

Julie James AM  
Leader of the House and Chief Whip  
Welsh Government

19 September 2018

Dear Julie

**Scrutiny of regulations made under the European Union (Withdrawal) Act 2018**

Thank you for your letter of 28 August 2018.

We considered your letter at our meeting on 17 September.

We are surprised that an executive would consider it appropriate to suggest to a legislature how it should have reported and in doing so, that it should follow the specific approach of other legislatures.

We remain content with the sifting criteria included in our February report, *Scrutiny of regulations made under the European Union (Withdrawal) Bill*, and reproduced in our subsequent report, *Scrutiny of regulations made under the European Union (Withdrawal) Act 2018*, published in July 2018.

It may be helpful however if I outline our position, which I hope will demonstrate that, while some differences do exist, approaches between committees in the National Assembly and the UK Parliament are broadly similar and working to the same objective. Those differences may be for very good reasons; for example, a desire to follow established practice in the relevant legislature and the different approaches to the legislatures adopted within the *European Union (Withdrawal) Act 2018*.

Our standard approach of considering every statutory instrument on its merits, together with our fifth criterion, cover most of the points identified in reports by the Procedure Committee in the House of Commons and the Secondary Legislation Scrutiny Committee in the House of Lords, and to which you refer. You will be aware that the fifth criterion is similar to one element of the merits criteria



we use to assess statutory instruments under Standing Order 21.3, and gives us the flexibility we need to consider all relevant issues..

The principle difference in approach centres around our focus on the use of an explanatory memorandum to explain adequately what a set of regulations is seeking to do and why. We make no apology for emphasising the need for clarity and transparency in explanatory memorandums within our criteria. It is an essential part of good governance and has been a consistent theme of our work on scrutinising subordinate legislation in the Fifth Assembly. With only 14 calendar days to undertake sifting and given the constitutional nature of the regulations, good explanatory memorandums will be vital.

Paragraphs 49 and 50 of our July report, reproduced below, set out what we believe should be the purpose of an explanatory memorandum and what it should cover:

*49. In making judgements against the criteria, we identify we are likely to consider whether the explanatory memorandum adequately explains:*

- *what EU obligations and requirements the regulations relate to;*
- *whether it disengages from or changes any EU obligations and if so how this is achieved;*
- *what legislation the regulations are amending and how this is achieved;*
- *whether EU obligations are being replicated or amended and how this is achieved;*
- *what, if any, new duties or obligations are being place on any public bodies.*

*50. In adopting this approach, we wish to emphasise our view that as part of the sifting process, the Welsh Government must clearly and adequately explain why it is making legislative changes. In our view, failure to do so would be a legitimate reason to apply the affirmative procedure to the regulations.*

A recommendation for applying the affirmative procedure in line with paragraph 50 of our July report would therefore indicate that in our view, the changes to the law in Wales as set out in the draft regulations have not been adequately explained and that further explanation is needed in a plenary debate. Should the Committee's recommendation not be accepted, this may prompt Assembly Members to table a motion to annul the regulations, as means of obtaining that further explanation.

We will assess both the information provided in explanatory memorandums and the substance of the regulations themselves when determining whether or not to recommend the use of the affirmative procedure. Our criteria have been specifically designed to allow us to do that. If we do recommend the affirmative



procedure, our report will explain the reasons for our decision by reference to the criteria, including the issues highlighted in paragraph 49 of our July report.

While the approaches identified by the different Committees are not identical, they are similar and working to the same common objective. We believe that the approach we identify represents an effective and efficient way to scrutinise Brexit-related legislation in the National Assembly. We will continue to work closely with all UK parliamentary committees in our scrutiny of such legislation. However, as I'm sure you will appreciate, it would be perfectly legitimate for different committees across different legislatures to come to different views on similar Brexit-related legislation.

We would have no objection to including the criteria we refer to in our reports in Standing Orders, including the points we refer to in paragraph 49 of our July report. This is, as far as we are aware, not the position being adopted in other UK legislatures. However, as with Standing Order 21.3, how we report on these criteria is a matter solely for the Committee to determine.

I hope this clarifies the position and we look forward to working with the Welsh Government on this important task.

Yours sincerely



**Mick Antoniw AM**

Chair

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

