

Mick Antoniw AM
Chair, Constitutional and Legislative Affairs
Committee

19 February 2018

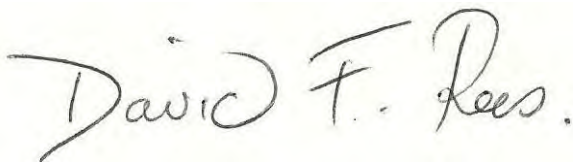
Dear Mick,

European Withdrawal Bill – Output to the House of Lords

Please find attached correspondence that the External Affairs and Additional Legislation Committee have circulated to members of the House of Lords regarding the EU Withdrawal Bill.

The correspondence includes the Committee's six objectives that we believe need to be met in order for the Committee to recommend that the Assembly grants its consent for the Bill.

Yours sincerely,



David Rees AM,

Chair of the External Affairs and Additional Legislation Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



House of Lords
London
SW1A 0PW

19 February 2018

Dear Member of the House of Lords,

European Union (Withdrawal) Bill

I am writing to seek your support for the changes to the European Union (Withdrawal) Bill that we, the Assembly's External Affairs Committee, believe are necessary.

These changes are set out as six objectives. These objectives are those of a cross-party committee of the National Assembly for Wales. The External Affairs Committee is, in short, the Assembly's Brexit Committee. It was established by the Assembly to consider the implications for Wales of exiting the European Union and to safeguard Welsh interests in the withdrawal process and in the setting of post-exit arrangements.

The objectives are based on written and oral evidence received from a wide range of stakeholders and have benefitted from the input of constitutional and legal experts from across the United Kingdom. Further information is available from our website. This work builds on the report we published in June 2017 on the White Paper associated with the Withdrawal Bill: *The Great Repeal Bill White Paper: Implications for Wales.*

Before setting-out our objectives, I wish to emphasise again that **we are not, in any way, seeking to frustrate the UK's withdrawal from the EU.** As we stated in our



report on the White Paper, we understand the need to retain and convert EU law and to make it operable from the day of exit. Our concern lies in the treatment of the devolution settlement and the lack of engagement with the Assembly, through its committees, in relation to the delegation of powers to Welsh Ministers and the setting of scrutiny arrangements.

We have a formal role in the Assembly's process for considering whether to grant its legislative consent for the Bill.

We have published an [interim report on the Legislative Consent Memorandum](#) attached to the Bill. In this report, **we recommended that the Assembly withhold its consent for the Bill in its current form.**

Parliament's response to the six objectives set out below will have a significant bearing on whether we are able to revise our position and recommend that the Assembly grants its consent.

Our six objectives are to:

1. **Remove the Clause 11 restriction on the devolution settlement.**
2. **Ensure the Welsh Ministers and the Assembly are responsible for correcting all aspects of EU-derived law in areas of devolved competence.**
3. **Ensure powers available to Welsh Ministers under the Bill are strictly limited and far more tightly drawn than those currently set out in the Bill.**
4. **Prevent UK Ministers from amending aspects of EU-derived law that affect Wales unless reserved.**
5. **Prevent UK or Welsh Ministers amending the Government of Wales Act using delegated powers.**
6. **Ensure that the Assembly can set its own scrutiny arrangements.**

Attached to this letter is a paper that explains each of these objectives. Whilst we maintain our desire to see each objective met in full, we have reflected on the debate and response to them in the House of Commons.



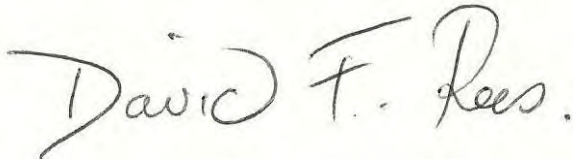
To that end, we remain open to considering pragmatic suggestions to move closer to our position in some areas.

Where this is the case, we have indicated this in the attached paper.

We are aware that further amendments are likely to be tabled, including amendments from the UK Government. We will consider these once tabled and hope that they might contribute to meeting our objectives.

Please contact me if you require any further information, or wish to discuss these objectives in more detail.

Yours sincerely,

A handwritten signature in black ink that reads "David F. Rees." The signature is written in a cursive style with a large initial 'D' and 'R'.

