

The Welsh Government's Legislative Consent Memorandum on the Agriculture Bill

January 2019



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About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.assembly.wales/SeneddCLA

Committee Chair:



Mick Antoniw AM
Welsh Labour
Pontypridd

Current Committee membership:



Dawn Bowden AM
Welsh Labour
Merthyr Tydfil and Rhymney



Suzy Davies AM
Welsh Conservatives
South Wales West



Mandy Jones AM
Independent
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West

Lee Waters AM became a member of the Welsh Government after the Committee agreed its report but before the report was laid before the National Assembly.



Lee Waters AM
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Llanelli

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Background

The Welsh Government's Legislative Programme

1. On 17 July 2018, the former First Minister Carwyn Jones AM (the former First Minister), delivered the Welsh Government's legislative programme for the 12 months to follow.¹

2. In the context of the UK's exit from the European Union he said:

"We know the year ahead will be one of the busiest in legislative terms since Wales gained primary law-making powers. As the UK prepares to leave the European Union, there will be a significant amount of work for this Assembly to undertake between now and March if we are to have a fully functioning statute book at the point of exit. This will be a challenging time and the legislative workload associated with leaving the EU should not be underestimated.

The Assembly will need to deal with a substantial programme of correcting regulations under the EU withdrawal Act between October and March. We will continue to keep under review the need for Brexit-related Bills over the coming 12 months, and it is likely that a number of UK Brexit Bills will require the consent of this Assembly. As far as possible, we must not allow this Brexit workload to limit our legislative ambitions, but we must be flexible and be ready to adapt our legislative programme should the need arise."²

3. In response to questioning he said:

"First of all, the five Bills that we've put forward—they allow us some slack in order for us to be able to free up resource to deal with any Bills, or any other legislation, that will be needed as a result of Brexit."³

4. The former First Minister also said:

"He asked about a Welsh agriculture Bill. We don't know what's in the UK agriculture Bill yet—we haven't seen it, and I don't suppose that anybody else has seen it in Whitehall. Apparently, it's going to be

¹ Record of Proceedings (RoP), 17 July 2018

² RoP, [142-143], 17 July 2018

³ RoP, [166], 17 July 2018

published in September. Until we've seen it, it's difficult to know exactly what legislative interventions we will need to make. What is not clear at the moment is what happens after 2021. What happens to agricultural subsidies? We've no guarantee that a single penny will come to Wales ...

In terms of animal welfare, again, we will work with the UK Parliament where we need to. There have been occasions where we have piggybacked on UK legislation, and where that legislation is uncontroversial, there's no reason why we shouldn't do that in the future—where there is no proven need for there to be separate Welsh legislation and when, in fact, we're in agreement with what's happening across the border. That is something that is done fairly commonly in government.”⁴

The UK Government's Agriculture Bill

5. The UK Government's Agriculture Bill⁵ (the UK Agriculture Bill) received its first reading in the House of Commons on 12 September 2018. The Committee Stage in the House of Commons ended on 20 November 2018. The date of the House of Commons Report Stage is yet to be announced.

6. The explanatory notes to the UK Agriculture Bill⁶ state that:

“The Agriculture Bill ... will provide the legal framework for the United Kingdom ... to leave the Common Agricultural Policy ... and establish a new system based on public money for public goods for the next generation of farmers and land managers.”⁷

7. As regards the UK Agriculture Bill's application to Wales, the explanatory notes state:

“The UK Parliament will not normally legislate for areas within the competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. The government will therefore seek legislative

⁴ RoP, [169-170], 17 July 2018

⁵ [Agriculture Bill 2017-19, HC 266](#)

⁶ UK Government, [Agriculture Bill: Explanatory Notes](#), September 2018 (Explanatory notes)

⁷ Explanatory notes, paragraph 1

consent for provisions in clause 27 and Schedule 3 which would be within the competence of the National Assembly of Wales.”⁸

8. The explanatory notes state that Schedule 3 to the UK Agriculture Bill extends mostly identical powers to the Welsh Ministers as those conferred on the Secretary of State in Parts 1-5 of the Bill and provide the following information:

“Part 1 gives powers to the Welsh Ministers to provide new financial assistance. Paragraphs 1(2)(a) and (b) confer additional powers on the Welsh Ministers enabling them to give financial assistance for or in connection with:

- supporting businesses or communities in rural areas;
- supporting people who are involved in the production, processing, marketing or distribution of products from an agricultural, horticultural or forestry activity.

Powers [are] granted to the Welsh Ministers in Part 2 to provide financial support after exiting the EU with the exception of the power to modify aid schemes for fruit and vegetable POs. A different definition of BPS to that in the corresponding Bill clause for England is given to include the redistributive payments made under BPS Wales.

Parts 3 and 4 give the Welsh Ministers powers relating to the collection and sharing of data and intervention in agricultural markets.”⁹

9. Specifically, paragraph 1 of Schedule 3 provides powers for the Welsh Ministers to give financial assistance in order to:

- manage land or water in a way that protects or improves the environment;
- support public access to and enjoyment of the countryside, farmland or woodland, and better understanding of the environment;
- manage land or water in a way that maintains, restores or enhances cultural or natural heritage;
- mitigate or adapt to climate change;

⁸ Explanatory notes, paragraph 47

⁹ Explanatory notes, paragraphs 292-295; BPS means Basic Payment Scheme; PO means Producer Organisations

- prevent, reduce or protect from environmental hazards;
- protect or improve the health or welfare of livestock;
- protect or improve the health of plants;
- support businesses or communities in rural areas;
- start or improve the productivity of an agricultural, horticultural or forestry activity;
- support those involved in the production, processing, marketing or distribution of products derived from an agricultural, horticultural or forestry activity.

10. In addition, Schedule 3 provides powers for the Welsh Ministers to make regulations to:

- require the publishing of specified information about financial assistance which has been given (paragraph 2(7), as introduced);
- check, enforce and monitor financial assistance (paragraph 3(1), as introduced);
- amend the agricultural transition period for Wales (paragraph 5(2), as introduced);
- modify legislation governing the basic payment scheme to simplify or improve the scheme (paragraph 6(1), as introduced);
- phase out direct payments or terminate direct payments (paragraph 7(1), as introduced);
- modify retained direct EU legislation and subordinate legislation relating to the financing, management and monitoring of the Common Agricultural Policy (CAP), to cease its effect in relation to Wales, or to simplify or improve the operation of that legislation (paragraph 9(1), as introduced);
- modify retained direct EU legislation and subordinate legislation relating to support for rural development, to cease its effect in relation to Wales, or to simplify or improve the operation of that legislation (paragraph 10(1), as introduced);

- require a person to provide information in respect of agri-food supply chains (paragraph 11(2), as introduced), and to enforce the requirements imposed by those provisions (paragraph 15(1), as introduced);
- modify retained direct EU legislation relating to public market intervention and private storage aid (paragraphs 18(1) and 18(2), as introduced);
- make provision about marketing standards and the classification, identification and presentation of certain carcasses by slaughterhouses (paragraphs 19(1) and 19(3), as introduced);
- amend the list of sectors to which marketing standards can be applied (paragraph 20(2), as introduced).

11. The regulation-making powers under paragraphs 6(1), 9(1), 10(1), 18(1), 18(2) and 20(2) of Schedule 3 are subject to the negative procedure, with the remaining powers subject to the affirmative procedure.

12. The delegated powers memorandum that accompanied the UK Agriculture Bill provided the following summary for the Schedule 3 powers to be given to the Welsh Ministers:¹⁰

Clause	Power conferred	Justification	Parliamentary procedure
Schedule 3	Wales	The delegated powers conferred on Welsh Ministers in this Schedule are of a similar nature to those in the main body of the Bill.	The scrutiny procedures mirror those in the main body of the text.

