

Bruce Crawford MSP  
Convener  
Finance and Constitution Committee  
The Scottish Parliament

17 May 2019

Dear Bruce

Thank you for your letter of 26 March 2019 inviting our views on UK Ministers legislating in devolved areas as a consequence of UK Brexit legislation, and the scrutiny of international treaties and common frameworks.

### **Legislation**

As regards legislation and the Legislative Consent Memorandum (LCM) process, while you will be familiar with some of the background, I think it would be helpful to set out the approach that has been adopted here and how it has developed.

Following the failure to reach an agreement on amendments to the Withdrawal Bill with the UK Government, the Welsh Government decided to introduce the Law Derived from the European Union (Wales) Bill, which was passed in March 2018. Along with the Scottish Government's UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, it was referred to the Supreme Court for a ruling on legislative competence. However, in April 2018, the Welsh Government announced that it had come to an **Intergovernmental Agreement** with the UK Government on the Withdrawal Bill. As part of the agreement, both governments agreed that steps would be taken to repeal the Bill (once enacted) and that the reference to the Supreme Court would be withdrawn.

After the Legislative Consent Memorandum in relation to the Withdrawal Bill was debated and approved by the Assembly on 15 May 2018, the Secretary of State for Wales wrote to the Llywydd confirming that the reference to the Supreme Court would be withdrawn. As a result, the Bill proceeded to Royal Assent and became an Act on 6 June 2018. Following the procedure set out in the Act, the Act was repealed on 22 November 2018 by the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018. The Committee's report on the Regulations noted:

"We note the significance of these Regulations and how the repeal would mean that important constitutional and legal matters (such as the continuation of EU-related Welsh law after exit and the powers of the Welsh Ministers to correct



deficiencies in retained EU law) will be dealt with under the European Union (Withdrawal) Act 2018.

We also note that the repeal of the Act forms part of the Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks.”

The Intergovernmental Agreement between the UK and Welsh Governments provides that:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency.”

Following on from our 2018 July report, **Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: operational matters**, changes were made to the National Assembly’s Standing Orders which included requirements for the Welsh Government to lay a written statement giving notification of any regulations made, or to be made, by a UK Minister acting alone within the legislative competence of the Assembly or the executive competence of the Welsh Ministers. As well as summarising the purpose of the regulations, the Welsh Government is required to explain its impact on the Assembly’s legislative competence and why consent was given.

In addition, regulations by UK Ministers that amend primary legislation within the competence of the Assembly, trigger the Statutory Instrument Consent Memorandum (SICM) process.

In February 2019, we published a **progress report** on our scrutiny of regulations under the *European Union (Withdrawal) Act 2018* (the 2018 Act) and have **exchanged correspondence with the First Minister** about the concerns we express in the report. In particular, we highlighted the Welsh Government giving consent to the UK Government making negative procedure regulations that restrict the legislative competence of the Assembly (albeit in narrow fields) without the Assembly having a role. In addition we expressed concern about the way in which the SICM process has been operating and recently **exchanged correspondence with the Llywydd** about our concerns.

Our Committee, along with others, such as the External Affairs and Additional Legislation (EAAL) Committee and Climate Change, Environment and Rural Affairs Committee, have reported on Legislative Consent Memoranda on Brexit Bills and expressed concerns about the approach adopted. For example, in our LCM report on the Agriculture Bill we said:



“In effect, the UK Parliament is delegating powers to the Welsh Ministers permitting them to act in devolved areas, despite not having been involved in the scrutiny of agriculture policy in Wales for almost a generation. In so doing, the National Assembly’s scrutiny function is being bypassed, a situation we find constitutionally unacceptable.”

In relation to the Trade Bill, the EAAL Committee concluded that:

“The legislative consent process does not allow for a nuanced interaction with the legislation under scrutiny. Rather, it offers a blunt and binary choice of granting consent for the provisions as drafted or rejecting them entirely.

Our consideration of the Trade Bill illustrates the often unsatisfactory balancing act that is required when considering questions of legislative consent.”

Overall, from our perspective, we believe that devolved legislatures should have a greater role in the scrutiny of UK legislation in devolved areas.

One particular issue that we believe needs to be addressed relates to how UK Bills in devolved areas is dealt with where issues of timing are an issue. Occasionally, debates on legislative consent motions take place without there having been time for a committee to scrutinise the accompanying legislative consent memorandum because of the constraints of time, often as a UK Bill approaches its final legislative stages.

