

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No.2) on the European Union (Withdrawal) Bill

May 2018

Background

The UK Government's European Union (Withdrawal) Bill

1. The UK Government's European Union (Withdrawal) Bill¹ (the Bill) received its first reading in the House of Commons on 13 July 2017 and completed its passage through the House of Commons scrutiny stages on 17 January 2018. The Bill received its first reading in the House of Lords on 18 January 2018 and, after sitting for 11 days at Committee Stage and six days at report Stage, has since progressed to Third Reading, which is scheduled for 16 May.²
2. The purpose of the Bill, as set out in our report on the Welsh Government's initial Legislative Consent Memorandum (LCM),³ is to repeal the *European Communities Act 1972* the day the United Kingdom leaves the European Union (EU). In addition, the Bill ends the supremacy of EU law in UK law and converts EU law as it stands at the moment of exit into domestic law. It also creates powers to make secondary (or delegated) legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU. The powers are exercisable by UK Ministers and in respect of Wales, the Welsh Ministers, subject to some limitations. This will enable the domestic legal system to function correctly outside the EU. The Bill also enables UK Ministers and

¹ **European Union (Withdrawal) Bill, Bill 5**

² Further details are available on the [UK Parliament Public Bill pages](#)

³ **Welsh Government, *Legislative Consent Memorandum, European Union (Withdrawal) Bill, September 2017***



the Welsh Ministers to implement the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU (though further and more detailed provision around the withdrawal agreement is expected in a Withdrawal Agreement and Implementation Bill).

The Welsh Government's initial Legislative Consent Memorandum

3. On 12 September 2017, the First Minister, the Rt Hon Carwyn Jones AM, laid before the National Assembly an LCM in respect of the Bill as presented to the House of Commons at first reading.

4. On 19 September 2017, the Business Committee referred the LCM to this Committee and the External Affairs and Additional Legislation Committee for consideration.

Our earlier consideration of the Bill, the initial Legislative Consent Memorandum, and our conclusions

5. We issued our report **The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill** on 18 December 2017.

6. Our report outlined the main issues we wished to raise in relation to the LCM, specifically with regard to clauses 7 to 10, clause 11 and clause 17. We also made some observations regarding the constitutional arrangements of the United Kingdom and emphasised the importance of respecting the legislative consent process.⁴

7. We reached two conclusions in that report. We agreed that the clauses of the Bill set out in Annex A to the Welsh Government's LCM required consent (except so far as they related to Schedules 5 and 9). Secondly, we concluded that the National Assembly should withhold consent unless appropriate amendments were made to the Bill.⁵

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No.2)

8. The Cabinet Secretary for Finance, Mark Drakeford AM, wrote to the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, the Rt Hon David Lidington CBE MP, on 24 April 2018. In his letter, the Cabinet Secretary confirmed that, following the UK Government's latest amendments to clause 11

⁴ Our report, **The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill**, paragraphs 16 to 41

⁵ Our report, **The Welsh Government's Legislative Consent Memorandum on the European Union (Withdrawal) Bill**, paragraphs 42 and 43

together with the commitments and assurances set out in an Intergovernmental Agreement,⁶ the Welsh Government will support an LCM linked to the Bill.⁷

9. The Chancellor of the Duchy of Lancaster responded the same day and stated he was grateful for the confirmation that the Welsh Government will put forward a recommendation of legislative consent for the Bill to the National Assembly.⁸

10. 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 Intergovernmental Agreement and the UK Government's amendments to the Bill.⁹

11. 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 Bill¹⁰ (the Supplementary LCM) as presented to the House of Lords at first reading.¹¹

12. On 1 May 2018, the Business Committee formally referred the Supplementary LCM to this Committee and the External Affairs and Additional Legislation Committee for consideration.

