



David Rees AM
Chair
External Affairs and Additional Legislation Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

15th June 2017

Dear David,

As you will recall, in January, together with Plaid Cymru, I published our White Paper “Securing Wales’ Future” outlining our agenda and priorities for Wales as the UK prepares to leave the European Union (EU). I made it clear then that this marked the beginning of a dialogue, and signalled my intention to publish a series of further policy documents to contribute to the debate both here in Wales and the United Kingdom (UK).

Today I have published the first of those policy documents, “Brexit and Devolution” which is enclosed. You will have received the Written Statement issued this morning, and I intend to make an Oral Statement to the Assembly during Plenary on 20 June.

The UK which leaves the EU is not the same as the one that entered it nearly 50 years ago and we will need to find new mechanisms for working with the UK Government and the other devolved administrations which reflect and respect devolution. We have consistently been very clear that powers already devolved to Wales, Scotland and Northern Ireland must remain devolved after EU exit, and that any other proposition would be wholly unacceptable. The people of Wales have voted for our powers and this must be respected.

This policy document offers constructive and inclusive proposals for the future of the UK, including governance mechanisms which respect devolution and enable the four governments of the UK to work together to ensure the smooth functioning of the Union after we leave the EU.

These proposals set out to protect devolution and we will aim to draw support on a cross-party basis; we welcome views from your Committee as we take forward the debate on the important issues raised. I look forward to taking the opportunity to discuss our proposals with you in the near future.

Bae Caerdydd • Cardiff Bay
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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.

I have also written in similar terms to the Chair of the Constitutional and Legislative Affairs Committee and I am copying this letter to the Presiding Officer.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones'. The signature is fluid and cursive, with the first name 'Carwyn' written in a larger, more prominent script than the last name 'Jones'.

CARWYN JONES



Llywodraeth Cymru
Welsh Government

Brexit and Devolution

Securing **Wales'** Future

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1 First Minister's Preface

Leaving the European Union (EU) is the most significant challenge facing the United Kingdom (UK), a challenge thrown into even sharper relief by the outcome of the General Election. Decisions taken now will affect Wales for decades to come.

Our ability to trade, travel, attract investment, determine policies, legislate, support our countryside, invest in our regions – all of these will be influenced by how we leave the EU. The UK which will leave the EU is not the same country which joined in 1973. At that time, the UK was one of Europe's most centralised states. Today, through nearly 20 years of devolution, much has changed. Most notably, there are devolved legislatures and administrations for Wales, Scotland and Northern Ireland. Westminster and Whitehall retain responsibilities for some policies – health, education and agriculture, for example – in England only and for others, such as defence and foreign policy, for the UK as a whole.

The EU which we are leaving is also very different from the European Economic Community we joined in 1973. During this time, the EU has become much bigger, its powers have increased and the degree of integration between its Member States has deepened greatly. So the task of disengagement is complex and, as we prepare to withdraw, many difficult issues must be addressed within the UK as we learn afresh how to manage our business as a dynamic multi-national democracy outside the EU.

A return to the Wales and UK of 1973 is plainly not an option. The arrangements for the UK's

withdrawal from the EU must reflect the reality of devolution. And let us remind ourselves that devolution, just as much as EU exit, is also based on referendums and popular will. We, and colleagues across the UK, must keep that in mind as we deliberate our collective future.

This document outlines the Welsh Government's proposals for responding positively and creatively to the constitutional implications of EU exit. We suggest how the division of competences between devolved administrations and the UK Government can best be managed in the interests of all – and how we need to work together to ensure the smooth functioning of the UK after we leave the EU.

In this critical period in our history it is vital that the UK Government and devolved administrations work together in genuine partnership to map our collective future.

We should agree common approaches where these are necessary – through discussion, not diktat – because it is in all

our interests to do so. If there is a 'Brexit dividend' for Wales then part of that must, surely, be the opportunity to exercise our devolved powers in a fuller and more creative sense.

As First Minister, representing a party which has just received a further incontrovertible endorsement from the electorate in Wales, I am both passionate about Wales and proud of our United Kingdom. I see no contradiction between the two. Clearly, not everyone takes this view. There are those who see our Union as a shackle and others who are disrespectful towards the clear mandate for Welsh devolution which was reinforced by the 2011 referendum. I believe in Wales' ability to address our future according to our needs and values. I believe, equally, that a vibrant and dynamic Union benefits us all. Any retreat towards a monolithic and centralised UK takes us in the wrong direction and in the long term, I am certain, will serve to threaten, not strengthen, our Union. The opportunities presented by EU exit must be about the future, not the past.

I believe we must address four fundamental questions:

- how do we ensure coherence across the UK to protect the functioning of our internal market without at the same time undermining devolution?

- how do we achieve deeper and more sustained co-operation between the four governments in the exercise of our individual, but connected, competences after the UK withdraws from the EU?
- how do we reform the machinery of government to support this coherence and co-operation?
- how do we build wider consensus across political parties and civic society about the long term governance of the UK?

