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Cardiff Bay  
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16 March 2018

Dear Elin,

### **CHANGES TO THE EUROPEAN UNION (WITHDRAWAL) BILL**

Further to my letter of 16 January, UK Government officials have been working closely with their counterparts in the Welsh Government, Scottish Government and Northern Ireland Civil Service on a number of detailed issues relating to the devolution provisions in the EU (Withdrawal) Bill.

I am writing to set out where we have got to in our work on these issues. I am pleased that this work has delivered agreement in many areas. Notwithstanding ongoing discussions between the UK government and the Welsh Government to secure the Welsh Government's support for the Bill, we now need to finalise detailed provision in order to prepare for the Bill's Lords Report stage.

I enclose an annex setting out the changes we intend to make to the Bill. In summary, we will:

- Amend the Bill so that the Clause 7 power to correct deficiencies cannot be used to amend the Government of Wales Act 2006 (or the Scotland Act 1998);
- Correct the deficiency in the reservation for technical standards on the face of the Bill as it is common to all three devolution settlements;
- Make corrections to the Government of Wales Act 2006 on the face of the Bill where they are within devolved competence, as requested in the First Minister's letter of 5 February; and
- Amend the Bill to ensure that the 'made affirmative' procedure is available to scrutinise the Welsh Ministers' use of the powers in the Bill, as recommended by the Assembly's Constitutional and Legislative Affairs Committee.

There remain further corrections that will need to be made to the Government of Wales Act which my officials have discussed with yours. The remaining deficiencies that have been identified are in reservations in Schedule 7A to the Act and I can confirm that, as our officials have discussed, my intention is to use the Order in Council power in section 109 of the Act so that the Assembly is able to approve the changes that are made. My officials will continue to work closely with yours and

counterparts in the Welsh Government over the coming weeks to ensure that you are sighted on the changes that will be made in this order.

There remain some outstanding issues relating to scrutiny arrangements by the Assembly where the First Minister's view, as set out in his 5 February letter, differs from the recommendations made by the Assembly's Constitutional and Legislative Affairs Committee following its scrutiny of the Bill. I have asked the First Minister to confirm whether his consideration of the Committee's recommendations have resulted in any change in what he is seeking.

I am copying this letter to the First Minister and to the Chairs of the Assembly's Constitutional and Legislative Affairs Committee and External Affairs and Additional Legislation Committee. I am also writing in similar terms to the First Minister.

Yours,

A handwritten signature in black ink, appearing to be 'Alun Cairns', with a horizontal line underneath.

**Rt Hon Alun Cairns MP**  
Secretary of State for Wales  
Ysgrifennydd Gwladol Cymru

## **ANNEX A - CHANGES TO THE EU (WITHDRAWAL) BILL**

### **1. Protection for the Devolution Statutes under the Correcting Power**

- 1.1 Working with Welsh Government officials, we have been able to confirm that we will not need to use the clause 7 power to correct the remaining deficiencies in the Government of Wales 2006 (GoWA) and can instead use the Bill itself or orders made under section 109 of GoWA. We will therefore table amendments to clause 7 to apply the same protection from modification to GoWA (and the Scotland Act) that currently applies to the Northern Ireland Act.
- 1.2 Subject to agreement of the drafting we will also correct the ‘technical standards’ reservation for all three Acts in the Bill. The change will read across to the correcting power conferred on devolved ministers in Schedule 2 Part 1. That power too will not generally be capable of modifying the Devolution Acts.
- 1.3 We announced the amendments to clause 7 at Committee Stage, to be tabled at Report Stage. We now need to draft and agree the amendments for those deficiencies that will be corrected on the face of the Bill in time for Report Stage.

### **2. Outstanding Corrections to the Government of Wales Act 2006**

*The technical standards reservation:*

- 2.1 UK Government and Welsh Government officials have been considering how best to remedy the deficiency in the reservation covering technical standards and requirements for products in pursuance of an EU obligation for each of the three devolution statutes. For this, and every deficiency in a reservation, we intend that the corrections should be devolution neutral, i.e. that they should not change the scope of the reservation.
- 2.2 The proposed correction to the technical standards reservation would reserve existing technical standards in relation to products as they apply immediately before exit day, including any subsequent changes that are made to those standards (as it currently works whilst we are in the EU). Technical standards for new products arising post-exit, and therefore outside of an EU obligation would not fall within the scope of the existing reservation and would not be covered by the amended reservation.
- 2.3 We will need to work with the Welsh Government and the other devolved administrations to consider any technical standards arising in future outside of the reservation, just as we would now for those that are outside of our EU obligations and are not covered by the existing reservation. This will be a matter for relevant departments to consider.
- 2.4 We have now shared the drafting of the amendment with the Welsh Government and my officials will continue to work with their counterparts in the devolved administrations to agree drafting.

*Deficiencies within devolved competence:*

- 2.5 In his letter of 5 February the First Minister confirmed that he wants the deficiencies within GoWA that fall within devolved competence to be corrected in the Bill.
- 2.6 In order to instruct Parliamentary Counsel in sufficient time for these to be drafted, for the drafting to be agreed and the amendments tabled for Report Stage, we will need to make progress quickly and to have instructed Counsel no later than 23 March. My officials are working with Welsh Government officials on how these deficiencies will be corrected.

