

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No 2) on the Agriculture Bill

June 2019

Background

The Bill

1. The UK Government's Agriculture Bill¹ (the Bill) received its first reading in the House of Commons on 12 September 2018 and completed Committee Stage on 20 November 2018. The Bill as amended in Public Bill Committee was published on 21 November 2018.²
2. Report Stage in the House of Commons is yet to be scheduled.
3. In summary, the Bill makes provision about a legal framework for the United Kingdom to leave the Common Agricultural Policy while establishing a new system based on "public money for public goods for the next generation of farmers and land managers".³
4. More detailed information about its provisions, including explanatory notes, is available is on the UK Parliament website.⁴

¹ [Agriculture Bill 2018-19, HC 266](#)

² [Agriculture Bill 2018-19, HC 292](#)

³ UK Government, [Agriculture Bill: Explanatory Notes](#), September 2018 (Explanatory notes), paragraph 1

⁴ [UK Parliament, Agriculture Bill 2017-19](#)



The Welsh Government's Legislative Consent Memorandum

5. On 4 October 2018, Lesley Griffiths AM, the then Cabinet Secretary for Energy, Planning and Rural Affairs, laid before the National Assembly a Legislative Consent Memorandum (LCM) in respect of the Bill, as introduced in the House of Commons.⁵
6. We reported on this LCM on 4 January 2019 (first report).⁶
7. The Welsh Government is yet to respond to our first report.

The Welsh Government's Supplementary Legislative Consent Memorandum

8. On 26 March 2019, Lesley Griffiths AM, the Minister for Environment, Energy and Rural Affairs (the Minister) laid a supplementary Legislative Consent Memorandum (No. 2) (LCM No 2) in respect of the Agriculture Bill.⁷
9. The Business Committee agreed that the Climate Change, Environment and Rural Affairs Committee, the Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee should report on LCM No 2 by 11 June 2019.⁸
10. LCM No 2 sets out supplementary provisions in the Bill for which consent is now required. It states:

“The Welsh Government laid a Legislative Consent Memorandum in relation to the Agriculture Bill (as introduced on 12 September 2018) on 4 October. It noted two outstanding concerns which had not been resolved to our satisfaction relating to the World Trade Organisation (WTO) Agreement on Agriculture and the Red Meat Levy and that work to resolve our outstanding concerns would continue during the Bill's passage through Parliament. Since the publication of the first Memorandum, the Bill has been amended during scrutiny in the House of Commons and agreement has been reached with the UK Government on the two outstanding issues of disagreement.

⁵ Welsh Government, [Legislative Consent Memorandum Agriculture Bill](#), October 2018

⁶ Constitutional and Legislative Affairs Committee, [The Welsh Government's Legislative Consent Memorandum on the Agriculture Bill](#), January 2019

⁷ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Agriculture Bill](#), March 2019

⁸ Business Committee report, [Timetable for consideration of the Supplementary Legislative Consent Memorandum on the Agriculture Bill](#), April 2019

This Supplementary Memorandum sets out those changes to the Bill made at Commons Committee stage which require the consent of the Assembly. It also explains the agreement reached with UK Government on how the Secretary of State will exercise the powers relating to Part 7 (WTO Agreement on Agriculture) so that the interests of all parts of the UK are fully considered. The amendments made and the agreement reached together address the two concerns highlighted in paragraph 23 of our first Legislative Consent Memorandum. However, we anticipate further changes could be made to the Bill at House of Commons Report stage and as it progresses through the Lords. The first and Supplementary Memorandum must be considered together (with any further Supplementary Memorandums which may be laid before the Assembly to cover any future amendments) when deciding on consent.

