

Mark Drakeford AM
First Minister

23 January 2020

Dear Mark

Thank you for appearing before the committee on 13 January 2020 to give evidence on our current inquiry, Wales' Changing Constitution, and for extending the session to allow us to scrutinise your Legislative Consent Memorandum (LCM) on the European Union (Withdrawal Agreement) Bill.

The session was valuable in terms of informing our inquiry and our consideration of the LCM but there are a number of issues on which we would be grateful for further clarification.

Intergovernmental agreements

During our evidence session we raised the role of intergovernmental agreements entered into by the Welsh Government as part of the making of UK Brexit-related legislation. It may be helpful if I set out the background to our concerns.

European Union (Withdrawal) Act 2018

In October 2019, we wrote to the Counsel General about a range of issues including the use of intergovernmental agreements. In his response of 27 November 2019, the Counsel General set out how the Welsh Government considers the intergovernmental agreement related to the European Union (Withdrawal) Act 2018 has brought benefits to the Assembly's ability to legislate. However, as a result of this agreement, and by permitting the UK Government to make a significant number of regulations in devolved areas, a section 109 Order under the Government of Wales Act 2006 is now required to amend Schedule 7B to that Act, to address the impact on and risk to the National Assembly's legislative competence.



Cynulliad Cenedlaethol Cymru
Bae Caerdydd, Caerdydd, CF99 1NA

✉ SeneddMCD@cynulliad.cymru

☎ 0300 200 6565

National Assembly for Wales
Cardiff Bay, Cardiff, CF99 1NA

✉ SeneddCLA@assembly.wales

☎ 0300 200 6565

We acknowledge the commitment in the Trefnydd's letter of 17 December 2019 to provide an update on progress regarding the section 109 Order and look forward to hearing how it will address the concerns that we have raised on these matters.

Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (formerly the Healthcare (International Arrangements) Bill)

In January 2019, we published our report *The Welsh Government's Legislative Consent Memorandum on the Healthcare (International Arrangements) Bill*. Recommendations 1 and 3 related to Ministerial consent arrangements and notification to the Assembly about consent decisions. Vaughan Gething AM, the Minister for Health and Social Services, set out the Welsh Government's response on 12 February 2019. In considering the Welsh Government's response to our report at our meeting on 18 February 2019, we were asked not to publish a draft Memorandum of Understanding between the Welsh and UK Governments, which was used to explain why recommendations 1 and 3 were being rejected. In a letter of 18 February 2019, the Minister explained that the request not to publish the draft Memorandum of Understanding was in line with paragraph 7 of the *Inter-Institutional agreement between the National Assembly for Wales and the Welsh Government*, which refers to the Assembly recognising and respecting the need for confidential inter-governmental discussion between governments. There was insufficient time for the Committee to scrutinise a revised supplementary LCM which included the final Memorandum of Understanding before the relevant Legislative Consent Motion was debated on 12 March 2019.

Agriculture Bill

Although the UK Government's Agriculture Bill did not complete its passage through the UK Parliament prior to the 2019 General Election, we did scrutinise two Legislative Consent Memorandums related to the Bill and issued two reports. In our first report, *The Welsh Government's Legislative Consent Memorandum on the Agriculture Bill* published in January 2019, we noted that the Welsh Government had entered into a bilateral agreement with the UK Government as a means of resolving a dispute over whether consent was required for the inclusion of a particular clause in the Bill. Recommendation 9 of our report stated:

"The Cabinet Secretary should explain to this Committee why it may not be necessary to amend clause 26 of the UK Agriculture Bill to resolve the issues that have been of concern to the Welsh Government. In so doing, the Cabinet Secretary should explain whether the intergovernmental agreement she spoke of would, in effect, allow UK Ministers to act in devolved areas without any scrutiny by the National Assembly."

Our second report in June 2019, *The Welsh Government's Legislative Consent Memorandum (Memorandum No 2) on the Agriculture Bill*, expressed concern at the delay in responding to our first report, as well as highlighting serious concerns with the use of the bilateral agreement. On 25 July 2019, after our last meeting of the summer



term, Lesley Griffiths AM, the Minister for Environment, Energy and Rural Affairs responded to our reports and in respect of recommendation 9 stated above:

“I have secured the strongest possible role for the Welsh Ministers in the use of the powers and I no longer consider it necessary to amend the Bill. Subordinate legislation on devolved matters will continue to be laid before the Assembly for scrutiny in the usual way.”

The use of intergovernmental agreements

In his letter to us of 27 November 2019 the Counsel General, told us:

“Intergovernmental agreements are by their nature, and should remain, the responsibility of the relevant executives, and should not be subject to consent by legislatures. The Welsh Government enters into a range of agreements, both legally binding and non-legally binding, and it would not be constitutionally appropriate given the separation of powers for the Assembly to consent to those, although of course Members can and do scrutinise them.

