

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



Llywodraeth Cymru
Welsh Government

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Ein cyf/Our ref: CG/PO/296/2023

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

4th September 2023

Dear Huw,

Thank you for your letter of 24 July in relation to my appearance at Legislation, Justice and Constitution Committee on 10 July. I welcomed the opportunity to speak to the Committee. I have provided a detailed response to your further questions in an Annex to this letter.

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.

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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

1) How will the Senedd be able to scrutinise the work that Dame Vera Baird is doing as an independent expert advisor on justice devolution?

Dame Vera Baird KC was appointed to oversee the design and delivery of the workplan for justice devolution preparations. Her role mainly comprises providing advice to the Welsh Government and helping us find the best ways to deliver our ongoing policy work to prepare for devolution of justice. Her role is therefore predominantly consultative in nature and is not something that can readily be scrutinised by the Senedd. However, I can provide some reassurance that the work she undertakes is overseen by myself, the Minister for Social Justice and Chief Whip and a group of senior officials. Further to this, there is a standing item on justice devolution preparations at each Cabinet Sub-Committee on Justice whereby Dame Vera provides updates on progress on the justice devolution workplan. Minutes of these meetings are of course published.

The Senedd will be able to scrutinise the Welsh Government's proposals on how to take forward elements of justice devolution as they are published for consultation. These will be informed by Dame Vera's advice, as they will also be informed by the other pieces of work being undertaken specifically on youth justice and probation devolution, which I referenced in my oral statement on 27 June. Dame Vera is not responsible for undertaking the work to produce any of these outputs, nor is she responsible for drafting content. However, her role liaising with leads of individual projects, providing direction and sharing her experience and expertise will have an impact on the final products.

2) Your comments during the meeting implied that the intergovernmental disputes resolution process cannot be used in relation to individual UK Bills making provision in devolved areas because of the timescales involved in such Bills passing through the UK Parliament. Is that correct? If so, how could disputes in relation to UK Bills be resolved? If disputes are not resolved, what impact does this have on the law made for Welsh citizens in devolved areas?

The focus of the IGR Review is initially on dispute avoidance. We act in that spirit. Where we have concerns about a particular piece of UK legislation, we seek to work with UK Government in the first instance to ensure our positions are understood, with a view to them taking appropriate action to remedy the issue.

It is not the case that the dispute processes in the IGR Review cannot be used in relation to individual UK Bills; however, the associated timetabling would be likely be complex. It can sometimes be very late in a Bill's passage before it becomes clear that agreement at intergovernmental level cannot be reached, and whilst the dispute processes can run quickly, they do not override Parliament's ability to pursue and timetable legislative business.

We are naturally monitoring the UK Government's legislative programme at its widest, and continue to escalate issues – both in relation to individual Bills and cross-cutting matters – as needed. I am clear that the UK Government's continued disrespect for the Sewel Convention is indefensible and wholly inappropriate. The citizens of Wales rightly expect

that the law applicable to them will be made in a way that respects the constitutional conventions of the United Kingdom.

3) How concerned are you that the increasing use of UK Bills to make (at times significant) provision in devolved areas is marginalising the opportunities for the public and stakeholders in Wales to engage with the making of that law given the different procedures that exist between the Senedd and the UK Parliament?

It remains my view that there can be situations where it is both sensible and advantageous for UK Bills to make provision for Wales. However, I am acutely aware of the associated scrutiny concerns, both for the Senedd and the wider public and stakeholders. Inevitably, Senedd scrutiny for UK legislation will not be as detailed as that for legislation made in the Senedd.

For this reason, we continue to take the primary position that legislation for Wales should be made in Wales, in line with the devolution settlement; and where UK legislation is considered appropriate (in line with our principles), we are committed to ensuring as much scrutiny as possible through the LCM process.

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.

4) How do you monitor what legislative proposals in other parts of the UK could potentially have an impact on Welsh law as a result of the United Kingdom Internal Market Act 2020? Are you aware of any proposals that could impact in the near future?