13. On 15 November 2018, amendments were agreed to Schedule 3 to the UK Agriculture Bill at committee stage. The amendments added two new regulation-making powers to Schedule 3:

- to make provision for or in connection with reducing the national and net direct payments ceilings for Wales that would otherwise apply in 2020 by up to 15% (new paragraph 7, as amended at committee stage);
- to modify legislation governing the basic payment scheme to make provision for or in connection with securing that the basic payment

¹⁰ UK Government, [Agriculture Bill Delegated Powers Memorandum from the Department for Environment, Food and Rural Affairs to the Delegated Powers and Regulatory Reform Committee, September 2018, page 12](#)

scheme continues to operate in relation to Wales beyond 2020 (new paragraph 8, as amended at committee stage).

14. In summing up the debate at committee stage on the inclusion of Schedule 3 to the UK Agriculture Bill, George Eustice MP, the UK Minister for Agriculture, Fisheries and Food said:

“This is an important schedule to the Bill. We have been asked to include it by the Welsh Government, who are keen to ensure that they have the right powers in place to implement their own domestic policy. They have been clear that, in the medium to longer term, they would introduce new legislation through the Welsh Assembly to implement future policy. However, these powers, which are similar to those already outlined in the Bill, will enable them to continue in the meantime to make payments under the legacy basic payment scheme and also to start designing their new policy.

It is important to note that, just because the Welsh Government have taken broadly the same powers as England through the schedule—almost a carbon copy of those which the Bill has for England—it does not mean that their policies will remain identical. Indeed, the policies may well diverge quite considerably, because these are enabling powers in an enabling Bill that will give the Welsh Government the power to design their own schemes that will work for their own topography and the Welsh farming industry.”¹¹

The Welsh Government's Statement

15. On 12 September 2018, Lesley Griffiths AM, the Cabinet Secretary for Energy, Planning and Rural Affairs (the Cabinet Secretary)¹² made a statement on the UK Agriculture Bill¹³. Her statement announced that she had asked the UK Government to:

“... include powers for Welsh Ministers in an Agriculture Bill which has been introduced to the UK Parliament. The Bill provides a legal basis for

¹¹ House of Commons, Public Bill Committee, Agriculture Bill, 15 November 2018, col 415

¹² Following a Welsh Government Ministerial re-shuffle on 13 December 2018, Lesley Griffiths AM became the Minister for Environment, Energy and Rural Affairs

¹³ Welsh Government Written Statement, [Introduction of the UK Agriculture Bill](#), 12 September 2017

future support to farmers after Brexit, as we transition away from the Common Agricultural Policy...”

16. The Cabinet Secretary's statement also said that she intended the powers provided to the Welsh Ministers by the UK Agriculture Bill to be transitional:

“... until our own primary legislation can be brought forward, to design a 'Made in Wales' system which works for Welsh agriculture, rural industries and our communities. Provisions relating to Wales are contained in a separate Schedule so that any changes the National Assembly wishes to see for Welsh Ministers can be made easily.”

17. The Cabinet Secretary described the provisions for the Welsh Ministers in the UK Agriculture Bill as broadly similar to those provided for England:

“The Welsh provisions in the Agriculture Bill broadly mirror those proposed by the UK Government for England... There are a small number of additional powers being taken in Wales. In addition to a small number of technical differences, our powers also include an emphasis on supporting rural communities and businesses involved in supply chains.”

18. The statement identifies two areas of disagreement with the UK Government. First, that the Welsh Government disagrees with the UK Government on the extent to which clause 26, relating to the UK's World Trade Organisation (WTO) Agreement on Agriculture, is a reserved matter. The statement emphasises the strong relationship between WTO powers and devolved responsibilities on agriculture support. Secondly, the Welsh Government would like to see powers relating to the redistribution of the red meat levy included on the face of the Bill and expects a UK Government amendment “to correct this as soon as possible”.

19. The statement was accompanied by a joint statement between the Welsh and UK Governments.¹⁴ The joint statement said:

“The Agriculture Bill provides both administrations with new powers to bring replacement schemes into effect, as well as extending some provisions to Northern Ireland. However, the Bill does not contain a legislative framework for these powers. This reflects the fact that the UK Government and Welsh Government are of the view, based on

¹⁴ Welsh and UK Governments, [Agricultural Framework Progress Update: September 2018](#)
[A joint statement by the UK Government and the Welsh Government](#), September 2018

discussions to date, that the vast majority of policy areas can be suitably managed through non-legislative, intergovernmental coordination.”

The Welsh Government's Legislative Consent Memorandum

20. On 4 October 2018, the Cabinet Secretary laid before the National Assembly a Legislative Consent Memorandum (LCM) in respect of the UK Agriculture Bill.¹⁵

21. On 9 October 2018, the Business Committee referred the LCM to this Committee, the External Affairs and Additional Legislation Committee and the Climate Change, Environment and Rural Affairs (CCERA) Committee for consideration. The Business Committee set a reporting deadline of 14 December 2018, which was subsequently extended to 4 January 2019, following a letter from Mike Hedges AM, the Chair of the CCERA Committee.¹⁶

22. In accordance with Standing Orders 29.1 and 29.2, an LCM is required because provisions in the UK Agriculture Bill modify or fall within the Assembly's legislative competence.

23. Paragraphs 7 to 9 of the LCM set out the Welsh Government's assessment of which provisions in the UK Agriculture Bill require consent. As such they note the following clauses, as requiring the Assembly's consent:

- Clause 26 (WTO Agreement on Agriculture). This point is disputed by the UK Government but the LCM indicates that consent is required because its provisions relate to agriculture and the observation and implementation of international obligations, namely the Agreement on Agriculture.¹⁷
- Clause 27 (Wales), which introduces Schedule 3 and extends broadly similar powers to the Welsh Ministers as those conferred on the Secretary of State in Parts 1-5 of the Bill. The Annex to the LCM lists the regulation-making powers within Schedule 3, describing each power and the procedure to be applied in each case.

24. Paragraphs 20 to 23 of the LCM set out the Welsh Government's reasons for making provisions for Wales in the UK Agriculture Bill. They indicate that:

¹⁵ Welsh Government, [Legislative Consent Memorandum, Agriculture Bill](#), October 2018

¹⁶ Business Committee, [Revised timetable for consideration of the Legislative Consent Memorandum on the Agriculture Bill](#), November 2018

¹⁷ LCM, paragraph 7

- the powers being taken for Welsh Ministers are intended to be transitional until primary legislation can be brought forward to design a “Made in Wales” system for Welsh agriculture, rural industries and communities;
- the powers are required in order to enable the Welsh Government to continue making payments to land managers, related supply chains and other rural businesses and organisations in Wales under the current CAP Pillar 1 and Pillar 2 schemes from 2020, to make changes to the current schemes and to enable transition;
- it is the Welsh Government's intention to bring forward a Wales Agriculture Bill during this term;
- the UK Agriculture Bill provides a legal basis for future support to farmers after Brexit, as the UK transitions away from the Common Agricultural Policy;
- the provisions sought for the Welsh Ministers reflect the opportunities identified for future agricultural support which are the subject of consultation set out in the green paper *Brexit and our Land: Securing the Future of Welsh Farming*;¹⁸
- there is considerable uncertainty about the UK's future relationship with the EU and the rest of the world and how best to support business to compete globally. Primary legislation needs to be put in place now to enable the Welsh Government to react quickly once decisions are made;
- the Bill provides enabling powers to the Welsh Ministers. No decisions will be made on how these will be used until the UK's future relationship with the EU and rest of the world is known and the consultation has concluded;
- by including provisions in the UK Agriculture Bill now, Wales will not be constrained in its design of new schemes and will be able to implement what is best for Wales.¹⁹

25. Paragraph 23 of the LCM states:

¹⁸ Welsh Government, *Brexit and our Land: Securing the Future of Welsh Farming*, July 2018

¹⁹ LCM, paragraphs 20-22

“Welsh Government is generally supportive of the Bill as drafted; there are two outstanding concerns which have not been resolved to our satisfaction relating to the World Trade Organisation (WTO) Agreement on Agriculture and the Red Meat Levy. Further work to resolve our outstanding concerns will continue during the Bill's passage through Parliament and a supplementary Legislative Consent Memorandum will be brought forward if required at the appropriate point.”