Time constraints can also lead to other consequences. For example, in the Withdrawal Bill, the UK Government decided against making amendments to it in relation to Wales because of a lack of time to seek supplementary legislative consent. The effect of this was to set out in legislation a small but constitutionally significant difference between the sifting process to be adopted in the Assembly and UK Parliament.

Our views feed into a wider issue regarding the extent to which the Sewel Convention retains any constitutional validity and whether it needs to be reviewed or alternatively replaced with new arrangements.

We are also becoming concerned at the extent to which agreements between the UK and Welsh Governments are being used to overcome situations where for example they cannot agree on whether matters are reserved or on amendments to UK Brexit legislation. Such agreements appear to have been entered into, or are in the process of being developed, in relation to the Bills on Agriculture and Fisheries, and the Healthcare (International Arrangements) (now the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019).

To illustrate our concern, this is an extract from a recent Agriculture LCM. It covers the disagreement over whether clause 26 (WTO Agreement on Agriculture: regulations) of the Agriculture Bill (as introduced) requires consent:

“In summary, the clear onus is on seeking agreement. However, where that is not feasible there are strong mechanisms for the Welsh Ministers to exert their views. These arrangements will be codified in a Memorandum of Understanding and the



Secretary of State will put this on record in a statement on the floor of the House of Commons. This is a good outcome providing a strong role and flexibility for the Welsh Ministers following extensive and highly collaborative working between Governments. It provides a valuable model which could be used in other areas where intergovernmental cooperation is needed and demonstrates both governments' commitment to collaboration."

### **International Treaties and Common Frameworks**

As a result of our functions in relation to the scrutiny of subordinate legislation and also constitutional Bills introduced to the Assembly, we have not undertaken much work in this area but may look to do so later in the year.

That said, I think we will need to understand how the treaties and common frameworks will affect Wales. This will be particularly important as we have to legislate to implement obligations set out in treaties that are agreed at governmental level. Once a treaty is signed, Wales (and the rest of the UK) will have to comply with it and it will be too late to change the obligations it contains.

Alongside our work, the EAAL Committee has also been considering the implications for Wales of UK international agreements and UK trade policy more generally. In recent months, it developed a new procedure for the scrutiny of international agreements to handle the increase in the number of agreements being signed prior to the end of March 2019.

This new procedure centres on assessing whether UK international agreements engage devolved competence and whether they affect areas of devolved public policy. If initial assessments suggest that this is the case, the EAAL Committee takes a more detailed look at the agreements. Should issues of concern arise, it reports these to the Assembly and aims to draw them to the attention of the Welsh and UK Governments, and the committee counterparts in the other UK legislatures. Since the start of March 2019, the EAAL Committee has considered 26 agreements, reporting on six of them. It has also written to the UK Government with an initial view on the role of the Assembly in the development and scrutiny of international agreements.

As regards common frameworks, there is considerable uncertainty about the nature of both legislative and non-legislative frameworks, a point highlighted in recommendations we made in our LCM report on the Fisheries Bill.

Through Ministerial scrutiny sessions and correspondence, the EAAL Committee has also been pressing for greater transparency around the ongoing intergovernmental work to develop common UK policy frameworks, and for a more coherent programme of work to be communicated by governments.

It has considered the UK Government's recently published *Revised Frameworks Analysis* and is engaged in seeking a more detailed appraisal of the situation from the Welsh Government against each of the policy areas identified in the revised analysis.



Once further information is received from the Welsh Government, the EAAL Committee intends to develop a more detailed position on the scrutiny of non-legislative frameworks, in liaison with other Assembly committees.

We therefore believe there should be a much greater role for the devolved legislatures in scrutinising international treaties and common frameworks.

### **Conclusion**

The issues you raise highlight the need for us to take a wider view on the impact of Brexit on the UK constitutional framework, which is likely to be put under considerable pressure over the next decade. We therefore welcome your letter, as we believe that constructive collaboration between legislatures will be vital in helping to scrutinise and shape future constitutional arrangements and relationships. For that reason, we would welcome the opportunity to discuss these issues with you at an informal meeting between our committees.

Yours sincerely



**Mick Antoniw AM**

Chair

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

cc. David Rees AM, Chair, External Affairs and Additional Legislation Committee