We maintain a regular dialogue with the other Devolved Governments to give and receive feedback on proposals that might have Internal Market Act implications. Our interaction with the UK Government is more sporadic and we would welcome closer collaboration with it in this space. While the Welsh Government does all that it can to monitor the legislative proposals from the UK Government this is often dependent on the level of interaction the UK Government provides.

We are aware of the position taken by the UK Government on the UK Internal Market Act with regard to Scottish Government's proposed deposit return scheme for drink containers and are reviewing how this impacts on the design and implementation of our own proposed scheme.

5) What assessment has the Welsh Government made of how recently announced plans to introduce restrictions on the sale of high fat, sugar and salt products may be impacted by the UK Internal Market Act's market access principles?

We have begun to consider whether the UK Internal Market Act will have any impact on the proposals. However, until final, detailed policy instructions have been finalised we cannot make a detailed assessment.

6) In your statement on 1 July in relation to UK Bills being passed without Senedd consent you said, “We have never seen this level of strain in the devolution settlement during the entire 24 years of its existence”. Can you set out why you believe this is the case and what action the Welsh Government is taking in response?

The UK Government in recent years has taken a fundamentally disrespectful and destructive approach to the Sewel Convention, to devolution, and to the Union.

The Retained EU Law (Reform and Revocation) Act 2023 was a perfect example of this attitude – there is no rational argument that the Bill was exceptional, or urgent, yet the UK Government continued to move ahead regardless of the lack of Senedd consent.

I continue to make representations to UK Government at every opportunity, setting out the scale and nature of our concerns across their legislative programme.

We have seen progress in certain areas, for example the recent progress on the Levelling-Up and Regeneration Bill; however, there is still much work to be done. We are pressing UK Government for information ahead of their next legislative programme as early as possible, with a view to ensuring a sensible foundation for sound intergovernmental working as we move towards the next Parliamentary session.

I am also very mindful of the role of the House of Lords in this area. I attended a briefing session with the Lords in January to make our positions known, and I’m keen to continue that collaboration. I believe UK Government should provide a clearer articulation of their reasoning on legislative consent issues, and at an earlier stage in the process, so as to better inform Lords with sufficient time.

7) In January this year you told us that you were not aware of any circumstance where the Welsh Government has requested that the UK Government legislate on its behalf. We have since learned that the Welsh Government did request to be included in the UK Government’s Non-Domestic Rating Bill. Can you explain in detail:

- a. the process involved in using a UK Bill in circumstances where there is broad agreement to do so: when discussions start, who initiates them, what the timeframes are, the process for agreeing amendments etc.**
- b. the sign-off processes in the Welsh Government Cabinet for using UK Bills throughout their passage through the UK Parliament.**

The Minister for Finance and Local Government drew attention to our involvement with the Non-Domestic Rating Bill via a written statement this March, further to the commitment I offered in my letter to this Committee of 30 June 2022.

UK Government engagement and Parliamentary processes and timings for individual UK Bills vary significantly. On the Non-Domestic Ratings Bill, official level engagement from UK Government was generally timely and effective, and involved discussions prior to introduction, ahead of an exploration with Ministers of the possibility for delivering provision for Wales through the UK Bill.

That situation is different to the process with the UK Infrastructure Bank Act 2023, for example, which we did not originally recommend the Senedd consent to on introduction. On the UKIB Bill, significant engagement and discussions subsequently took place with a view to achieving suitable provision for Wales, leading ultimately to amendments that enabled us to recommend consent be given by the Senedd. That was a long process, with the relevant amendments leading to our recommendation for Senedd consent being six months after the Bill's introduction.

These examples may be sharply contrasted with, for example, the Retained EU Law (Revocation and Reform) Act 2023; where the processes and discussions failed to keep pace with the passage of the Bill.

At a general level, Ministers take decisions for their areas in a manner consistent with our principles for UK Bills, which have been shared with the Senedd, and I am sighted across those decisions.

There are situations, as you have seen recently with Protection from Sex Based Harassment Bill, where wider Cabinet consideration was needed due to specific issues. The Memorandum of Understanding for commencement of the Protection from Sex Based Harassment Bill, which was ultimately agreed, was not our starting position. Our principles would have dictated commencement powers be conferred on the Welsh Ministers. However, on balance, with concessions from UK Government and the wider consideration of our principles for advantageous provision for the people of Wales, a wider decision was taken that recommending consent was the best option.

