

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

December 2017

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 passed its second reading on 11 September 2017. It is currently passing through its Committee stage in the House of Commons.²
2. The purpose of the Bill is to repeal the *European Communities Act 1972* the day the United Kingdom leaves the European Union. In addition, the Bill ends the supremacy of European Union (EU) law in UK law and converts EU law as it stands at the moment of exit into domestic law. It also creates powers for UK Ministers (and in respect of Wales, in some instances, powers for Welsh Ministers) 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 European Union. This would enable the domestic legal system to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU.

¹ [European Union \(Withdrawal\) Bill, Bill 5](#)

² Further details are available on the [House of Commons Public Bill pages](#)



The Welsh Government's Legislative Consent Memorandum

3. On 12 September 2017, the First Minister, The Rt. Hon Carwyn Jones AM, laid before the National Assembly a Legislative Consent Memorandum (LCM)³ in respect of the Bill.
4. The Business Committee referred the LCM to this Committee, and the External Affairs and Additional Legislation Committee for consideration on 19 September 2017.

Our initial position on the Bill

5. We set out our initial concerns related to the Bill in two pieces of correspondence.
6. On 7 June 2017, we wrote⁴ to the Chair of the External Affairs and Additional Legislation Committee, as part of its scrutiny of the Great Repeal Bill White Paper.⁵ Our letter set out the principles that we consider should underpin the Bill and any other Bill relevant to the UK's exit from the EU. Those principles are attached in the Annex to this report.
7. On 31 July 2017, we wrote⁶ to the Secretary of State for Exiting the EU, David Davis MP setting out initial views on the Bill following its publication. Robin Walker MP, Parliamentary Under Secretary of State, replied on 24 October 2017.⁷

Provision for which the National Assembly's consent is required

8. The LCM notes several clauses of the Bill that are of "particular relevance to devolved matters", and states that the National Assembly consent is required in respect of each of those clauses. The full list of clauses the Welsh Government considers requires consent is set out in Annex A of the LCM.⁸

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

⁴ Letter to David Rees AM, Chair, External Affairs and Additional Legislation Committee, *UK Government White Paper: Legislating for the United Kingdom's withdrawal from the European Union*, 7 June 2017.

⁵ UK Government, *Legislating for the United Kingdom's withdrawal from the European Union*, Cmd 9446, March 2017.

⁶ Letter to The Rt Hon David Davis MP, Secretary of State for Exiting the European Union, *European Union (Withdrawal) Bill*, 31 July 2017.

⁷ Letter from Robin Walker MP, Parliamentary Under Secretary of State at the Department of Exiting the European Union, *European Union (Withdrawal) Bill*, 24 October 2017.

⁸ It is not always clear from the list in Annex A to the LCM and the list in Annex A to the Bill's Explanatory Notes whether the requirement for consent in relation to a clause also applies to any Schedule that accompanies the clause. For example, for the purpose of this report, and for the

9. The UK Government set out in its Explanatory Notes⁹ to the Bill (at paragraphs 68-70, and Annex A) the provisions for which it believes the National Assembly's consent is required.

10. A summary of the position adopted by each government is set out in the table below.

Table: Summary of the positions of the Welsh Government and UK Government on whether the National Assembly's consent is required for the European Union (Withdrawal) Bill

Clause of the Bill	Consent required?	
	Welsh Government	UK Government
Clause 1: Repeal of the ECA 1972	Yes	Yes
Clause 2 and Schedule 1: Saving for EU-derived domestic legislation	Yes	Yes
Clause 3 and Schedule 1: Incorporation of direct EU legislation	Yes	Yes
Clause 4 and Schedule 1: Saving for rights etc under section 2(1) of the ECA	Yes	Yes
Clause 5 and Schedule 1: Exceptions to savings and incorporation	Yes	No
Clause 6: Interpretation of retained EU law	Yes	No
Clause 7: Dealing with deficiencies arising from withdrawal	Yes	No
Clause 8: Complying with international obligations	Yes	Yes
Clause 9: Implementing the withdrawal agreement	Yes	No
Clause 10 and Schedule 2: Corresponding powers involving devolved authorities	Yes	Yes
Clause 11 and Schedule 3: Retaining EU restrictions in devolved legislation	Yes	Yes

avoidance of doubt, we have assumed that the reference to Clause 17 in Annex A of the LCM includes references to Schedules 8 and 9, which are introduced by clauses 17(4) and (6), and clause 17(7) respectively (by virtue of paragraph 9 to the LCM).