The provisions for which consent is sought are contained in Part 7 (WTO Agreement on Agriculture); Part 8 (Red Meat Levy); Schedule 3 (Provision relating to Wales), and Part 10 of the Bill (Final Provisions). The clause numbers... relate to the version of the Bill ordered to be printed on 20 November and published on 21 November (the version as amended in Committee)."⁹

11. Paragraphs 11 to 24 of LCM No 2 provide further details on the WTO Agreement on Agriculture, the Red Meat Levy, financial support after exiting the European Union (Schedule 3, Part 3), intervention in agricultural markets (Schedule 3, Part 4), and on the final, ancillary provisions of the Bill (Part 10).

12. LCM No 2 states the reasons for making provisions for Wales in the Agriculture Bill:

“As set out in the first Memorandum, the Welsh Government considers that legislation is necessary to provide a legal basis for future support to farmers after Brexit, as we transition away from the Common Agricultural Policy. By including provisions now in the UK Agriculture Bill the Welsh Ministers can support farmers in Wales, and will be able to implement what is best for Wales.

A new power is also included in the Bill to redistribute red meat levy to resolve current anomalies. The Agriculture Bill provides an ideal

⁹ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Agriculture Bill, March 2019, paragraphs 8 to 10. See also paragraphs 25 to 27.

opportunity to gain the necessary powers to bring forward an appropriate scheme to correct this imbalance.”¹⁰

13. With regards to the Bill as amended, LCM No 2 notes the Welsh Government's position:

“Welsh Government is content with the amendments tabled by UK Government Ministers during Commons Committee in respect of the Red Meat Levy (Part 8), the amendments to Schedule 3 (Provision relating to Wales) and the amendments to Part 10 (Final Provisions). It is also content with the provisions in respect of the WTO Agreement on Agriculture in view of the agreement reached with the Secretary of State on the exercise of those regulation making powers.”¹¹

14. In a letter to us on 26 March 2019, the Minister told us:

“(…) we have successfully secured an amendment to the Bill to provide appropriate means for resolving the long standing issue of repatriation of red meat levy. (...) The new Clause confers powers on Ministers, acting jointly, to establish a scheme that requires agricultural boards within Great Britain to redistribute levy between themselves. Officials will now continue to develop scheme in parallel to the legislation progressing through Parliament to ensure a fair system is in place as soon as possible.”¹²

15. In relation to the WTO Agreement on Agriculture, the letter states:

“(…) we have secured a significant agreement with the UK Government to govern the use of Secretary of State powers in the UK Agriculture Bill in respect of the UK's compliance with the WTO Agreement on Agriculture. This ensures that the interests of Wales are fully taken into account. (...) The agreement sets out a robust and transparent mechanism for involving Welsh Ministers in decision making as well as a mechanism for dispute resolution. I am pleased with this outcome,

¹⁰ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Agriculture Bill](#), March 2019, paragraphs 29 and 30

¹¹ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Agriculture Bill](#), March 2019, paragraph 31

¹² [Letter from the Minister for Environment, Energy and Rural Affairs, 26 March 2019](#)

which provides a strong role and flexibility for Welsh Ministers following extensive and highly collaborative working between Governments.”¹³

16. The mechanism for governing the Secretary of State powers, as mentioned in the Minister's letter, has been codified in The UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill (Bilateral Agreement), published on 21 March 2019.

17. The Bilateral Agreement sets out the arrangements for the initial making of regulations under clause 28¹⁴ (WTO Agreement on Agriculture: regulations) and the ongoing operation of the Part 7 regulations.

18. With regards to the initial making of regulations:

- Defra officials will share with counterparts in devolved administration's (DAs) proposals for regulations to be made under the WTO powers in the Agriculture Act (as it will become if the Bill is enacted).
- Draft regulations will be presented to the four UK agriculture Ministers with the aim of securing agreement, followed by an exchange of letters.
- The process for sharing regulations and consulting the devolved administrations should be guided by the principles set out in the Inter-governmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks. The administrations are committed to seek to proceed by agreement. If this is not possible, the matter would be escalated in line with the existing MoU governing Intergovernmental relations and any future agreements in place between Defra and the DAs on dispute resolution.
- In the event of a dispute, once all these attempts at resolution have been exhausted, the exchange of letters should be made available to both Houses of Parliament in advance of the affirmative vote on the regulations made under Part 7.¹⁵

