

Mark Drakeford AM/AC
Ysgrifennydd y Cabinet dros Gyllid
Cabinet Secretary for Finance



Llywodraeth Cymru
Welsh Government

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Mick Antoniw AM
Chair of the Constitutional and Legislative Affairs Committee
Ty Hywel
National Assembly for Wales
Cardiff
CF99 1NA

15 March 2018

Dear Mick,

LAW DERIVED FROM THE EUROPEAN UNION (WALES) BILL

Thank you for the report of the Constitutional and Legislative Affairs Committee on the Law derived from the European Union (Wales) Bill.

I am grateful to the Committee for its efforts in producing this report at such short notice, and I would like to commend Committee Members on the thoroughness of their scrutiny and for the report itself, given the very limited time that was available. I have no doubt that the report will help us to strengthen the Bill and ensure that it is as robust a piece of legislation as possible.

I have considered carefully the eight recommendations contained in the report and my detailed response to each is set out below.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Gohebiaeth.Mark.Drakeford@llyw.cymru
Correspondence.Mark.Drakeford@gov.wales

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.

Recommendation 1. *We recommend that the Cabinet Secretary during the Stage 1 debate confirms that our understanding of the use of powers under section 4 of the LDEU Bill is correct.*

I confirmed during the Stage 1 debate that the power in section 4 to make modifications or further provision can only be used to ensure the effective operation of the restated enactment. I am happy to confirm that again now in writing.

Recommendation 2. *We recommend that the Cabinet Secretary clarifies during the Stage 1 debate whether the self-limiting ordinances (as the Cabinet Secretary described them) contained in the LDEU Bill are more restrictive than those contained in the EU (Withdrawal) Bill.*

During the Stage 1 debate I said that we had carefully reflected on the views of the Committee, and the Assembly more widely, in preparing our Bill and that this included narrowing the scope of the powers, taking specific account of the concerns raised on the breadth of powers in the EU (Withdrawal) Bill. I went on to confirm that in general, the powers in this Bill are more restrictive than the powers in the EU (Withdrawal) Bill.

Recommendation 3. *We recommend that the Cabinet Secretary justifies during the Stage 1 debate why primary legislation cannot be used to deliver regulatory alignment on a case by case basis instead of the subordinate legislation currently envisaged under section 11.*

As recommended by the Committee, I set out in full during the Stage 1 debate my justification for the use, in the first instance, of subordinate rather than primary legislation to maintain regulatory alignment with the European Union.

The single most important consideration at this point in time lies in the volume of subordinate legislation that we are likely to face. We are already responsible for making a large number of statutory instruments each year in order to implement EU directives. If we are to succeed in our aim of maintaining full and unfettered access to EU markets for Welsh businesses one would need to add to that figure the numerous EU regulations, EU decisions and EU tertiary legislation adopted each year at EU level. Given the significant volume of work involved, I do not believe that primary legislation would be a practical legislative vehicle for maintaining alignment for the time being. In order to be certain that we can deliver that continuity and that continued access to EU markets for our businesses, I consider that the powers in section 11 are essential in the immediate future. However, as I set out in my response to recommendation 5 below, there may be an alternative solution in the longer term.

Recommendation 4. *We recommend that the Cabinet Secretary should table an amendment to section 11 of the LDEU Bill, if retained, to narrow its scope solely to matters which maintain regulatory alignment with the European Union, as indicated in the Explanatory Memorandum.*

I have carefully considered this recommendation, which reflects a central aspect of the policy intention behind section 11. I consider, however, that it is not appropriate formally to seek to limit the scope of the power in that way. This is because the language around 'maintaining regulatory alignment' is inherently uncertain, and would create legal uncertainty as to the validity of the measures to be taken. It is not at all clear to me that there is any limiting language which would maintain that legal certainty.

Insofar as it can be clearly defined, it seems to me that it also potentially unduly narrows the scope of the power, and may well act to prevent legislation being made to, for example, keep pace with enhancements of social rights adopted by the EU (this issue was referenced in our Stage 1 debate).

I therefore do not propose to accept this amendment – my view is that the power already contains some important caveats, which the Assembly will see as safeguards against what it would consider to be an inappropriate use of the power. These include the limitations in relation to taxation, retrospective provision and criminal offences (s. 11(4)) and the obligation to consult (s. 11(5)). It is of great importance to note that this power may be exercised only if the Assembly approves its use under the enhanced procedure. To my mind that, rather than imposing uncertain legal tests, is the right way to deal with the issue the Committee quite properly raises: to give the Assembly the power to scrutinise and, if necessary, reject the draft legislation where it considers the Welsh Government has overstepped the mark.

Recommendation 5. *We recommend that the Cabinet Secretary should table amendments to the LDEU Bill to provide that:*

(i) section 11 is repealed with effect after 5 years from exit day unless regulations, subject to the affirmative procedure, provide otherwise;

(ii) regulations made in respect of (i) must be informed by a review as to the continuing necessity for the powers provided by section 11;

(iii) the review in (ii) should be conducted by a committee of the National Assembly and require public consultation.

I have reflected on the careful consideration of this issue by the Committee and reasoned debate that took place in Plenary on Tuesday. I agree that the Bill can be strengthened on this issue and therefore, commit to working with Members of the Assembly on an amendment which will meet the Committee's recommendation.