⁹ European Union (Withdrawal) Bill, Explanatory Notes, Bill 5:EN

Clause of the Bill	Consent required?	
	Welsh Government	UK Government
Clause 12 and Schedule 4: Financial provisions	Yes	Yes
Clause 13 and Schedule 5: Publication and rules of evidence	Yes	No
Clause 14 and Schedule 6: Interpretation	No	No
Clause 15: Index of defined expressions	No	No
Clause 16 and Schedule 7: Regulations	Yes	Yes
Clause 17 and Schedules 8 and 9: Consequential and transitional provision	Yes	No
Clause 18: Extent	No	No
Clause 19: Commencement and short title	No	No

11. The LCM states that the Welsh Government will not be able to recommend to the National Assembly that it gives consent to the Bill as currently drafted and highlights specific concerns with:

- clauses 7-9 (because in its view, it gives Ministers of the Crown unacceptably wide regulation-making powers, including the ability to amend devolved law and the devolution settlement without consent);
- clause 10 (because it gives effect to Schedule 2 and in its view, unreasonably restricts Welsh Ministers' correcting powers to domestic EU law);
- clause 11 which in its view, introduces a new constraint on legislative competence.

12. On 19 September 2017, the First Ministers of Wales and Scotland wrote jointly to the Prime Minister stating:

“We have been clear since the Bill was first introduced that our governments could not recommend it as currently drafted to our legislatures for their consent. We have now set out our reasons for that, in detail, in legislative consent memorandums laid before each of the Scottish Parliament and the National Assembly for Wales. And, as we have indicated, we have begun to consider the scope for preparing alternative devolved legislation to provide for continuity of law on withdrawal from the EU. That is not, however, our preferred option. We want a European Union

(Withdrawal) Bill that can be made to work with, not against, devolution. The current Bill will need to be substantially amended for us to be able to recommend to our respective legislatures that they give their consent to it.

Our Governments have therefore prepared a set of amendments which, if made, would make the Bill one which we could consider recommending to the Scottish Parliament and the National Assembly for Wales. We have made these amendments widely available, and in particular to chairs/conveners of the relevant committees in the National Assembly for Wales and the Scottish Parliament. We hope that they will be received in the way they are intended: as a constructive contribution by the devolved administrations, which would enable progress to be made among the governments in a way which respects the hard-won devolution settlements of the UK.”¹⁰

13. Later that day, the First Minister stated in Plenary:

“Members will be aware of our legislative consent memorandum that was published last week. That memorandum sets out in detail those aspects of the Bill that require the Assembly’s consent, and describes very clearly why we don’t accept the Bill in its current form. I don’t propose to rehearse those arguments in detail again. Rather, I’d like to focus on the constructive solution, which the amendments published represent, a solution to a problem entirely of the UK Government’s own making, and one which could have been avoided had there been any genuine attempt to engage with the devolved administrations on the content of this Bill. We don’t bite. It would have been much easier for us to have had this discussion some time ago.”¹¹

14. In a concurrent evidence session with the External Affairs and Additional Legislation Committee, the First Minister told us that the amendments that had been suggested to the Bill by the Welsh Government, were “all red lines”.¹²

15. Following an earlier concurrent session with the External Affairs and Additional Legislation Committee about the Bill,¹³ Robin Walker MP, Parliamentary Under

¹⁰ Joint letter to the Prime Minister from The Rt. Hon. Nicola Sturgeon MSP, First Minister of Scotland, and The Rt. Hon. Carywn Jones AM, First Minister of Wales, 19 September 2017.

¹¹ 19 September 2017, RoP [228].

¹² External Affairs and Additional Legislation Committee and Constitutional and Legislative Affairs Committee, 27 November 2017, RoP [21].

