

Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Dr Andrew Goodall CBE

Ysgrifennydd Parhaol i Lywodraeth Cymru
Permanent Secretary to the Welsh Government




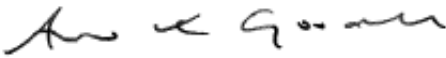
Llywodraeth Cymru
Welsh Government

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

09 November 2022

Dear Huw,

Thank you for your letter of the 20 October in relation to my appearance at Legislation, Justice and Constitution Committee on 10 October. I welcomed the opportunity to give evidence on matters relating to the Welsh Government's legislative programme and capacity to legislate. I have provided a detailed response to your further questions in an Annex to this letter.

| | |
|--|---|
|  |  |
| Mick Antoniw AS/MS Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad Counsel General and Minister for the Constitution | Dr Andrew Goodall CBE Ysgrifennydd Parhaol i Lywodraeth Cymru Permanent Secretary to the Welsh Government |

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

Welsh Government legislative programme and its capacity to legislate

1. Why do you consider it to be the case that the number of pieces of primary legislation passed in the Senedd has remained relatively static since 2007? Does the Welsh Government have a plan or ambition to increase the volume of primary legislation it brings forward to the Senedd?

The numbers of Bills alone do not tell the complete story. Since 2007 the government has used both primary and secondary legislation to deliver its legislative agenda. The amount of legislation passed annually, by reference to the total number of pages of legislation, has not been static.

In comparison to the period between 2007 and 2011, there was a very significant increase in the amount of primary legislation passed between 2011 and 2016.

In the last Senedd this reduced slightly as the clear impact, first all of EU Withdrawal and later of the pandemic, was felt. Notably, however, both of these extraordinary events led to a substantial increase in the amount of subordinate legislation that has been made.

We also continued to take forward some significant and large-scale legislative reforms alongside the huge volume of covid and Brexit-related subordinate legislation during this period.

We remain committed to bring forward a substantial legislative programme during the Senedd term, as outlined by the First Minister on 5 July 2022 in his most recent legislative statement. We have already introduced the first six Bills of this Senedd term.

It may also be worth mentioning that the capacity of the Senedd has not changed in that time, which also has a bearing on the amount of legislation that can be scrutinised.

2. Do you have any concerns about the effect of the growing amount of Welsh law being made in UK Parliamentary bills on the WG's programme to increase the accessibility of law in Wales?

Our principles reflect the importance of balancing our fundamental position that devolved legislation should be made in Wales, whilst responding to UK Government's legislative programme in a manner that does not prevent potentially advantageous provisions being made in a way that is convenient to us.

I accept that this is not optimal in so far as the accessibility of Welsh law is concerned. But the fact of the matter, unfortunately, is that the law across the whole of the UK is already difficult to find and understand. This is the unavoidable context for the kind of compromises that we sometimes have to make. The reality is that until we make more progress consolidating and codifying the law within devolved areas, Welsh law will continue to be inaccessible. So, although it is obviously preferable to

always legislate by way of Senedd Acts, in an imperfect world it is sometimes the better option in order for reform to be instigated more quickly.

3. Can you explain why disagreements on legislation have continued despite a new intergovernmental relations process being in place? For example, on the UK Infrastructure Bank Bill?

Given the instability of the UK Government over recent years and frequent UK Ministerial changes, progress and momentum in implementing the new ways of working and Inter-Governmental Relations mechanisms agreed by all 4 Nations as part of the Review have been slower than anticipated. Nonetheless, it has proved useful at times. For example, there have been two Inter-Ministerial Standing Committee Meetings where concerns with UK Parliament Bills to legislate in devolved areas have been discussed.

We hope that the more formal machinery agreed as part of the Intergovernmental Relations Review will not need to be used routinely. However, the option to escalate disagreements remains open to us.

Discussions with the UK Government on the UK Infrastructure Bank Bill are ongoing and have been constructive.

4. Does the Welsh Government accept that using UK Bills to legislate in devolved areas limits the opportunity for the Senedd to properly fulfil its scrutiny role?