Provision for which the National Assembly's consent is required

13. The Supplementary LCM notes that since the publication of the initial LCM, the Bill has been amended during scrutiny in the House of Commons and the House of Lords. Annex 1 to the Supplementary LCM lists the clauses that were amended in the House of Commons; Annex 2 lists government amendments tabled at Report Stage in the House of Lords and one non-government amendment that was agreed. The Supplementary LCM states that consent is required for the provisions or amendments listed in both annexes either because

⁶ **Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, as of 24 April 2018**

⁷ Letter from the Cabinet Secretary for Finance, Mark Drakeford AM, to the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, the Rt Hon David Lidington CBE MP - 24 April 2018

⁸ Letter from the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, the Rt Hon David Lidington CBE MP, to the Cabinet Secretary for Finance, Mark Drakeford AM - 24 April 2018

⁹ 25 April 2018, RoP [238-362]

¹⁰ **Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No.2) on the European Union (Withdrawal) Bill, April 2018**

¹¹ **European Union (Withdrawal) Bill, HL Bill 79**

they modify the Assembly's legislative competence or because they fall within the Assembly's legislative competence.

14. The Supplementary LCM clarifies that the Welsh Government's objections with the Bill as introduced related to four issues "all of which have been substantially addressed in the amendments made or proposed to the Bill or the Inter-governmental Agreement related to it".^{12 13}

15. The Supplementary LCM states:

"...the amendments tabled by UK Government Ministers for Lords Report, and the associated Inter-Governmental Agreement which was published on 25 April, are sufficient to enable the Welsh Government to recommend that the National Assembly give its consent to the Bill."¹⁴

Our view

16. This report outlines the main points we wish to raise in relation to the Supplementary LCM. We also make wider observations regarding the intergovernmental discussions that have taken place and the subsequent Intergovernmental Agreement that, as confirmed by the Cabinet Secretary for Finance, is crucial to the Welsh Government's recommendation that the National Assembly give its consent to the Bill.

17. We took evidence from the Secretary of State for Wales on 16 April 2018¹⁵ and from the Cabinet Secretary for Finance on 23¹⁶ and 30¹⁷ April 2018. The evidence we heard has informed the following views and conclusions.

18. We welcome the progress made by the Welsh Government in negotiating with the UK Government the position regarding the powers to be exercised by the National Assembly following the UK's withdrawal from the EU. As a consequence of these negotiations, the original clause 11 provision has been inverted so powers

¹² **Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No.2) on the European Union (Withdrawal) Bill, April 2018**, paragraph 8

¹³ The convention about the UK Parliament legislating on devolved matters is set out in section 107(6) of the Government of Wales Act 2006. Standing Order 29 relates to consent in relation to UK Parliament Bills.

¹⁴ **Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No.2) on the European Union (Withdrawal) Bill, April 2018**, paragraph 14

¹⁵ CLA Committee, 16 April 2018, RoP

¹⁶ CLA Committee, 23 April 2018, RoP

¹⁷ CLA Committee, 30 April 2018, RoP

over devolved policy will now lie with the National Assembly and in line with the devolution settlement currently in place.¹⁸

19. We do, however, believe it is unfortunate that substantial effort on the part of both sides has been spent correcting the significant deficiencies in the Bill in respect of clause 11 (a situation not dissimilar to our experience with the Wales Bill). These prolonged negotiations could and should have been avoided had the original drafting shown more respect for the role that devolution plays within the United Kingdom.

20. The amendments tabled by UK Ministers to clause 11 of the Bill indicate an important step forward and show significant movement by the UK Government. Furthermore, the force of the Sewel convention has become apparent during the Bill's progress and accompanying negotiations. In particular, it has become apparent that the Sewel convention has been maintained and reaffirmed as an important and effective political convention. We welcome the fact that the UK Government has repeatedly emphasised how important the convention is and how it will continue to be respected, although we draw the Assembly's attention to our observations below on the new clause 11.¹⁹

21. The Intergovernmental Agreement will test the notions of shared governance and trust. Furthermore, a spirit of shared governance and trust must apply more generally to intergovernmental issues; it must not be confined to the Intergovernmental Agreement. However, we acknowledge that it is a start towards a more respectful and workable intergovernmental relationship.