19. The second part of the Bilateral Agreement sets out a process designed to deal with decisions related to WTO classifications. The process indicates that

¹³ Letter from the Minister for Environment, Energy and Rural Affairs, 26 March 2019

¹⁴ This was clause 26 in the Bill as presented to the House of Commons on 12 September 2018 (HC 266)

¹⁵ The UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill, 21 March 2019

proposed classifications should be discussed by officials, and submitted to the four UK agriculture Ministers. In the event consensus cannot be reached through existing dispute resolution mechanisms, issues may be referred to an expert panel for independent advice. The purpose of the panel is to prepare independent, expert advice on the issue being considered. The Secretary of State should have regard to that advice when making a final decision.¹⁶

20. The Bilateral Agreement notes that:

“Agreement of these arrangements reflect the particular, technical nature of WTO rules and is without prejudice to the wider work on dispute resolution which is being taken forward as part of the Intergovernmental Relations Review commissioned by the Joint Ministerial Committee.”¹⁷

21. In summarising the agreement reached on Part 7 of the Bill, paragraph 13 of LCM No 2 states:

“In summary, the clear onus is on seeking agreement. However, where that is not feasible there are strong mechanisms for the Welsh Ministers to exert their views. These arrangements will be codified in a Memorandum of Understanding and the Secretary of State will put this on record in a statement on the floor of the House of Commons. This is a good outcome providing a strong role and flexibility for the Welsh Ministers following extensive and highly collaborative working between Governments. It provides a valuable model which could be used in other areas where intergovernmental cooperation is needed and demonstrates both governments’ commitment to collaboration.”¹⁸

22. Part 10 of the Bill includes provisions relating to regulations, interpretation and extent.

23. Clause 32 (Regulations) has been amended so that regulations made under section 32(3)(c) which make supplementary, incidental, consequential, transitional or saving provision modifying primary legislation will be subject to the affirmative resolution procedure. Regulations made under paragraphs 6(3), 11(5), 12(4), 20(3)

¹⁶ [The UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill](#), 21 March 2019

¹⁷ [The UK and Welsh Government Bilateral Agreement on WTO provisions within the Agriculture Bill](#), 21 March 2019

¹⁸ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No 2\), Agriculture Bill](#), March 2019, paragraph 13

and 22(3) of Schedule 3 will also be subject to the affirmative procedure if the relevant power is used, by virtue of section 32(3)(c), to make supplementary, incidental, consequential, translation of saving provision modifying primary legislation.¹⁹

24. The Annex to LCM No 2 sets out a list of subordinate legislation making powers conferred on the Welsh Ministers, updated from the original LCM to take account of the amendments made at House of Commons Committee stage as described in LCM No 2.²⁰

25. LCM No 2 states:

“Further changes are likely to be made to the Bill at House of Commons Report stage and as it progresses through the Lords, not least in order to respond to points raised by Committee scrutiny in the National Assembly, in which case further Memoranda will be laid before the Assembly as appropriate. A final recommendation in respect of the National Assembly’s consent will be provided once all amendments to the Bill have been made.”²¹

Committee consideration

26. We considered LCM No 2 at our meeting on the 13 May 2019. We were not in a position to take evidence from the Minister due to the tight timetable for reporting.

Our view

27. We note the views of the Welsh Government as set out in LCM No 2.

28. We are disappointed that the Minister has not issued a formal response to the conclusions and recommendations in our first report on The Welsh Government’s Legislative Consent Memorandum on the Agriculture Bill (first report). Based on our own assessment it would appear that, for certain, recommendations 1, 2, 6 and 9 of our first report have not been acted upon.