David Rees AM, Chair of the External Affairs and Additional Legislation Committee
Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



The Objectives explained

Objective 1: Remove the Clause 11 restriction on the devolution settlement

Explanation

Whilst the Committee believes that UK-wide frameworks will be necessary in a number of policy areas, it also believes that these should be agreed on a parity of esteem basis between the governments and legislatures of the United Kingdom and not imposed by the UK Government, even on a time-limited basis.

Clause 11, as drafted, places a new and significant constraint on the devolution settlement and shifts the power dynamic around setting common UK frameworks firmly in the direction of the UK Government. The UK Government has provided no information on how these common frameworks will be agreed, the timetable for agreeing them, or how Parliament and the devolved legislatures will be involved in this process.

This is further complicated by the fact that the UK Government is also, in a number of European Union policy areas, acting as the government of England. This leads to a possible conflict of interest when it comes to imposing pan-UK structures.

Professor John Bell told the Committee that “*Clause 11 is drafted in such a way as to hide the extent of the restriction on the future competences of devolved assemblies*”.

The Institute for Welsh Affairs stated in evidence that:

“It is no-one’s interest for a Withdrawal Bill not to be enacted and provide a legal safety net when the UK leaves the jurisdiction of EU law. However, in its current form, this Bill fails to respect the power already granted to the elected governments in Scotland and Wales, and to respect the democratic legislatures in Northern Ireland, Wales and Scotland.”

The Committee is aware of the UK Government’s commitment to table amendments to Clause 11 before the Bill leaves the House of Lords.

Should these amendments meet this objective, then the Committee will write again to confirm this.

Objective 2: Ensure the Welsh Ministers and the Assembly are responsible for correcting all aspects of EU-derived law in areas of devolved legislative competence

Explanation

The most constitutionally appropriate and efficient route to correcting EU law is to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

The narrower option (as provided for in the Bill) of restricting the involvement of the Welsh Ministers and the Assembly to correcting only EU-derived domestic legislation in devolved areas makes for a less efficient exit process. EU-derived domestic legislation includes UK domestic laws that have already been passed by the UK Parliament or devolved legislatures to implement requirements of EU law.

Welsh Government and Welsh public bodies are responsible for implementing EU law in devolved areas, and have been for 20 years. They hold the knowledge that is required to make sensible corrections to EU law in devolved areas. If UK Ministers were to seek to make corrections in devolved areas, they would need to seek the expert input of the Welsh Government and Welsh public bodies before drafting such corrections. Enabling the Welsh Ministers and the Assembly to correct all aspects of EU-derived law in devolved areas is a more efficient, and constitutionally appropriate, approach to correcting EU-derived law in devolved areas.

Cytûn provided the following assessment in evidence:

“Provisions which permit Ministers of the Crown, in their role as ministers with responsibility for matters in England which are devolved to the other nations, to amend the law in England while ministers in Wales are restricted from amending laws in the same areas in Wales. This creates an unfairness and inequality between the nations of the UK, and could endanger the smooth functioning of the UK single market, the maintenance of which is one of the key policy aims of the Bill.”

Objective 3: Ensure powers available to Welsh Ministers under the Bill are strictly limited and far more tightly drawn than those currently set-out in the Bill

Explanation

We recognise the case for a power to be delegated to the Welsh Ministers, and that this power will need to be wide in terms of the legislation it applies to. However, **this power must be strictly limited to the uses for which it is intended.**

As many Members of Parliament noted in their contributions at Second Reading, the powers proposed for the executive in this Bill are extraordinarily wide and subject to limited controls.

Unless the Bill is amended to place appropriate constraints on these powers, it risks unbalancing the power dynamic between the executive and the legislature at both a UK and devolved level. In terms of the relationship between Parliament and UK Ministers, the Delegated Powers Scrutiny Committee in the House of Lords found that:

“The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers, allowing them to make major changes beyond what is necessary to ensure UK law works properly when the UK leaves the EU.”

The External Affairs Committee believes that the same is true for the powers proposed, and sought, for Welsh Ministers.

Whilst the Welsh and Scottish Governments have sought to align the powers they would receive under the Bill with those to be granted to UK Ministers, they have not sought to place any limitation on these powers.

They acknowledge, in the explanatory notes that accompany their suggested amendments, that:

“We are aware that there are significant concerns in Parliament about the very broad scope of the Henry VIII powers proposed in the Bill, and would be supportive of amendments which sought to define these more narrowly.”

