



Elin Jones AC, Llywydd

Cynulliad Cenedlaethol Cymru

Elin Jones AM, Presiding Officer

National Assembly for Wales

The Rt Hon Alun Cairns MP
Secretary of State for Wales
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Your ref:

Our ref: EJ/RT

21 June 2017

Dear Alun

Further to our conversation on Monday, I would like to offer you, formally, my congratulations on your reappointment as the Secretary of State for Wales.

As we discussed, there are important challenges and opportunities for Wales ahead and I hope that we will be able to continue our dialogue in the best interests of the people of Wales. I thought it would be useful to follow up on some of the issues discussed:

Brexit and the Great Repeal Bill

Responding to the challenges of Brexit is a high priority for me and the Assembly. I would like to stress the need for UK Government to engage with the Assembly as well as Welsh Government to ensure the interests of the people of Wales are reflected.

The Great Repeal Bill will have a huge impact on the National Assembly for Wales. The Assembly must therefore play a full part in overseeing negotiations and scrutinising effectively the Great Repeal Bill and the huge volume of further legislation that will follow.

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English

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I enclose the evidence I presented to the National Assembly's External Affairs Committee Inquiry into *The Great Repeal Bill White Paper: Implications for Wales*. You will be aware that the Committee report was published on Monday.

Brexit will result in fundamental changes to the way the UK is governed. As was my priority during the passage of the Wales Act 2017, I want to ensure there is no diminution of the Assembly's competence and freedom to legislate without UK Government consent. Where a UK approach is thought beneficial in devolved areas, this should be by common consent of all governments and parliaments, and aligned with the principle of subsidiarity.

In relation to the UK Government's role, I draw your attention to these matters of particular concern to me:

- Ensuring our legislative consent procedures are fit for purpose in relation to both primary and secondary legislation. In accordance with our Standing Orders, I expect that Assembly consent is sought to the exercise of UK Ministerial powers in devolved areas;
- Seeking a robust inter-parliamentary legislative consent convention to ensure that Parliament is aware of whether the Assembly has consented or not (to cover subordinate legislation too);
- Ensuring that we, not Westminster, determine the appropriate delegation of powers to Welsh Ministers and scrutiny procedures applied to SIs where the power is delegated in UK Bills to Welsh Minister;
- Ensuring the effective programming of Brexit-related legislation, and efficient use of Assembly time and resources, will necessitate close working and the sharing of timely information between the Assembly, Welsh Government, and UK Government. I welcome the commitment you gave to working with the Assembly to enable this work to progress smoothly.



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I look forward to meeting with you to discuss these matters.

Yours sincerely

Elin Jones AM
Llywydd

Enc

cc

Rt Hon Carwyn Jones AM, First Minister of Wales
Huw Irranca-Davies AM, Chair, Constitutional and Legislative Affairs Committee
David Rees AM, Chair, External Affairs and Additional Legislation Committee

Responding to the Great Repeal Bill and its implications for the National Assembly for Wales

Core principles of constitutional change

01. Throughout the recent passage of the Wales Act, my priority was to ensure that three key constitutional principles were respected. These are:

- that there should be no diminution of the Assembly’s competence and freedom to legislate without UK Government consent;
- that the Assembly should have the sovereignty to decide on its own procedures and to consent to any changes in its powers; and
- that the important organising principle of subsidiarity should be at the heart of the UK constitution.

02. These same principles apply in the context of the Great Repeal Bill and inform my submission to the Committee.

A voice for the people of Wales

03. As the democratically elected body that represents the interests of Wales and its people, the National Assembly has a crucial role in ensuring the voice of the people of Wales is heard in the legislative preparation for leaving the EU.

04. The National Assembly is responsible for a wide range of devolved policy areas, such as agriculture, environmental protection and transport, which are affected directly by EU law. The implications for devolved policy areas that affect fundamentally the lives of people in Wales mean that the Assembly must play a full part in overseeing the UK–EU Brexit negotiations. I would like to see us ensure this through;

- Ensuring all governments are held to account by the parliaments of the UK for their inter–governmental working; facilitating coordination of scrutiny between legislatures where possible. Depending on the proposals and options that emerge in the Great

Repeal Bill, this could also include an element of joint scrutiny of the legislative proposals;

- holding the Welsh Government to account and examining closely its own preparations for the UK's withdrawal from the EU.

Specific implications of the White Paper for the Assembly

05. The Assembly must scrutinise effectively the Great Repeal Bill and the huge volume of further legislation that will follow.

06. The UK Government's White Paper suggests that there may be a need for common UK policy frameworks in devolved areas like environment and agriculture. The UK Government also commits to "intensive discussions with the devolved administrations to identify where common frameworks covering the UK are necessary". This commitment to work with devolved administrations is welcome, but any proposal to share powers in areas of devolved competency should be agreed by the legislatures of the UK, not just the devolved governments.

07. Where a UK approach is thought beneficial in devolved policy areas, this must be by common consent of all UK parliaments. However, this should not result in new constraints on the Assembly's legislative competence beyond that agreed necessary (as indeed we are constrained now through EU law).

Scrutiny and oversight of the Great Repeal Bill

08. The White Paper states that Welsh Government Ministers will be given powers "in line" with the powers of UK Ministers to adjust the body of EU-derived law, which the Bill intends to transfer into UK law, so as to make it workable on the day the UK exits the EU.

09. As a matter of principle, it should be the National Assembly that decides whether or not to give the Welsh Ministers powers to make delegated legislation, on devolved matters, and what the nature of those powers should be. A large volume of legislation will be needed to make the body of EU-derived law, which the Bill intends to transfer into UK law, workable



after the UK leaves the EU. This will need to be achieved within tight timescales. Given this, I recognise the case for Welsh Government Ministers to be given delegated powers in this regard. But this should only be permitted if the Assembly has been properly consulted and is satisfied that the scope of those powers is appropriate.