Secretary of State for Exiting the European Union, wrote to us explaining that the UK Government did not believe that the Assembly's consent is required for Clauses 7 and 9 of the Bill. He said:

“There are two tests for whether a clause meets the test for legislative consent from the Assembly. The first is whether the clause would be within the legislative competence of the assembly, and the second is whether the clause would alter the legislative competence of the assembly. Our technical analysis indicates that clauses 7 and 9 do not meet either of those criteria and so they alone do not trigger the legislative consent process.

We sought legislative consent for the Bill when it was introduced. It is for the Welsh Assembly to decide whether it gives that consent.”¹⁴

Our view

Introduction and general observations about the UK constitution

- 16.** This report outlines the main issues we wish to raise in relation to the LCM. However, before turning to those issues, we make some observations regarding the constitutional arrangements of the United Kingdom.
- 17.** We wish to emphasise the importance of respecting the legislative consent process – that process must be a central safeguard to the devolution settlement. In the context of the Bill, this raises several concerns:
- The Sewel Convention plays a fundamental role in the operation of the UK constitution. The UK Supreme Court¹⁵ recognised the important role the Sewel Convention has in facilitating harmonious relationships between the UK Parliament and the devolved legislatures.
 - It follows that the legislative consent process must be respected. It also follows that if the National Assembly refuses to give consent to the Bill and the UK Parliament goes ahead with the Bill regardless, then grievous damage would be caused to the UK constitution.

¹³ Evidence was taken from the Secretary of State for Wales, Alun Cairns MP and Robin Walker MP, Parliamentary Under Secretary of State for Exiting the European Union, External Affairs and Additional Legislation Committee and CLA Committee, RoP, 6 November 2017.

¹⁴ Letter to David Rees AM, Chair, External Affairs and Additional Legislation Committee, *European Union (Withdrawal) Bill*, Annex B, 4 December 2017.

¹⁵ *R. (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

- The Bill has brought into sharp focus the need for the UK constitution to develop stronger inter-governmental structures, including better shared governance. This has been a recurring theme in our Stronger Voice inquiry, which will report in the New Year.
- Devolution has fundamentally changed the UK constitution. While it is widely recognised in Wales, Scotland and Northern Ireland that the UK constitution has moved on from a London-centric model, it is not always clear that the UK Government recognises that the UK constitution has moved on in the same way.
- Given the above concerns, we believe that the case for constitutional reform to address these issues is very strong.

Clauses 7-10

- 18.** The Bill sets out a complex range of delegated powers for UK Ministers to make regulations on correcting deficiencies in retained EU law (clause 7), compliance with international obligations (clause 8) and implementing the withdrawal agreement (clause 9). Clause 10 and Schedule 2 provide similar but less extensive delegated powers for Welsh Ministers to make regulations in these areas.
- 19.** We are in the process of undertaking an inquiry into delegated powers under the Bill and will report in the New Year.
- 20.** However, there are a number of points we wish to highlight at this stage.
- 21.** We repeat the concerns we have raised previously that the Bill sets out the procedure that applies to regulations made under the Bill that are to be laid before the National Assembly.
- 22.** In our view, it is for the National Assembly to decide what procedures will apply to regulations laid before the Assembly, based on what the National Assembly considers appropriate. We note the comments of Robin Walker MP that the *Government of Wales Act 2016* (as amended) gives the National Assembly the power to vary Assembly scrutiny arrangements provided in enactments including in Acts of Parliament.¹⁶ We intend to consider this issue as part of our inquiry on delegated powers.
- 23.** More generally, we accept that the legislative challenge posed by exiting the EU is huge and unprecedented. We accept that government ministers require

¹⁶ Letter from Robin Walker MP, Parliamentary Under Secretary of State at the Department of Exiting the European Union, *European Union (Withdrawal) Bill*, 24 October 2017.

regulation-making powers to deal with that challenge. However, we do not believe that is a reason to ignore some basic constitutional principles. In particular:

- Regulation-making powers must not be used to shift the balance of power excessively towards governments and away from legislatures (in particular, the devolved legislatures as we believe happens under the Bill).
- Regulation-making powers that allow primary legislation to be amended (Henry VIII powers) must be clearly justified and at the very least, be subject to the affirmative procedure; this is a long-standing view we have held. The powers to amend primary legislation is a particular concern to us given that the powers can be used to amend the *Government of Wales Act 2006* and primary legislation in devolved areas. It is therefore of particular concern to read in the Delegated Powers Memorandum that:

