

The Welsh Government's Legislative Consent Memorandum on the Direct Payments to Farmers (Legislative Continuity) Bill

January 2020

1. Background

The UK Government's Direct Payments to Farmers (Legislative Continuity) Bill

- 1.** The UK Government's Direct Payments to Farmers (Legislative Continuity) Bill¹ (the Bill) was introduced to the House of Commons and given its first reading on 9 January 2020. It is sponsored by the Department for Environment, Food and Rural Affairs (DEFRA).
- 2.** The main purpose of the Bill is to provide the legal basis to continue paying Direct Payments to farmers by ensuring that the scheme continues in each part of the UK for claim year 2020.
- 3.** The explanatory notes to the Bill (as introduced) state that it is necessary because, under the terms of the Withdrawal Agreement (WA), the EU Direct Payments legislation will not apply in the UK for the 2020 claim year.²
- 4.** Second reading of the Bill is scheduled to take place in the House of Commons on 21 January 2020.³

¹ [Direct Payments to Farmers \(Legislative Continuity\) Bill](#)

² Direct Payments to Farmers (Legislative Continuity) Bill, [Explanatory Notes](#), paragraph 1

³ See the [UK Parliament website](#) for information on the Bill stages in the House of Commons and House of Lords.



The Welsh Government's Legislative Consent Memorandum

5. On 14 January 2020 the Minister for Environment, Energy and Rural Affairs, Lesley Griffiths AM (the Minister), laid before the National Assembly a Legislative Consent Memorandum (LCM)⁴ in respect of the Bill.

6. The Business Committee agreed that the Constitutional and Legislative Affairs Committee (the Committee), and the Climate Change, Environment and Rural Affairs (CCERA) Committee, should report on the LCM by 21 January 2020.⁵

Provision for which the National Assembly's consent is required

7. Paragraphs 8 to 81 of the LCM set out the Welsh Government's assessment that all provisions in the Bill require the consent of the National Assembly.

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

9. The Welsh Government and UK Government both agree that a Legislative Consent Motion is needed in relation to all clauses of and Schedules to the Bill.

10. Paragraphs 82 to 84 of the LCM set out the reasons for making the provisions for Wales in the Bill.

11. The LCM states:

“Taking powers under the UK Bill will provide a practical and pragmatic solution to the absence of legal powers needed to continue making direct payments to Welsh farmers in the 2020 scheme year.

By adopting a UK-wide approach we anticipate that we would be able to re-apply, and make operable, much of the drafting already in place for the Day 1 corrective legislation for the Direct Payments Regulation for the 2020 scheme year. Therefore rendering the process smoother, quicker and clearer for farmers and other stakeholders.”⁶

⁴ Welsh Government, [Legislative Consent Memorandum, Direct Payments to Farmers \(Legislative Continuity\) Bill \(LCM\)](#), January 2020

⁵ Business Committee report, [Timetable for consideration of the Legislative Consent Memorandum on the Direct Payments to Farmers \(Legislative Continuity\) Bill](#), January 2020

⁶ Welsh Government, LCM, paragraphs 83 and 84

12. The Delegated Powers Memorandum from DEFRA identifies the provisions of the Bill that confer powers to make subordinate legislation.⁷ It states:

“The Bill contains 9 clauses, 2 of which together confer 7 delegated legislative powers, and two schedules. These delegated powers are Henry VIII powers.”⁸

13. With regards to the making of subordinate legislation under the Bill, the Delegated Powers Memorandum states:

“Where the Bill gives the Secretary of State delegated powers to modify the retained EU law relating to Direct Payments as it applies in or as regards Scotland, Wales or Northern Ireland, it requires the consent of the devolved administrations.”⁹

14. Details of the powers for Welsh Ministers to make subordinate legislation can be found in paragraphs 29 to 58 of the LCM.

15. The LCM concludes:

“It is the view of the Welsh Government that given the urgency of the issue resulting from the absence of legal powers needed to continue making Direct Payments to Welsh farmers in the 2020 scheme year, it would be appropriate to deal with these provisions in this UK Bill.”¹⁰

⁷ Direct Payments to Farmers (Legislative Continuity) Bill, [Delegated Powers Memorandum](#), January 2020

⁸ Delegated Powers Memorandum, paragraph 2

⁹ Delegated Powers Memorandum, paragraph 7

¹⁰ Welsh Government, LCM, paragraph 86

2. Committee consideration

16. We considered the LCM at our meeting on 20 January 2020.¹¹ We were not in a position to take evidence from the Minister given the timetable for scrutiny.

Our view

General observations

17. We note that the Bill was laid in the House of Commons on 9 January 2020 and the Welsh Government laid its LCM before the National Assembly on 14 January 2020. While we acknowledge that the Welsh Government has not breached Standing Order 29, which governs the procedural requirements when consent for UK Bills is sought, it would have been more helpful if the Welsh Government had laid its LCM as soon as the Bill had been introduced to the House of Commons.

18. Given the limited time we have had to consider and report on the LCM, it has not been possible to look in detail at the LCM and the proposals in the Bill.

19. We note the Welsh Government's reasons for making provision for Wales in the Bill.

Clause 3

20. We note that clause 3 contains five regulation-making powers, some of which can be exercised by both Welsh and UK Ministers, all of which permit the modification of primary legislation and are, therefore, Henry VIII powers. We acknowledge that the regulations made under clause 3 are subject to either the made affirmative or draft affirmative scrutiny procedure, and this is welcomed.

Clause 5

21. We note that clause 5 amends an existing regulation-making power available only to UK Ministers.

Clause 6

22. We note that clause 6 contains two regulation-making powers that can be exercised by both Welsh and UK Ministers, at subsections (1) and (4). The

¹¹ [CLA Committee, 20 January 2020](#).

regulation-making power in clause 6(1) is also a Henry VIII power. However regulations made under clause 6(1) are subject to the negative procedure. As we have said in many previous reports, regulations which permit the modification of primary legislation should be subject to the affirmative scrutiny procedure.

Conclusion 1. Regulations made under clause 6(1) which modify primary legislation should be subject to the affirmative procedure.

Amending the Government of Wales Act 2006

23. We are concerned at the apparent lack of any limitation on the face of the Bill in terms of preventing the amendment of the *Government of Wales Act 2006*. This is particularly important because, at present, the Henry VIII power in clause 6(1) can be exercised by regulations subject to the negative procedure.

Conclusion 2. 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.

Sunset provision applicable to regulation-making powers

24. We note that the regulation-making powers in clauses 3(1) and (3) - to make provision appropriate to prevent, remedy or mitigate any failure or deficiency in retained EU law governing the CAP Direct Payment schemes - will sunset on 31 December 2020. We note that, in the Welsh Government's LCM, the Minister states that this sunset provision is an "important safeguard". We further note that the regulation-making powers in clause 6, while limited in their scope, are not subject to such a time-limit.

UK Ministers making regulations in devolved areas

25. As matters currently stand, Standing Order 30C applies to UK Ministers making regulations in devolved areas under the *European Union (Withdrawal) Act 2018*. It is our general view that Standing Order 30C should be extended to apply to regulations made by UK Ministers in devolved areas with the consent of Welsh Ministers under any Brexit-related Act of the UK Parliament.

Conclusion 3. Standing Order 30C should be extended to apply to regulations made by UK Ministers in devolved areas with the consent of Welsh Ministers under the Bill (once enacted).