

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref CG/10056/21

Huw Irranca-Davies MS
Chair – Legislation, Justice and Constitution Committee
Welsh Parliament
Cardiff Bay
Cardiff
CF99 1SN

22 October 2021

Dear Huw,

Thank you for your letter of 8 October 2021 regarding my appearance at your Committee on 20 September 2021.

I am writing to provide you with more detail on the matters you highlighted.

My responses can be found in Annex A.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Gohebiaeth.Mick.Antoniw@llyw.cymru
Correspondence.Mick.Antoniw@gov.Wales

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annex A

- 1. You confirmed that you and your officials were working on a strategy for the Welsh Government's legislative programme "setting out the guiding principles for legislation that is coming through, so that we have a consistency of approach". Please can you provide more information about this strategy and confirm when it is likely to be finalised and published?**

Our general principle, when it comes to legislation, remains that we should legislate in the Senedd in devolved areas. However finite time and resources mean we should also be open to taking a pragmatic approach to using UK Parliamentary legislation to achieve our objectives where the opportunity to do so arises. We have agreed a set of principles to guide decision making in relation to UK Parliamentary Bills. These principles are attached at Annex B.

The final decision on recommending consent to a UK Bill typically involves consideration of a range of constitutional, policy, political and other factors, which can sometimes conflict. Consequently, whilst the principles will provide the basis for such decisions, we must recognise they will be applied in the context of often complex and fluid negotiations and it will sometimes be necessary to consider the possibility of concessions in order to secure our policy objectives.

- 2. Is the Welsh Government taking any steps to pursue more fundamental changes in the Sewel Convention?**

Our position on the Sewel Convention remains as set out in *Reforming our Union*, republished earlier this year. We also anticipate the issue will be considered as part of the work of the constitutional commission currently being established.

- 3. Please can you provide details of the criteria you are using in this Senedd to determine whether it would be acceptable to use a UK Government Bill to take forward Welsh Government policy?**

As outlined in response to Question 1, the criteria for determining whether to use a UK Government Bill to take forward Welsh Government policy are set out at Annex B.

- 4. Can you confirm how many UK Bills will be subject to Welsh Government legislative consent memoranda in the foreseeable future which are in addition to those UK Bills for which memoranda have already laid before the Senedd?**

Decisions on whether UK Parliamentary Bills will be subject to a legislative consent memoranda are taken on an individual basis once we have received a copies of the proposed legislation. Consequently it is not possible to confirm how many Bills, in addition to those for which LCMs have already been laid, will require one. We will continue to comply with Standing Orders and notify the Senedd as the Bills are presented to Parliament.

- 5. You referred to quadrilateral Ministerial meetings to discuss intergovernmental relations and common frameworks. Will you ensure that the Senedd is notified of all such meetings wherever reasonably possible, in accordance with the Inter-Institutional Relations Agreement?**

The Welsh Government will continue to operate in line with the Inter-Institutional Relations Agreement (IIRA). In correspondence with the LJC Committee, and in a recent statement in Plenary, the First Minister confirmed our commitment to strengthen transparency and

accountability for inter-governmental relations. We will continue to update and report to the Senedd on our relations, engagement and joint working with other governments in the UK as well as with British-Irish Council member administrations. The First Minister has also agreed with you, as Chair of the Committee, to renew the IIRA for the sixth Senedd, and our officials are working on this.

6. Can you confirm that the Welsh Government has not implemented any internal processes to assess the impact of the [United Kingdom Internal Market Act 2020] on legislation which may fall within its scope?

The Welsh Government has not implemented a standardised process exclusively to assess the impact of the United Kingdom Internal Market Act 2020. However, as part of the policy formulation process, a range of considerations are taken into account, and that Act may be one such consideration depending upon the subject matter in question.

The Office for the Internal Market is tasked with independently advising the Welsh Government, the other Devolved Governments and the UK Government on how specific laws, rules and regulations impact on the UK Internal Market and will report on how it is working.