As noted in my letter to you on 4 August 2022, it is inevitable that Senedd scrutiny of UK Bills will not be as detailed as that for legislation made in the Senedd. For this reason we are committed to ensuring as much scrutiny as possible through the LCM process, and also to limiting our involvement with UK Bills where practical.

As previously noted, we continue to seek to work with the UK Government and the other devolved governments to strengthen ways of working and improve UK Government engagement on its legislative programme, including respect for the Sewel convention.

5. Do you consider there to be an opportunity for the Senedd to play a greater role in deciding when the Welsh Government will seek provisions in UK Parliamentary Bills?

As noted in my letter of 4 August 2022, I confirm that, wherever possible, we will lay a written statement before the Senedd and notify relevant Committees where we have sought provision in a UK Bill, before the commencement of the legislative consent process. Again, the extent to which this is possible will be affected by the nature of the engagement from the UK Government on any such Bill, and any temporary confidentiality requirements related to inter-governmental discussions on it.

6. The Welsh Government has seconded staff to Cabinet Office to work on the UK Procurement Bill. Is this common practice or likely to be so? Was any assessment made of the resources needed to develop a Welsh Bill instead?

Two members of the Welsh Government Procurement Reform team were seconded to the UK Cabinet Office for three days a week for approximately seven months. The staff contributed to the development of policy, and this successfully ensured maximum alignment of policy between the administrations. The arrangement also contributed to the establishment of effective two-way communication lines, with staff regularly reporting back and being actively involved in all engagements.

We are not aware of this arrangement happening before in respect of UK procurement legislation.

Whether we second staff to the UK Cabinet Office in the future on other legislation projects is something that will be considered on a case-by-case basis. This would need to take into account the business impact and longer term benefits for Welsh Government.

More generally, as a Civil Service organisation, the Welsh Government facilitates inter-government loans and wider public sector secondments regularly. We often make opportunities available to attract specific skills or experience into the organisation on a temporary basis, and similarly our own staff are able to apply for loans or secondments elsewhere, often for development and progression. The Welsh Government have a relatively small number of staff working in other parts of the public sector on a loan or secondment basis, and the intention in those cases is that as well as benefiting the individual, the individual returns with skills, experience and knowledge that grows our own capability.

Resourcing and capacity was not a consideration in the decision to move forward with the UK Government Procurement Bill instead of a Welsh Procurement Bill. It was taken following our engagement with stakeholders, both on the buyer and supplier side, who had a strong preference for consistent legislation across England, Wales and Northern Ireland.

Retained EU Law (Revocation and Reform) Bill

7. You told us that your approach to the EU Law (Revocation and Reform) Bill will be determined by what format the Bill might take (ROP [118]). Can you expand on this.

The Welsh Government is engaged in ongoing official level negotiations to seek changes to the Bill. I have outlined previously and described in my letter to the Secretary of State, shared as part of a press release on 23 September, the aspects of the Bill we are trying to influence. We will need to re-evaluate the position once the UK Government's position is clear, something that may be influenced by the most recent change in leadership.

8. Has the process of reviewing retained EU legislation (REUL) begun

The Welsh Government is considering how it will respond to the situation imposed by the UK Government. In general, our position is that the EU Withdrawal Act regularised the position effectively and we are not aware of any significant problems with retained EU law. While acknowledging that amendments to it would be required from time to time, we had no intention to repeal, revoke or amend the law in a wholesale manner on ideological grounds.

9. How many pieces of REUL have been made by the Welsh Ministers, which are not included in the UK Government’s estimated 2,400 pieces?

As I have outlined previously, the Welsh Government is still considering its approach to REUL and in the first instance we are working to influence changes in the Bill.

The Welsh Government is considering the information being shared by UK Government departments as we develop our own approach to managing the enormous workload presented by the Bill. We are also liaising with The National Archives, who have been developing data searching tools to better identify the law in question.