Report by the House of Lords Delegated Powers and Regulatory Reform Committee

26. The House of Lords Delegated Powers and Regulatory Reform Committee published its report (the DPRR Committee's report) on the UK Agriculture Bill on 17 October 2018.²⁰ Given the significance of the UK Agriculture Bill, the Delegated Powers and Regulatory Reform Committee reported in time for committee stage in the House of Commons, the same approach they adopted in relation to the *European Union (Withdrawal) Act 2018*. It also intends to report on the UK Agriculture Bill following its introduction to the House of Lords.²¹

27. The DPRR Committee's report is critical of the UK Agriculture Bill, particularly in relation to its approach to delegated powers. It states:

“We are dismayed at the Government's approach to delegated powers in the Agriculture Bill.

(a) The Agriculture Bill represents a major transfer of powers from the EU to Ministers of the Crown, bypassing Parliament and the devolved legislatures in Wales and Northern Ireland...”²²

28. The DPRR Committee's report comments on the lack of detail in the UK Agriculture Bill, noting that the debate will be focused on delegated powers:

“Parliament will not be able to debate the merits of the new agriculture regime because the Bill does not contain even an outline of the substantive law that will replace the CAP after the United Kingdom leaves the EU. Most debate will centre on delegated powers because

²⁰ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018

²¹ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 2

²² House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 4

most of the Bill is about delegated powers. At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail.”²³

29. Although the majority of the delegated powers in the UK Agriculture Bill require subordinate legislation to be made by the affirmative procedure, the DPRR Committee’s report notes the reduced scrutiny provided by the affirmative regulation procedure when compared to the scrutiny of a bill:

“17 of the 26 delegated powers allow for regulations to be made by the affirmative procedure. This is a high proportion by the standards of most bills. However, the affirmative procedure offers nothing like the scrutiny given to a bill. A bill typically goes through several substantive stages in each House and can be amended. An affirmative statutory instrument is unamendable during its making and is debated once in each House. The fact that Defra proposes to make so many classes of affirmative instrument in the Agriculture Bill is an acknowledgment that the Bill covers matters of great importance to farmers, the food industry and consumers. The Bill provides an extensive framework for a wholly new agricultural regime. And yet the Bill is very short on matters of substance.”²⁴

30. The DPRR Committee’s report expresses dissatisfaction with the number of delegated powers in the Bill, given that it is so short on detail and states:

“Given the significant delegation of powers in this Bill, we did not find convincing the Government’s attempted justifications that consultation is ongoing and that there is not yet a withdrawal agreement. The Agriculture Bill could have contained more detail than it does ...The existence or otherwise of a withdrawal agreement is not an argument for giving Ministers so many law-making powers in a bill that offers so little substantive detail.”²⁵

31. The DPRR Committee’s report also expresses concerns at the lack of consultation requirements in the Bill, the extensive powers conferred on Ministers

²³ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 4(b)

²⁴ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 6

²⁵ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 8

with correspondingly few duties and the exercise of powers indefinitely and without sunset clauses.²⁶

32. The DPRR Committee's report makes recommendations in relation to five delegated powers, four of which apply to Wales as their provisions are mirrored in Schedule 3.

33. First, the Delegated Powers and Regulatory Reform Committee recommends that the Minister explains why the details provided for monetary penalties found in clause 16 should not also apply to other clauses where monetary penalties are provided (in clauses 3(2)(g), 20(4)(e) and 23(4)(d); these clauses, except for 23(4)(d), are mirrored in Schedule 3 for Wales, namely paragraphs 3(2)(g) and 19(4)(e)).²⁷

34. Secondly, the "simplify or improve" test contained in clauses 6(1), 9(2)(b) and 11(2)(b) (mirrored in Schedule 3 for Wales at paragraphs 6(1), 9(2)(b) and 10(2)(b)) is regarded as inappropriate and highly subjective.²⁸ Clause 6(1) allows the Secretary of State to make regulations amending or repealing legislation governing the basic payment scheme (direct payments to farmers) to make changes he or she "considers will simplify or improve" the scheme. Clauses 9 and 11 contain similar provisions allowing the Secretary of State to "simplify or improve" retained direct EU legislation relating to the financing, management and monitoring of the CAP and support for rural development.

35. The Delegated Powers and Regulatory Reform Committee calls for a "clearer, more focussed and proportionate test" and notes that:

"During the passage of the European Union (Withdrawal) Act 2018, Ministers came under sustained criticism for taking powers to make law that they considered 'appropriate' (rather than necessary) to correct deficiencies in retained EU law arising from the United Kingdom's withdrawal from the EU. At least section 8(2) and (3) of that Act gives an exhaustive definition of what counts as a deficiency in retained EU law. By contrast, the 'simplify or improve' test in clauses 6, 9 and 11 of the Agriculture Bill gives the Minister a much wider discretion than does the 'appropriate' test in the European Union (Withdrawal) Act 2018. It

²⁶ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraphs 4(c), 4(d) and 4(e)

²⁷ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 12

²⁸ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 16

allows Ministers to do what they like, providing they consider it a simplification or improvement.”²⁹

36. Thirdly, on clause 20 relating to marketing standards and carcass classification (mirrored in Schedule 3 for Wales by paragraph 19), the Delegated Powers and Regulatory Reform Committee states that:

“Clause 20 contains an inappropriately wide delegation of power to Ministers. The Bill should contain more detail on the relevant principles, policies and criteria underlying marketing standards in the various agricultural sectors.”³⁰

37. Finally, in Schedule 1, Part 3, paragraph 1(1)(a) (mirrored for Wales by Schedule 3, paragraph 20(2)) the Delegated Powers and Regulatory Reform Committee recommends that the Henry VIII powers should be subject to the affirmative procedure (they are subject to the negative procedure in the Bill as it stands).³¹ The powers allow the Secretary of State to make regulations to add or remove an agricultural sector to the list of agricultural sectors for which marketing standards may be set under clause 20 (as respects Wales, paragraph 19 of Schedule 3).

Committee consideration

38. We wrote to the Cabinet Secretary on 24 September 2018,³² and received a reply on 11 October 2018³³. We took evidence from the Cabinet Secretary on 5 November 2018.³⁴

39. The Cabinet Secretary also exchanged correspondence with the Chair of the CCERA Committee.³⁵

²⁹ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 14

³⁰ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 22

³¹ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 27

³² Letter from the Chair to Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs, Agriculture Bill, 24 September 2018

³³ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, Agriculture Bill, 11 October 2018

³⁴ Constitutional and Legislative Affairs (CLA) Committee, ROP, 5 November 2018

³⁵ Letter from Mike Hedges AM, Chair of CCERA Committee to Lesley Griffiths AM, the Cabinet Secretary for Energy, Planning and Rural Affairs, 18 October 2018; Letter from the Cabinet Secretary

The approach taken

40. In a letter to the CCERA Committee, the Cabinet Secretary explained the rationale for the approach adopted by the Welsh Government:

“I instructed the UK Government to take powers for Welsh Ministers in the Agriculture Bill to provide certainty to the Welsh agriculture sector as the UK Government continues to negotiate the terms of the UK’s future relationship with the EU. I confirm it is still my intention to bring forward an Agriculture (Wales) Bill to the Assembly but this is unlikely to be in place for 2020 because of the pressure on the legislative timetable. The Welsh provisions in the Bill are needed now to provide Welsh Ministers with a legal base to continue with existing schemes following our exit from the European Union (EU) and provide flexibility for transition and potential implementation of new schemes, should that be required. Without such powers the Welsh Government would not be able to continue paying agricultural support in 2020 or to simplify existing schemes, for example, by removing the greening requirement of the Basic Payments Scheme and simplifying arrangements for payments to cross border farms. The powers provide the flexibility to begin transition, once policy decisions have been taken on the nature of new schemes.”³⁶

41. Her letter also explained that the powers were broad enabling powers, and that it is necessary for legislation to be ready in good time in order for the Welsh Government to react quickly once decisions are made,³⁷ points she re-iterated in a subsequent letter to CCERA Committee³⁸.