8) In our consideration of the legislative consent memoranda on the Non-Domestic Rating Bill, we noted that the Bill is being used to change a scrutiny procedure for a delegated power which the Senedd itself only approved two years ago during the passage of the Local Government and Elections (Wales) Bill (now the 2021 Act). Can you set out your views on using UK Bills to make changes to scrutiny procedures agreed in Senedd legislation, and how appropriate you think this approach is?

I'm aware that the Minister for Finance and Local Government set out a detailed response to the Committee on 30 June.

Constitutionally, the appropriateness of such a provision being made in a UK Bill is wholly connected with the legislative consent process. This is why this issue is brought to the attention of Members through our LCM.

If the Senedd is content for such a provision to be made in a UK Bill then it is appropriate. If not, then UK Government should amend the provision appropriately.

The Non-Domestic Rating Bill is an example of the positive impacts that UK Bills can have when the consent process works appropriately. We had good engagement, which enabled us to lay our LCM within two weeks of introduction, enabling the Senedd to have greater scrutiny opportunity than can be afforded in cases where that engagement hasn't taken place.

9) The Welsh Government appears to be relying on the 'correction prior to making' procedure with increasing frequency when correcting errors in subordinate legislation. Who within the Welsh Government – officials or a Minister - decides whether an error in a draft affirmative instrument is sufficiently minor to be corrected before the instrument is signed?

My correspondence with the Committee earlier this year on this matter made clear the nature of the minor errors, often small punctuation or other typographical issues, which the well-established process of corrections deal with. As I explained this process applies to Welsh Statutory Instruments, as it does to UK and Scottish Statutory Instruments and Statutory Rules of Northern Ireland.

Decisions on these matters are taken by a range of officials (within Welsh Government as well as the SI Registrar if time allows) and sometimes also by Ministers. However, I believe the recent discussions within the Senedd indicate that it is not so much as to whether the SI Registrar, a lawyer or a member of the Legislative Codes Office within Welsh Government, or a Minister decides whether moving a bracket in an SI needs to happen, but rather the Senedd knowing the correction has taken place.

I have therefore asked officials to establish a method for making available a record of the intended or final correction of errors for draft affirmative instruments in light of Committee reports. Because as the temporary Chair observed in a recent debate, it is important that the Senedd understands what it is that is being asked to approve.

I will write to the Committee on this matter once officials have identified a suitable mechanism to support this.

10)What criteria does the Welsh Government apply, beyond those set out in Statutory Instrument Practice, when considering whether an error in bilingual subordinate legislation is minor and non-substantive?

We are informed by the guidance that I have previously set out to the Committee in my earlier correspondence on this matter.

11)Do the Welsh Ministers take into account matters relating to the accessibility of Welsh law before consenting to the UK Government making subordinate legislation in devolved areas? If so, what criteria is used to make an assessment?

We start from the position that legislation in devolved areas should be made in Wales, with accessibility of the law being one of the principles underpinning that.

Any decision to agree to provision being made in a UKSI will involve an analysis of various factors, including accessibility.

Those factors would also include the potential benefits of bringing forward provision in a UKSI in situations where there is a lack of policy divergence.

These can include resourcing, clarity and coherence, where, for example, there are complicated inter-connected devolved and reserved issues; or technical provisions with cross-border implications.

12)Can you provide an update on the Welsh Government plans for a Statute Repeals Bill?

As the First Minister set out in his recent legislative statement, updates on the consolidation Bills will be given in my annual report on progress on the accessibility programme. That report will be laid in the Autumn, so I will provide a fuller update on the proposals at that time. The current intention is that the first Bill of this type will be known as the Legislation (Repeals) (Wales) Bill.

13)The First Minister noted in his legislative programme statement that the Welsh Government would be introducing a consolidation Bill on planning. Can you provide us with an update on when that Bill will be introduced to the Senedd?

An update on this Bill will also be given in my forthcoming annual report.