“The UK Government will not *normally* use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority.”¹⁷ [Our emphasis].

and

“Adopting the affirmative procedure for small corrections to primary legislation would produce impractical results. Instead, the requirement for affirmative procedures is based on the type of correction rather than where the correction is being made.”¹⁸

- The important aspect of regulation-making powers is how they could be used. While we often hear reassurances from government ministers that they “do not intend to use a power in a certain way”, the real question is “how could the powers be used?” In this context, it is important to remember that withdrawal will, in one way or another, affect almost all areas of life. It follows that the regulation-making powers could extend to almost all areas of life.

24. We are concerned by the way these basic principles are eroded under the Bill, and that the powers in the Bill could be used by government ministers to make significant policy changes in devolved areas “as they consider appropriate”, and without proper scrutiny by the Assembly.

¹⁷ European Union (Withdrawal) Bill, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, paragraph 11

¹⁸ European Union (Withdrawal) Bill, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, paragraph 47.

25. While that applies equally to the Welsh Ministers and UK Ministers, we also note that UK Ministers have far broader powers than the Welsh Ministers. Again, and notwithstanding our general concerns, this reflects a lack of parity; even in devolved areas, the Bill gives the UK Ministers greater powers than the Welsh Ministers.

26. We therefore agree with conclusions expressed in a recent report of the House of Lords Constitution Committee,¹⁹ when it said:

“We are concerned about the delegated powers the Government is seeking in the European Union (Withdrawal) Bill. The number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence. We stress the need for an appropriate balance between the urgency required to ensure legal continuity and stability, and meaningful parliamentary scrutiny and control of the executive.”²⁰

and,

“We are concerned that, despite the broad powers contained in clauses 7 to 9 to make substantial changes to retained EU law, only a narrow range of matters require the express consent of Parliament through the affirmative procedure. This is not constitutionally acceptable for Henry VIII powers of this significance.”²¹

Clause 11

27. Clause 11 of the Bill freezes the competence of the National Assembly for Wales in relation to EU law. The National Assembly must currently comply with EU law and the Bill says that, after exit, the Assembly will have to comply with retained EU law, i.e. the body of EU law that will be retained after exit.

¹⁹ House of Lords Constitution Committee, *European Union (Withdrawal) Bill: interim report*, 3rd Report of Session 2017-19, HL Paper 19, September 2017.

²⁰ HL Paper 19, September 2017, paragraph 44

²¹ HL Paper 19, September 2017, paragraph 56

28. The Explanatory Notes to the Bill say that this:

“... is intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed. It provides that the devolved legislatures or administrations may only modify retained EU law to the extent that they had the competence to do so immediately before exit. This means that devolved institutions will still be able to act after exit as they could prior to exit in relation to retained EU law.”²²

29. While it is intended to be a transitional provision, the Bill includes no provision to time limit the application of Clause 11. In this regard, we note the views of the First Minister that:

“... we wouldn't accept a sunset clause. Who is to say that it wouldn't be extended ad infinitum in the future? It's a matter of principle here. Either Governments across the UK can trust in themselves and each other to come to sensible agreements across the UK or not, and clause 11 is a clause that, to me, suggests that somehow we can't be trusted.”²³

30. The Bill does not, however, include any such freezing in relation to the UK Parliament, even in devolved areas. The Bill in its intention to revive the supremacy of the UK Parliament, appears to do so at the expense of devolution. As part of the transitional arrangement, the National Assembly is being asked to trust the UK Government and the UK Parliament with devolved areas. In our view, it is doubtful that the UK Government ever considered the alternative approach that, during this transitional period, the UK Government and UK Parliament should trust the National Assembly in devolved areas.

31. We note evidence given to the House of Commons Public Administration and Constitutional Affairs Committee inquiry into Devolution and Exiting the EU.²⁴ With regard to clause 11, that inquiry heard evidence that the reliance on the supremacy of the UK Parliament in clause 11 amounts to a “legislative blunderbuss”²⁵ which is “not a good way of building trust with the devolved Administrations”.²⁶

²² European Union (Withdrawal) Bill, Explanatory Notes, Bill 5-EN, paragraph 34.