Wales and the UK will be stronger for an open discussion. This debate on the future of the Union should be positive and inclusive, and should develop without disparagement or disrespect to others. No one has the monopoly on good ideas.

This document sets out the Welsh Government's approach to these questions. I want our United Kingdom to survive and prosper. This needs vision, ambition and imagination and I believe this document makes a significant contribution to that debate.



Carwyn Jones
First Minister of Wales



2 Summary of Welsh Government proposals

At the start of 2017 the Welsh Government, together with Plaid Cymru, published a White Paper, “Securing Wales’ Future”, setting out how we think the UK should approach withdrawal from the EU. This new document develops constitutional and governance ideas which were first surfaced in that White Paper.

Withdrawal from the EU represents a major constitutional change for the UK and for Wales. But Brexit must not undermine devolution, which is now a fundamental and permanent part of the UK constitution as recognised in the Wales Act 2017.

We are calling for deeper and more sustained co-operation between devolved administrations and the UK Government after EU exit, a shared governance approach developed on the basis of agreement between the four governments, and building on the traditions of co-operation built up during the years of EU membership. Our proposals for agreeing new UK frameworks describe how this would work in practice. New arrangements for consultation, joint decision making and joint delivery will be needed.

This means redesigning our approach to inter-governmental relations, in order to support shared executive governance of devolved matters, and deeper collaboration where devolved and non-devolved issues inter-connect.

The UK’s inter-governmental machinery must be reformed with a new UK Council of Ministers, served by an independent secretariat, to strengthen decision making and collaboration.

A Convention on the Future of the United Kingdom should be held to build cross party and civil society consensus on the future governance of the UK for the long term.

3 The EU Referendum and its impact on the governance of the United Kingdom

As a consequence of the EU referendum of June 2016 the UK has activated Article 50 of the Treaty on European Union. This has triggered a negotiation between the UK Government and the EU on the terms of withdrawal. The provisions of Article 50 allow two years for these negotiations and, all other things being equal, the working assumption is that the UK will formally leave the EU in spring 2019.

Since the referendum, the Welsh Government has been in discussions with the UK Government, the Scottish Government and the Northern Ireland Executive about the overall negotiating priorities of the UK. The Welsh Government's priorities are set out in our White Paper "Securing Wales' Future". These discussions have progressed through a combination of bi-lateral engagements and the formal inter-governmental machinery of the Joint Ministerial Committees (JMC). JMC Plenary brings together the respective heads of government from the four administrations while JMC EU Negotiations is the forum for more detailed work by the UK Government and Ministers representing the devolved administrations. The Welsh Government has played a constructive part in this process and remains committed to working with partners to produce positive outcomes for Wales and the UK.

By the time of our likely EU exit, the UK will have been in the EU for nearly 50 years. During this half century the competences of the EU have extended substantially and the UK's integration with EU policies, markets, programmes and practices is now wide and deep. Consequently, disengagement from the EU will necessarily be complex and many challenges must be addressed.

It is not only the EU which has changed over the last 50 years. The UK has itself changed profoundly. Devolution is foremost among these changes.

The UK entered the Common Market as a highly centralised state but we will leave the EU as a much more decentralised country, governed through four administrations drawn from directly elected legislatures. More generally, the General Election which has just been held has highlighted that no one political institution or political party can legitimately claim alone to speak for the whole of the UK.

As the UK leaves the EU, returning to the 1973 status quo is obviously not an option. Brexit arrangements within the UK must recognise devolution and the allocation of competences to the Welsh Government and the National Assembly for Wales - as well as those of our Scottish and Northern Irish counterparts.

A positive future for the UK must be based on respect, recognition of competences and joint decision-making in areas of common UK interest.

4 Devolution: the Welsh context for EU withdrawal

Devolution in Wales

Devolution in Wales was established in response to the Welsh referendum of September 1997. The Government of Wales Act 1998 paved the way for a new Welsh democratic institution. The first elections were held in May 1999 and powers were transferred from UK ministers to the National Assembly for Wales on 1 July that year.

Devolution has been transformed since 1999 as a result of further Acts of Parliament in 2006, 2014 and 2017. A further referendum was held in 2011 which confirmed popular support for devolution in Wales. Among other matters, this referendum conferred powers on the National Assembly for Wales to make primary legislation in devolved areas. The Wales Act 2017 confers additional powers and establishes a 'reserved powers' model for devolution in Wales.

(below) The Senedd, Cardiff Bay

The National Assembly for Wales is now the principal law-making body for Wales on most matters which affect people in their daily lives, such as the following:

- Health
- Education and training
- Housing
- The environment
- Economic development
- Local government
- Transport
- Planning
- Agriculture and fisheries
- Culture
- Sport and recreation

Some of these policy areas, including economic development, environmental protection and agriculture and fisheries, are also areas where the EU institutions have had the most significant powers. On these matters the National Assembly must not, in exercise of its powers, enact legislation in contravention of EU law.

