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12 September 2018

Dear David,

In our telephone conversation of 27 July, we discussed legislative consent following the European Union (Withdrawal) Act. I agreed to set out potential next steps on strengthening the Sewel Convention, building on the proposals in my letters to you of 20 June and 6 July.

To set the wider context, as I said again to you last night, I can reaffirm the Scottish Government's commitment to co-operation to ensure a functioning statute book upon EU exit and to establish common frameworks where these are in Scotland's interests.

However, I should also make clear that, given the decision of the Scottish Parliament on legislative consent on the EU (Withdrawal) Act, the Scottish Government will not consider proposals for regulations under section 12. Nor, in the light of that decision, would it be possible to co-operate on the development of frameworks when devolved competence has been constrained through such regulations. I am sure you recognise this position and that you will be as keen as me to avoid such a situation arising. Given the significance of the issue, I would urge that you and I have the opportunity for early discussion should any proposals for such regulations be brought forward.

Turning to the substantive matter of legislative consent, the view of the Scottish Government, and of an overwhelming majority of members of the Scottish Parliament, is that the UK Government acted in an unprecedented and constitutionally improper way in ignoring the views of the Scottish Parliament on legislative consent for the EU (Withdrawal) Act, having rightly identified the need for that consent and having sought it. Any decision on legislative consent by the Parliament is now effectively meaningless if it can be set aside by the UK Government, and on grounds not previously raised during the legislative process.

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I set this position out not with a view to debating respective positions, but to demonstrate the seriousness of the situation from a devolved perspective. I understand that the UK Government has a different view of events, as set out by David Mundell to the Finance and Constitution Committee on 6 September, and I acknowledge the significant efforts preceding these events on the part of all of the governments to reach agreement on the Bill. However, the confidence of the Scottish Parliament in the Sewel Convention, and thus its authority to determine the devolved law of Scotland has understandably been undermined by these events. I note that the recent report of the House of Commons Public Administration and Constitutional Affairs Committee on *Devolution and Exiting the EU* identifies similar disquiet at Westminster about the status of the Sewel Convention.

There is a need to address these concerns, and provide reassurance and clarity about the place of the Sewel Convention in our constitutional arrangements. This reassurance needs to address a number of points:

- Strengthening processes for determining the applicability of the Sewel Convention to particular Westminster legislation. This is particularly important given the nature and novelty of the issues that are arising from withdrawal, some of which have recently been aired in the Supreme Court.
- Commitment by the UK Government to respect the views of the Scottish Parliament when consent is required; in particular that it undermines the Convention if the UK Government can decide circumstances are “not normal” having initially sought consent.
- Robust procedures to protect the interest of the Scottish Parliament and enforce the convention; including strengthening the statutory protection in the Scotland Act 2016, and procedures for resolving disputes on the scope of reservations and the applicability of the Convention.

In my view the optimum way of achieving these objectives would be statutory provision to ensure the processes in DGN10 are followed, and that the UK Government would respect the decision of the Scottish Parliament, similar to the amendments to the 2016 Act proposed by the Scottish Government (see Annex A).

I will be addressing some of these issues, and seeking the view of the other parties, in the Scottish Parliament this week .

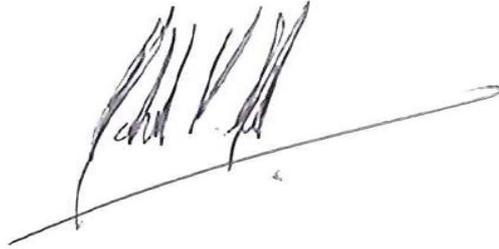
The next step would be to put in place a joint process to take forward proposals to address the concerns of the two Parliaments. We have noted previously that the review of intergovernmental relations commissioned by JMC could provide a context for such a process. I look forward to our discussion tomorrow at the JMC (EN).

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I am copying this letter to David Mundell, Mark Drakeford and David Sterling.

A handwritten signature in black ink, appearing to read 'Michael Russell', written over a horizontal line.

MICHAEL RUSSELL

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