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Bruce Crawford MSP  
Convener  
Finance and Constitution Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP

2 August 2019

Dear Bruce

Thank you for your letter of 26 June 2019 setting out the findings from the committee's recent exercise to explore the potential impact of Brexit, if it happens, on devolution and parliamentary scrutiny. The views set out are a useful contribution to the debate. We recognise, and are sympathetic, to many of the issues raised and agree with many of the suggested ways to address them.

I have stated on a number of occasions the Scottish Government is clear that parliamentary scrutiny in all these areas will be important if Brexit does take place. The summary provided in the letter focuses on 3 areas in particular and I deal with each of these in turn below. Each of these areas will bring their own particular challenges in what will be a new and unprecedented scenario for all the governments and legislatures of these islands should the UK leave the EU.

## Legislation

I am grateful to you for setting out the view of subject committees on the operation of the existing Statutory Instruments protocol which applies to legislation made under the EU (Withdrawal) Act. I also remain grateful for the support from Parliament and Committees in processing the high volume of Brexit related secondary legislation and notifications.

In terms of next steps, it remains our position that Scottish Ministers should be asked to consent where it is proposed that UK Ministers will make subordinate legislation relating to non-reserved matters currently subject to EU law. It equally remains our position that the Scottish Parliament should have the opportunity to scrutinise those consent decisions.

On that basis, I agree that the current protocol should be used as the starting point for the development of a similar protocol to apply to the exercise of all powers by UK Ministers to legislate in devolved areas that are currently within the competence of the EU. I also agree that a future protocol will need to be flexible enough to accommodate a broader spectrum of

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SI than is covered by the current protocol, and that it should enable the Scottish Parliament to take a proportionate approach to its scrutiny of Scottish Ministers' consent decisions.

You will be aware that Scottish Government and Scottish Parliament officials are working together to consider the scope, structure and operation of a future protocol. I can assure you that this work will take into account the views of subject committees on where improvements could be made to the operation of the current protocol.

You will also wish to be aware that the Scottish Government is in dialogue with the UK Government at Ministerial and official level about the operation of a future protocol. I know that the outgoing Chancellor of the Duchy of Lancaster wrote to you on 23 July to confirm that discussions with the Scottish Government on these issues would continue, and I will be raising them with the incoming Chancellor of the Duchy of Lancaster in due course.

It is my intention that a new protocol will be in place on or before 31 October 2019. My officials will continue to work with the parliamentary authorities and the UK Government on the development of this protocol, and I will provide an update on that work in the early autumn.

We continue to seek discussions with the UK Government over what would need to be done to restore our confidence in the operation of the legislative consent process, following the imposition of the EU (Withdrawal) Bill without the Scottish Parliament's consent. If these take place, I will keep the Parliament informed.

## **International treaties**

I welcome your suggestions regarding the role of the Scottish Parliament in relation to international treaties. You will be aware that together with the Cabinet Secretary for Culture, Tourism and External Affairs I submitted evidence to the recent House of Lords inquiry into Parliamentary scrutiny of treaties, as did your Committee. The Scottish Government position outlined in that submission remains the same: that the full, formal and early involvement of the Scottish Government and Scottish Parliament is necessary to ensure the legitimacy, and effective implementation, of current and future treaties.

Having noted in that evidence that *'We think it is equally vital that the Scottish Parliament has a mechanism to scrutinise both the ambitions and the implementation of treaties'*, I hope the Committee will be reassured the Scottish Government is committed to providing sufficient time and information to allow the Scottish Parliament and its committees an opportunity to influence the formulation, negotiation and agreement of international treaties in relation to devolved issues. Indeed, this is the long-standing position of the Scottish Government, dating back to the inter-governmental exchanges on the Bill which preceded the Constitutional Reform and Governance Act 2010.

In line with your suggestion, I have asked my officials to consider broadening the scope of ongoing discussions between Scottish Government and Scottish Parliament officials to include discussions on the process for the Scottish Parliament to scrutinise international treaties. The Committee has highlighted a number of areas where the Scottish Parliament would have an interest, including civil law, security and policy. It is the Scottish Government's position that, in practice, almost all international agreements are likely to affect devolved interests.

