



Mick Antoniw AM
Chair, Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff

11 March 2019

Dear Mick

I am writing in response to your letter regarding your progress report on the scrutiny of regulations under the EU (Withdrawal) Act.

I would first like to take the opportunity to thank you for your Committee's scrutiny of the proposed negative Welsh SIs laid for sifting. The Committee has been fair and reasonable in its recommendations and I appreciate the support in the progress of this challenging work so that these SIs can come into force on exit day.

I was also heartened to see, in your report, the indication that the Assembly would manage, if necessary, any increase in workload arising from the UK's withdrawal from the EU. I had been concerned about being able to secure the necessary plenary and, particularly, committee time for all of the affirmative SIs that are required for EU exit, but based on your letter I can see that we should be able to proceed with confidence that the Assembly will have the capacity to scrutinise and debate these SIs before exit day.

The report laid in the Assembly addresses some issues that are general to the scrutiny of the exit SIs, and others that are specific to individual SIs. In terms of matters relating to specific SIs, these have already been addressed in detailed letters to you, so I will not return to those again here. Instead, I will address the points that apply more generally to the programme of legislating for EU exit.

I have read the Committee's report very carefully. I have to tell you that it simply does not match my daily experience of grappling with the extraordinary circumstances of Brexit and pursuing the Welsh Government's priority of protecting the welfare of citizens, as far as possible, in the event of a no deal Brexit. That has meant acting in the here-and-now to ensure immediate arrangements are in place, while preserving our ability to create new systems in the future.

I do not accept the National Assembly has been marginalised or bypassed. Co-operation

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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.

with the UK Government in order to deliver an operable statute book, rather than marginalisation, is what has been happening. The context here is that, as you know, we are still having to work on the basis that 'no deal' is a real possibility. In July 2018 we were all working to a timetable in which the UK Government said it would reach an agreement at the October European Council, and that would have meant that much of the legislation could have been deferred to the transition period. As it is we have had to shoehorn it all into a highly compressed timescale. This is an unprecedented legislative exercise. The Welsh Government, or indeed the other Devolved Administrations, has never attempted anything on this scale since devolution began. Never has an entire Member State left the EU and a legislative exercise on this scale in the UK, in such a compressed time period, has probably never happened before.

The Report suggests that the Committee does not share this view, or our concern as to whether or not we have a functioning statute book on 30 March if No Deal really does happen.

I also reject the assertion that the Welsh Government has been complicit in a reduction in legislative competence through the use of concurrent powers. You will know that there has been an exchange of Ministerial correspondence with the Wales Office about a s109 Order to address the unintended restrictions on the Assembly's competence created by powers conferred in EU Exit SIs, and other legislation, which engage paragraphs 8, 10 and 11 of Schedule 7B of the Government of Wales Act. Officials are examining the issue in detail and considering how it can best be resolved. In the meantime, we operate within the law as it stands today.

More broadly, as the Committee knows, leaving the EU will mean that the UK will have to operate in a different way internally. Transferring functions to be exercised within the UK rather than on an international basis will inevitably mean that the UK Government and the Devolved Administrations will need to find new ways of working in order to manage these functions. There is a broader constitutional debate to be had than simply the future operation of Schedule 7B – a debate for which the Welsh Government has consistently called, at UK level

The report contains some detailed criticisms of the written statements issued under SO30C. The Committee has been diligent in writing to the Welsh Government about concerns with specific written statements. The templates and guidance issued to the officials preparing SO30C statements have been revised.

It has, however, become clear that we have a different understanding of the purpose of these written statements. Our interpretation of SO30C was that the purpose of these written statements was to notify the National Assembly that EU Exit SIs had been laid in Parliament. Members could then consider the SIs (and the supporting documents) laid in Parliament as they wished. Our approach has therefore been to provide a notification which brings the salient points of each SI to the attention of the Assembly. The contents of our statements relate to the requirements set out in SO30C.3, which itself originates from your Committee's report of July 2018 and recommendations 7 and 8 in particular.

It would appear from correspondence and the Committee's progress report that the Committee Members are more concerned with scrutinising the Welsh Ministers' rationale for giving consent and in scrutinising the Statements, rather than the SIs themselves. I had assumed that the SIs and EMs to which the notifications refer would be of more interest to Members, and the Statements have been drawn up accordingly.