22. We hope this progress will mean improved intergovernmental working and lead to the short and long term reform we recommended to the JMC in our report, ***UK governance post-Brexit***. Recommendation 9 of that report sought to ensure that the Welsh Government enters into an inter-governmental agreement with us to support the scrutiny of inter-governmental activity in this area. We are therefore committed to keeping a watching brief on further developments in respect of the Intergovernmental Agreement, including its future application, interpretation and review.

23. The intergovernmental negotiations have resulted in an agreement between the Welsh and UK Governments that EU law should be temporarily preserved

¹⁸ We note that, despite negotiating for the amendments to clause 11 in full knowledge of the effect, the Welsh Government does not seem to have carried out an analysis of the number of statutory instruments it will be responsible for drafting under the Bill.

¹⁹ After the Supplementary LCM was laid, clause 11 of the Bill became clause 15 as a result of amendments agreed to at Report Stage in the House of Lords.

where it is envisaged that future common frameworks with a legislative underpinning may be necessary. The current position whereby this temporary preservation will apply to the devolved institutions and England²⁰ is a substantial development. We believe this may increase the pressure on all sides to come to an agreement on common frameworks.

24. However at this point there is still considerable uncertainty around common frameworks. It remains to be seen how much certainty there will be should the Bill receive Royal Assent; the terms of the Intergovernmental Agreement appear to suggest that much remains to be decided.

25. In considering the Supplementary LCM we wish to draw to the National Assembly's attention to the following points:

- The convention about the UK Parliament legislating on devolved matters is set out in section 107(6) of the *Government of Wales Act 2006* and specifically deals with "legislating". Accordingly, Standing Order 29 relates to consent in relation to UK Parliament Bills. For that reason, the Intergovernmental Agreement (a political agreement) does not form part of the National Assembly's legislative consent process.
- The Intergovernmental Agreement does not have a legal status and cannot bind future Welsh or UK Governments.
- The length of the proposed sunset provision for clause 11 will allow restrictions and common frameworks to extend beyond the life of the current Welsh and UK Governments. This is particularly relevant when noting that the Intergovernmental Agreement cannot bind future governments.
- For Wales, temporary preservation of EU law will be given effect through regulations made under clause 11 and Schedule 3 to the Bill. For England, temporary preservation will only be given effect through the Intergovernmental Agreement. The recognition of England is constitutionally notable. Nevertheless, in the context of mutual respect and parity between the nations of the UK, this difference of approach is also notable, particularly given that the Intergovernmental Agreement does not legally bind the current governments and cannot legally bind future governments: it is a purely political agreement. As with the

²⁰ See point 4 in paragraph 25 for further commentary.

operation of the Sewel convention and the Supreme Court's judgment,²¹ political agreement and conventions create strong precedents.

- The clause 11 restrictions will apply until the National Assembly passes Acts that lift those restrictions. The earliest such legislation could be passed is towards the end of the Sixth Assembly and may extend into the Seventh Assembly.
- The amendments to the Bill do not require the Welsh Ministers to lay before the National Assembly a copy of any draft clause 11 regulations on the day they receive them from UK Ministers even though the 40 day clock on making a consent decision will start on the day the Welsh Ministers receive them. The Cabinet Secretary gave an undertaking that the Welsh Government would lay them immediately if they were able to.²²
- In the event that the National Assembly actively refuses consent for a particular set of draft clause 11 regulations, UK Ministers will still be able to lay those draft regulations before the UK Parliament for approval, with a statement prepared by the Welsh Ministers explaining why the National Assembly refused consent. It will then be for the House of Commons and the House of Lords to approve clause 11 regulations subject to the affirmative procedure. Therefore it will be for the UK Parliament to make a decision on whether the Sewel convention will be enforced.
- UK Ministers will report every three months on whether powers which impose restrictions on the National Assembly's competence should be repealed. UK Ministers will send a copy of each report to the Welsh Ministers but there is no requirement for the Welsh Ministers to subsequently lay the reports before the National Assembly.
- When restrictions on the National Assembly's competence are lifted by the UK Government, the Bill does not require UK Ministers to notify the National Assembly or the Welsh Ministers.