7. Does the Welsh Government intend on notifying the Senedd of:

- i. its own legislation which may fall within the scope of the Internal Market Act; or**
- ii. legislation made or passed in another legislature which may consequently bring Welsh legislation within the scope of the Internal Market Act?**

If the Welsh Government develops legislation the Senedd will be informed.

When the UK Government introduces a Bill, that Bill is thoroughly scrutinised as part of the LCM process. However, there are no plans to scrutinise the legislation of Scotland or Northern Ireland in this way. That said, if we do become aware of legislation introduced or made in another legislature that may bring Welsh legislation within the scope of the United Kingdom Internal Market Act 2020, then we would be able to bring this to the attention of the Senedd.

8. Is the Welsh Government proceeding with its legislative programme on the basis that the practical effect of Welsh laws within the scope of the Internal Market are not impacted and undermined, as argued in its grounds for judicial review?

The Welsh Government's position is that the Act has not altered the devolution settlement. Indeed, that is what we have submitted as part of the Judicial Review challenging the United Kingdom Internal Market Act 2020, which is now at appeal stage in the Court of Appeal. We confirm that the Welsh Government is proceeding with its legislative programme on that basis. We look forward to testing these issues before the Court of Appeal on 18 January.

9. Within its competence, can you confirm it is the Welsh Government's intention to keep pace with EU law?

- i. If the intention is to keep pace, can you confirm:**
 - (a) what processes the Welsh Government has in place to monitor developments in EU law and on what basis, and**
 - (b) whether the Welsh Government will seek executive powers to keep pace with EU law, along the lines of the powers envisaged by the Welsh Government in the Law Derived from the European Union (Wales) Bill?**

ii. How will the Welsh Government decide whether or not it will align with EU standards?

Members who served in the Fifth Senedd may recall that the Welsh Government decided not to ask the Senedd for powers to keep pace with EU law. This was for several reasons. Ministers were concerned that such wide powers would not be acceptable to the Senedd. They considered that there were existing powers to keep pace, for example with technical modifications to EU tertiary legislation, and they noted that, for more significant EU legislation, the legislative process in the EU would provide more than enough time to enable a Bill to be introduced and passed by the Senedd if that was considered necessary.

There is not a central mechanism to monitor differences between EU and Welsh law. This is the responsibility of individual portfolio Ministers and their departments, who engage with stakeholders as part of their own policy and legislative programmes.

The Welsh Government will continue to engage through the Common Frameworks programme, which is the preferred mechanism for all nations of the United Kingdom to discuss and agree divergent policy in line with devolved competence.

10. On non-regression, you stated that there has been disagreement between the Welsh and UK Governments over maintaining standards and the extent to which standards will be protected, particularly in the areas of food, environment and agriculture. Can you provide more information as to these discussions and provide the latest position?

The Welsh Government has voiced its concerns that any move by the UK Government to reduce standards will meet strong opposition. The Welsh Government has no plans to roll back on current standards and intends to maintain these and in some cases consider where enhancements may be appropriate in line with Welsh Government policy.

11. Can you provide further information on:

- i. what processes the Welsh Government has put in place to assess whether legislation it is making does not regress from standards in place at the end of the transition period?**
- ii. Are there any areas where the Welsh Government has concerns that legislation made by UK Ministers has led to regression and what action, if any, has it taken in these instances?**

The Welsh Government has made clear our policy intention is not to lower any current standards and is to maintain the high standards consumers have come to expect.

We are not aware of any live scenarios where legislation made by UK Ministers has led to regression of standards. However, we monitor movements by the UK Government or associated bodies to regulate for lowering of standards and will strongly oppose any moves in this direction.

12. Can you set out your understanding of the relationship between legislative competence and the Withdrawal Agreement?

Your letter refers to section 7A of the European Union (Withdrawal) Act 2018 (general implementation of remainder of withdrawal agreement) and the effect on the Senedd's legislative competence of this being a "protected enactment".

A provision is outside the Senedd's legislative competence if it breaches any of the restrictions in Part 1 of Schedule 7B to the Government of Wales Act 2006, having regard to any exception in Part 2 of that Schedule from those restrictions.

