)⁷ in respect of the Bill.

² [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), December 2019

³ [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), paragraphs 2 and 3

⁴ See the [UK Parliament website](#) for information on the Bill stages in the House of Commons and House of Lords.

⁵ House of Lords, Delegated Powers and Regulatory Reform Committee, [1st Report of Session 2019-20, European Union \(Withdrawal Agreement\) Bill](#), 9 January 2020

⁶ House of Lords, Select Committee on the Constitution, [1st Report of Session 2019-20, European Union \(Withdrawal Agreement\) Bill](#), 14 January 2020

⁷ Welsh Government, [Legislative Consent Memorandum, European Union \(Withdrawal Agreement\) Bill](#), January 2020

11. The Business Committee agreed that the Constitutional and Legislative Affairs Committee (the Committee), and the External Affairs and Additional Legislation Committee, should report on the LCM by 17 January 2020.⁸

Provision for which the National Assembly's consent is required

12. Paragraph 6 of the LCM sets out the clauses with particular relevance to matters within the legislative competence of the National Assembly.

13. Paragraphs 7 to 48 of the LCM set out the Welsh Government's assessment of which provisions in the Bill require consent.

14. Paragraphs 49 to 57 of the LCM set out the reasons for making the provisions for Wales in the Bill.

15. The LCM states:

“The Welsh Government agrees that legislation is necessary to provide clarity and certainty for citizens and businesses as we leave the EU. The Welsh Government also agrees that such legislation is best made by Parliament, for the UK as a whole, as this offers the greatest degree of clarity and certainty for citizens and businesses.”

16. Annex A to the Bill's explanatory notes lists the clauses which the UK Government believes require consent.

17. The Welsh Government and UK Government both agree that a Legislative Consent Motion is needed in relation to the following clauses:

- Clauses 1 and 2: Saved law for implementation period;
- Clauses 3 and 4: Supplementary power in connection with the implementation period, and powers corresponding to clause 3 involving devolved authorities;
- Clauses 5 and 6: General implementation of remainder of Withdrawal Agreement and the EEA EFTA and Swiss separation agreements;
- Clauses 12 to 14, clause 16 and Schedule 1: Recognition of professional qualifications, coordination of social security systems and non-

⁸ Business Committee report, [Timetable for consideration of the Legislative Consent Memorandum on the European Union \(Withdrawal Agreement\) Bill](#), January 2020

discrimination, equal treatment and rights of workers etc and powers of devolved authorities;

- Clause 15 and Schedule 2: Independent Monitoring Authority for Citizens' Rights Agreements;
- Clause 18 and 19: Main power in connection with other separation issues and powers corresponding to section 18 involving devolved authorities;
- Clause 20: Financial Provision;
- Clause 21 and 22: Main power in connection with Ireland/ Northern Ireland Protocol, and powers corresponding to section 21 involving devolved authorities;
- Clause 27: Dealing with deficiencies in retained EU law;
- Clause 28: Ancillary fee-charging powers; and
- Clauses 40 to 41 and Schedules 4: Regulations, consequential and transitional provisions.

18. However, the Welsh Government is of the view that a Legislative Consent Motion is needed in relation to additional clauses not identified in Annex A to the Bill's explanatory notes.

19. Following his appearance before the External Affairs and Additional Legislation (EAAL) Committee on 6 January 2019⁹, the First Minister wrote¹⁰ to the Chair of the EAAL Committee providing information on the areas of dispute between the UK Government and the Welsh Government regarding the clauses in the Bill for which consent is required.

20. In the letter, the First Minister states:

“There was dispute about 10 clauses in the October version of the Bill but this had declined to five when the Bill was re-introduced in December.”¹¹

21. The First Minister added that, while there is a high degree of consensus on the clauses that require consent, it is the Welsh Government's view, though still

⁹ [External Affairs and Additional Legislation \(EAAL\) Committee, 6 January 2020](#)

¹⁰ [Letter from the First Minister to the Chair of the EAAL Committee, 13 January 2020](#)

¹¹ Letter from the First Minister to the Chair of the EAAL Committee, 13 January 2020

not accepted by the UK Government, that the National Assembly's consent is required for clauses 17, 25, 26, 29 and 36.¹²

22. The Annex to the LCM sets out the full list of provisions which contain powers for Welsh Ministers to make subordinate legislation.

23. The LCM concludes:

“...the Welsh Government cannot recommend that the National Assembly gives its consent to this Bill.”¹³

The Welsh Government's proposed amendments to the Bill

24. On 8 January 2020 the First Minister wrote to inform us that he had written to the Lord Speaker of the House of Lords, “inviting Peers to consider tabling amendments to the EU (Withdrawal Agreement) Bill”.¹⁴

25. In his letter to Lord Fowler, the First Minister wrote:

“While these amendments focus on securing an appropriate role for the devolved institutions as we leave the EU, they also serve the purpose of entrenching the rights of Parliament in respect of oversight of the forthcoming negotiations, which the UK Government has sought to remove from earlier drafts of the Bill.”

26. The letter indicates that amendments are being sought in relation to clauses 21 and 22, clause 26, clause 38, and Schedule 2. In addition the letter identifies amendments to introduce new clauses relating to transparency and scrutiny by Parliament and the devolved legislatures at all stages of the negotiations, and the removal of the prohibition on the UK Government from agreeing to an extension to the transition period.

