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08 May 2018

Annwyl Carwyn,

Effect of the Welsh and Westminster government inter-governmental agreement on the powers of the National Assembly for Wales

Plaid Cymru has received legal advice relating to the deal between the Labour Welsh Government and the Conservative Government in Westminster. We are writing to you seeking clarity on the advice you have received and to ascertain if you plan to take any further steps to protect our devolution settlement.

I have attached with this letter, the full legal advice received by Assembly lawyers and outline key passages below.

National Assembly for Wales lawyers have confirmed that:

“[T]he Bill as amended will still allow the Assembly’s competence to be restricted without its consent, and the inter-governmental agreement does not provide watertight assurance that this will not happen.”

This indicates that our devolution settlement has been put in perilous risk as a result of this agreement. Under the new arrangement, Westminster will be able to roll-back devolution with no means for the Assembly to mitigate this. Such a situation clearly contradicts the two devolution referendums supported by people in Wales.

Plaid Cymru accepts that if the UK leaves the EU, four-nation frameworks that recognise the unique constitutional, economic and social needs of each country will need to be developed. Under the current agreement, between 24 and 26 devolved policy areas will be taken back under Westminster control to achieve this. These powers could have been used to develop specific solutions to specifically Welsh issues. As a result of this agreement, we must now rely on Westminster to develop solutions for us in these policy areas with no recourse to stop damaging frameworks being imposed upon Wales.

What is more, the legal advice confirms that:

“There is a lack of clarity and certainty about the areas in which restrictions can be imposed, as these will not be listed on the face of the Bill. The intergovernmental agreement (para. 5)

states that restrictions are “likely” to be in 24 areas, but that it is “possible” that some additional areas will be restricted.”

As noted, the aforementioned list of powers to be retained in Westminster is already set to grow from 24 to 26 as outlined in the *Intergovernmental Agreement* – with the potential inclusion of ‘state aid’ and ‘Food Geographical Indicators’. As the legal advice notes, there are no protections in place to stop this list increasing in size. An exit from the European Union is likely to throw up many more complexities and questions around devolution, in turn giving Westminster leverage to extend the list of policy areas. Furthermore, now that the Welsh Government has decided it will repeal the Law Derived from the European Union (Wales) Bill our legislative backstop will also be ceded. What powers does the Welsh Government or, to your understanding under the agreement, the Assembly, have to prevent more policy areas being taken under Westminster’s control?

Ministers from both the Welsh and Westminster governments have tried to placate concerns that these powers will be permanently retained in Westminster by referencing a sunset clause within the amendments. This five-year sunset clause follows the two-year regulation making powers in devolved areas granted to Ministers in Westminster by the Bill. This takes the overall time for which the National Assembly for Wales will be precluded from passing legislation in devolved areas to seven years.

This, in effect, is the *minimum* number of years before powers will return to the National Assembly for Wales. As you have previously indicated, however, there is no guarantee that this sunset clause will not be “extended ad infinitum” [Carwyn Jones; External Affairs and Additional Legislation Committee; 27/11/2017].

In itself a 7-year period in which our devolved settlement will be restricted is unacceptable, particularly as this takes us beyond the scheduled 2021 National Assembly for Wales elections. With restrictions lasting until 2026, this agreement also ties the hands of any future administration and could undermine their ability to govern effectively.

Considering your previous comments, what has changed as part of this new agreement, which ensures that a sunset clause will not be extended “ad infinitum” by Westminster?

The most concerning and obtuse element of the agreed amendments to Clause 11 relates to the mechanism for ‘consent’. As you are aware, when Westminster seeks to legislate in a devolved policy area it must seek our Assembly’s consent. Welsh Ministers have claimed that the amendments confirm that this will continue to be the case in policy areas covered by this agreement. For example, the Cabinet Secretary for Finance has indicated that “things [policy areas] that are to be held at the UK level will require the consent of the National Assembly for Wales” [Mark Drakeford AM; Constitutional and Legislative Affairs Committee; 30/04/2018]. This, however, is not the case.

The new 'consent decision' mechanism enshrined in the amendments to Clause 11 give the National Assembly for Wales no legislative recourse to stop Parliament from imposing regulations in devolved areas. As is noted by the legal advice received from the Assembly:

"The words "consent decision" suggest that the Minister can only lay the draft regulations before the UK Parliament if either the Assembly has consented to their making, or the Assembly has done nothing about them for 40 days. *But this is misleading* [emphasis retained from original]. New subsection 109A(5) defines a "consent decision" as a decision to agree a motion consenting to the laying of the draft regulations; or a decision not to agree such a motion; or a decision to agree a motion refusing to consent to the laying of the draft regulations."

As is summarised by the legal advice:

"Parliament will be able to approve the regulations even if the Assembly has refused, or withheld, its consent to them being made."

Furthermore, as is clear in the amendments and noted in the legal advice, Westminster will also be able to approve regulations after 40 days, regardless as to whether the Assembly chooses to act or not.

We are seeking your urgent advice as to whether you have received any alternative interpretation of this amendment and this reconfiguration as to how our Assembly grants consent to Westminster to legislate in devolved areas.

We welcome the effective inversion of Clause 11 from its original position. In its prior formulation, restrictions on the Assembly's competence were blanket, applying to all areas affected by EU law, with a power for the UK Government to provide for exceptions. The amendment to Clause 11 now sees the devolution settlement retained, with the Westminster Government imposing restrictions in particular areas of competence. This, however, is somewhat undermined by the fact that these restrictions are not set out on the face of the Bill and, as noted in the legal advice, are:

"[t]herefore open-ended."

As such, although in principle this inversion of Clause 11 is conducive to a settlement which better reflects the devolved structures of the UK, it will in all likelihood be unable deliver any such constitutional framework.

What is more, with a lack of effective provision to withhold consent (and in effect stop any further containment of once devolved powers by Westminster) it means that:

"the Assembly's competence can be restricted without its consent."

Although this has been confirmed by the Assembly's own lawyers, I would also seek clarity as to whether this fundamental reconfiguration of the National Assembly for Wales's relationship with Westminster is commensurate with the advice you have received.

A final element of the agreement and amendments which is of concern is the clear lack of parity between Wales and England. Although there is an indication in the non-binding, non-legislative agreement that the Westminster government will not introduce any legislation deviating from pre-Brexit EU law in areas of devolved competence, this is not included in the amendments. Whereas, there is a legislative, binding requirement on the National Assembly for Wales not to legislate in these areas. As the legal advice states:

“There is... still a lack of parity in that the Assembly will be restricted by statute, while the UK Government will be bound only by a non-legislative agreement.”

This shows a lack of trust and respect for the existing UK constitution.

There are further procedural issues for the National Assembly for Wales created by this agreement. I will, however, outline my concerns relating to these matters separately.

In the immediate term I would welcome your guidance as to whether this legal advice is comparable to your understanding of the agreement. Furthermore, if this legal advice is correct, what does your government intend on doing to ensure that our National Assembly and the devolution settlement is not undermined by it.

Yours sincerely,



Leanne Wood

Leader of Plaid Cymru