42. We asked the Cabinet Secretary why the UK Agriculture Bill was needed. She told us:

“I should say from the outset that it’s not the way that you would want to make policy, but there is so much uncertainty around Brexit, and ... I will be bringing forward a Wales agricultural Bill. Unfortunately, due to the legislative timetable, the uncertainty, we’ve only just been out to consultation ourselves, I though the best way was to have these

to the Chair of CCERA, 30 October 2018; Letter from Chair of CCERA Committee to the Cabinet Secretary, 9 November 2018; Letter from the Cabinet Secretary to the Chair of CCERA, 21 November 2018

³⁶ Letter from the Cabinet Secretary to the Chair of CCERA Committee, 30 October 2018

³⁷ Letter from the Cabinet Secretary to the Chair of CCERA Committee, 30 October 2018

³⁸ Letter from the Cabinet Secretary to the Chair of CCERA Committee, 21 November 2018

transitional powers within this Bill. So, we've had a lot of detailed conversations at a ministerial level, at an official level—you know, there's a Welsh Schedule in it that's been done following my instructions. So, whilst I do obviously accept people's concerns, I do want to reassure you—these are only transitional powers. There's a lot of flexibility around it and it's right that we take a neutral position.”³⁹

43. She emphasised that detailed discussions had taken place at ministerial level and that her officials spoke to the Department for Environment, Food and Rural Affairs on a daily basis.⁴⁰

44. She also explained why broad powers were needed:

“... so by the time we are in a position to do our own tailor-made, bespoke Welsh agricultural policy, we will know a lot more about what we want. So, in general terms, these transitional powers that we're seeking from the UK agricultural Bill will allow for a wide range of possible payment schemes to be established, for instance. You'll be aware what we've been consulting on. We need to have that broadness, I think, and that flexibility in the scope. But, I've been very clear that no policy decisions have been made...”⁴¹

45. She also said that the Welsh Government needed to be able to pay farmers in 2020 and that the UK Agriculture Bill would allow that to happen.⁴² An accompanying official emphasised that without the UK Agriculture Bill, there would be a legal gap from 2020 to make any payment, so some sort of legislation of this sort is essential.⁴³

46. An official accompanying the Cabinet Secretary explained that:

“... it's important to distinguish between the parts of the Bill. On the Welsh Schedule, Schedule 3, those provisions have been drafted on the instructions by Welsh Government and Welsh Government alone. And we are content with every element of them and we have had control over every element of them. Of the English provisions and the UK-wide

³⁹ CLA Committee, RoP [50], 5 November 2018

⁴⁰ CLA Committee, RoP [52], 5 November 2018

⁴¹ CLA Committee, RoP [73], 5 November 2018

⁴² CLA Committee, RoP [72-73], 5 November 2018

⁴³ CLA Committee, RoP [74], 5 November 2018

provisions, we have, of course, discussed with DEFRA and the UK Government, but the situation is rather different.”⁴⁴

47. Given the possible relationship between the Bill and common frameworks, and the possibility of non-legislative action in the agriculture subject area, we asked for an update on the inter-ministerial discussions on the cross-UK frameworks. The Cabinet Secretary told us:

“There’s been an incredible amount of work done around frameworks. We always have a progress report at our quadrilateral meetings. ... We’re progressing at many levels, but a lot of the focus is on correcting legislation and, regrettably, contingency planning for a ‘no deal’. ... We are continuing discussions, but I aim to have them in place by the end of the implementation period. So, I’d be very happy to update committee, perhaps after the next quadrilateral meeting in a couple of weeks, when we’ll probably have a further progress report.”⁴⁵

48. In a subsequent letter, the Cabinet Secretary said:

“As agriculture is a devolved area, the key point is each administration of the UK will have the opportunity to develop policy to suit their own unique circumstances once the UK has left the EU. Work will continue with the appropriate governance put in place at the appropriate time. The Ministerial Quadrilateral forum last met in Cardiff on 19 November and considered progress on the development of frameworks from across the portfolio. The four Administrations have agreed to progress work on strengthening the governance arrangements and structures ahead of the UK’s departure from the EU, including revising the current Ministerial Quadrilateral forum.”⁴⁶

Delegated powers and the procedure that applies to the making of regulations laid before the National Assembly

49. In correspondence prior to her evidence session, we asked the Cabinet Secretary about the substantial delegated powers in a number of significant areas.⁴⁷ In response, the Cabinet Secretary told us:

⁴⁴ CLA Committee, RoP [57], 5 November 2018

⁴⁵ CLA Committee, RoP [199], 5 November 2018

⁴⁶ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 5 December 2018

⁴⁷ Letter from the Chair to the Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural

“As you note, the nature of the Wales schedule is to confer a series of delegated powers on Welsh Ministers. The powers are broadly similar to those taken by the UK Government in relation to England. The breadth of the provisions reflects the uncertainty of Brexit and the fact Welsh policy remains subject to consultation. I believe it is prudent to take these powers but am clear no policy decisions have been made.”⁴⁸

50. Her letter added:

“In relation to delegated authority, the general approach taken in the Bill is to use the affirmative procedure for regulation-making powers to establish new frameworks (for example, financial assistance and information gathering frameworks) and the negative procedure for technical matters relating primarily to the administration of payments under existing legislation. I expect this distinction to be debated in the UK Parliament during the Bill’s passage, particularly by the Delegated Powers and Regulatory Reform Committee.

I am committed to ensuring the Assembly has appropriate opportunities to scrutinise these provisions through the Legislative Consent Motion process and I have provided a memorandum.”⁴⁹

51. To illustrate our concerns with the framework nature of the UK Agriculture Bill, we drew attention to the comment in the DPRR Committee’s report which said that “At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail”.⁵⁰ The Cabinet Secretary said she agreed with this view.⁵¹

52. We asked the Cabinet Secretary how she could justify asking for powers in a UK Bill without being entirely sure of what they will be used for. She replied:

“We need to make sure that we’ve got the legal basis to pay our farmers in 2020. So, for instance, you will have heard me say that we’re going to keep the basic payment scheme for 2018-19 and then post that, we

Affairs, Agriculture Bill, 24 September 2018

⁴⁸ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, Agriculture Bill, 11 October 2018

⁴⁹ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, Agriculture Bill, 11 October 2018

⁵⁰ House of Lords, Delegated Powers and Regulatory Reform Committee, Agriculture Bill, 34th Report of Session 2017-2019, HL Paper 194, 17 October 2018, paragraph 4(b)

⁵¹ CLA Committee, RoP [192-193], 5 November 2018

were looking at policy decisions around payment. But, going back a step, we need to be more flexible about that ... We believe that this was the best way of doing it. It's not a permanent arrangement; it's not forever—they're transitional powers ahead of us bringing forward our own Bill.”⁵²

53. An official accompanying the Cabinet Secretary explained why the powers in Schedule 3 were broader than the powers that England has taken:

“... particularly to reflect some things that we do differently already, but also to reflect different priorities that we have, and that are reflected in the way we deliver, for instance, the rural development programme—more focus on supporting businesses and communities in rural areas, more focus on some of the production processing and so on. So, there are slightly wider powers than are being taken in England because those reflect things that we want to do in Wales and indeed already do in Wales.”⁵³

