

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



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru

20 April 2022

Dear Huw,

Thank you for your letter of 25 March in relation to my appearance at Legislation, Justice and Constitution Committee on 14 March. I welcomed the opportunity to speak to the Committee regarding the Intergovernmental Relations Review, the Internal Market Act, and the Sewel Convention. I have provided a detailed response to your further questions in an Annex to this letter.

Yours sincerely,

A handwritten signature in blue ink that reads "Mick Antoniw". The signature is written in a cursive style and is underlined with a single horizontal line.

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

Intergovernmental Relations

1. You indicated that you hoped to discuss the implementation of the Intergovernmental Relations Review and the “situation in respect of UK legislation” at the first meeting of the Interministerial Standing Committee (IMSC) this month. You will have seen our letter to the First Minister (dated 22 March) and our request to be kept updated on progress following the first meeting. What are your priorities and expectations for the work of the IMSC?

The First Minister and I represented the Welsh Government at the first meeting of the Inter-Ministerial Standing Committee (IMSC) on 23 March. The First Minister wrote to you on 31 March with an update on the discussions at that meeting. The First Minister also issued a Written Statement to the Senedd on the IMSC, outlining that at this meeting the important topics of the Ukraine crisis, our approach to UK legislation, and the Levelling Up White Paper were discussed.

In relation to implementing the IGR Review, it was agreed that a forward programme of meetings would be developed to enable a structured and regular rhythm of engagement. It is important that these meetings are timetabled and routinely take place if the promise of the IGR Review is to be fulfilled. The IMSC must be given time to establish its ways of working, with joint ownership of the machinery, reflected for example in shared chairing and agenda-setting, and the intention to work on the basis of agreement by consensus.

The IMSC will become an important forum for Ministerial engagement on cross-cutting domestic and international matters. The IMSC will provide a strong basis to work jointly and collaboratively on common frameworks and regulatory matters and to facilitate consultation between the governments at a Ministerial level. The IMSC will oversee portfolio-level engagement and provide an escalation route for matters of strategic importance.

2. How do you think the IMSC should approach oversight of the UK internal market and common frameworks? In particular:

- What consideration should the IMSC give to the reporting of the Office for the Internal Market?
- How will the IMSC ensure that discussions on balancing the opportunities and risks of regulatory divergence are open to parliaments and stakeholders?

As set out in its Terms of Reference, the Standing Committee will “consider issues which have an impact on regulatory standards across the UK for internal trade” and “consider the implications of diverging approaches in establishing cross-cutting local policies which impact on another government’s area of responsibility.” Discussions with the other governments through the IMSC – and through relevant Inter-Ministerial Groups on specific issues – should enable consideration to be given to reports from the Office for the Internal Market (OIM) and wider developments. We remain committed to engaging with the Senedd and stakeholders when considering future regulatory policy and potential divergence, and to reporting on inter-Ministerial discussions in line with the Inter-Institutional Relations Agreement and arrangements relating to Common Frameworks.

The OIM has a duty to publish an annual report (the first is due no later than March 2023) and once every five years with a more detailed examination of the health of the internal market. This five yearly report will also look at how Common Frameworks are contributing to the effective operation of the internal market.

The OIM published an initial [report](#) this March. Among other things, it considers possible future regulatory measures of the four nations, within the scope of the UK Internal Market Act 2020, and provides an initial analysis of intra-UK trade data regarding the size and importance of this market.

▪ What is your response to the recent recommendation of the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee that there should be agreement between the Scottish Government and Scottish Parliament that, as a minimum, there should be to no dilution of public consultation or of parliamentary scrutiny as a result of common frameworks and intergovernmental working?

I agree with this recommendation; Common Frameworks are not intended to interfere with the ability of the Senedd or any other legislature to scrutinise.

3. We discussed the establishment of the Intergovernmental Relations Secretariat. Could you set out your expectations for what the size and grade composition of the secretariat should be? Given the key role of the secretariat to the functioning of the new tiers of intergovernmental working and, not least, the dispute resolution processes, we would be grateful too if you could keep us updated on the establishment of the secretariat.

As outlined in the evidence session the resourcing of the standing IGR secretariat has not yet been finalised. Work is underway on the overall staff complement and grade mix as well as options around recruitment to ensure appropriate resource for the standing secretariat to carry out its functions. Ownership will be shared across the four governments, but it will operate independently of any parent governments' interests. The secretariat will ultimately be accountable to the Council. It will support and co-ordinate business at the top and cross-cutting tiers – but not the FISC – and oversee disputes, according to an agreed set of guidelines. The standing secretariat will liaise and work closely together with senior IGR officials across all of the governments. Core functions are set out in the package of reforms. Until the standing secretariat is established, officials from each government will act as a joint secretariat. I will keep you updated as the standing secretariat is established.