Indeed, SO30C is very specific that the written statement is a notification, and has a clear list of points that the written statement must include. These changes to Standing Orders

were discussed at length between Welsh Government officials and Assembly clerks over last summer, with a shared understanding that these written statements were to notify Assembly Members of SIs laid in Parliament, rather than to convey a detailed policy rationale for the giving of consent. If it had been foreseen that the Committee would wish to take that approach, SO30C could have been worded differently and could have required that the statement included the information that would facilitate that approach (such as an overview of the policies within the SIs, a justification of why a UK approach was preferred over a Welsh approach etc).

I hope, following the action taken regarding the templates and guidance for officials, SO30C statements are now providing the Committee with the information that supports the approach to scrutiny that it has chosen to take, though we have been following the procedures agreed with the Assembly last summer.

I have noted that the Committee would prefer the Welsh Ministers to lay motions for all Statutory Instrument Consent Memorandums.

Standing Orders make it clear that it is the choice of Ministers or Members to lay a motion. That Suzy Davies AM was able to lay a motion to debate the Marine Environment SICM indicates that the Standing Orders are operating as intended. As I indicated above, as your report states that the Assembly would, if necessary, have been able “to manage any increase in workload” arising from Brexit, I am encouraged that Assembly Members would have the resources at their disposal to draft a memorandum and lay a motion in the Assembly if they felt that this was essential.

I note that the Committee feels the balance between Welsh SIs and UK SIs is not right. That is a matter of judgement. It is a matter of fact that we have communicated consistently since September 2018 that we anticipate around 150 EU Exit SIs to be made in Parliament in areas devolved to Wales and around 50 EU Exit SIs to be laid in the National Assembly. Those projected numbers, for both UK and Welsh SIs, have since declined, but only very slightly, as the process has developed. The Committee might not agree with the balance but it cannot have been surprised at it.

It should also not be a surprise to the Committee that the UK EU Exit SIs have preceded the Welsh SIs, and so they will have inevitably seen more UK SIs than Welsh SIs at the start of the scrutiny period. We have been very clear from the beginning of the process that almost all the Welsh SIs are interdependent with the UK SIs and cannot be laid ahead of them.

We have a difference of view about the consistency between the course of action taken by Welsh Ministers and the provisions of the Intergovernmental Agreement. The SIs to which we have consented do not make new policies. Rather they put existing approaches on to a domestic footing. In each case the approach taken is to ensure that the underlying policy remains in place, through agreement with the UK Government. Therefore, even if there are policy choices being made, these are limited to what is necessary to ensure the law operates successfully on exit day.

To give an example, EU law may currently stipulate that a particular function is to be exercised by an EU institution. Evidently, after the UK has left the EU the institution in question will no longer exercise that function in relation to the UK.

A decision is necessary to identify a domestic equivalent to the EU body. The Committee appear to regard this as a policy choice. It is clearly not. The policy is to locate a function with a responsible body. The identification of that body is the mechanical expression of that policy, which remains consistent throughout.

You also raise the issue of directly applicable EU law. None of the regulations laid in the National Assembly have so far amended this body of EU law. SIs amending directly applicable EU law are being considered on a case-by-case basis and the Welsh Ministers have kept this approach under review. In the cases seen so far, the Welsh Government's approach has been to retain a UK-wide approach, rather than create new policies and delivery structures in the immensely constrained circumstances of Brexit.

Powers to amend directly applicable EU law were included in the EU (Withdrawal) Act at the request of the Welsh Government to ensure parity between the powers being conferred on the Welsh Ministers and UK Government Ministers. Having the powers to amend directly applicable EU law means that taking a UK-wide approach has been a conscious policy choice rather than one we are compelled to accept due to a lack of powers to do otherwise. It also gave the Welsh Ministers the flexibility to consider how best to make legislation addressing directly applicable EU law.

Finally, you raise the point that the approach that has been adopted makes the Welsh statute book less accessible. It must be recognised that this legislation is made in the context of leaving a well-established international legal system and replacing it with a UK-wide one where it has not necessarily been agreed what will happen in the longer term. We have endeavoured to preserve clarity and accessibility as much as possible, indeed, one reason for using UK SIs for UK-wide systems is to provide greater accessibility of law by having one SI for the UK rather than four separate SIs across all the administrations. Ultimately, our priority has been the protection of citizens and businesses. A part of the move to the new situation of a post-Brexit world will be to enhance the accessibility and clarity of the law while putting the longer term solutions in place.

Yours sincerely

A handwritten signature in black ink that reads "Mark Drakeford". The signature is written in a cursive, slightly slanted style.

MARK DRAKEFORD