Agenda Supplement – Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 1 – Senedd
Meeting date: 2 December 2019
Meeting time: 14.30

For further information contact:
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– Supplement 1

Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

4.3 Letter from the Counsel General: Wales' changing constitution

(Pages 1 – 4)

CLA(5)-33-19 – Paper 10 – Letter from the Counsel General, 27 November 2019

Attached Documents:

CLA(5)-33-19 – Paper 10

Jeremy Miles AC/AM
Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister

Llywodraeth Cymru
Welsh Government

Mick Antoniw AM
Chair of Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
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27 November 2019

Dear Mick,

Thank you for your letter of 18 October and for welcoming the publication of my Written Statement on 18 September concerning the legal proceedings resulting from the prorogation of the UK Parliament. You also raised a number of important issues in connection with your inquiry into Wales' changing constitution.

You noted that the question of how "not normally" could be defined in the context of the Sewel Convention is covered in 'Reforming our Union: Shared Governance in the UK'. That policy document sets out the Welsh Government's views on this matter and we will continue to pursue it with the UK Government. I will keep you updated on progress. We would also welcome further discussion with the Committee about how the evidence you have received and the consideration you have given could inform the intergovernmental discussions.

You also asked seven specific questions, which I have reproduced below together with my answers:

Q1: Please could you clarify how the inter-governmental agreement has been the basis of ensuring the Assembly's consent has been integral to ensuring our statute book can function properly?

The Welsh Government invited the Assembly to consent to the European Union (Withdrawal) Bill in part on the basis that the Intergovernmental Agreement reiterated the UK Government's commitment to not normally use powers to amend domestic legislation in devolved areas without the agreement of the Welsh Government. Following the Assembly's decision to consent to the Bill, scrutiny of this arrangement was then enshrined in Standing Order 30C.

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Furthermore, the Intergovernmental Agreement, and the collaboration which flowed from it, have ensured that the UK Government has not brought forward regulations under section 12 of the European Union (Withdrawal) Act to restrict the Assembly's competence. In our view, this represents a significant achievement given that, as you will recall, the original Bill would have prevented the National Assembly from legislating in any of the space relating to devolved competence previously occupied by EU law.

Q2. Why are intergovernmental agreements appropriate for dealing with primary legislation that is passed by legislatures?

Intergovernmental agreements are a transparent way to set out the principles and mechanisms by which governments intend to work together to implement primary legislation passed by legislatures. They reflect the interconnectedness of the responsibilities of the governments of the UK and the shared role of those governments in the governance of the UK.

Q3: In relation to the UK Agriculture Bill and our consideration of Welsh Government LCMs, the Cabinet Secretary for Energy, Planning and Rural Affairs explained that the Welsh Government had entered into an agreement with the UK Government. Our report on the second LCM, expressed concern at the approach adopted. In your view, should such agreements also be subject in the future to formal consent by the National Assembly?

Intergovernmental agreements are by their nature, and should remain, the responsibility of the relevant executives, and should not be subject to consent by legislatures. The Welsh Government enters into a range of agreements, both legally binding and non-legally binding, and it would not be constitutionally appropriate given the separation of powers for the Assembly to consent to those, although of course Members can and do scrutinise them.

Where intergovernmental agreements are linked to primary legislation for which the Assembly's consent is sought, we would anticipate that consideration of the relevant intergovernmental agreement would be part of the Assembly's consideration. Furthermore, we would anticipate ongoing Assembly scrutiny of the operation of intergovernmental agreements under the mechanisms agreed in the inter-institutional agreement between the Assembly and the Welsh Government.

Q4: What risks are associated with intergovernmental agreements given that they are not legally binding and how can the Welsh Government seek to protect the Welsh devolution settlement in the event of future, different governments overriding these agreements?

The devolution settlement is not affected by the use of intergovernmental agreements, as they operate within the existing settlement.. We consider that the use of intergovernmental agreements maximises our influence over decision-making so that we can protect Welsh interests, for which we are held accountable by the Assembly.