Welsh Government Ministers exercise a wide range of executive powers in broadly the same fields as those in which the Assembly can legislate. Welsh Ministers make decisions, award grants, make secondary legislation and take other action necessary to promote the economic, social and environmental well-being of Wales. In carrying out these functions Welsh Ministers are accountable to the National Assembly.

Under the UK constitution, the UK Parliament retains the power to legislate on any matter for Wales as for the rest of the UK.



However, in accordance with the ‘Sewel Convention’, Parliament will not normally legislate for Wales on matters which lie within the National Assembly’s legislative competence, or affect that competence, unless the Assembly has given its formal consent through a Legislative Consent Motion. In contrast, Welsh Ministers’ executive powers have been transferred away from the UK Government and are generally exercisable free of any possibility of interference by UK Ministers. Welsh Ministers owe no accountability to the UK Parliament. The model of devolution practised in the UK has some examples of co-ordinated agreements in relation to the exercise of competence, but most decisions are taken either by Welsh Ministers or by UK Ministers as appropriate.

In reality however, given the distribution of executive responsibilities between the governments, the actions of one government may well have significant implications for the policies of one or more of the others, or for citizens in ‘another’ territory. This means that the machinery for inter-governmental collaboration needs to be effective. The existing arrangements operate under the aegis of the Joint Ministerial Committee (JMC), which brings together Ministers from the four administrations to discuss matters of common concern. The JMC is a consultative body and takes no decisions: EU withdrawal raises fundamental questions about its role and working arrangements, and we address these in chapter 7.

This model of distinct and separate competence has worked well in areas where there is relatively little inter-dependence

between government activity and each administration has been free to pursue distinct policies in line with its mandate. This is the case, for example, with most front-line public services such as education and health, which are very largely devolved matters. Even here, though, there is some linkage; for example, cross-border health referrals are covered by an inter-governmental protocol which largely works well. In general these issues have not presented substantial administrative (as opposed to political) challenges for inter-governmental relations within the United Kingdom, partly because they have a relatively limited international dimension and there is, therefore, no requirement to establish a UK-wide external facing perspective. The existing devolution settlement establishes obligations on the National Assembly and Welsh Government to observe international obligations and these responsibilities have been fully discharged during the period of devolution.

The Welsh Government’s relationship with the EU

Those devolved competences which have a significant international impact (actual or potential) have, in practice, generally been exercised within the framework of EU regulation. Under current arrangements, the Welsh Government engages with EU-related business in two ways.

First, we deal directly with the European Commission on agreeing the strategic direction and administration in Wales of key programmes financed by the Structural Funds, and on implementation of the Common Agriculture Policy.

We also contribute, in accordance with the Memorandum of Understanding first agreed in 1999 (see chapter 7), to the development of the UK’s policy lines for representation in meetings of European Councils. The JMC Europe (E) provides the machinery for our engagement, alongside the other devolved administrations, with the UK’s policy development process on EU matters.

The Welsh Government does not recognise the description, in the previous UK Government’s White Paper (“Legislating for the UK’s withdrawal from the European Union”) of the apparently exclusive responsibility it attributes to the UK Government in the development of EU policy frameworks. The UK Government normally represents the UK in European Council of Ministers meetings but, in doing so, it must present the policy of the United Kingdom as a whole rather than the policy of the UK Government alone.

Since devolution began, the Welsh Government has been able to exercise appropriate influence directly in Brussels, through our collaborative arrangements with the UK Government. As a broad generality, Welsh Ministers have viewed the cross-UK collaborative practices on EU business positively as a means to advance and protect the Welsh interest at EU level – working through the UK as the Member State of which Wales is part. Withdrawal from the EU will require entirely new arrangements for dealing with these matters.

We are clear that EU exit should not result in the ‘repatriation and redistribution’ of the functions of government within the UK. The powers will lie where they rest

as a result of Parliamentary legislation since 1999, but these will no longer be exercised subject to EU obligations. That is the position under the devolution legislation, and that position, as was noted in the ‘Miller judgement’¹, can only be changed by new primary legislation at Westminster – which we believe is unnecessary and undermining of devolution.

The Welsh Government is strongly resistant to any suggestion that Whitehall and Westminster have exclusive

responsibilities in respect of any UK-wide policy frameworks required after EU exit has taken effect.

Powers already devolved must remain devolved and Wales has a legitimate interest in a range of reserved policy areas which will impact on us. The Welsh Government expects to continue, within the scope of our powers, to contribute to the development of policy frameworks where they are necessary, as it has done in the past: our proposals on this are set out in chapter 6.