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## Common UK Frameworks

As stated in our response to the Finance and Constitution Committee's report on Common Frameworks, the Scottish Government recognises the crucial role parliamentary scrutiny will play in the development, implementation and oversight of any future frameworks. The Scottish Government has been clear that the process for the agreement of common frameworks must be transparent and inclusive.

The Scottish Government is committed to work with the Parliament to develop a suitable scrutiny procedure drawing on our joint experience of the existing examples of agreed scrutiny processes. Any protocol would need to reflect the complexity of the handling of the powers being repatriated from the EU recognising that there will not only be legislative and non – legislative frameworks but frameworks that may contain both statutory and non-statutory elements.

Frameworks that are established through primary legislation would be subject to the usual parliamentary consent procedure. While this procedure would not be appropriate for non-legislative frameworks and those frameworks established through secondary legislation, Scottish Ministers would however expect to be held to account for any decisions made in respect of such frameworks and would commit to engage with the relevant committees in advance of any decisions being taken.

In circumstances where it is proposed that a deficiency 'fixing' SI might be used as the basis of a longer term framework arrangement, consideration will need to be given to whether further parliamentary scrutiny is required given that such fixes were intended for a specific and time-limited purpose. Similarly if a working level agreement that has been developed to be used in the event of a no-deal Brexit were to form part of a future framework then that agreement would also have to go through the proper framework process, which would include parliamentary scrutiny.

Consideration will also need to be given to the role all four legislatures might play in the ongoing monitoring and scrutiny of frameworks post-implementation.

We suggested in our response to the Finance and Constitution Committee's report that it would be helpful in the first instance to agree some shared principles on which such scrutiny should be based. These principles could perhaps assist in identifying the key stages in the development or operation of a framework at which the Scottish Parliament is likely to want to consider whether it wishes to undertake scrutiny of the framework.

My officials have since been in discussion with clerks and lawyers from the Parliament and it has been agreed that a small sub-group should meet over the summer to consider further. I would expect the group to consider the suggestions made in the committee's letter as part of that work, though progress on some has already been made: for example over recent months several of my ministerial colleagues have both given evidence at committee and have provided written updates on progress and we also recently published a draft framework outline. I would also expect the outcome of the sub-group discussions to be considered by those working on the future protocol.

I would reiterate my previously stated view that there is a need for Parliaments to have a role in developing, agreeing and implementing all frameworks and the arrangements put in place

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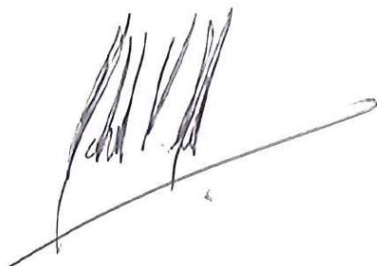


should ensure that the necessary time and information is provided to allow for effective scrutiny to take place in advance of the final agreement of any framework.

The Scottish Government supports more transparency to ensure an enhanced role for the Scottish Parliament and the other UK legislatures in scrutinising new inter-governmental agreements and we continue to actively participate in the ongoing quadrilateral review of inter-governmental relations on this basis. The written agreement on inter-governmental relations which facilitates the Scottish Parliament's role in scrutinising Scottish Government activity in the inter-governmental arena represents a positive step in meeting these objectives and I will continue to press for reforms which will provide procedural guarantees, greater transparency and oversight to rebuild trust and public confidence in the system. Urgent, meaningful and timetabled action is required to make progress with the review and a JMC Plenary to discuss the next steps should be convened as soon as possible.

In conclusion, I would assure you that the Scottish Government is keen to work with the Parliament to take forward consideration of the scrutiny procedures that will be required post Brexit, should it happen. SG officials are already fully engaged in thinking about many of these matters and, if they are not already in discussion with the Parliament, I will ensure they make contact in advance of the committee's event at the end of August.

I am copying this letter to Alister Jack, the Secretary of State for Scotland, and to the Rt. Hon. Michael Gove MP, Chancellor of the Duchy of Lancaster.



**MICHAEL RUSSELL**

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