Q5: How sustainable are the use of intergovernmental agreements and common frameworks over the longer term? If non-legislative common frameworks can be overridden or discontinued by future, new governments, how is this an appropriate way forward? It would be helpful if you confirm that both legislative and non-legislative common frameworks are intended to be a long-term solution.

Since 2017, successive UK governments have consistently committed to Common Frameworks and there has to date been no reluctance to continue to engage. The premise of Common Frameworks is the clear recognition of the benefits of intergovernmental working in areas of shared interest. They build on long-term official level relationships

across the UK that have been established since devolution, but formalise and clarify these in relation to the new responsibilities emerging in the context of the UK's decision to leave the EU. Both legislative and non-legislative frameworks and framework elements are important parts of this long-term relationship. Frameworks are intended to be a long-term commitment with explicit provision and mechanisms by which they can be reviewed and updated, and future legislatures and governments should be able to initiate a process of renegotiation. The provisions for review and assessment, and for monitoring procedures will enable them to evolve and adapt to developing policy landscapes.

Q6. How does the use of intergovernmental agreements and common frameworks impact on the complexity of the devolution settlement for citizens?

Firstly it needs to be recognised that intergovernmental agreements and common frameworks of this kind are only intended to operate in a context where the UK has left the EU. Leaving the EU would of course increase the direct involvement of the Welsh Government and the Assembly in areas of law within devolved competence. In this context, intergovernmental agreements and common frameworks aim to provide clarity around the impact of the devolution settlement for citizens. Citizens receive a mix of devolved and non-devolved services in Wales, and in reality devolved responsibilities and non-devolved ones impact on each other. In this context, a clear, published and scrutinised approach to how the Welsh Government is working with the other governments of the UK on shared areas of interest which have an impact on citizens is a significant step forward. Intergovernmental agreements which use plain language, remove confusion and include mechanisms for avoiding disputes can help to simplify and demystify processes to aid citizens' understanding and engagement.

Q7:There are at least 20 occasions in which the UK Government has amended primary legislation in devolved areas by using subordinate legislation powers under the EU (Withdrawal) Act 2018, this being done (almost always) with the agreement of the Welsh Government, but without the formal consent of the National Assembly.

- *(i) We would be grateful for your views on the implications of this approach for any future reform of the Sewel Convention.*
- *(ii) How the approach adopted by the Welsh Government in not tabling appropriate statutory instrument consent motions is consistent with proposition 5 of Reforming our Union.*

As the First Minister explained in his letter to you of 23 August, although Standing Orders place no obligation on Ministers to table a motion in respect of a SICM, the Welsh Government has not changed our overall approach: in normal circumstances, it remains our intention to table motions for SICMs. However, in respect of Brexit-related SIs, there were practical issues of timing to consider.

The First Minister also explained that the context for the approach we took was the programme of corrections to the statute book, to make sure it continued to work after EU Exit. This was an unprecedented undertaking: the volume of correcting SIs coming our way, and the limiting timescales surrounding them, meant that our normal practice regarding the handling of SICMs was simply not a practical proposition. We developed a way of working which ensured that Brexit related SICMs would be dealt with in a timely manner, whilst also ensuring that they would be brought to the Assembly's attention. In deciding not to ourselves table SICMs in respect of these pieces of secondary legislation, we were very conscious that where any Member believed that a SICM should be debated by the Assembly, it would be open to them to table a motion.

We would expect any reforms to the Sewel convention in line with our proposals in ‘Reforming our Union’ to take into account the challenges we experienced in this context as well as the views of your Committee.

I trust that these responses are helpful. Please do let me know if there is anything further I can do to assist with your inquiry, including further meetings and/or technical briefings with my officials. The constitutional implications of new Welsh Government functions, increased intergovernmental working, and development of international agreements are significant and I know that both your Committee and the External Affairs and Additional Legislation Committee are giving careful consideration to the implications for Assembly and interparliamentary scrutiny, which I welcome.

I am copying this letter to the Chair of the External Affairs and Additional Legislation Committee and to the First Minister.
Regards,

Jeremy Miles AM
Y Cwnsler Cyffredinol a Gweinidog Brexit
Counsel General and Brexit Minister