10. You said in Plenary on Wednesday 5 October that you will do everything you can to protect standards that are important to Wales. Which REUL are you treated as a priority? What reassurances can you give stakeholders, businesses and people of Wales who are concerned about the Bill?

The review of REUL is an ideological exercise of the UK Government and the Bill imposes unnecessary activity and arbitrary deadlines. The Welsh Government is considering its approach to REUL and this will develop in the coming weeks and months. Our starting point is that we intend to protect all standards. The Welsh Government has no plans to change the body of REUL in a way which departs from the safe and good standards the people of Wales have come to expect.

11. You told us that you “want to get the constitutional principles right about the Bill” and to guarantee your position (RoP [118]). Can you expand on this.

As I indicated in my letter to the Secretary of State, attached to my press release on 23 September, “any powers to amend retained EU law (REUL) in areas of devolved competence should reside with the Welsh Ministers, with any powers held concurrently in such areas to be drafted to include a requirement for Ministers of the Crown to obtain the consent of the Welsh Ministers before they are exercised.” My position has not changed, and I continue to press that the UK Government makes amendments to the Bill on that basis.

12. You suggested that your current strategy is to prioritise intergovernmental engagement, via talks with UK Ministers and individual UK Government departments (RoP [118]). Can you set out what changes you are pursuing to the Bill in these discussions.

Please see the letter attached to my press release on 23 September. This outlines the main concerns with the Bill, which form the substance of my continued ask of the UK Government for amendments to the Bill.

13. You said “at the moment, there are a number of areas where [the Bill] gives powers to UK Government to legislate in devolved areas. The discussions I've had with the relevant Minister have been to say that that has to change” (RoP [118]). Can you confirm whether the Welsh Government is seeking amendments to the Bill to remove these powers?

As I indicated above, we have stated that any powers in areas of devolved competence should in the first instance be solely exercisable by a Minister of a devolved government. Where powers are held concurrently, that should be drafted to include a requirement of Ministers of the Crown to obtain the consent of the Welsh Ministers before they are exercised.

14. You explained that you have received “positive assurances” from the UK Government on the matter of powers in the Bill for UK Ministers to act in devolved areas (RoP [118]). Can you confirm if this means that the UK Government is open to removing these powers?

In my meeting with the then Secretary of State for Wales on 28 September he gave assurances that he would respect the devolution settlement and the Sewel convention. I expect the UK Government to follow through on this commitment.

15. You also said “the proof of the pudding will be when we actually see the detail—that is, that the UK Government won't legislate, and certainly won't legislate unless we consented to that legislation” (RoP [118]). Not legislating in devolved areas and not legislating in devolved areas without the consent of Welsh Ministers are very different actions. Which of the two outcomes are you negotiating to achieve?

I have made clear that it will not be acceptable for Ministers of the Crown to legislate to change REUL within the scope of the Senedd without as a minimum the explicit consent of Welsh Ministers. I continue to seek changes to the Bill to reflect this.

16. You said in Plenary that you are careful considering using powers in Bill to restate legislation en bloc. What consideration has been given to using the power in clause 1(2) to avoid the initial sunset buy simply listing all instruments that are devolved REUL, without individually analysing each instrument?

The Welsh Government continues to assess the implications of the Bill and it is too early to specify a strategy on how we will address REUL.

17. To what extent could the Senedd amend the Bill if it becomes an Act? For example could the Senedd change the December 2023 sunset clause insofar as it relates to devolved retained EU law?

The Welsh Government continues to work with the UK Government to seek changes to aspects of the Bill that present fundamental problems for Wales. I have drawn attention to these in my recent press release. We have made no decisions about what we may propose if the Bill is not satisfactory.

18. How will you meet the capacity and resource challenge you outlined in Plenary on 5 October?

The Welsh Government continues to consider the potential implications and what this will mean in terms of resource. There could be a very significant drain on resources, which comes at a time when the Government is focused on far more important issues, such as the cost-of-living crisis.

19. What impact might the need to preserve retained EU law have on your ability to bring forward Welsh Bills? Do you expect to see a further increase in the use of UK Bills to deliver your policy and legislative objectives as a result?