EU membership and the devolution settlements

We also reject the view, set out in the UK Government’s White Paper that the existing devolution settlements are ‘premised’ on the UK’s continuing membership of the EU. As the Supreme Court pointed out in the ‘Miller case’:

“When enacting the EU constraints in the Northern Ireland Act and the other devolution Acts, Parliament proceeded on the assumption that the United Kingdom would be a member of the European Union....But, in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the European Union....”

(below) Main entrance of the Supreme Court, London



1 www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/

5 Legislating for EU exit: ensuring continuity while respecting devolution

The Welsh Government's ambition is that the Great Repeal Bill or any equivalent legislation brought forward by the UK Government should be constructed in a way that freezes EU law into UK law, at the point of our departure from the EU, while respecting and accommodating devolution. We believe this is straightforwardly achievable and the Welsh Government stands ready to work with the UK Government to help frame the legislation in an appropriate way.

The UK Government's White Paper ("Legislating for the United Kingdom's withdrawal from the European Union") signalled an intention to replicate the current EU frameworks in domestic law. It is suggested there should be "intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. Whilst these discussions are taking place with devolved administrations the UK Government will seek to minimise any changes to these frameworks".

While we welcome dialogue with the UK Government in areas of common interest, we oppose new and additional constraints being placed on our devolved legislative competence. Among the arguments for EU exit in Wales was the opportunity to escape from EU policy constraints; swapping EU constraint for a UK version doing the same thing would leave Wales no better off in respect of devolution – and arguably worse, since in our dealings with

the EU we are guaranteed an input into the formulation of a common UK position.

From the outset of the debate about our collective future outside the EU, the Welsh Government has recognised a need to develop UK frameworks. It is clearly important that no new barriers to the effective free movement of goods and services within the UK are created as a result of EU withdrawal. The development of UK frameworks should be taken forward immediately on the basis of negotiation and agreement among the four UK administrations.

But, separately from EU exit, there are some important areas of inter-dependence between devolved and non-devolved matters. For example, the UK Government's proposed changes to social security benefits, and to higher education, have had very significant repercussions for the Welsh Government which the existing inter-governmental machinery has not adequately addressed. Most recently, the interface between the UK Government's planned reforms of prisons and youth justice, and devolved services, is very extensive and we have at present no machinery for addressing this. There are many other examples. In short, the existing inter-governmental machinery is no longer fit-for-purpose: we set out our proposals for change in chapter 7.

Withdrawal from the EU will radically increase these areas of inter-connected competence. It will do so in relation to both:

- devolved matters where UK wide approaches will need to be negotiated and agreed;
- non-devolved matters which will have a major impact on devolved services and budgets, or on Wales more generally.

To deal with these matters of inter-connected competence, the Welsh Government advocates a deeper and more sustained co-operation between devolved administrations and the UK Government after EU exit. We believe that the traditions of co-operation which have been built up during the years of EU membership provide a useful body of experience for inter-governmental thinking and a useful starting place for further work. We believe it is implausible that the UK can withdraw from the EU and then continue with existing governance arrangements as if nothing major had happened. We believe that such an approach, or a centralising agenda, will threaten the Union over the long term. We further believe that a coherent and adaptable response to our post-EU governance arrangements will help bind our own four-nation Union together more closely.

Co-operative and collaborative work between the devolved administrations and the UK Government is clearly the best approach both to continuity legislation for EU departure and for the longer term as we shape a new future for the United Kingdom: indeed, particularly in the light of the outcome of the General Election, any

other approach would seem constitutionally inappropriate and reminiscent of the 1980s.

We hope that the UK Government will recognise this by:

- Consulting fully with the Welsh Government and the other devolved institutions on both the principles and the detail of the Great Repeal Bill or equivalent legislation;
- Agreeing that the Sewel Convention applies and that a Legislative Consent Motion must be sought from the National Assembly;
- Removing any threat of introducing new constraints on the competence of either the National Assembly or the Welsh Government.

If it does not, then the Welsh Government must consider other available options to protect our devolved interests, including the option of introducing our own legislation to secure the rights of the National Assembly and Welsh Ministers in respect of EU derived law in devolved areas of competence.

Our objectives in doing so would be two-fold. First, to protect the devolution settlement and powers which the Welsh people have consistently voted for over many years. Secondly, to preserve for the long term the social and environmental protections which we have accrued through the EU. Withdrawal from the EU must not be a licence for slackening

environmental and other protections or allowing exploitation of workers. If we cannot be confident that the UK Government will work fairly with us, and in good faith, to secure these outcomes, then we must pursue other avenues.

The following chapters set out how we think co-operative arrangements could work in practice, through new inter-governmental agreements, and new machinery for delivering them.



6 Shared executive governance: a new approach to the exercise of powers in a United Kingdom outside the EU

This chapter proposes that we need to move from our current binary (devolved or non-devolved) approach to competence, to one that recognises the reality of inter-connected competences. This will not change the need for clarity on where powers lie, but will introduce a more sophisticated approach to the exercise of those powers in the interests of better governance and delivery for citizens.