10. Moreover, the National Assembly has responsibility for the effective scrutiny of the use that the Welsh Government makes of its powers. Therefore, it is also essential that the Assembly should be satisfied that the processes and procedures to which resulting Welsh Minister subordinate legislation are subject are appropriate.
11. To enable the Assembly to complete this work effectively, the Great Repeal Bill should ensure the Assembly has the freedom to determine its own scrutiny procedures. It would be wholly inappropriate for the Bill to set out procedures for the scrutiny of Welsh Government Ministers' secondary legislation, or to constrain the Assembly's ability to make decisions about its own internal scrutiny procedures in any way.
12. This approach is in line with both the core constitutional principles of sovereignty and subsidiarity, outlined above, as well as being essential to ensuring the effective and timely scrutiny of the legislation. The Assembly will, of course, need to consider how it balances its responsibility for effective scrutiny with the need for all the legislative changes to be made before the UK withdraws from the EU.

Legislative Consent Memoranda (LCMs)

13. It is crucial that the Assembly ensures that our own legislative consent procedures are fit for purpose in the context of Brexit, ensuring that the Assembly's consent is sought—and respected—for all legislation in devolved areas. This should include both primary and secondary legislation that is brought forward by UK Ministers, regardless of whether that secondary legislation uses “Henry VIII powers”.
14. This will require the development of a robust inter-parliamentary legislative consent convention to ensure that the UK Parliament is aware

of whether the Assembly has consented or not, and respects the Assembly's decisions across all legislation, including subordinate legislation. In my view, the existing Legislative Consent convention (Sewel convention), and its manifestations in UK Government Devolution Guidance Notes, are not sufficient safeguards. It is essentially a government to government, rather than a parliament to parliament convention. I do not regard this as appropriate in this context.

15. This is a separate matter from the fact that, as we know from the recent Supreme Court judgment on the triggering of notice under Article 50 of the Treaty on European Union, the Sewel Convention is not enforceable through the courts, even in the statutory form which part of it now has as a result of section 2 of the Wales Act 2017. That is also a matter I wish to see resolved, as part of changes to the UK constitution as a result of Brexit.
16. It may also point to the need for the Assembly to adjust its own internal procedures so as to ensure that more time is devoted to the scrutiny of relevant UK Parliament Bills. I would welcome the Committee's thoughts on this point.

Implications for the Assembly and scrutiny of the Brexit legislation emanating from the Great Repeal Bill

17. If brought forward by a new UK Government, the Great Repeal Bill will have significant implications for the work of the National Assembly, both in terms of the volume of secondary legislation that will need to be considered and the timeframe within which it will need to be passed.
18. These are serious challenges but also provide an opportunity to demonstrate the Assembly's maturity and effectiveness as a legislature.
19. The Assembly will need to ensure that Members have the time, resources and support they need to undertake this important legislative work within the capacity constraints of the National Assembly.
20. The Assembly has already responded to the outcome of the EU referendum by creating the additional committee capacity required and

bolstering Commission staff support in key areas. The Assembly is in the process of scoping further the implications of the Great Repeal Bill for the institution and will continue this work over the coming months. This work is being taken forward by the Assembly Commission, the Business Committee and the Chairs of Committees who are looking at the Assembly's capacity from their different perspectives. The Commission is considering staff resource, the Business Committee our procedures and committee capacity, and the Committee Chairs in the Chairs' Forum are considering how they manage their committee work programmes.

21. The view of the committees and Members, and in particular the views of your committee and the Constitutional and Legislative Affairs Committee, will be very important in shaping these preparations and ensuring that the institution is in the best possible position to respond.
22. Ensuring the effective programming of Brexit-related and other legislation, and efficient use of Assembly time and resources, will also necessitate close working and the sharing of timely information between the Assembly and Welsh Government, and between the UK Government and all legislatures in the UK.

The implications for the UK constitution

23. The Great Repeal Bill (and Brexit more generally) will result in fundamental changes to the way the UK is governed.
24. The significant changes that are likely to unfold will present common challenges and opportunities for all legislatures within the UK. To that end I will continue to work closely with counterparts across the UK to share information, best practice and institutional knowledge on the responses to these challenges.
25. Given the volume of primary legislation likely to pass through the Houses of Parliament which will be of interest and relevance to Wales and related to areas of devolved competence, it will be important to ensure that good inter-parliamentary relationships are developed at all levels. I therefore note the evidence presented to you by the Cabinet Secretary for Finance

and Local Government that “withdrawal from the EU represents a fundamental constitutional change for Wales and the UK as a whole, one that will require new inter-governmental arrangements, based on full respect for devolution, to enable the development of UK-wide frameworks based on common consent by all four governments”. I would highlight, in addition to this, the importance of inter-parliamentary oversight of these arrangements.

Conclusion

26. In summary, the Great Repeal Bill and the preparations for the UK’s withdrawal from the EU bring complex challenges for the public policy areas for which the Assembly has responsibility and for the organisation of the Assembly itself.
27. Across the Assembly, your Committee and others are already undertaking important work in setting out the institution’s expectations of the Welsh Government and addressing the questions that need to be answered.
28. The National Assembly must be ready to play a full part in overseeing the Brexit negotiations, scrutinising the Great Repeal Bill and the huge volume of further legislation that will follow, and ensuring that the voice of the people of Wales is heard. This will stretch the already limited capacity of our legislature. The Welsh Government and the Assembly Commission will need to be innovative and radical in how we approach and support our legislative and scrutiny duties over the next few years.
29. As that process unfolds, I am determined to demonstrate and secure the National Assembly’s role as a strong, effective legislature for Wales.