

David Rees AM
Chair of the External Affairs and Additional legislation
Committee
National Assembly for Wales

7 June 2017

Dear David

UK Government White Paper: Legislating for the United Kingdom's withdrawal from the European Union

I refer to your letter of 27 April seeking comments on the Great Repeal Bill White Paper.

The views of this Committee are informed by our collective position on the implications of exiting the European Union (EU) for the National Assembly's constitutional position within the UK. We have set out this view in the declaratory statement below.

**Constitutional and Legislative Affairs Committee, National Assembly for Wales:
Declaratory Statement on the Impact of exiting the European Union on the
Devolution Settlement for Wales**

We believe the following principles should underpin the Great Repeal Bill and any other Bill relevant to the UK's exit from the EU:

1. The whole process of exiting the EU must always ensure respect for the rule of law.

In the recent words of the former Lord Chief Justice, Lord Judge, "An elementary principle which underpins the rule of law in our country is that laws are made after Parliamentary scrutiny".¹ Exiting the EU will bring with it the biggest legislative challenge ever faced by the National Assembly (and, indeed, the UK as a whole), and

¹ Annual Bingham Lecture, 3 May 2017: The Right Hon Lord Judge PC: A Judge's View on the Rule of Law.



the rule of law requires that the primary and secondary legislation that arises from exiting the EU is properly scrutinised.

2. The legislation arising from exiting the EU must be clear, precise and well-drafted.

Certainty of the law is another elementary principle which underpins the rule of law.

While the timetable for translating EU law into the law of the UK and devolved nations is tight, care must be taken to ensure that legislation is clear, precise and well-drafted. This will be particularly challenging for drafters seeking to give effect to policy instructions; such instructions are likely to evolve as policy objectives are updated because the Great Repeal Bill's passage will proceed in parallel with the UK Government's negotiations to exit the EU.

3. The UK Government's Great Repeal Bill (and other Bills relevant to exiting the EU) must be informed by its clear vision for the constitutional construction of the United Kingdom. That vision must be published.

In essence the UK Government must publically answer the question: what is the Union for? This question has not received sufficient attention, creating even greater uncertainty around the constitutional direction of the United Kingdom at this crucial time. We echo the words of the House of Lords Constitution Committee in a 2014/15 report that there is "no clear focus within [UK] Government for oversight of the constitution".²

4. The National Assembly must be the legislature responsible for legislating in devolved areas.

This includes: (1) passing primary legislation in devolved areas, (2) delegating powers to the Welsh Ministers to make subordinate legislation as the National Assembly considers appropriate, and (3) the procedure to be applied to scrutiny of that delegated legislation.

In this context, it is important to remember the very first section of the *Government of Wales Act 2006* (as amended by the *Government of Wales Act 2017*). Section A1 of the 2006 Act is a statutory declaration, declaring: (1) that the Assembly and the Welsh Government are permanent parts of the constitution of the United Kingdom, and (2)

² House of Lords Constitution Committee, 6th report of Session 2014/15: The Office of the Lord Chancellor.



the commitment of the UK Parliament and the UK Government to devolution in Wales.

Any discussion around the constitution and role of the Union must be framed in the context of section A1 of the 2006 Act.

5. Where the UK Parliament / Government seeks to legislate through primary / secondary legislation in devolved areas, they must seek the consent of the National Assembly for Wales in accordance with *Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales* and the National Assembly's Standing Orders.

We raised some of these principles indirectly in our response to an inquiry by the House of Commons Procedure Committee into delegated powers within the Great Repeal Bill, which we sent to you on 26 April 2017.

We have some specific concerns about the White Paper itself and it is to these I now turn.

The short, opaque nature of *Chapter 4: Interaction with the devolution settlements* is a matter of considerable concern. The lack of clear principles within the chapter and confusing nature of some of the language suggests that more thought needs to be given to the impact of the proposed legislation on the devolution settlements.

What makes the position particularly uncertain for Wales is that the introduction of the Great Repeal Bill coincides with a changing devolution settlement that is untried and untested. The boundaries of the National Assembly's legislative competence under the reserved powers model are sometimes uncertain and therefore, in Wales, the uncertain process of exiting the EU is being built on what are already uncertain foundations.

It has never been more important for the UK Parliament and the UK Government to assert their commitment to devolution in Wales.

The White Paper talks of the creation of UK frameworks and a single market. However, it remains unclear how devolved nations will participate in the development of those frameworks (including the various structures and governance arrangements that will need to be put in place) and, as a consequence, how the frameworks will operate in practice. There is a danger that the frameworks could lead to more powers for governments at the expense of legislatures, highlighting the need for consultation with the devolved legislatures to ensure that necessary checks and balances are incorporated.



Also, we have no clear idea how the *Government of Wales Act 2006* will look after exiting the EU.

Once the reserved powers model is in force, the boundaries of our legislative competence will no longer be as we previously understood them, and it is difficult to say with confidence what the legislative competence of the National Assembly will be.

The 2006 Act will certainly have to be amended to remove the requirement for Assembly legislation to comply with EU law but it is also likely that other adjustments will need to be made. Whether such adjustments will aim to amend the Assembly's legislative competence, including the addition of reservations and restrictions, remains to be seen. However, based on the UK Government's approach in relation to the *Wales Act 2017*, we are concerned that the National Assembly could lose powers to central control as a result of exiting the EU, particularly in policy areas that have been heavily reliant on EU law, such as agriculture and the environment.

Overall, the key issue that needs to be addressed by the UK Government is the creation of a legal and constitutional context that serves the devolved nations and UK following exit from the EU. That context needs to be developed in partnership with devolved nations rather than being imposed upon them. It will provide an opportune time to re-examine the need for a separate legal jurisdiction in Wales; the absence of such a jurisdiction had a negative impact on the way in which the *Wales Act 2017* was drafted and the powers available to the National Assembly. It is probable that its continued absence could marginalise the interests of Wales in the UK following exit from the EU.

As regards the making of subordinate legislation in order to translate EU law into domestic law, our declaratory statement and letter to the Procedure Committee sets out our position.

However, we would like to emphasise our view that any powers given to the Welsh Ministers to make subordinate legislation (either through UK or Welsh government legislation) must be tightly drawn and must only permit changes to be made that are necessary for the purposes of translating EU law into domestic law. Even if those powers are properly drafted, the National Assembly must still be given the opportunity to ensure that the exercise of those powers are properly scrutinised.



We will revisit our position following introduction of the Great Repeal Bill. This Bill is of considerable constitutional importance and we look forward to working with you closely once it is introduced.

Yours sincerely

Huw Irranca-Davies

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Chair

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