### **3. Restrictions on Delegated Powers**

*Restricting the definition of deficiency:*

- 3.1 The Commons accepted the amendment to limit the scope of the clause 7 power to amend only those deficiencies that are listed in subsection (2) of clause 7, while providing a 'sweeper' provision to ensure deficiencies not on the list but of a 'similar kind' to those on the list are recognised as also being deficiencies.
- 3.2 The new power to add to this list of definitions is available to UK ministers. In line with our commitment at the despatch box, we will consider closely any suggestions put forward for additional definitions of deficiencies that you identify in your own laws. We would expect any definitions added to the list to apply to the power for ministers in both the UK Government and devolved administrations. This is important to ensure that there is consistency across the jurisdiction of the UK so that we can all deal with any deficiencies that arise.

*Enhanced explanatory material:*

- 3.3 The First Minister has confirmed that the requirements for enhanced explanatory material relating to the effect of SIs and equalities statements should not be applied to Welsh Ministers' powers. I will keep you informed if there are any further changes to the provisions on explanatory material.
- 3.4 We have been considering further the question of how this duty should apply in relation to the joint procedure. The joint procedure is a means to ensure scrutiny by Parliament and the relevant devolved legislature where it is appropriate that both consider the legislation, for example where correcting a deficiency in an existing joint instrument. We would not want it to be viewed as a means to avoid scrutiny by not having to provide the same level of explanatory material. We therefore think that it is correct for the duty to continue to apply to a UK minister when legislating jointly with a devolved minister.
- 3.5 This would mean that the material that is required to be produced by the UK minister would be available to the relevant devolved legislature to consider. But the duty would apply to the UK minister only, not to the devolved minister.

## 4. Scrutiny Arrangements

*The 'made affirmative' procedure:*

- 4.1 In its report on the EU (Withdrawal) Bill the Assembly's Constitutional and Legislative Affairs Committee ("the Committee") recommended that the 'made affirmative' procedure is available for the exercise of the Bill powers by the Welsh Ministers. The First Minister also asked for this in his 5 February letter. The Scottish Government have confirmed that this should be available to the Scottish Ministers. We have also confirmed with the Northern Ireland Civil Service that we will make the procedure available to Northern Ireland departments.
- 4.2 My officials will work with yours, and those in the Devolved Administrations to ensure that the amendments deliver the intended effect and work properly in the context of each legislature's procedures.

*The 'sifting committee' procedure:*

- 4.3 The Committee recommended that the provisions relating to a sifting committee in the Bill should be extended to scrutiny of instruments laid before the Assembly and that it should be binding, going further than the procedure that has been applied in the Bill in relation to UK Ministers. However, the First Minister has stated that such a procedure should not apply to the Welsh Ministers' powers.
- 4.4 I recognise that this is a question for the Assembly and Welsh Government to consider and I would be grateful for your thoughts on how you would like us to proceed. It is worth noting that amending the scrutiny arrangements in the Bill will be within the legislative competence of the Assembly and so this does not necessarily need to be addressed in the Bill, but could be dealt with in new Assembly legislation if that were more appropriate.

*Further changes to scrutiny:*

- 4.5 I have previously invited you to comment on any other changes that you would wish to be made to the scrutiny arrangements for the Welsh Ministers' powers. If there are any such changes I would be grateful for confirmation of what they would be at the earliest opportunity.

## 5. Technical and Consequential Changes

*Severance of ultra vires provision in Schedule 2 regulations:*

- 5.1 A question has been raised by Welsh Government legal advisers and Scottish Parliament legal advisers as to the effect of the provision requiring that Schedule 2 regulations can only be made where they are within competence.
- 5.2 The current drafting stipulates that no regulations can be made unless every provision is within competence. The point has been made that this could prevent the courts from applying the usual principle of severance, by which they could

sever a provision that is outside of competence rather than striking down the whole instrument.

- 5.3 Having tested this with Parliamentary Counsel, we do not think that this would be the case and severance would apply as normal. However, we believe that it would provide helpful reassurance if we amend the drafting to make this clearer. Counsel has drafted amendments that will achieve this and we will share these with you. We intend for these to be tabled at Report Stage.

*Allowing for composite instruments under the joint procedure:*

- 5.4 The joint procedure included for the Schedule 2 powers currently permits a UK minister and a devolved minister to make 'joint instruments', which will be laid before and scrutinised by Parliament and the relevant devolved legislature. These would be where the UK minister and devolved minister are exercising the same power and each has the competence to make every provision within the instrument.
- 5.5 The intention is that this should also permit the making of a 'composite instrument', where provisions made under different powers by a UK minister and a devolved minister are combined in a single instrument. We expect this to be the more common manner in which the procedure would be used, for instance where a Welsh Minister is making provision for Wales and a UK minister is making the same or equivalent provision for England.
- 5.6 Some doubt has been expressed as to whether the current drafting does allow for composite instruments to be made using this procedure. Counsel has drafted technical amendments to address this, which we will share with you. We plan to table these at Report Stage as well.