It is too early to understand the full impact this Bill will have on the Welsh legislative programme. We can be certain, however, that if the UK Government persists with this Bill it will have some impact. I recently referred to the impact of the Retained EU Law Bill in my address to the Legal Wales Conference in Llandudno. At least 2,400 laws to review, in less than fifteen months. It will gum up UK Parliamentary time and occupy the time of thousands of civil servants, at a time when there is so much else that needs their attention.

20. Does it remain the Welsh Government's intention to bring forward a consolidation Bill on planning to the original planned timetable, given the impact that the Bill is likely to have on the Welsh Government's capacity?

Our commitment to simplifying and modernising planning law in Wales is undulled. Drafters, lawyers and planning policy officials are working on the significant programme of work that it will take to deliver a bilingual consolidation of planning law in Wales.

This Committee has seen the quality of the work the consolidation projects will achieve. The Law Commission described the Historic Environment Bill in fullest terms, and the Commission's Chair declared it to be an "impressive [and] high quality piece of work".

However, like all of our legislative programmes and many other aspects of the Welsh Government's work, it is going to come under pressure if the UK Government persists. We will have to keep this under close review.

21. When will the Welsh Government engage with the Business Committee about the likely impact on Senedd business, including this Committee?

The Welsh Government will engage once the implications of the Bill are better understood. As the Bill was introduced only on 22 September we are still trying to comprehend fully what the impacts will be.

To the Permanent Secretary

22. Have you considered the recommendations of Audit Wales’ report on the Welsh Government’s workforce planning and management in relation to developing legislation?

The Welsh Government has established a formal organisational development programme to focus our effort on making the changes to ensure we are fit for purpose. The organisation has been engaged in shaping the programme - Welsh Government 2025 - over the summer with the formal oversight and governance, WG2025 Implementation Board chaired by our new Chief Operating Officer, Tim Moss now in place to drive action planning, implementation, and evaluation. As part of Welsh Government 2025, we are developing a new workforce strategy that reflects the challenges facing the organisation now and, in the years, ahead.

The outcomes we need to achieve through our workforce strategy and the steps that will get us there will be developed over the next few months. The workforce strategy and initial action plan will be published later this year. The Welsh Government will continue to prioritise the alignment of our workforce to priorities set out by the First Minister in the programme for government and ensure the organisation is able to fulfil its statutory duties. The new workforce strategy will set out the capability priorities and a development plan for our workforce including how we further embed the principles of the Well-Being of Future Generations Act.

Alongside the workforce strategy, we will deliver improvements in workforce planning through the implementation of the Workforce Delegation and Accountability Framework. This will delegate workforce planning and staff budgets, as well as accountability for decision-making, to Senior Civil Servants and support more flexible and responsive resourcing arrangements. This will provide a route for identifying alternative delivery mechanisms for specific delivery priorities and managing the impact on our workforce. As part of this, we will continue to grow our capability and create a talent pipeline for the technical capability needed to deliver the legislative priorities.

23. You told us that the Welsh Government has made some decisions over recent months to expand the number of lawyers within the organisation “in order to give some additional headroom” (RoP, [28] to [45]). You agreed to provide us with figures confirming the number of lawyers working in Welsh Government on legislative matters and how many of these are additional recruits from the recent expansion exercise.

The Legal Services Department lawyer cohort will be increased by the addition of 20 extra lawyers (see also my answer below in relation to Question 24 about recent steps taken to bolster lawyer numbers in the Legal Services Department over the last year or so) which are currently being recruited. The majority of those additional

20 lawyers will be involved in supporting legislative workload. 4 of that number (2 Grade 7 lawyers and 2 para-legal lawyers) will be allocated to a new central litigation team which is being introduced to ensure further efficiencies and also release further lawyers to support the Legislative Programme going forward.