54. We pressed the Cabinet Secretary on the points raised by the official. In particular, we suggested that if the Welsh Government want to do new and additional things with the broader powers they were requesting, then it would be appropriate to wait for the results of the consultation and a new Welsh Agriculture Bill. Furthermore we asked why Schedule 3 is not more constrained given that it is only intended to be transitional. In response, the Cabinet Secretary said she had nothing else to add.⁵⁴

55. The regulation-making powers in Schedule 3 to the UK Agriculture Bill, in some instances make reference to “simplifying or improving” the basic payment scheme (paragraph 6), retained direct EU legislation relating to the common agriculture policy (paragraph 9) and support for rural development (paragraph 10). We asked why the phrase “simplifying or improving” is being used. The Cabinet Secretary replied:

“So, we followed traditional definitions. It's the same as England. I mentioned that we want to try and reduce some of the burdensome aspects of the common agricultural policy, BPS requirements that are particularly not appropriate in a domestic context, but I did say we

⁵² CLA Committee, RoP [76], 5 November 2018

⁵³ CLA Committee, RoP [90], 5 November 2018

⁵⁴ CLA Committee, RoP [91-92], 5 November 2018

haven't made any policy decisions; we are going to be out to consultation in the spring."⁵⁵

56. When asked, in particular, why regulations under paragraph 9(1) of Schedule 3 to the UK Agriculture Bill that modify retained direct EU legislation relating to the financing, management and monitoring of the common agricultural policy, should be subject to the negative procedure, the Cabinet Secretary told us:

"So, the modification around payments is considered technical because it would be limited to administration charges ... we want to simplify and improve the basic payment scheme. So, we don't want the powers to increase burdens, for instance. So, we looked very carefully at the Welsh Government guidelines around this, and, because they are technical, we decided it needed to be a negative procedure."⁵⁶

57. When we asked whether the Cabinet Secretary would be prepared to re-consider some of the procedures, she replied by saying that she would be happy to look again and that she was committed to providing an adequate opportunity for scrutiny. She continued:

"When you look at this Bill, there will be lots of affirmative procedures in it, which I've just been told there are a large number, but there is the need to react very quickly. And the whole point of having these powers, these transitional temporary powers, is that we just don't know. So, you mentioned before the lamb sector. It could be that we need to react incredibly quickly when we know what the trade deals are for instance, whether it's a deal, whether it's no deal..."⁵⁷

58. When we pursued this point the Cabinet Secretary agreed she would need (on occasion) to act within seven days.⁵⁸

59. The Cabinet Secretary also told us that "we definitely need to respond to" the report of the Delegated Powers and Regulatory Reform Committee in the House of Lords.⁵⁹ In a subsequent letter she told us:

"I noted the Committee's concern regarding the Delegated Powers and Regulatory Reform Committee's report on the UK Agriculture Bill. I

⁵⁵ CLA Committee, RoP [139], 5 November 2018

⁵⁶ CLA Committee, RoP [122], 5 November 2018

⁵⁷ CLA Committee, RoP [124], 5 November 2018

⁵⁸ CLA Committee, RoP [125-126], 5 November 2018

⁵⁹ CLA Committee, RoP [139], 5 November 2018

would like to reassure the Committee I am carefully considering the report with the UK Government and will respond to the points raised, as is traditional, as the Bill passes through the House of Lords.”⁶⁰

Areas of disagreement with the UK Government

60. As noted previously (see paragraph 18), the Welsh Government's statement notes two areas of disagreement and we explored these with the Cabinet Secretary.

61. As regards the issue relating to the power to make regulations in respect of the WTO Agreement on Agriculture, the Cabinet Secretary said:

“We think it's a devolved matter. They think it's a reserved matter. Again, officials are working to make sure that we are able to rectify this, because if we don't rectify it, then I will not be able to ask the Assembly to consent to this.”⁶¹

62. She agreed that for the Welsh Government this issue was a red line.⁶²

63. In a subsequent letter, the Cabinet Secretary said:

“On the issue of WTO rules, I have had positive discussions recently with the Secretary of State for Environment, Food and Rural Affairs. Officials are also making good progress in finding a solution. I hope to be able to agree an approach which meets the principles of the Inter-Governmental Agreement and respects the devolution settlement. It may not be necessary to amend the Bill itself to achieve this. It could be possible to reach a satisfactory outcome through an agreement between Governments as to how the existing provision should operate. I am hopeful we will be able to reach agreement with the UK Government on this remaining issue. I will then be able to recommend the Assembly gives its consent in due course.”⁶³

64. As regards the issue regarding the red meat levy, she said:

⁶⁰ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 5 December 2018

⁶¹ CLA Committee, RoP [59], 5 November 2018

⁶² CLA Committee, RoP [60-61, 151], 5 November 2018

⁶³ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 5 December 2018

“... it has just gone on for too long ... And I think the UK Agriculture Bill was absolutely the best opportunity we had of rectifying and clarifying this very unfair—in my view—situation. So, we’d had discussions at our quadrilateral ministerial meetings, I asked whether it could be on the face of the Bill, that was not agreed to, so I asked for a Government amendment. I understand now it’s not even going to be a Government amendment, so I’ve written again ... You know, it’s £1 million per annum that I believe Wales is losing. So, I do hope it still will become part of the Bill.”⁶⁴

65. The Cabinet Secretary subsequently told us that the situation had been resolved:

“I am pleased to be able to inform the Committee the red meat levy issue has now been resolved to my satisfaction. A Government-supported amendment now forms part of the Bill. I am content the amendment accurately reflects the mechanisms for levy collection in Wales and provides an appropriate means to resolve the long-standing issue of repatriation of red meat levy.”⁶⁵

A Welsh Government Agriculture Bill

66. One of the main issues we explored with the Cabinet Secretary was why the Welsh Government did not bring forward its own Bill for scrutiny under the legislative procedures of the National Assembly. She told us:

“I think it’s regrettable that we have so much uncertainty, and I said at the outset that this is not the way you would want to do it, but I think we have to be able to react quickly to whatever comes when we do eventually—if we do eventually—leave the EU in March. No policy decisions have been made. We will have a tailor-made Bill—I’ve been very clear about that—but I think it was really important that we took a neutral provision and that we have that flexibility. But we need to be able to pay farmers in 2020, and so, this Bill will allow us to do that.”⁶⁶

⁶⁴ CLA Committee, RoP [148], 5 November 2018

⁶⁵ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 5 December 2018

⁶⁶ CLA Committee, RoP [72], 5 November 2018

67. We pursued this point by asking whether or not it would have been easier to bring forward a Welsh Government Agriculture Bill that effectively replicated Schedule 3 to the UK Agriculture Bill. The Cabinet Secretary explained:

“I did consider introducing the Welsh Bill straight away, but I decided that the most proportionate approach was to use the UK agriculture Bill as an interim legislative vehicle. I've clarified several times that I'm absolutely going to bring forward a Welsh agricultural Bill, but I wanted to go out to consultation ... I think, by the time we bring forward our Bill, if it is 2020 or 2019-20, we will be a lot clearer, one hopes, as to where we are, and we'll know more about trade deals, for instance. So, whilst, of course, we instructed Schedule 3, and that's been written completely on our instruction, I still think there is a lot more work to be done around bringing forward an agriculture Bill. I also mentioned the constraints on the legislative timetable. So, as I said, whilst of course we did consider it, I think on balance this was the right thing to do.”⁶⁷

68. The Cabinet Secretary confirmed that neither a lack of resources nor concerns about the need to translate a Welsh Government Bill, played a part in making the decision to use a UK Government Bill. She did acknowledge that there had been resource issues in the department with new officials being taken on but indicated that the constraints of the legislative programme timetable were a factor.⁶⁸