4. As discussed during the session, we were concerned to note the statement made by the Minister for Economy on 10 March that the first meeting of the UK-EU Relations Interministerial Group (IMG) was called with only two hours' notice. You expressed a hope that these were "early teething troubles". How will the Welsh Government seek to ensure future meetings of IMGs are called with reasonable notice?

As mentioned above, the IMSC oversees portfolio-level engagement and provides an escalation route for matters of strategic importance. Oversight and assurance will also be provided jointly by senior officials in all four governments, meeting on a regular basis to oversee the establishment of IMGs, where they do not currently exist, as well as provide a mechanism for improving the quality of engagement. We will continue to work to influence the focus, operations and ways of working through joint secretariat arrangements with the other governments.

IMGs need to operate in line with the principles for intergovernmental relations and should have agreed terms of reference; meetings organised collaboratively by policy officials from the four governments; agendas agreed between governments; rotating chairs (as well as locations, if 'in-person' meetings are needed) as standard practice. If issues emerge, we will raise these at official level, Ministerial level, the IMSC and, if necessary, in the Council. We will continue to keep the Senedd updated in line with our commitment to transparency and accountability around inter-governmental relations.

As for the UK-EU Relations IMG, we have made clear that we expect to be given proper notice of all intergovernmental meetings of this nature, consistent with the principles agreed under the review of IGR. Welsh Government officials have fortnightly meetings with the UK Government's EU Secretariat and the other Devolved Governments, and through this we will continue to seek to ensure future meetings of the IMG operate in line with these principles.

5. Can you set out how the Interministerial Group for the TCA will interact and communicate with forums established by the TCA? For example, will it coordinate its meeting schedule to align with TCA meetings?

The Terms of Reference for this IMG are yet to be finalised and signed off, but the current intention is that the Group should aim to meet regularly, including before meetings of the Partnership Council and the Withdrawal Agreement Joint Committee. This will enable Devolved Ministers to discuss with UK Government counterparts the issues which are likely to be considered at these meetings, and seek to ensure that devolved interests are represented in the positions taken by the UK in those TCA meetings. Relevant issues may also be discussed in portfolio-specific IMG or official level meetings.

6. We discussed whether the new intergovernmental structures provide for sufficient Welsh Government involvement in international policy. Can you set out your understanding of how the IMSC and the various interministerial groups will work together to provide four government oversight of international policy?

The importance of engagement on international issues as it affects devolved responsibilities is recognised within the IGR Review.

There are two international focussed IMGs – the Trade IMG to discuss agreements with the UK's new trading partners, and the Trade and Cooperation Agreement Implementation (TCA) IMG for the UK-EU TCA. The departmental IMGs can also consider international engagement and agreements where devolved responsibilities are involved.

The new UK-EU Relations IMG will be a forum for discussion of matters relating to the TCA and the Withdrawal Agreement, but the UK Government has outlined that wider diplomatic issues relating to the UK's international affairs are outside the scope of this IMG.

With regards to engagement with the UK Government on the negotiation of new Free Trade Agreements, structures were already in place that allowed for Welsh Government engagement, both at an official and Ministerial level. Although there remains room for improvements in some elements of this engagement, these are focused on the nature of the information shared with us, rather than the engagement structures themselves.

The Ministerial Forum for Trade (MfT) has been in place for several years and provides an opportunity for Ministers from the Devolved Governments to engage on UK Trade Policy. However, the Terms of Reference (ToR) for the Ministerial Forum for Trade have never been formally agreed. Now that the IGR Review is complete, the ToR for the MfT will be revisited and discussions have begun with UK Government and the other devolved governments over how best to align the terms of the MfT with the IGR principles.

The IMSC can consider cross cutting and wider strategic international issues. It can also provide an escalation route for international issues which cannot be adequately addressed in the relevant IMG, or bilateral meetings, or which require further strategic oversight across multiple policy areas.

The IGR Review also allows that international engagement and agreements that fall outside the remit of the IMSC or a relevant IMG can be led directly by the FCDO, either on a bilateral or multilateral basis as necessary. In support of this, regular senior official level meetings involving the FCDO and the devolved governments have been established.