As discussed, many of the powers devolved to the National Assembly and Welsh Government are currently exercised within the framework of EU regulation. The powers include agriculture, fisheries and environmental protection. These powers were devolved by means of UK Parliamentary legislation based on the explicit approval of the Welsh people in two referendums (1997 and 2011). The Wales Act 2017 frames Welsh devolution within a ‘reserved powers’ model along similar lines to Scotland’s settlement.

This means that matters reserved to the UK Parliament’s legislative competence are specifically listed; competence in respect of matters not explicitly listed is devolved. One of the benefits of this model is that it provides greater clarity about which powers are reserved and which are not.

At the point of UK exit from the EU, unless there is Parliamentary legislation to the contrary, those devolved powers currently exercised within an EU context

will remain with the devolved institutions in Wales. Any other outcome would, in our view, require UK Parliamentary legislation to reverse the existing devolution settlement. Such a course would directly contradict the explicitly expressed preference of the Welsh people and would be vigorously opposed by the Welsh Government. We believe an approach along these lines would weaken trust and undermine the Union.

The current EU policy and regulatory frameworks

Under current arrangements, the EU ensures policy coherence and common practice, with agreed frameworks, in its areas of competence. In order to address the implications of removing these frameworks, and to understand which aspects may be needed on a UK-wide basis, it is important to appreciate the extent and scope of the current EU policy and regulatory frameworks. These are summarised in Box 1.

These EU frameworks also ensure aligned goals and co-ordinated approaches within the UK, where the policy choices of four administrations might otherwise challenge the smooth frictionless functioning of the UK’s own internal market.

In addition, following Brexit, a range of powers outside of our devolved competence currently exercised exclusively by the EU, or jointly by the EU and Member States, will most probably return

to the UK Government. The Welsh Government will have an active policy and practical interest in many of these, including State aid regulation, competition law, migration and trade policy.

Box 1: The Components of an EU Framework

In each regulatory framework there is a complex picture of international, EU and domestic legislation. In addition, governance, administrative and funding arrangements operate at the EU and domestic levels to support the operation of EU frameworks.

An EU framework can therefore consist of all or some of the following:

- An overarching strategic policy direction developed and set at the EU level;
- A legislative framework, enacting the policy direction, consisting of EU Treaties, Directives and Regulations, some of which are directly applicable;
- The legislative framework also translates international obligations (where they exist) into a common EU framework which is then tailored and implemented at a domestic level;
- Domestic legislation as necessary to enact the EU requirements into domestic law;

- Administrative arrangements including for example in relation to registration, inspection, labelling, licensing, quotas, export requirements and management plans;
- Enforcement mechanisms;
- Support for research underpinning policy development;
- Financial support such as structural funds and competition rules such as in respect of State aids;
- Governance in place within the UK as a Member State to oversee the UK's input into the design and delivery of the EU's frameworks, including agencies and delivery bodies and decision making fora etc.

It may well be that in some of these areas the UK will need to maintain regulatory convergence with the EU even after Brexit, in order to secure the sort of full and unfettered access to the Single Market which is our main objective for our future relationship with the EU.

But in other areas, a consequence of the UK's exit from the EU will undoubtedly raise this question: how do we ensure coherence of policy and practices across the UK to protect the functioning of our internal market without undermining devolution?

The previous UK Government's White Paper "Legislating for the United Kingdom's withdrawal from the European Union" states on pg 27:

“When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK, allowing these rules to be set here in the UK by democratically-elected representatives”

We agree with this, but hold that it is democratically-elected representatives in Cardiff, Edinburgh and Belfast as well as those in London who need to set these rules in areas of devolved competence.

The Welsh Government believes that, on matters within devolved competence, and where necessary, binding UK frameworks should be drawn up and agreed by all four administrations: Wales, Scotland, Northern Ireland, and the UK Government representing England's interest and separately – if necessary – the wider Union interest. The Welsh Government recognises the need for such frameworks and readily accepts the duty to reach agreements which benefit all and harm none. What we could not accept, and what would risk tearing the Union apart, would be if the UK Government attempted to take powers to itself and seek to impose by central diktat what can and should be achieved through negotiation, shared interest and agreement.

So far as the non-devolved matters mentioned above are concerned, the Welsh Government will naturally have an active interest in these. In the same way that there must be UK-wide discussions on some devolved policies, we also argue for UK-wide discussions and agreement in some aspects of non-devolved policy. We believe this is necessary to ensure that policies have legitimacy across all parts of the UK and to ensure that there is appropriate integration where necessary between devolved and non-devolved policies.

Determining the case for shared governance frameworks at UK-level

As we plan for the UK's withdrawal from the EU, it will be essential for the UK Government and the devolved administrations to agree where the shared governance approach is needed. We propose this should be approached on the basis of subsidiarity, and where it is determined that a shared governance approach is needed, there should be consideration of the scope and mechanisms required in each case. As Box 1 illustrates, there is a wide spectrum of options and regulatory mechanisms to be considered, including: structures of governance, decision making bodies, and operational oversight.