26. The amendments to the Bill at Report Stage in the House of Lords may have operational implications for the scrutiny of regulations made under the Bill and other relevant matters. We will give these issues further detailed consideration.

²¹ R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5

²² Constitutional and Legislative Affairs Committee, RoP [115-118], 30 April 2018

27. Whatever opinion there may be as to the latest developments around clause 11 and the Intergovernmental Agreement, we repeat the importance of the principles we set out in our Declaratory Statement on the Impact of Exiting the European Union on the Devolution Settlement for Wales (see Annex 1 to this report.)

28. Opinion will vary as to the extent to which these principles have been reflected so far. However, we will continue to defend these principles by:

- ensuring that, whenever this Committee is scrutinising Brexit-related legislation, we will do so with rigour and seek to apply the rule of law;
- seeking clarity with regard to the drafting of any Brexit-related legislation (primary or secondary);
- continuing to emphasise the importance of having a clear vision for the future of the United Kingdom constitution which respects the role that devolution plays (and has played for 20 years) within the United Kingdom;
- defending devolution in Wales by repeating the demand for the National Assembly always to be the legislature responsible for legislating in all devolved areas (apart from where the National Assembly consents otherwise);
- repeating the fundamental importance of the Sewel convention to the constitutional framework and governance of the United Kingdom.

29. The issues raised in the LCM are also relevant to our report on the Scrutiny of *Regulations made under the European Union (Withdrawal) Bill* issued on 16 February 2018. Our report made seven recommendations and on 7 March 2018, the National Assembly endorsed recommendations 1, 2, 4 and 7, which related to changes to the Bill that we believed were necessary. Therefore, for completeness, Annex 2 sets out our assessment of whether the latest UK Government amendments to the Bill reflect the four recommendations endorsed by the National Assembly.

Annex 1

Constitutional and Legislative Affairs Committee, National Assembly for Wales:

Declaratory Statement on the Impact of exiting the European Union on the Devolution Settlement for Wales²³

We believe the following principles should underpin the Great Repeal Bill and any other Bill relevant to the UK's exit from the EU:

- 1. The whole process of exiting the EU must always ensure respect for the rule of law.**

In the recent words of the former Lord Chief Justice, Lord Judge, "An elementary principle which underpins the rule of law in our country is that laws are made after Parliamentary scrutiny". Exiting the EU will bring with it the biggest legislative challenge ever faced by the National Assembly (and, indeed, the UK as a whole), and the rule of law requires that the primary and secondary legislation that arises from exiting the EU is properly scrutinised.

- 2. The legislation arising from exiting the EU must be clear, precise and well-drafted.**

Certainty of the law is another elementary principle which underpins the rule of law.

While the timetable for translating EU law into the law of the UK and devolved nations is tight, care must be taken to ensure that legislation is clear, precise and well-drafted. This will be particularly challenging for drafters seeking to give effect to policy instructions; such instructions are likely to evolve as policy objectives are updated because the Great Repeal Bill's passage will proceed in parallel with the UK Government's negotiations to exit the EU.

²³ This Declaratory Statement was first issued in June 2017. References to the Great Repeal Bill should be construed as references to the European Union (Withdrawal) Bill.

3. The UK Government's Great Repeal Bill (and other Bills relevant to exiting the EU) must be informed by its clear vision for the constitutional construction of the United Kingdom. That vision must be published.