69. The Cabinet Secretary also told us in terms of the Welsh Government Agriculture Bill that she wanted it to be much more precise, reflecting, following consultation, a tailor-made, bespoke Welsh agricultural policy.⁶⁹

70. On numerous occasions throughout her evidence session she told us that a separate Welsh Government Agriculture Bill would be brought forward,⁷⁰ suggesting 2020 as the aspirational date⁷¹. She also indicated that the Welsh Government would bring forward such a Bill once it had completed the necessary consultations and impact assessments.⁷²

⁶⁷ CLA Committee, RoP [78], 5 November 2018

⁶⁸ CLA Committee, RoP [82], 5 November 2018

⁶⁹ CLA Committee, RoP [178-179], 5 November 2018

⁷⁰ For example, CLA Committee, RoP [53, 68, 72, 78], 5 November 2018

⁷¹ CLA Committee, RoP [86], 5 November 2018

⁷² Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 11 October 2018

71. By comparison with the UK Government Agriculture Bill, she set out the context for a future Welsh Government Agriculture Bill, saying:

“In some ways—obviously, this is England’s Bill now. We’ll have our own Bill. By the time we have our own Bill, we will know what we want. So, we’ve just finished, last week, the ‘Brexit and our land’ consultation. We’ve had 12,000 responses, so we’re now going to consider all those responses. That’s the start of our consultation process. We’ll be out to consultation again in the spring.”⁷³

72. We questioned the Cabinet Secretary on whether it was appropriate for the UK Parliament to scrutinise the proposed powers for the Welsh Ministers in agriculture, a policy area which has been devolved for 20 years. She replied:

“Well, because we’re taking these transitional powers in the UK Government Bill, obviously Parliament will scrutinise, but the Assembly will scrutinise as well ... But I can’t stress enough: these are transitional powers, and we will be bringing forward an agriculture Bill during this term. I hope to have it in place by 2020. But that has to be remembered at all times: we will be having our own Bill, and this is just transitional, and because there is just so much uncertainty at the moment, we believe this was the right thing to do.”⁷⁴

73. On a similar point, we asked what the Cabinet Secretary would say to those who may argue that the UK Agriculture Bill does not respect devolution. She said:

“Well, if anything, I would say the Bill actually supports devolution, because that confirms that we will have the powers to pursue our own agricultural support, and I know you’ll say—and this was my initial reaction—‘Well, agriculture has been wholly devolved since 1999’, but I don’t think we can take that as a given. We were very concerned that the UK Government could be rowing back on devolution, for instance...”⁷⁵

A sunset clause

74. In a letter to CCERA Committee, the Cabinet Secretary said:

⁷³ CLA Committee, RoP [53], 5 November 2018

⁷⁴ CLA Committee, RoP [68], 5 November 2018

⁷⁵ CLA Committee, RoP [70], 5 November 2018

“Given the level of uncertainty surrounding Brexit, I did not consider it to be appropriate to include an explicit sunset provision for these powers to be on the face of the Bill. The provisions in the UK Agriculture Bill are, therefore, not time limited. I can confirm it is my intention for the powers to be transitional and superseded by a Wales Agriculture Bill at the appropriate time. I intend to bring forward a Wales Agriculture Bill before the end of the current Assembly term.”⁷⁶

75. We asked the Cabinet Secretary why, if the Bill was intended only to be transitional, there was no sunset clause in the Bill. She replied:

“... how can we have a date when there is just so much uncertainty? We don't even know if there's going to be a transition period, we have no idea of dates, and when we are given dates, the dates move. So, there is just so much uncertainty that we wouldn't be able to do that.”⁷⁷

76. We pursued this point by asking why a sunset clause could not be included by means of reference to an event. The Cabinet Secretary said:

“We did consider this very carefully, and I explained why we came to the decision that we did, and it was around the uncertainty and the fact that the transition period could move. As I say, we're given a different date—. Perhaps not every day, but certainly every week, we hear different dates. So, the provisions in the UK Bill are obviously not time limited, but I'd go back to what I was saying: it's completely transitional, not permanent, and obviously a Wales agriculture Bill will supercede the UK Government Bill. So, that was completely the reason why we did that.”⁷⁸

77. We pressed again on whether it would be possible to avoid using specific dates in a sunset clause in the UK Agriculture Bill. In response, the Cabinet Secretary said:

“Okay. It is something that we can amend, or we can still consider that. Officials are continuing to have discussions around it, and if—. I'm very happy to take further legal advice on it, but the legal advice I was given

⁷⁶ Letter from the Cabinet Secretary to the Chair of CCERA, 30 October 2018

⁷⁷ CLA Committee, RoP [52], 5 November 2018

⁷⁸ CLA Committee, RoP [101], 5 November 2018

was that that was the most appropriate way forward at that time. But we could put an amendment forward.”⁷⁹

78. In a subsequent letter she told us:

“The Committee asked me to consider the need for a sunset clause for the Welsh provisions in the Bill. I will, of course, continue to reflect on this as Parliament and the Assembly continue to scrutinise the Bill. However, my intention is still for the powers to be transitional and for them to be superseded by a Wales Agriculture Bill, using the most suitable legal mechanism for doing so at the appropriate time.”⁸⁰

Amending the UK Government's Agriculture Bill

79. We asked the Cabinet Secretary how amendments she would like to see to the UK Agriculture Bill would be taken forward.

80. As regards her preferred approach on the red meat levy, the Cabinet Secretary said:

“I've got opposition Members who would also be happy to bring forward an amendment. But I believe the best way forward now... would be a Government amendment.”⁸¹

81. A UK Government amendment was subsequently agreed at committee stage.⁸²

82. We asked the Cabinet Secretary what action she would take if and when amendments are made to the UK Agriculture Bill which affect matters within devolved competence. Specifically, the Cabinet Secretary was asked whether she would look for equivalent corresponding amendments for Wales should the provisions for England be amended. The Cabinet Secretary said:

“We would look at it on a case-by-case basis, individually. So, officials will be doing that, but nothing will be decided without me seeing. I've

⁷⁹ CLA Committee, RoP [102-103], 5 November 2018

⁸⁰ Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 5 December 2018

⁸¹ CLA Committee, RoP [150], 5 November 2018

⁸² Letter from Lesley Griffiths AM, Cabinet Secretary for Energy, Planning and Rural Affairs to the Chair, 5 December 2018

asked to see absolutely everything that comes through on amendments.”⁸³

83. The Cabinet Secretary went on to explain that if an amendment fettered the position of the Welsh Government or didn't reflect the decisions or aims of the Welsh Government, she would not accept them.⁸⁴

84. In response to our questioning regarding the need for further LCMs should amendments be made to the UK Agriculture Bill in devolved areas, the Cabinet Secretary confirmed that, in those circumstances, she would bring forward supplementary LCMs.⁸⁵

85. Furthermore, the Cabinet Secretary told us that the timeline for the UK Agriculture Bill's passage through the UK Parliament provided sufficient time for the National Assembly to be asked for its consent should amendments necessitate supplementary consent.⁸⁶

Our view

86. The UK Agriculture Bill is a significant piece of law. While it is arising as a consequence of the UK's withdrawal from the EU, it is providing significant powers to the Welsh Ministers in an area of policy that has been devolved to the National Assembly for over 20 years. Clearly, therefore, it is subject to the National Assembly's consent.

87. In examining the LCM, we have also paid close attention to the UK Agriculture Bill itself, particularly in light of the way it has been drafted.

88. While recognising the difficulties and complexities involved in leaving the EU, this should not be used as a justification to prepare constitutionally inappropriate or badly drafted law. We are concerned that the UK Agriculture Bill falls into this category for a number of reasons, but in particular because it bypasses the kind of scrutiny by democratically elected Assembly Members that would be expected in a policy area that is devolved and affects communities across Wales.