7. We discussed the new intergovernmental dispute resolution process. Could you confirm whether the Welsh Government has, or will have, internal criteria for deciding how and when to seek escalation of matters through the new intergovernmental dispute resolution process? If such criteria exist, please can you provide us with the details?

The proposed mechanism around dispute avoidance and resolution outlines each government's right to refer and escalate a dispute, and requires independent chairing and independent secretariat arrangements. It includes a presumption of independent input, through either advice or mediation, and increased transparency to aid legislatures' scrutiny and stakeholder engagement.

Triggering a formal dispute is a significant step to take and should normally be seen as a last resort, when all attempts to satisfactorily resolve an emerging issue or disagreement have been exhausted. As such, our approach prior to initiating a formal dispute would commonly involve a number of important stages, including:

- Exhausting all of the portfolio level intergovernmental dispute avoidance and resolution mechanisms, including IMGs and any Common Framework arrangements;
- An internal review by senior Welsh Government officials to consider the steps taken to that point to resolve the issues, and to consider it in the context of the IGR dispute resolution process, and any criteria or guidance issued by the standing secretariat, including the eligibility criteria set out in the IGR Review;
- Securing agreement from the portfolio Minister, the Counsel General, the Finance Minister (for finance disputes) and the First Minister who will consider the merits of the case in the context of the specific issue and overall intergovernmental relations;

8. We briefly discussed the UK Government's intention to proceed with the Professional Qualifications Bill despite legislative consent not being given by the Senedd and the Scottish Parliament. As noted by the Minister for Education and Welsh Language in his letter to us on 8 March, and as you acknowledged during the meeting, this is a breach of the legislative consent convention. It was not clear from the session whether you consider this matter, or any similar matter in the future, would be taken through the new dispute resolution processes by the Welsh Government. We would welcome clarity on this point.

During the IMSC on 23 March, the First Minister and I made clear that the UK Government must properly respect the Sewel Convention. As a result of which it was agreed for joint work to be carried out by officials on principles to minimise, if not eliminate, differences in approach to the Sewel Convention. I propose to see how this joint work is taken forward in the first instance, but all options remain on the table.

9. You described the revised dispute resolution process as a “massive improvement” and “groundbreaking”. How will you monitor how well new intergovernmental processes are working, and what action will you take if you feel they are not being followed?

The IGR Secretariat will be responsible for ensuring transparency of IGR operations such as sharing joint communiqués for the Council and IMSC. It is also required to complete an annual report of intergovernmental activity. This will include any issues progressed through the DAR mechanism and, respecting the confidential nature of some issues, each government will share this with their legislature. We will supplement and complement this via our own monitoring and reporting as required by our Inter-Institutional Relations Agreement with the Senedd. Where we have any concerns over the intergovernmental processes and procedures, we will raise these directly with the Secretariat and at senior official level, or via the IGR Ministerial structures including the IMSC, the FISC, or the Council.

Making laws for Wales

10. In a letter to us on 17 January 2022, you set out that there is a need to balance “defend[ing] the current devolution settlement so far as possible and the principle that we should legislate ourselves here in Wales, with opportunities that may arise to improve the law for citizens of Wales.” How does the Welsh Government weigh up the conflicts between these factors?

The final decision on whether to recommend the Senedd gives 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 agreed by Cabinet in October 2021 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 compromises in order to secure our overall policy objectives.

We approach legislation in terms of maximising the outcomes for the people of Wales in line with our priorities. So we decide how best to do that via both Senedd and UK Parliament legislation, taking account of the priorities and capacity of our own legislative programme and also the potential opportunities – and risks – arising from the UK Government’s legislative programme.

If we only delivered our priorities through Senedd legislation, rather than pursuing a wider set of priorities through both legislative programmes, then we would end up delivering less for the people of Wales. However, where we consider accepting or proactively using UK Government legislation to pursue our policy objectives, our commitment to defending the devolution settlement and our principles will continue to guide our approach.

11. How is the Welsh Government's decision to seek consent for UK bills in devolved areas such as leasehold reform and building safety compatible with the Welsh Government's principle that primary legislation in devolved areas should be enacted by the Senedd?

Our starting point remains that primary legislation in devolved areas should be enacted by the Senedd. However, 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.

In October 2021 I wrote to the Legislation, Justice and Constitution Committee setting out our criteria for determining the circumstances in which we would consider using a UK Bill to take powers for Wales. In summary we would consider using a UK Bill where the law can be changed more quickly than we could achieve in our own legislative programme and where it is sensible for the regulatory regime to be similar across England and Wales. As previously noted, the final decision on recommending consent to a UK Bill typically involves consideration of a range of factors, which can sometimes conflict.