¹² Letter from the First Minister to the Chair of the EAAL Committee, 13 January 2020

¹³ Welsh Government, LCM, paragraph 59

¹⁴ Letter from the First Minister to the Chair of the Constitutional and Legislative Affairs (CLA) Committee, 8 January 2020

2. Committee consideration

27. We considered the LCM at our meeting on 13 January 2020 during an evidence session with the First Minister.¹⁵

28. Key issues raised with the First Minister included:

- the implications of the Bill (in its current form) on the Welsh devolution settlement;
- the disagreement between the UK Government and the Welsh Government over the clauses needing consent;
- whether any changes would need to be made to the *Government of Wales Act 2006* as a result of implementing the separation agreements;
- whether the Welsh Government could commit to tabling motions for Statutory Instrument Consent Memorandums (SICMs) each time the UK Government uses its powers under the Bill to amend primary legislation in devolved areas;
- whether the First Minister considers that clause 38 (which says that giving effect to the withdrawal agreement in domestic law does not affect the principle of UK Parliamentary sovereignty) is necessary; and
- the impact on intergovernmental and interparliamentary relations if the consent decisions of the devolved legislatures are overridden.

29. A full transcript of the meeting is available on our webpages.¹⁶

Our view

General observations

30. This report outlines the main issues we wish to raise in relation to the Legislative Consent Memorandum on the European Union (Withdrawal Agreement) Bill, set within the context of the limited time that was available to us to undertake our scrutiny work.

¹⁵ [CLA Committee, 13 January 2020](#)

¹⁶ CLA Committee, 13 January 2020

- 31.** However before turning to those issues, and in line with the report we issued on the Legislative Consent Memorandum on the European Union (Withdrawal) Bill, we take this opportunity to reiterate observations we have made on many occasions in the past two years regarding the constitutional arrangements of the United Kingdom.
- 32.** We wish to emphasise the importance of all relevant parties of the United Kingdom respecting the legislative consent process. The Sewel convention plays a fundamental role in the operation of the UK constitution.
- 33.** The passing of the European Union (Withdrawal) Bill (now the 2018 Act) highlighted inadequacies in the legislative consent process, particularly in terms of the inability of any relevant party to seek formal resolution of a disputed area.
- 34.** We are considering the scope and application of the Sewel convention as part of our current inquiry into Wales' Changing Constitution. We will be reporting on these matters later in the year.

Conclusion 1. If the National Assembly decides not to consent to the Bill, on the matters for which consent is required, and the UK Parliament nevertheless decides to proceed in the absence of consent, this will have significant adverse constitutional consequences for the future of the Sewel convention and devolution.

Amendments proposed by the Welsh Government

35. We note the First Minister has sought amendments to the Bill in the House of Lords which are intended to protect the interests of Wales. We further note that the proposed amendments would re-introduce previously drafted provisions that would enable an appropriate level of parliamentary oversight of the forthcoming international negotiations.

Conclusion 2. The amendments proposed by the Welsh Government do not undermine the primary objective of the Bill, which is to leave the European Union on 31 January 2020, but rather are intended to improve parts of the Bill in important areas.

Clause 21

36. As currently drafted, clause 21 of the Bill would permit the modification of the *Government of Wales Act 2006* (the 2006 Act) by UK Government regulations, in so far as the UK Government considered such modification appropriate in order to implement the Protocol on Ireland / Northern Ireland.

While such regulations would require approval in both Houses of Parliament, there is no formal role for the National Assembly set out in the Bill. This is a concern as we do not know the extent to which the 2006 Act may need to be modified.

37. Section 8 of the *European Union (Withdrawal) Act 2018* (the 2018 Act) provides Ministers with a similar power to that which is included in clause 21 of the Bill, enabling regulations made under that section to make provision that could be made by an Act of Parliament. However, section 8(7) limits the regulations that may be made under section 8(1) so that they may not, amongst other things,-

- impose or increase taxation or fees,
- make retrospective provision,
- create a relevant criminal offence,
- establish a public authority,
- amend, repeal or revoke the *Human Rights Act 1998* or any subordinate legislation made under it, or
- amend or repeal the *Scotland Act 1998*, the 2006 Act or the *Northern Ireland Act 1998*.

38. We note that the Welsh Government has raised concerns about the breadth of power contained in clause 21, and that one of its proposed amendments seeks to replicate (with appropriate adjustment) section 8(7) of the 2018 Act.

39. We further note that the DPRR and Constitution committees in the House of Lords have also expressed concerns about clause 21.

Conclusion 3. We agree with the DPRR and Constitution committees that clause 21 is a “most potent” and “extensive form” of a Henry VIII clause. We further agree with both committees that, if clause 21 in its current format can be justified, the powers within it should be limited.

Conclusion 4. We repeat our longstanding view that any modification of Schedule 7A or 7B to the 2006 Act should be done via the process set out in section 109 of the 2006 Act.

Clause 38

40. We note that the Welsh Government has raised concerns about, and sought amendments to, clause 38.

Conclusion 5. Clause 38 is an unnecessary provision in a Bill which is concerned primarily with leaving the European Union rather than the broader constitutional framework of the UK. There are important debates to be had about the nature of sovereignty within the UK. Entrenching this position in statute and, in particular, in a Bill which is not concerned with the constitutional make-up of the UK or the devolution settlements may bring about unintended consequences.

41. We are writing to the Welsh Government about some of the potential issues raised by the inclusion of clause 38 in the Bill.