Where it is agreed that shared governance frameworks are required, this will not necessarily mean securing policy uniformity. In some instances frameworks may be concerned to promote convergence and a common approach to be followed by all administrations – for example, in dealing with specific environmental threats. In other instances frameworks may be designed to constrain



(above) Llyn Clywedog reservoir

divergence but still leave individual administrations with room for manoeuvre to suit local circumstances – as for example, the existing Common Agricultural Policy does (a conclusion endorsed for UK domestic law by the Court of Appeal in the ‘Horvath case’²). It is worth noting, by way of illustration, that environmental standards under EU Directives currently allow for divergence between administrations, so there should be no assumption of convergence under future UK frameworks, except where this is necessary to secure an agreed common policy outcome.

So where regulatory convergence is no longer a requirement of our future relationship with the EU, we propose a pooling of sovereignty by the devolved administrations and the UK Government, supported by a system of shared governance, to regulate aspects of the internal UK market. This should not be a matter of simply replicating EU frameworks at the UK level: the

case for maintaining existing EU policy frameworks domestically will need to be considered afresh in the UK context.

Some existing EU frameworks, for example, those created by the Birds Directive or the Bathing Waters Directive, are not primarily motivated by internal market considerations, and there may be no need to retain a UK-wide regime for these. This does not mean that the protections achieved by such Directives should be withdrawn; the point is rather that it should be for the responsible governments in each part of the UK to have the freedom to decide.

Criteria for shared governance frameworks

Clear and agreed criteria, having regard to the principle of subsidiarity, will be required for identifying where UK-wide approaches and decision-making structures are appropriate. Such criteria might include:

a. Measures which support a fully functioning internal UK market

these might include: common minimum standards which enable goods to be traded both within the UK and abroad; rules on State aid/business support (subject to regional variations or exceptions); and environmental requirements on production industries – in so far as these are not pre-determined by our future relationship with the EU or other international obligations.

b. Matters where there is a direct dependency between devolved and non-devolved policy areas

outside of the EU, the Welsh Government would have a more direct interest in trade negotiations, particularly given that these would have important inter-dependencies with key aspects of the policy and regulatory context for devolved areas such as steel, agriculture or fisheries. At present, the Welsh Government has the opportunity to work with the UK Government to influence EU negotiating mandates on new free trade

agreements to ensure that Welsh interests are protected. It would be perverse if, post-Brexit, we had less opportunity to ensure that trade policy does not adversely impact on devolved policy areas. Continuing full and unfettered access to the Single Market is our primary ambition for EU negotiation and we remain unconvinced of the UK Government's arguments for leaving the Customs Union, but if this were to happen, we need appropriate constitutional arrangements to ensure our interests are protected.

c. Trans-boundary co-ordination

Many issues are trans-boundary in nature where activity in one country has a consequential effect in another.

d. Shared administrative arrangements

in some cases shared administrative arrangements may be the most efficient or cost effective way of continuing to deliver services after EU exit.

e. Compliance with international standards

for instance the co-ordination between administrations of controls to ensure the UK meets international obligations.

An example of inter-governmental collaboration and shared governance: animal health and welfare

We argue that a new model of shared governance is both essential and achievable. The current arrangements for protecting animal health and welfare across the four UK administrations illustrate what can be achieved through shared purpose and collaboration based

on evidence, as summarised in Box 2. As a general proposition, we do not believe it will be in the general interest to develop four separate and incompatible animal health regimes across the four countries of the UK. Such an outcome would complicate commercial mobility of livestock and produce, and add needless cost – an outcome which is in no one's interests. What we will need, plainly, is a set of binding UK-wide framework agreements developed and sustained through negotiation.

Animal health and welfare is a devolved matter and each administration sets its own policy priorities, within the context of EU regulation. The Chief Veterinary Officers of the four UK administrations work closely together to ensure that responses to animal health and welfare threats are evidence-based, and that they are co-ordinated and aligned as far as possible.

Box 2 illustrates inter-governmental collaboration in a high profile and fast moving area, enabling the UK to meet its international obligations, and to support both trade and animal welfare.

This is the kind of approach that will be needed to underpin new UK inter-governmental frameworks as discussed above. To oversee these, and ensure the necessary democratic accountability, there will need to be new inter-governmental governance structures, led by Ministers, as outlined in chapter 7.