I note that the Committee recommends that a review of the continuing necessity of the power should be conducted by a committee of the Assembly. I consider that the duty to conduct a review would be better placed on the Welsh Ministers. Requiring a committee of the Assembly to conduct a review could inadvertently raise questions about the powers of Assembly committees to conduct such reviews. The role of the Assembly, including its committees, is to scrutinise and hold the Government to account. I expect this to be no different in the case of section 11 of the Bill.

I therefore propose the amendment would place a duty on the Welsh Ministers to lay a report before the Assembly which outlines the Welsh Government's view on the operation and effect of the power and its continuing necessity. This will then enable a committee to scrutinise that report and to conduct any further reviews it considers appropriate in accordance with the mechanisms available. I also propose that the regulations to continue the effect of the power be subject to the enhanced procedure which gives the Assembly sufficient time to scrutinise the regulations and report before determining whether the power is to continue in effect.

Recommendation 6. *We recommend that the Cabinet Secretary:*

- *justifies why there is no consent role for the National Assembly under sections 13 and 14, particularly where the UK Ministers amend primary legislation, including Acts and Measure of the National Assembly;*

- *clarifies how the consent role for Welsh Ministers under sections 13 and 14 fits with the statutory instrument consent process set out in Standing Order 30A.*

We have noted and carefully considered the points made within this recommendation.

Fundamentally, the point relates to the role of the Assembly – as distinct from the Welsh Ministers – in consenting to UK Government legislation.

This whole issue needs to be seen in the context of EU-derived law, and in the context of what is necessary and appropriate to protect the legislation and the regulatory schemes operating in devolved areas currently governed by EU law (e.g. environment, food, farming) once the UK has left the EU.

Where the UK Government proposes secondary legislation which amends primary legislation within devolved competence (that is, UK Acts or Acts of the Assembly) the Assembly *does* have a consenting role by virtue of Standing Order 30A (the so-called statutory instrument consent motion process). That is an important safeguard, but not one which takes effect as a legal restriction. And there is no equivalent process where the UK secondary legislation *only* amends secondary legislation within devolved competence. That is a problem in itself, not least because the difference between primary and secondary legislation is often an entirely technical one. In the context of EU withdrawal, where a great deal of the legislation is secondary, the protection of devolved legislation and the regulatory schemes operating in devolved areas currently governed by EU law is of great importance.

The purpose of sections 13 and 14, as is plain, is that the UK Government should, as a matter of law, need consent in relation to secondary legislation within the scope of EU law made under new powers. That is inherently an important safeguard for those devolved regulatory schemes etc.

Under our provision, it is the Welsh Ministers rather than the Assembly which should give consent. That position is without prejudice to the Statutory Instrument Consent Motion process, and so where UK legislation amends primary legislation the Assembly's current role is preserved. More generally, it is appropriate that the consent process for UK secondary legislation should be conducted between Governments, rather than legislatures.

Recommendation 7. *We recommend that the Cabinet Secretary should table an amendment to the LDEU Bill, requiring Explanatory Memoranda accompanying regulations made under the Bill, to be clear and transparent as to:*

- *why the affirmative procedure should apply;*
- *what changes are being made by the regulations, including what is being changed, why it is being changed and the impact that the change will have;*
- *whether there has been adequate consultation and what was the response to the consultation;*
- *the impact the regulations may have on equality and human rights;*
- *whether the regulations raise matters of public, political or legal importance.*

I agree that further provision could be made on this matter to better enable the decisions to be made by the Assembly as part of the enhanced procedure. Under the Bill, whether the enhanced procedure is to apply is a matter for the Assembly, not the Welsh Ministers.

Therefore I propose that rather than explaining why the affirmative procedure should apply, a duty should be placed on the Welsh Ministers to explain whether they consider the enhanced procedure should apply. This could then assist the Assembly in making its decision on whether the enhanced procedure is to apply. I am bringing forward a Government amendment to this effect at Stage 2.

I am unconvinced that a duty to provide the other information specified is necessary. This information, and more, is currently provided in relation to each statutory instrument that is laid before the Assembly. I would not wish to begin constraining what should or should not be set out in explanatory memoranda. The Committee should be able to scrutinise each statutory instrument and the accompanying memorandum on its own merits.

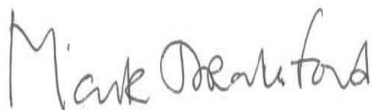
Recommendation 8. *We recommend that the Cabinet Secretary should table an amendment to the Bill, requiring Explanatory Memoranda accompanying regulations made under the Bill, to be clear and transparent as to:*

- *why the urgent procedure should apply;*
- *what changes are being made by the regulations, including what is being changed, why it is being changed and the impact that the change will have;*
- *whether there has been adequate consultation and what was the response to the consultation;*
- *the impact the regulations may have on equality and human rights;*
- *whether the regulations raise matters of public, political or legal importance.*

I propose a similar approach to recommendation 7. I am bringing forward an amendment which will require the Welsh Ministers to give reasons as to why the urgent procedure should apply. For the same reasons as set out in relation to recommendation 7, I do not consider it to be necessary or helpful to impose duties on the contents of explanatory memoranda.

I hope that these responses demonstrate my commitment to listen and to work collaboratively to deliver an effective piece of legislation that ensures legal continuity. I look forward to continuing to work with Members as the Bill progresses through its further stages.

Yours sincerely,



Mark Drakeford AM/AC
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Cabinet Secretary for Finance