Where intergovernmental agreements are linked to primary legislation for which the Assembly’s consent is sought, we would anticipate that consideration of the relevant intergovernmental agreement would be part of the Assembly’s consideration. Furthermore, we would anticipate ongoing Assembly scrutiny of the operation of intergovernmental agreements under the mechanisms agreed in the inter-institutional agreement between the Assembly and the Welsh Government.”

The comments of the Counsel General and the approach adopted in relation to the Healthcare and Agriculture Bills highlight a lack of clarity around when the Welsh Government believe it is appropriate for committees to engage in scrutiny of intergovernmental agreements linked to primary legislation. In our evidence session you acknowledged that scrutiny of intergovernmental agreements was “post-event”.

During the evidence session we asked, why, when governments can’t agree on provisions in UK Bills that would be subject to Assembly consent, is it appropriate to use intergovernmental agreements in their place, which then won’t be subject to Assembly consent. This question arose, in particular, as a result of our scrutiny of the Agriculture Bill. We also asked whether the use of intergovernmental agreements therefore provide an incentive for the UK Government not to include legally binding provisions in UK Bills, and you indicated that you understood why these concerns might arise.

Intergovernmental agreements have become of considerable interest and concern to us because they cover the UK Government making regulations in devolved policy areas, which are then subject to formal scrutiny by the UK Parliament rather than the National Assembly. The role of Assembly committees in scrutinising regulations and associated policy on these devolved issues effectively amounts to post-event representation rather



than influencing thinking or decision-making by reporting to the Assembly on the regulations in question.

We therefore welcome your offer of considering how the National Assembly could play a greater role in scrutinising intergovernmental agreements and any further thoughts you have on their continued use and duration, particularly as the majority of UK-wide common frameworks will also be underpinned by such agreements.

Regulations under the European Union (Withdrawal Agreement) Bill

The European Union (Withdrawal Agreement) Bill provides the Welsh Ministers with a number of regulation-making powers. During the evidence session, we asked to what extent has the Welsh Government assessed the need for regulations to be made by the Welsh Ministers under the Bill, in particular under the following clauses: 4, 12-14, 19 and 22.

The First Minister told the Committee that the powers under clause 4 are ones that the Welsh Government has currently no plans to use. In terms of the others, he said that they are all matters that are going to be subject to further discussion between the UK Government and the European Union during the implementation period and it is therefore difficult to see at this point in the process the extent to which Welsh Ministers might need to use their powers because “we do not know enough about the way in which citizenship rights for example will be the subject of further refinement between the UK and EU” during the next 12 months.

In order to inform our preparatory work, we would be grateful if you could provide the Committee with your assessment of the volume of and timescales for subordinate legislation expected to be made under these clauses of the European Union (Withdrawal Agreement) Bill and whether the Welsh Government intends to make its own regulations or consent to statutory instruments made by the UK Government.

Statutory Instrument Consent Memorandums (SICMs)

We have clearly disagreed over the requirements set out in Standing Order 30A. Irrespective of our differing views on this point, it is correct to say that the UK Government has amended primary legislation in devolved areas with the agreement of the Welsh Government and without the consent of the National Assembly. However, we very much welcome the letter of 17 December from Ken Skates AM, Minister for Economy and Transport Minister stating that as the majority of the programme to correct the statute book has been substantially completed, “the time is right to ... revert to the normal procedure whereby Welsh Government table Motions for SICMs”. During our evidence session we sought a commitment that the Welsh Government will table motions for SICMs each time the UK Government uses its powers under the European Union (Withdrawal Agreement) Bill to amend primary legislation in devolved areas, so that the Assembly can formally consent. In response you committed to tabling motions as far as is reasonably practicable.



We would be grateful if you could clarify the circumstances in which it may not be practicable to table such motions and have a short debate on them, particularly when the volume of SICMs is relatively small (some 20 over the last 14 months).

We would also be grateful if you could confirm that your commitment will apply in respect of the UK Government using powers derived from all Brexit-related Acts of the UK Parliament.

Clause 38 of the European Union (Withdrawal Agreement) Bill

During the evidence session, we started to explore clause 38 of the European Union (Withdrawal Agreement) Bill about parliamentary sovereignty but ran out of time. I would therefore be grateful for your observations on clause 38 and in particular its implications for the existing constitutional framework of the United Kingdom.

Yours sincerely

A handwritten signature in black ink that reads "Mick Antoniw". The signature is written in a cursive style with a horizontal line underneath the name.

Mick Antoniw AM
Chair

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