Paragraph 5 of Schedule 7B states that a provision of an Act of the Senedd cannot make modifications of, or confer power by subordinate legislation to make modifications of any of the provisions listed in the table set out in paragraph 5(1) of the Schedule. This includes the whole of the European Union (Withdrawal) Act 2018, other than any excluded provision. Section 7A of the 2018 Act is not on the list of excluded provisions in paragraph 5(1A) of the Schedule and is therefore a "protected enactment" for the purposes of paragraph 5 of Schedule 7B.

13. You confirmed your understanding that a justice 'data dashboard' has been established. Is this in a form that can be shared with the Senedd?

We will provide the Committee with PDF versions of the dashboard as soon as possible to provide an example of the development and the range of data available within them. But it is important to note that the Crime and Justice Dashboards are at a developmental stage and changes may be made following feedback from users. We will be working to publish these dashboards formally but currently they are work in progress, with the eventual content to be confirmed.

In light of that, we would welcome any feedback from the Committee on the content. The data in the Dashboards include a wide range of data drawn from a variety of sources, including the Ministry of Justice, the Home Office, HM Prison and Probation Service, the Higher Education Statistics Agency, the Youth Justice Board for England and Wales and the Youth Custody Service; but they remain limited to what is available elsewhere, and we continue to pursue the case for the availability of fuller and more useful disaggregated data on justice in Wales from the Ministry of Justice.

Within the Welsh Government the Dashboards are interactive to allow for their fuller use but at this stage, due to commitments made to some data providers, we are not able to make the full interactive dashboard available externally.

14. A forward work programme for the Cabinet Sub-Committee on Justice was agreed at its July meeting. Please can you share this with the Committee?

Work is continuing to finalise the work programme, which will need to take account of the final recommendations of the Law Commission's project on the devolved tribunals that is expected to be published shortly. We intend to publish our justice work programme once it has been finalised.

Annex B: Welsh Government's principles for UK Bills

- Recommending consent for devolved provisions in UK Bills should clearly align with the First Minister's principles:
 1. We follow the principle that primary legislation in devolved areas should be enacted by the Senedd. However, it is necessarily the case that there are, and will continue to be, circumstances in which it is sensible and advantageous if provision which would be within the Senedd's legislative competence is sought for Wales in UK Parliament Bills, with the consent of the Senedd. Such provision will not infrequently include conferring new delegated powers on the Welsh Ministers.
 2. Taking provision in a UK Bill can enable pragmatic solutions to be reached in a timely fashion, while simultaneously respecting the legislative competence of the Senedd through the legislative consent process. It can be a matter of practical good government for such provisions to be included in a UK Bill.
 3. Examples of situations where such an approach would be appropriate could include:
 - when the UK Government's legislative proposal would also be appropriate for Welsh circumstances but there is no time available for similar provisions to be brought forward in the Senedd;
 - where the interconnected nature of the relevant Welsh and English administrative systems mean that it is most effective and appropriate for provision for both to be taken forward at the same time in the same legislative instrument;
 - where the devolved provisions in question are minor or technical and non-contentious;
 - where the UK Bill covers both devolved and reserved matters and the UK Parliament route must be taken in order to achieve the policy objective;
 - where the legislative competence of the Senedd and/or the powers of the Welsh Ministers would be extended in a way that could not be achieved through a Senedd Act, given the limits on the Senedd's legislative competence.
 4. Finally, it would be most unwise for the Welsh Government to adopt a self-denying ordinance in such circumstances.
- Delegated powers, including Henry VIII powers, in UK Bills in devolved areas should be conferred on the Welsh Ministers alone.
- UK Bills should not create concurrent powers.
- UK Parliament Bills should either protect or enhance the existing devolution settlement, rather than introducing new reservations.
- UK Ministers must confirm in writing how they will meet new costs falling to the Welsh Government or devolved Welsh authorities.

- The Welsh Government must have an equal status to the UK Government's in governance of cross-border bodies with devolved functions which are established in UK Bills.
- Non-legislative intergovernmental agreements, such as Memorandums of Understanding and despatch box commitments, accompanying Bills should be avoided as they only bind the current UK Government to an extent, and they do not bind future UK Governments.