89. The UK Agriculture Bill transfers extensive powers to the Welsh Ministers to develop significant policy and, in so doing, prevents detailed scrutiny by Assembly Members. For example, there is more limited opportunity for Assembly Members

⁸³ CLA Committee, RoP [153], 5 November 2018

⁸⁴ CLA Committee, RoP [158-160], 5 November 2018

⁸⁵ CLA Committee, RoP [164], 5 November 2018

⁸⁶ CLA Committee, RoP [165-166], 5 November 2018

to engage with stakeholders through National Assembly committees. In addition, Assembly Members are prevented from tabling amendments to test the legislation or seek its improvement (as Members would normally do for a Bill introduced into the National Assembly).

90. To illustrate this point, the power to provide financial assistance in paragraph 1 of Schedule 3 to the UK Agriculture Bill is a non-legislative power, enabling the Welsh Ministers to establish new financial support schemes. Assembly Members cannot table amendments to include monitoring or oversight provisions in relation to how these powers are exercised by the Welsh Ministers. This is particularly important because the powers in the UK Agriculture Bill are not time-limited.

91. As a consequence of the Welsh Government's approach, the use of amendments to probe and suggest improvements to the UK Agriculture Bill as it relates to Wales (in particular in respect of Schedule 3) will fall to Members of the UK Parliament, who have not been involved in the detailed scrutiny of Welsh agriculture policy for almost 20 years. For any amendments that are tabled to provisions that affect Wales only, decisions will be taken by MPs not just from Wales but from all over the UK. Furthermore those MPs may not prioritise potential benefits to Wales or the National Assembly.

92. Future decisions on Welsh agricultural policy in this area, for an unspecified period of time, will then be on a "take it or leave it basis", as subordinate legislation delegated to be made by the Welsh Ministers is not amendable.

93. In effect, the UK Parliament is delegating powers to the Welsh Ministers permitting them to act in devolved areas, despite not having been involved in the scrutiny of agriculture policy in Wales for almost a generation. In so doing, the National Assembly's scrutiny function is being bypassed, a situation we find constitutionally unacceptable.

94. It is therefore disappointing that some of the Cabinet Secretary's comments appear to suggest that the LCM process provides Assembly Members with adequate opportunities for the scrutiny of an important area of devolved policy.

95. To be absolutely clear, the scrutiny of an LCM in an area of devolved policy does not afford Assembly Members the same rights or timescales in terms of scrutiny when compared to those that would be granted if the National Assembly were scrutinising a Welsh Government Bill.

96. Also, there is no guarantee that amendments promoted or favoured by the Welsh Government, either in response to the views of the National Assembly or

otherwise, will be supported by MPs should they be tabled by the UK Government (or by others) on their behalf. So, while provisions in Schedule 3 to the UK Agriculture Bill have been drafted solely on the instructions of the Welsh Government and it has had full control of these provisions, its role in influencing amending stages is limited.

97. We are therefore concerned that the Welsh Government did not introduce its own Bill for scrutiny in the National Assembly under our four-stage legislative process.

98. It is unclear to us why this was the case for a number of reasons.

99. In July 2018, the former First Minister advised the National Assembly that the Welsh Government had not seen the UK Agriculture Bill, but also said that flexibility had been built into the Welsh Government's legislative programme for Brexit-related legislation, including Bills. An Agriculture Bill, made in Wales, would seem the perfect candidate to take advantage of that flexibility.

100. By 12 September 2018, the UK Government had introduced a UK Agriculture Bill to the UK Parliament, including Schedule 3 in relation to Wales, which was based solely on instructions from the Welsh Government.

101. We would welcome clarification from the Cabinet Secretary as to when, between mid-July and early September, the Welsh Government secured agreement to include Schedule 3 in the UK Agriculture Bill and when it started drafting appropriate instructions.

102. Having prepared these instructions, we do not understand why they could not then be used by Welsh Government legislative drafters to prepare a Bill for introduction to the National Assembly. We have not received an adequate response from the Welsh Government on this point.

103. Such a Welsh Government Bill would have had the benefit of being bilingual and it would have been much easier to resolve, at the outset, the two issues of concern that the Welsh Government had with the UK Agriculture Bill on its introduction in the House of Commons (namely in relation to the red meat levy and the WTO Agreement on Agriculture).

104. We are also unclear why the Cabinet Secretary suggested that the legislative timetable is a problem, given the First Minister's comments in July 2018. In addition, of course, a Welsh Government Bill only has to pass through one legislative chamber (albeit with a 12-week Stage 1 process), while at Westminster, it passes through both the House of Commons and the House of Lords.

- 105.** We believe the Welsh Government should have taken responsibility and made the time to introduce its own Agriculture Bill, as it would do for any other important area of policy. It would have provided the Welsh Ministers with the legal base to continue paying agricultural support in 2020 and, possibly, to implement new schemes if deemed necessary and appropriate, i.e. the very reasons for which the Welsh Ministers have advocated seeking powers in the UK Agricultural Bill.
- 106.** Clearly, given the apparent control exerted over the content of Schedule 3 by the Welsh Government, and the confirmation from the Cabinet Secretary in evidence, resourcing issues were not a cause for concern.
- 107.** We are therefore unclear why a Welsh Government Bill could not have been introduced in September this year and would welcome further clarification and explanation from the Cabinet Secretary on this specific point.
- 108.** The Cabinet Secretary said on numerous occasions that the Welsh Government would introduce its own Agriculture Bill for scrutiny later in this Assembly. In our view, a 2020 Bill could have been a vehicle not only to develop a fuller Agriculture Bill based on the Welsh Government's consultation exercise on *Brexit and our Land: Securing the Future of Welsh Farming*, but also to consolidate any Bill containing transitional provisions introduced into the National Assembly in September 2018. While perhaps unusual, it would have been a recognition of the tight and somewhat uncertain timetable associated with the UK's exit from the European Union.
- 109.** The approach of the Welsh Government is also at odds with its proposals to make the Welsh statute book more accessible, recently advocated through its own Legislation (Wales) Bill, which was introduced for scrutiny in the National Assembly on 3 December 2018. Monolingual legislative provisions within a UK Bill, in an area of devolved policy, makes the statute book more complex and less accessible.
- 110.** We wish therefore to convey our overall dissatisfaction with the Welsh Government's approach and consider its explanation for justifying that approach to be inadequate.
- 111.** We also wish to express our considerable disappointment and frustration that an opportunity has been lost to demonstrate the ability of the National Assembly to produce high quality legislation at a time of considerable constitutional upheaval and in an important area of policy that affects many communities in Wales.

Recommendation 1. The Cabinet Secretary should write to this Committee in response to the clarification we request in paragraphs 101 and 107 of this report.

112. We now turn to the content of the UK Agriculture Bill itself.

113. At committee stage in the House of Commons, George Eustice MP, the UK Minister for Agriculture, Fisheries and Food indicated that unless the Scottish Government took action to introduce a clause similar to the new provision included for the Welsh Ministers under paragraph 8 of Schedule 3, it would not have legal authority to make payments from 2020.⁸⁷ Given that the UK Agriculture Bill does not make provision in respect of the Scottish Ministers, we would like clarification from the Cabinet Secretary on whether it would be the only provision needed for the Welsh Ministers to have legal authority to make payments in 2020.

Recommendation 2. The Cabinet Secretary should write to this Committee and clarify whether the only provision needed for the Welsh Ministers to have legal authority to make direct payments to farmers in 2020 (and beyond) is contained in paragraph 8 of Schedule 3 to the Bill, as agreed at committee stage in the House of Commons.

114. As currently drafted, the UK Agriculture Bill enables the Welsh Ministers to use its regulation-making powers indefinitely to implement post-Brexit arrangements.