The Learned Society for Wales submitted in writing that:

“The discretion given to Ministers of the Crown to adjust retained EU law is however very wide. Arguably, it is wider than is necessary. [...] The breadth of the discretion effectively makes it impossible to challenge its exercise other than by internal procedures within the UK Parliament.”

The Committee’s view is that the discretion offered to Welsh Ministers should be limited to only “essential” provision. A note on why the Committee has arrived at this formulation, rather than suggesting “necessary” (as has been proposed in other amendments tabled in the House of Commons) is provided after the committee suggested amendments for this Objective.

Whilst the Committee's interest is in controlling the powers granted to Welsh Ministers, the mechanics of the Bill make it difficult to achieve without also placing limitations on those available to UK Ministers (and other devolved Ministers). The Committee's preference is to restrict its suggested amendment to the powers delegated to Welsh Ministers. Where possible, this has been done, but has not been practically possible in all instances given how the Bill is constructed.

Note on the use of "essential" rather than "necessary" or "appropriate"
The amendments suggested above would reduce the current wide discretion for using delegated legislation and limit it to those aspects which are truly unavoidable, by replacing the power to make "such provision as the Minister considers appropriate" with a power to make "such provision as is essential". The discretion is reduced in two ways. First, the word "essential" is, clearly, significantly narrower than the word appropriate. It does indeed focus on what is unavoidable; what must be done in order to make EU-derived law operate effectively after Brexit. Secondly, the amendment would apply an objective test of what is essential, not the test of what a Minister "considers" essential. The latter necessarily includes an element of subjectivity, even with the proviso that the courts will always require Ministers' consideration to be "reasonable".

The amendment would limit the discretion for all devolved Ministers. This is simply dictated by the structure of the current Schedule 2.

Other amendments have already been tabled with the same purpose, as regards the powers of UK Government Ministers. However, those amendments seek to replace the word "appropriate" with the word "necessary". The Committee is of the view that this would still give Ministers too wide a discretion in the context of these extremely broad-ranging Henry VIII powers, and in the extremely important constitutional context of Brexit. This is because the word "necessary" is capable of a range of meanings. True, it can be interpreted as meaning "essential". But it has also been interpreted by the courts as meaning "proportionate" (notably, in a Human Rights and indeed an EU-law context). And "proportionate" is very little different from the current term, "appropriate", which has attracted so much criticism from constitutional experts.

The term "essential" has been used in many pieces of Westminster legislation, e.g. the Consumer Rights Act 2015, the Investigatory Powers Act 2016 and the Financial Services and Markets Act 2000 (now amended). In the Acts mentioned, the term is used in a context involving an element of discretion – as it would be in the Bill. Clearly, therefore, Parliament has considered it an appropriate word where the aim is to strictly limit, but not eliminate, discretion.

Objective 4: Prevent UK Ministers from amending aspects of EU-derived law that affect Wales unless reserved

Explanation

As stated against Objective 2 above, the External Affairs Committee believes that the most constitutionally appropriate and efficient route to correcting EU law would be to ensure that the Welsh Ministers and the Assembly are responsible for making corrections to all areas of transferred EU law that fall within devolved legislative competence.

As drafted, the Bill provides UK Ministers with exclusive powers to amend direct EU legislation in devolved areas (though amendments to Schedule 2 made in the Commons create a mechanism for devolved ministers to be granted correcting powers for limited aspects of direct EU legislation in the future). The Bill also provides concurrent powers for UK Ministers to amend EU-derived domestic legislation in devolved areas.

Objective 2 (above) seeks to widen the powers available to Welsh Ministers so that Welsh Ministers can amend direct EU legislation in devolved areas.

This objective 4 seeks to remove the concurrent powers granted to UK Ministers to allow them to amend EU-derived domestic legislation in devolved areas.

This objective goes further than the Welsh Government amendments as it seeks to remove the possibility of UK Ministers amending EU-retained law in devolved areas.

As a mature legislature, the Assembly should not be seeking UK Parliamentary time to address issues for which it is responsible. The Assembly should be responsible for scrutinising legislation for which it is accountable to the electorate for delivering.

The External Affairs Committee believes that all devolved legislatures should be enabled to play their full part in the process of legislating for Brexit.