²³ External Affairs and Additional Legislation Committee and Constitutional and Legislative Affairs Committee, 27 November 2017, RoP. [128]

²⁴ House of Commons Public Administration and Constitutional Affairs Committee, Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration, First Report of Session 2017-19, HC 484, November 2017.

²⁵ HC 484, November 2017, Question 26

²⁶ HC 484, November 2017, Question 26

- 32.** Similarly, the inquiry heard evidence that clause 11 “could be described as a bit of a steam-hammer”,²⁷ and asking whether “that sort of block is necessary and is there room for some attenuation of this to deal with the matters that really would cause damage to the UK’s internal market”.²⁸
- 33.** Finally, with regard to clause 11, the National Assembly’s competence in relation to EU law / retained EU law is being frozen; the Assembly will have to comply with retained EU law. However, both the Welsh Ministers and UK Ministers are given powers to modify retained EU law. This means that if the Welsh Ministers modify retained EU law, then that will modify the legislative competence of the Assembly. Under the Bill such actions could be carried out by regulations which are subject to the negative procedure.
- 34.** In addition, given that it is only UK Ministers who can modify some aspects of retained EU law, even in devolved areas, this would result in the legislative competence of the National Assembly being defined by the executive action of the UK Government. Under the Bill, such executive action could be carried out by regulations which:
- (i) follow the negative procedure in the UK Parliament,
 - (ii) do not have to be laid before the Assembly, and
 - (iii) would not require the National Assembly’s consent under Standing Order 30A because it is not amending primary legislation but certain aspects of retained EU law under Clauses 3 and 4 of the Bill.
- 35.** This highlights the concerns we refer to earlier in our report regarding the use of delegated powers under the Bill.
- 36.** Clause 11(2) envisages that the freezing of the Assembly’s competence in relation to retained EU law can be released via Orders in Council, and this is recognised in the Explanatory Notes to the Bill:
- “The Bill further provides a power to release areas from the limit on modifying retained EU law ...”²⁹
- 37.** Orders in Council are likely to apply to specific areas where a common UK framework is not required. A selective process such as this is reminiscent of a conferred powers model and will only add another layer of complexity to the

²⁷ HC 484, November 2017, Question 100

²⁸ HC 484, November 2017, Question 100

²⁹ European Union (Withdrawal) Bill, Explanatory Notes, Bill 5-EN, paragraph 36

devolution settlement in Wales, which is moving to a reserved powers model from 1 April 2018.

38. Our consideration of Clause 11 has drawn our attention to the issue of common UK frameworks. The Explanatory Notes to the Bill say:

“The UK Government hopes to rapidly identify, working closely with the devolved administrations, areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power.”³⁰

39. We acknowledge that common frameworks will be needed in some areas.

However, the Bill does not set out any procedure or guidance as to how decisions will be reached on common frameworks. While we have heard evidence from the First Minister that, in relation to the first stage of exploring an agriculture common framework, it has been a case of “so far, so good”,³¹ discussions around common frameworks appear still to be at very early stages.

40. Given our general observations about the UK constitution and the lack of strong inter-governmental structures, we are concerned that agreeing on common frameworks will become a lengthy and disputed process, with the possibility of common frameworks in devolved areas being imposed on Wales.

41. Finally, it must be recognised that in devolved areas, the UK Government is acting as the English Government. We emphasise the importance of common UK frameworks being workable for all parts of the United Kingdom, with the interests of all parts of the United Kingdom recognised.

CONCLUSIONS

42. We agree that the clauses of the Bill set out in Annex A to the Welsh Government's LCM require consent (except so far as they relate to Schedules 5 and 9), although we would have liked to explore the differences of opinion between the UK and Welsh Governments in greater depth.

43. In our view, consent should be withheld by the National Assembly unless appropriate amendments are made to the European Union (Withdrawal) Bill.

³⁰ European Union (Withdrawal) Bill, Explanatory Notes, Bill 5-EN, paragraph 36

³¹ External Affairs and Additional Legislation Committee and Constitutional and Legislative Affairs Committee, 27 November 2017, RoP, [73]

Annex

Constitutional and Legislative Affairs Committee, National Assembly for Wales:

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

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.

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.**