115. However, we note the Cabinet Secretary's commitment to introduce a Welsh Government Bill (and for it to become law) by the end of the Fifth Assembly. This being the case, we remain unclear as to why the Welsh Government has not introduced a sunset provision in the UK Agriculture Bill. This would not only add weight to the Cabinet Secretary's assertion that the UK Agriculture Bill is transitional but provide certainty that the powers available to the Cabinet Secretary would not be available indefinitely.

Recommendation 3. The Cabinet Secretary should seek to amend the UK Agriculture Bill to insert a sunset provision to the effect that Schedule 3 will no longer apply after the Fifth Assembly.

116. We share the dismay of the Delegated Powers and Regulatory Reform Committee of the House of Lords at the approach to delegated powers in the UK Agriculture Bill and, as will be apparent from our earlier comments, we share its

⁸⁷ House of Commons, Public Bill Committee, Agriculture Bill, 15 November 2018, col 525

concerns about the major transfer of powers to Ministers of the Crown and the bypassing of legislatures in the process.

117. We also share a number of the concerns that the Delegated Powers and Regulatory Reform Committee highlighted in its report. For example, the lack of justification for a Bill containing such little detail; the lack of a requirement to consult on subordinate legislation to be made under UK Agriculture Bill; the extensive powers conferred on Ministers with correspondingly few duties and the lack of sunset clauses.

118. We endorse the recommendations of the Delegated Powers and Regulatory Reform Committee of the House of Lords as we identify in paragraphs 33 to 37 of this report, and as they apply to Schedule 3 to the UK Agricultural Bill.

119. The Cabinet Secretary has told us that she will wait to respond to the points raised by the Delegated Powers and Regulatory Reform Committee as the UK Agriculture Bill passes through the House of Lords, “as is traditional”. However, the report of the Delegated Powers and Regulatory Reform Committee was published earlier than is the norm due to the significant nature of the UK Agriculture Bill. For that reason, and given that the Delegated Powers and Regulatory Reform Committee proposes to issue a further report once the UK Agriculture Bill is introduced to the House of Lords, we would expect the Cabinet Secretary to respond before the UK Agriculture Bill reaches the House of Lords, for the benefit of this Committee. Given that the provisions in Schedule 3 are based on Welsh Government instructions, we would expect the Welsh Government to respond separately rather than jointly with the UK Government.

Recommendation 4. The Cabinet Secretary should respond to the 34th report of the Delegated Powers and Regulatory Reform Committee, entitled *Agriculture Bill* (HL Paper 194) published on 17 October 2018 before the start of proceedings in the House of Lords and copy that response to this Committee.

120. The Cabinet Secretary told us that she had taken broad enabling powers because no decisions had yet been taken in respect of the policy that is the subject of the UK Agriculture Bill.

121. It is not appropriate for any Welsh Minister to justify taking broad enabling powers within a Bill because no decisions have been taken on how those powers will be exercised to implement as yet undecided policy. That constitutes poor governance and legislative practice and is a cause for concern. Moreover, it is particularly unwelcome to see the virtue of such an approach enthusiastically

endorsed in the context of powers being delegated to the Welsh Ministers, in devolved areas, by the UK Parliament.

122. Given that no policy decisions have yet been taken, we believe the Cabinet Secretary needs to justify why the negative procedure has been used for some of the regulation-making powers.

123. This is particularly important because of the exceptionally poor quality of the explanatory notes, as they relate to Schedule 3, that accompanied the UK Agriculture Bill's introduction to the UK Parliament. For example, the explanatory notes contain no detailed information about the powers being delegated to the Welsh Ministers or the justification for why they need to be taken. Instead, the explanatory notes rely on the fact that the Welsh Ministers' powers mirror those of the Ministers of the Crown acting in England. However, the two sets of powers are not cross-referenced.

124. Given the instructions that would need to have been provided to UK Government legislative drafters by the Welsh Government, it should have been relatively straightforward to provide information for inclusion in the explanatory notes to make the UK Agriculture Bill more accessible and understandable in relation to its effect in Wales.

125. We are therefore concerned at the lack of transparency within the explanatory notes. Much more detailed information is available to MPs wishing to scrutinise provisions in the UK Agriculture Bill as they apply in England than is available to MPs wishing to scrutinise the provisions as they apply in Wales.

126. The explanatory notes as they apply to Schedule 3 to the UK Agriculture Bill are not fit for purpose and are completely unacceptable.

127. They add further weight to our argument that the Welsh Government should have introduced its own Bill, rather than seeking powers through a UK Government Bill.

128. We also note that the LCM for the UK Agriculture Bill prepared by the Welsh Government describes each power being taken, but does not then comment on the appropriateness of each delegated power or the appropriateness of the procedure to be applied (as would be expected for a Welsh Government Bill).

129. We raised specific questions with the Cabinet Secretary about use of the negative procedure in respect of regulations to be made under paragraph 9(1) of Schedule 3 to the UK Agriculture Bill that modify retained direct EU legislation relating to the financing, management and monitoring of the common

agricultural policy. We disagree with the Cabinet Secretary's view that such changes would be technical in nature.

130. In our view, the Cabinet Secretary should seek to amend the UK Agriculture Bill to apply the affirmative procedure to the power for the Welsh Ministers to make regulations under paragraph 9(1) of Schedule 3.

131. In reaching this view, we considered the Cabinet Secretary's suggestion that the use of a particular procedure was influenced by the need to act quickly. Our predecessor committee advocated on many occasions that the use of the negative procedure over the affirmative procedure does not offer any significant time-saving, and this is a view we share.

Recommendation 5. We recommend that the Cabinet Secretary reviews all procedures attached to the regulation-making powers delegated to the Welsh Ministers under the UK Agricultural Bill, taking account of the views we express in this report.

Recommendation 6. The Cabinet Secretary should lay before the National Assembly a supplementary document to the LCM which:

- outlines the outcome of the review in recommendation 5;
- justifies why it is appropriate to seek a regulation-making power in each case within the UK Agriculture Bill;
- justifies the choice of procedure in each case, taking account of our view that there should be a presumption in favour of the affirmative procedure given that no decisions have yet been taken on how the regulation-making powers will be used;
- explains any decision to reject recommendation 3;
- explains and provides a practical example of where the negative procedure may be necessary because of the need for urgency;
- explains the process by which it will seek amendment of the UK Agriculture Bill, where that is deemed appropriate.

Recommendation 7. The information collated under recommendation 6 related to the delegation of powers to the Welsh Ministers should be made available to MPs for report stage on the UK Agriculture Bill.

Recommendation 8. The Cabinet Secretary should ensure that the explanatory notes to accompany the UK Agriculture Bill on its introduction to the House of Lords should include information collated under recommendation 6 related to the delegation of powers to the Welsh Ministers.

132. The LCM seeks consent in respect of clause 26, noting the power to make regulations in respect of the WTO Agreement on Agriculture is a devolved matter. The Cabinet Secretary told us that this issue was a red line. Subsequently, the Cabinet Secretary advised us that the issue causing the dispute may be resolved by means of an inter-governmental agreement.

Recommendation 9. The Cabinet Secretary should explain to this Committee why it may not be necessary to amend clause 26 of the UK Agriculture Bill to resolve the issues that have been of concern to the Welsh Government. In so doing, the Cabinet Secretary should explain whether the inter-governmental agreement she spoke of would, in effect, allow UK Ministers to act in devolved areas without any scrutiny by the National Assembly.

133. On a more general point, we wish to comment on the Cabinet Secretary's suggestion that the UK Agriculture Bill "actually supports devolution". We disagree. By-passing the National Assembly's legislative process for the scrutiny of Bills is not supporting devolution and the UK Agriculture Bill does not legally confirm that agricultural support is devolved.

134. Until we receive a response to our recommendations in this report and have considered the supplementary LCM that will need to come forward given amendments made to the UK Agriculture Bill, we are not in a position to formulate a view as to whether the National Assembly should provide its consent to the clauses of the UK Agriculture Bill referred to in the LCM.