¹⁹ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Agriculture Bill, March 2019, paragraph 23

²⁰ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Agriculture Bill, March 2019, Annexe

²¹ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No 2), Agriculture Bill, March 2019, paragraph 31

29. Recommendation 5 and paragraphs 129 to 131 of our first report commented on the use of the negative procedure in respect of regulations to be made under paragraph 9(1) of Schedule 3 to the Bill. It is not clear if the Minister did undertake a review of the procedures attached to the regulation-making powers delegated to the Welsh Ministers (as per recommendation 5 of our first report) nor if she did seek to amend the Bill to apply the affirmative procedure to regulations made under paragraph 9(1) of Schedule 3 (as per paragraph 130 in our first report). However, we acknowledge and welcome the fact that the Bill as amended does require that regulations made under that paragraph – now paragraph 11(1) – will be subject to the affirmative procedure if the relevant power is used to make supplementary, incidental, consequential, transitional or saving provision modifying primary legislation.

30. We draw attention to paragraphs 86 to 111 of our first report. We remain of the view that the UK Agriculture Bill transfers extensive powers to the Welsh Ministers to develop significant policy and, in doing so, prevents detailed scrutiny by Assembly Members. For that reason we wish to repeat the view expressed in paragraph 110 of our first report – **we are not satisfied with the Welsh Government's approach to this UK Bill.**

31. While it is evident that the Welsh and UK Governments have continued their discussions about the WTO provisions in the Bill since we produced our first report, it appears that the dispute over whether the Assembly's consent is required for these provisions is unresolved. Recommendation 9 of our first report asked the Minister to explain why it may not be necessary to amend clause 26 – now clause 28 – of the Bill to resolve the Welsh Government's concerns. Further, we asked that the Minister explain whether the agreement she spoke of would allow UK Ministers to act in devolved areas without scrutiny by the National Assembly. We have not, as set out above, received any such explanation, and the issue is not acknowledged in LCM No 2.

32. For the avoidance of doubt, the agreed governance mechanism between the Welsh and UK Governments and a commitment from the UK Government to consult the Welsh Government before making regulations under clause 28 does not mean that the UK Government has agreed that the provisions of clause 28 fall within the Assembly's competence. As such, **the agreed governance mechanism does not equate to a consent-seeking process.** For these reasons, **we question why the Minister is content with the current situation.** We are of the view that the Minister's approval of this negotiated position is particularly confusing if the Minister still believes that the provisions of clause 28 fall within the National Assembly's legislative competence. We are disappointed that the Minister has not

provided further clarity on the Welsh Government's assessment of legislative competence.

33. Furthermore, we note that the Minister's comments on the negotiated position have included statements such as "this is a good outcome" and this is a "valuable model for the future". We are surprised at the tone of those comments. **The position arrived at with clause 28 – and the Bill as a whole – presents a significant transfer of power which prevents the National Assembly from holding the Welsh Government to account in a way that is constitutionally appropriate. The Bilateral Agreement, negotiated by the Minister, would not be our chosen model for the future and we do not believe it is a good outcome.**

34. In our view, the Bilateral Agreement appears to provide the UK Government with all the power. Despite the processes for co-operation and consultation set out in the Bilateral Agreement, the Secretary of State will have the final say on draft regulations. In making Part 7 regulations, it is the UK Parliament that will discharge the scrutiny duty, despite it not having done so in the area of Welsh agriculture policy for 20 years, whereas the National Assembly does not have a role. As stated in our first report, **the National Assembly's scrutiny function is being bypassed, which is a situation we find constitutionally unacceptable.**

35. In our view, the Bilateral Agreement does not adequately respect the role of the National Assembly as a legislature. In the event that a dispute arises between the Governments, the exchange of relevant letters will be made available to both Houses of Parliament. This process recognises the role of those Houses in scrutinising the regulations that will be made under Part 7 of the Bill. However, **not only will the National Assembly have no involvement in making important secondary legislation that applies in Wales, it potentially will also not be told when the UK Government may be proceeding with such regulations, about which the Welsh Government may have concerns. Again, this is not acceptable.**

36. In January 2019, an Inter-Institutional relations agreement between the National Assembly for Wales and the Welsh Government (Inter-Institutional agreement) was settled on by both parties. In our view, the Inter-Institutional agreement represents an example of the legislature and the executive acknowledging their respective roles and working together to develop appropriate arrangements that will help facilitate robust scrutiny of the UK's withdrawal from the EU.