The Legal Services Department is currently in the process of a restructure, to be implemented in December, to align it even more closely to Ministerial portfolios and ensure sufficient support for Ministers where in particular there are heavy legislative pressures on Ministerial portfolios such as the Minister for Climate Changes' portfolio. The new departmental structure will also allow more easy flex of legal resources to support the Legislative Programme with groups of lawyers coalesced together around Ministerial portfolios.

Going forward the Legal Services Department will have approximately 90+ lawyers allocated to directly supporting the Legislative Programme in terms of the preparation and passage of Bills (plus drafting lawyers in the Office of Legislative Counsel). Further Legal Services lawyers will also be engaged with legislative implementation work on an ongoing basis. The number of lawyers drafting secondary legislation will fluctuate over time, as they do now, depending on the demands of that implementation work and associated timescales but numbers will be in excess of 100+ lawyers at any one time working on legislation in the widest sense i.e. Legislative Programme and implementation work.

24. You said that you had put a plan in place that has been an opportunity to address some of the capacity concerns (RoP [81]). We would be grateful to receive further details about the plan, including broadly how it addresses capacity issues and what the Welsh Government is aiming to achieve through it. For example, is it to deliver more legislation or to fill vacancies to maintain current capacity?

The plan for the delivery of the legislative programme includes the high-level objectives of increasing capacity, improving capability, improving processes and improving governance. It focuses on actions to help deliver the current legislative programme; however, this should also contribute to increasing the capacity and capability in the longer-term.

One of the specific actions relating to increasing capacity was to create a central pool of Bill Managers to support the development of Bills and their subsequent passage through the Senedd. The aim of this pool is to build up capacity and capability across the legislative programme and help maximise resilience and efficiency. It will also help to create and maintain a central cohort of skilled and experienced Bill Teams and will increase the Welsh Government's ability to flexibly and quickly deploy resource to take forward Bills, thereby ensuring greater resilience, contingency and succession planning. Since the establishment of the pool an additional 9 Bill Managers and Deputy Bill Managers have joined this team to project manage Bills in the legislative programme, complementing the range of existing policy and legal staff already engaged in Bills.

An additional action in the plan is further prioritisation resources to the legislative programme. Wherever possible we have sought to prioritise movement of internal capacity to legislative roles by offering a range of development opportunities to grow an internal pipeline through managed moves, lateral adverts and temporary development opportunities.

There was also action to increase the capacity of Legal Services. Ongoing recruitment of lawyers has continued to be undertaken as a standing feature to seek to minimise risk that vacancies have the potential to cause. Additional lawyers have been added to the departmental structure in recognition of increased workloads.

Legal Services has also sought secondees and lawyers on fixed terms contracts to expand its resources to support delivery and is also looking to expand the Welsh Government's cohort of trainee solicitors to provide opportunities for training as well as increasing this flexible resource.

25. As regards your plan, it would also be useful to know when it was introduced, what objectives or milestones it sets and to what timeframes, and the outcome of any reviews, evaluation or assessments undertaken to date? This information would also be welcome for any equivalent predecessor plans or strategies in place from 2007 onwards.

The plan was a focused and time-limited plan that was in place from April to July 2022. Progress on actions contained in the plan were reported at the Legislative Programme Board, chaired by the Permanent Secretary, following its introduction in April. The Board continues to receive regular progress updates on longer-term actions to progress the key objectives in the plan referred to in the previous question.

26. We asked how long does it take to train somebody to be a parliamentary counsel if they're already a solicitor and a barrister (RoP, [83] to [87]). You agreed to provide us with detail and clarity on this point.

As a rule of thumb, the UK Parliamentary Counsel's Office position for many years has been that it takes at least 5 years to train a parliamentary counsel to a level that would enable them to lead on a medium-sized bill. This will often take longer depending on the individual and the extent to which they had relevant background experience. This is consistent with practices elsewhere.

Although this has proved difficult over the years within the Welsh Government (as we have essentially had to establish a legislative drafting office from scratch), the Office of the Legislative Counsel now operates a similar system under which less experienced drafters are trained by working closely with senior counsel who oversee the process.