Our principles were consistently applied in relation to our decisions on both leasehold reform and building safety. In relation to both Bills in those areas there were significant benefits to be found through the preservation of commonality of law, utilising timely Parliamentary legislative opportunities as opposed to introducing Senedd legislation (which would have had an impact upon the existing legislative programme before the Senedd), and a significant degree of Welsh Government involvement in the development of proposals (for example the collaboration with the Law Commission's leasehold reform projects).

12. Can you clarify the **statement you made in Plenary on 15 February 2022 that the number of legislative consent memoranda is not "within the choice of the Welsh Government"?**

Whilst there will be UK Bills in which we are requesting provision, there will also be Bills in which we consider there to be provisions within the Senedd's competence which have not been subject to such requests.

In this Sixth Senedd, and since the new Parliamentary session in May, we have laid legislative consent memoranda, including supplementary memoranda on 19 UK Bills. The sheer volume of initial and supplementary legislative consent memoranda tabled by the Welsh Government reflects the amount of legislation coming from the UK Government, and also the extent to which the UK Government or the UK Parliament is amending the legislation during its Parliamentary passage.

13. The Minister for Education and Welsh Language sought an amendment to the Professional Qualifications Bill to the effect that the powers in that Bill cannot be used by UK Ministers to make regulations that amend the Government of Wales Act 2006. In contrast, the Minister for Health and Social Services has not pursued a similar amendment to an equivalent enabling power in the Health and Care Bill. What are your views on the two opposing approaches, and which of these approaches is compatible with the Welsh Government's principles for UK bills?

I do not consider there is a conflict here; each UK Bill we deal with is different and has to be considered on a case-by-case basis. A consistent approach to similar clauses across Bills is aimed for, however each Bill requires different issues to be balanced and negotiated agreements reached.

The Professional Qualifications Bill continues to give the Lord Chancellor and the Secretary of State the power to legislate in areas which are within the legislative competence of the Senedd, without any requirement to obtain the consent of the Welsh Ministers. This directly affects future policy space, Welsh regulators and the professions they regulate. This significantly impacts the approach we have taken, and we have worked with the UK Government to make clear our concerns with the concurrent powers in the Bill, and have repeatedly explained that they must be amended to reflect Welsh Ministers' powers in areas of devolved competency.

The decision to recommend Senedd consent to the consequential amendment provisions in the UK Health and Care Bill was taken following much consideration. The decision was based on reassurances given by the UK Government about the intended use of the powers, the sight of examples of the likely usage of the powers (for example the changing of names of English organisations which are referred to in Welsh legislation where a transfer of functions has occurred) and the Despatch Box Statement made in the House of Lords on 9 February by Lord Kamall. This was set out in the Supplementary Legislative Consent Memorandum (Memorandum No. 3) and the Minister for Health and Social Services letters to the Committee of 14 and 28 February.

The consequential amendment clauses are not considered by the UK Government as being within the competence of the Senedd (although we did not share this view) and the UK Government made clear in discussions that it was not prepared to remove or amend the clauses. The UK Government has specifically confirmed that it has no plans to use the powers, which are consequential on the Bill, to amend the Government of Wales Act 2006.

We obtained significant concessions for Wales in this Bill and it was clear that, given the assurances provided by the UK Government and the Despatch Box commitment, not obtaining the concessions in other areas of the Bill presented a greater risk to Wales than the risk presented by the consequential amendments clauses.

14. What steps is the Welsh Government taking to move forward with reform of the legislative consent process as set out in Proposition 5 of Reforming our Union: Shared governance in the UK?

The First Minister and I raised the unacceptable breaches of the Sewel Convention at the recent meeting of the Inter-Ministerial Standing Committee. As indicated in the First Minister's Written Statement to members following the meeting, the First Minister drew the Chair's attention to a recent letter from the Chair of the LJC Committee on the use of UK legislation. He also encouraged serious consideration of the House of Lords Constitution Committee's report and recommendations on the Convention. Linked to this, we called for codification of the Sewel Convention, and a strengthening of reporting mechanisms to respective Parliaments. I underlined the importance of early engagement on future UK Bills. As outlined earlier in this note, arising from the discussion at the IMSC, officials have been asked to follow this up and work on principles to minimise, if not eliminate, differences in approach. We remain of the view that placing the Sewel Convention on a statutory and justiciable footing remains the most appropriate way to protect the devolution settlement and safeguard the United Kingdom and we will continue to press this point.