In essence the UK Government must publically answer the question: what is the Union for? This question has not received sufficient attention, creating even greater uncertainty around the constitutional direction of the United Kingdom at this crucial time. We echo the words of the House of Lords Constitution Committee in a 2014/15 report that there is "no clear focus within [UK] Government for oversight of the constitution".

4. The National Assembly must be the legislature responsible for legislating in devolved areas.

This includes: (1) passing primary legislation in devolved areas, (2) delegating powers to the Welsh Ministers to make subordinate legislation as the National Assembly considers appropriate, and (3) the procedure to be applied to scrutiny of that delegated legislation.

In this context, it is important to remember the very first section of the Government of Wales Act 2006 (as amended by the Government of Wales Act 2017). Section A1 of the 2006 Act is a statutory declaration, declaring: (1) that the Assembly and the Welsh Government are permanent parts of the constitution of the United Kingdom, and (2) the commitment of the UK Parliament and the UK Government to devolution in Wales.

Any discussion around the constitution and role of the Union must be framed in the context of section A1 of the 2006 Act.

5. Where the UK Parliament / Government seeks to legislate through primary / secondary legislation in devolved areas, they must seek the consent of the National Assembly for Wales in accordance with Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales and the National Assembly's Standing Orders.

Annex 2

The table below provides our assessment of whether the latest UK Government amendments to the Bill reflect four of the seven recommendations contained in our report on the *Scrutiny of Regulations made under the European Union (Withdrawal) Bill* **and endorsed by the Assembly**.

<p>Recommendation 1 (linked to recommendation 6):</p> <p>that the sifting mechanism currently included in the Bill should cover all regulations made under the Bill that are laid before the Assembly (whether made by the Welsh Ministers acting alone or acting together with UK Ministers), and that an Assembly committee should be responsible for the sifting.</p>	<p>These recommendations have mostly been accepted.</p> <p>The amendments provide that an Assembly committee would be responsible for sifting regulations made under the Bill that are laid before the Assembly:</p> <ul style="list-style-type: none"> - The Assembly committee would sift all regulations made by the Welsh Ministers acting alone under the Bill. - With regard to regulations that are made by the Welsh Ministers and UK Ministers acting together the position is still unclear.
<p>Recommendation 2: that the decision of the sifting committee (as to which procedure should apply to regulations) should be binding.</p>	<p>This recommendation has not been accepted. However, at Report Stage in the House of Lords, a non-government amendment (amendment 70) was accepted in line with recommendation 2 but in respect of the UK Parliament only.</p>
<p>Recommendation 4 (part i): that the affirmative procedure should automatically apply in more circumstances²⁴.</p>	<p>This recommendation has not been accepted; the affirmative procedure will not automatically apply in more circumstances.</p>

²⁴ In particular, when: (a) regulations are making policy, and (b) regulations are amending primary legislation.

<p>Recommendation 4 (part ii): that regulations made under the Bill should not be able to amend the Government of Wales Act 2006 (the 2006 Act).</p>	<p>This recommendation has been partly accepted:</p> <ul style="list-style-type: none">- The regulation-making powers to correct deficiencies²⁵ will no longer be able to amend the 2006 Act.- The regulation-making powers to comply with international obligations²⁶ will be deleted so will no longer be able to amend the 2006 Act.²⁷- The regulation-making powers to implement the withdrawal agreement²⁸ will still be able to amend the 2006 Act.- The regulation-making powers to make consequential and transitional provision²⁹ will still be able to amend the 2006 Act.
<p>Recommendation 7: that the “made affirmative” procedure apply to regulations made by the Welsh Ministers in urgent cases.</p>	<p>This recommendation has been accepted.</p>

²⁵ Under clause 7 and Part 1 of Schedule 2.

²⁶ Under clause 8 and Part 2 of Schedule 2.

²⁷ But these powers are expected to be replaced in other primary legislation.

²⁸ Under clause 9 and Part 3 of Schedule 2.

²⁹ Under clause 17.