This approach would not prevent the Welsh Government and UK Government from working together in the preparation of subordinate legislation.

Our position was not shared by the UK Government when responding to amendments tabled by Stephen Kinnock MP in the House of Commons (amendments based on the Committee's suggested amendments to fulfil this objective)

Without moving away from the principle of our position, we would consider amendments to the Bill that required the consent of the Assembly for the use of concurrent powers to legislate in devolved areas to be a meaningful step towards our position.

Objective 5: Prevent UK or Welsh Ministers amending the Government of Wales Act using delegated powers

Explanation

As a point of constitutional principle, the foundation statutes for devolution in Wales should only be amended through the use of primary legislation or, in limited circumstances, through the use of a Section 109 Order (as provided for in the Government of Wales Act 2006 “GoWA”).

The Committee has received evidence from a number of sources in relation to both the White Paper and the Withdrawal Bill that emphasise that it should not be possible for the Government of Wales Act 2006 (‘GoWA’) to be amended through the use of delegated powers.

The Withdrawal Bill would currently provide UK Ministers with a power to amend GoWA through the use of subordinate legislation.

The Welsh Government amendments restrict the ability of the UK Government to amend the GoWA through the use of subordinate legislation in most circumstances.

However, the Welsh and Scottish Government amendments allow UK Ministers the ability to amend the GoWA with the consent of Welsh or Scottish Ministers when it comes to implementing a withdrawal agreement.

As a minimum, this should require the consent of the Assembly. However, the more constitutionally appropriate route would be to remove this power altogether and this aligns with the approach taken to the Human Rights Act in the Bill.

Objective 6: Ensure that the Assembly can set its own scrutiny arrangements

Explanation

As acknowledged by the powers provided to the Assembly by Government of Wales Act 2006, it is for the Assembly alone, as the democratically accountable institution for Wales, to set its own procedures.

The Bill as drafted would undermine this constitutionally crucial principle by seeking to set, on behalf of the Assembly, the procedures that will apply to scrutiny of secondary legislation. This cannot be right.

In its report on the White Paper, the Committee stated:

“It would be of grave concern to us if the UK Government were to impose procedure on the Assembly, particularly as it has not consulted the Assembly about this.”

The UK Government has not responded to the Committee’s calls for it to engage constructively with the Assembly.

The Withdrawal Bill seeks to impose procedure on the Assembly without any consultation and in the absence of acknowledging the Committee’s view as expressed in its report on the White Paper.

The procedure the UK Government is proposing (principally for Parliament and, by extension, the devolved legislatures) falls far short of the Committee’s expectations, as expressed in its report on the White Paper.

Professor Bell suggested in writing that:

“The provisions on Scrutiny are inadequate. [...] The Bill does not recognise the magnitude of the task and therefore the need to have differently designed procedures to ensure adequate scrutiny. [...] The Bill assumes current procedures will be used, but that is simply not possible. Very serious attention needs to be given to how scrutiny will operate.”

The Institute for Welsh Affairs wrote:

*“Corresponding powers are conferred on devolved institutions by clause 10 and schedule 2, meaning that Welsh Government Ministers could also take Henry VIII powers under this Bill should they wish. It would of course be unsatisfactory to see this power replicated in Wales, without action to rebalance the scrutiny mechanisms available to the National Assembly for Wales.
Defects in parliamentary scrutiny ought not to be replicated in Cardiff.”*

The amendments made in the House of Commons, at the instigation of the Chair of the Procedure Committee, have improved the scrutiny arrangements for Parliament. They do not apply to the devolved legislatures, though the Committee

understands that the UK Government is willing to consider amending the Bill to apply enhanced Assembly scrutiny arrangement on the face of the Bill.

The Committee proposed amendments in the House of Commons (tabled by Stephen Kinnock MP) that would allow the National Assembly for Wales to set scrutiny arrangements through its Standing Orders. The Committee saw this as enabling a pragmatic option for establishing Assembly scrutiny arrangements quickly.

The amendments were not agreed.

The Committee also acknowledged that its approach would not preclude other avenues being pursued to establish scrutiny arrangements.

The Assembly's Constitutional and Legislative Affairs Committee is due to report on its preferred scrutiny arrangements in late February. We will write again with a view on these once the view of that committee is known.