Box 2: inter-governmental collaboration: animal health and welfare

- An agreed set of overarching principles which frames each administration's strategy;
- Policies recognise cross-border issues, and implementation is joined up and coherent;
- Great Britain (GB) Livestock and Welfare Enforcement Group includes representatives of 3 GB administrations, the Food Standards Agency, Food Standards Scotland and the Animal & Plant Health Agency, and meets quarterly to share intelligence and develop consistent proposals and communications;
- the four UK administrations work together to align evidence-based action in response to serious animal health disease, with a collectively agreed UK contingency plan;
- disease control strategies set out complementary, co-ordinated measures for managing an outbreak in each part of the UK;
- these plans and strategies are underpinned by joint working arrangements, including monthly meetings of the Chief Veterinary Officers;
- taken together, these arrangements meet the UK's legal obligations to the EU and the OIE (World Organisation for Animal Health).

7 Inter-governmental relations: how things work now and how they should change

Everyone agrees that leaving the EU is a step of profound importance which will radically revise how we are governed. It is inconceivable that so major a change can occur without far-reaching changes in how the four governments within the UK work together. This calls for clear thinking and imagination.

How things work now

Formal discussions between devolved administrations and the UK Government take place through the Joint Ministerial Committees (JMC). The JMC structure is set out in the Memorandum of Understanding (MoU) between the UK Government and the devolved administrations, originally agreed in 1999, with an updated version presented to the UK Parliament, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly in October 2013. The MoU also comprises concordats on a number of matters including the co-ordination of EU issues.

In variable formations the JMC bring together Ministers from the four administrations to discuss policy in areas of common interest across the UK. The Prime Minister and First Ministers meet at JMC Plenary (P). Traditionally this met once a year and only in London, until January 2017 when it met outside London for the first time in Cardiff City Hall. JMC EU Negotiations (EN) was established after the referendum as the main Ministerial forum for EU exit negotiations. The

JMC Europe (E) remains the body which develops the UK's agreed positions on EU business (with the full participation of the devolved administrations in respect of devolved matters) and will continue to operate until the point of EU exit.

The British Irish Council (BIC) also provides an important forum for discussions on the UK's withdrawal from the EU and we believe the significance of BIC should grow over time.

What needs to change

EU withdrawal raises fundamental questions about the JMC's role and working arrangements. In our view, these are inadequate for the new challenges we face as discussed. The JMC is a consultative body and makes no decisions – it might negatively be characterised as, effectively, a 'talking shop'. What will be needed in future, outside the EU, is a structure capable of taking forward negotiations on dossiers of common UK-wide interest and reaching binding decisions. It must also be supported by a dispute resolution mechanism.

Lessons from effective Government across the World

The UK will need to establish our own arrangements to strengthen the Union as we leave the EU, but there are useful lessons to draw on from other countries with decentralised governments. Formal structures to support co-ordination and collaboration between the different levels of government are well established

features of political governance across the world, such as in Australia, Austria, Canada and Germany. While developing a model to suit our own circumstances, the UK should be open to learning from approaches elsewhere in order to ensure our political leadership is fit for purpose.

Political leadership: a new UK Council of Ministers

We propose a UK Council of Ministers system. This would operate along lines similar to, but on much smaller scale than, the EU Council of Ministers. In practice, the four administrations would meet regularly in a variety of formats to negotiate common rules and frameworks where it is agreed that coherence across the UK is necessary and beneficial. We will need a set of binding UK-wide framework agreements developed and sustained through negotiation, although the agreement of common approaches as a basis for free transactions across the UK should not prevent individual administrations developing enhanced policies, over and above framework imposed requirements, within their own sphere of competence. The new Council of Ministers should have a structure and work programme designed to enable the negotiation and implementation of such agreements. The case for statutory underpinning of the Council of Ministers could usefully be explored in this context.

How decisions should be made

A UK Council of Ministers would comprise four administrations: Wales, Scotland and Northern Ireland as devolved administrations, with the UK Government representing the UK and England. Decisions based purely on population share would result in the UK Government permanently dictating outcomes, thus undermining the collaborative democratic principle. Equally, if the three devolved administrations were able to outvote the UK Government this, too, would produce perverse and undemocratic outcomes (it is worth noting, in any case, that no assumptions should be made that devolved administrations share 'block interests': on the specifics of policies, devolved administrations are often no more or less likely to agree with each other than they are with the UK Government).

The first option should always be to achieve decisions through consensus and, in general, this is the outcome we would most frequently expect. Where consensus is not possible, we suggest a combination of the UK and one of the devolved administration should be sufficient for affirmative decisions. This would ensure the degree of plurality necessary for legitimacy in a multi-national state while respecting the dynamics of population share.

What happens if agreement cannot be reached at all through normal procedures? We recognise the need for a backstop arrangement as part of the overall operating procedure and we are open to further discussion on this.

Failure to reach agreement on a specific matter implies deadlock in a negotiation. The first response to such a deadlock should be a period of independently managed arbitration: the arrangements for this should be discussed and agreed by the four administrations.

Implementing decisions and resolving disputes

Once frameworks have been agreed which relate to devolved matters, responsibility for implementing them should rest with the devolved administrations (including where necessary securing appropriate consent from legislatures) in respect of their territories and with the UK Government for England.