37. Paragraph 8 of the Inter-Institutional agreement states "This Agreement seeks to ensure that the principles of the Welsh Government's accountability to the National Assembly for Wales and transparency with regard to these

relationships are built into the revised intergovernmental mechanisms". We are concerned that, in respect of the intergovernmental handling of the Agriculture Bill, these principles have not been taken into account.

Recommendation 1. The Minister should provide details on how, in her approach to and handling of the Agriculture Bill, she has complied with the requirements of the Inter-Institutional relations agreement between the National Assembly for Wales and the Welsh Government, particularly paragraphs 8 and 14 to 17 of that Agreement.

38. Without being afforded a scrutiny role, the National Assembly must be provided with assurance that it will, as a minimum, be notified of the making of important agriculture-related regulations, including where intergovernmental dispute exists.

39. Standing Order 30C sets out requirements in circumstances where the Welsh Ministers consent to the UK Ministers acting in devolved areas under the European Union (Withdrawal) Act 2018. We note that the Welsh Ministers will not, in the case of regulations made under Part 7 of the Bill, provide consent to the UK Ministers.

Recommendation 2. We believe a procedure comparable to the procedure outlined in Standing Order 30C should be developed, that recognises the terms of the Bilateral Agreement, and which applies to the relevant regulations made under the Agriculture Bill, once enacted.

40. The Bilateral Agreement is not legally binding on either government. It will, as with other intergovernmental agreements, rely on ongoing co-operation between those governments. Co-operation may be influenced by a number of factors and, within the current political landscape, we believe we have legitimate cause to express concern about the reliance upon and the sustainability of such agreements.

41. We have been clear in previous reports that the UK leaving the EU will necessitate new intergovernmental relationships. In our report on *UK governance post-Brexit* (February 2018) we called for a significant reform of the Joint Ministerial Committee (JMC). In our view, the current intergovernmental position as regards the Agriculture Bill, and specifically the future handling of regulations regarding the WTO Agreement on Agriculture, serves to highlight that **constitutional reform is needed more than ever**. Recommendation 3 of our report on *UK governance post-Brexit* called for the JMC to become a transparent and accountable UK-wide Council, that acted as a decision-making body and which

was subject to an independent dispute resolution mechanism. **We remain of the view that fundamental reform of the JMC, such as that proposed above, is urgently required.**

42. With regards to the settling of intergovernmental disputes, the Minister stated that the Bilateral Agreement sets out a mechanism for dispute resolution. The Bilateral Agreement, as it relates to the initial making of Part 7 regulations, says that, should agreement not be reached between both Governments, matters would be escalated in line with “the existing MoU governing Intergovernmental relations and any future agreements in place” between Defra and the devolved administrations on dispute resolution. In terms of the ongoing operation of Part 7 regulations, the Bilateral Agreement states that the terms of the Agreement are without prejudice to the wider work on dispute resolution which has been commissioned by the Joint Ministerial Committee. In our view, **it would appear that the Minister has agreed to subject the making of Part 7 regulations to existing, unsatisfactory intergovernmental Memoranda of Understanding, in the hope that future dispute resolution mechanisms will suitably and appropriately meet the needs of Wales. We question the rationale behind such a decision.**

43. For the reasons outlined above, **we are therefore dismayed at the Minister's approach to the Bill and, in particular, the position expressed within paragraph 13 of LCM No 2.**

44. Our consideration of LCM No 2 has been hindered by the lack of a timely response to our first report. **The Minister should formally respond to our first report as a matter of urgency.**

45. We are also disappointed that we have not been provided with an update on the Welsh Government's plans for its own Agriculture Bill. We hope that such clarity will be provided in the Welsh Government's legislative statement, which we anticipate will be delivered by the First Minister in early July.