Where disputes arise about the implementation of agreed standards, there will need to be an independent adjudication mechanism.

This might be undertaken by (or under the aegis of) the Supreme Court, or might involve a new institution in the first instance.

A new independent secretariat

At present the JMC secretariat is a group of officials, in a virtual secretariat mode, but in practice part of the constitutional team in each administration. This structure is not sufficiently robust to manage a programme of work to underpin shared or inter-connected competences.

The work of the UK Council of Ministers would best be managed, we believe, by an independent standing secretariat charged with cohering arrangements in the general interest, similar to the current structure for the British-Irish Council secretariat. In practice, the personnel would be seconded from each of the four administrations, but would operate independently of their 'home' administrations' interests. An independent secretariat – with ownership shared across the four administrations – would provide a strong foundation for supporting the shared governance approach we propose in chapter 6.

8 The future governance of the United Kingdom: building consensus for the long term

Leaving the EU is a profound change of direction for the UK. It is unrealistic, impractical and, we believe, undesirable, to take a step of this magnitude without significant change in how we conduct business within the UK. Simply carrying on as we are is not a plausible option.

The Welsh Government supports a dynamic and inclusive UK which works for the benefit of all its parts and disadvantages none. We believe in mutual respect for all parts of the UK and a principle of solidarity underpinning the collective interest. Our role, plainly, is to promote and protect the interests of Wales and we will always pursue that aim with vigour. However, we also recognise that a fair and successful Union must balance a range of interests, territorially and socially, across the whole UK.

For these reasons, we believe the time is now right to convene a Convention on the Future of the UK. This should draw together the various interests across the Union with a view to reporting

with options for sustainable future governance models for a UK operating in a global environment in fundamentally changed circumstances outside the EU. Its chair should be a respected independent figure of stature and the Convention should take evidence from the UK Government, the devolved administrations, Parliaments and National Assemblies, elected mayors and local government, business and civil society.

The Convention should consider the range of major questions which will face the UK once it is outside the EU. These include effective constitutional arrangements for a Union of four nations, respecting the identity and aspirations of each, while preserving the collective interest of the whole. The UK is, in spite of many challenges, a successful multi-national democracy but to remain so it must change and adapt to meet new circumstances.

We believe that the traditional model of exclusive Westminster Parliamentary sovereignty is outmoded and inappropriate to the circumstances of a modern UK.

Instead, we believe that ‘pooled sovereignty’ offers a better way forward. Pooled sovereignty recognises the special nature of the UK as a union of four countries which combine, through democratic consent, to form the world’s most successful multi-national democracy.

In the era of devolution this balances the freedom to act with autonomy in each nation with agreement to work together collaboratively in specified areas of common interest.

Pooled sovereignty acknowledges that the people of Wales, like those of Scotland and Northern Ireland, have chosen devolution as their preferred model of government. Pooled sovereignty offers a different relationship among the nations of the Union based on mutual respect and parity of esteem among the administrations.

9 Conclusion

The Welsh Government appreciates that, for many in the UK, some of the ideas set out in this document may appear challenging. Adopting them would amount to a major constitutional reconstruction of the UK, and we do not under-estimate this.

But in our view, the UK's withdrawal from the EU represents an existential challenge to the UK itself. As an administration committed to both the Union and devolution, we consider that all options should be on the table, in order to preserve and foster unity for the UK while guaranteeing the diversity of its constituent nations.

We want to assure the principle of autonomy as well as the imperative of integration. We are clear that an excessive emphasis on centralisation in the UK's response to Brexit would be counter-productive and damaging, and we are concerned that the UK Government's White Paper veers in that direction.

Can the Union survive EU exit in the medium and long terms? No-one can be sure.

For some years now (and long before the 2016 EU referendum), the First Minister has argued for the establishment of a constitutional convention:

“primarily tasked with examining the full context of relationships between the devolved administrations and the UK Government, bearing in mind [our] joint enterprise of the governance of the UK”.

It continues to be the Welsh Government's belief, and even more so after the EU referendum and the General Election, that a debate along these lines, across the political parties and civic society, about the future of our Union is vital to its survival.

Such a convention would be charged with putting in place appropriate, sustainable political institutions recognising the quasi-federal nature of the United Kingdom, resolving questions around the way in which the interests of England and English regions (including the position of the London Mayor and metro-mayors) are fully represented and achieving clarity on the form and function of UK-wide political and governmental institutions, including the House of Lords.

In the meantime, this paper sets out the Welsh Government's proposals for action that can be taken now in response to the constitutional and inter-governmental challenges presented by leaving the EU. These are practical and constructive proposals designed to achieve the deep and sustained co-operation between governments that we believe is needed. In our White Paper, “Securing Wales' Future”, we called for imagination and vision to design a new way of working. This paper sets out the Welsh Government's proposals to respond to this challenge, to protect the interests of Wales and strengthen the Union.