

Submission to the House of Commons Welsh Affairs Select Committee and the National Assembly for Wales Constitutional and Legislative Affairs Committee for their reviews of the Draft Wales Bill 2015

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Introduction

This evidence is submitted to both committees in relation to the Draft Wales Bill (“Bill”) published on 5th October 2015. The Bill represents a significant change in the structure and scope of the arrangements for devolution in Wales, and in inter-governmental and inter-parliamentary relations between Wales and the UK.

Our evidence draws on a body of research conducted by the authors since 1999 on devolution and the National Assembly for Wales (“Assembly”)’s power, legislative competences, and institutional capacity.

We commend the committees’ joint and simultaneous approach to scrutiny of the Bill. We have commented elsewhere that inter-parliamentary relationships are the least well-developed aspect of post-devolution constitutional arrangements within the UK. We believe this is an area that needs to be further enhanced and better and more equitably formalised. Whilst joint and simultaneous review is a positive development, we regard as disappointing the very limited time given to scrutinising such a critically important Bill, potentially hindering much needed improvements to its contents. The timeline poses real challenges for civic society to respond with their views. Also, with a National Assembly election a matter of months away in May 2016, the timetable also poses constraints on all of the political parties contesting those elections, specifically with regard to being able to set out- with little uncertainty or scope for interpretation- firm, long-term policy proposals.

Principles underpinning this submission

The Bill is a significant intervention at a moment when there is serious concern as to the stability of existing constitutional arrangements between the nations of the UK and their parliaments, and when their future complexion is highly uncertain.

We start, therefore, by highlighting the importance of considering this Bill within the wider and changing UK constitutional context. We view recent developments in Scotland (the Smith Commission, the Scotland Bill 2015), England (both the *Devolution to Cities and Counties Bill*, as well as the proposals for tax devolution to local government in England), the voting system in Westminster (EVEL), and the future of the UK within the European Union as critical dynamics that pose questions as to the future complexion of the UK state. We believe that these vital issues are best addressed holistically.

Earlier in 2015, the Assembly's Constitutional and Legislative Affairs Committee reviewed the UK Government's proposals for further devolution to Wales and identified four principles that should be reflected in any new constitutional settlement: "subsidiarity, clarity, simplicity and workability." The St. David's Day process, initiated in the aftermath of the Scottish Independence Referendum in September 2014, established clarity, stability and durability as working principles in taking forward the recommendations of the Commission on Devolution in Wales Part II (the Silk Commission).

Similarly, in previous evidence submitted to other related enquiries, we have respectfully suggested that there is a set of fundamental principles upon which any democratically elected legislature -in this case, the Assembly- should rest, namely:

- Clarity
- Simplicity
- Intelligibility (to internal and external stakeholders)
- Profile
- Legitimacy
- Autonomy/subsidiarity (to act on matters affecting Wales, without excessive prescription or unnecessary obstacles)
- Capacity (to discharge its fundamental roles)¹.

We believe that, in aggregate, these principles stand as pre-conditions for an effective and durable devolution settlement that makes a substantive difference to the people of Wales in all key determinants of sub-national democracy (social, economic and political).

We find a fundamental contradiction between the tone and the spirit expressed in the St David's Day process (and subsequently by the Secretary of State for Wales) and the actual content and prescriptions of the Bill. In particular, we are concerned at the absence of clear, strategic constitutional solutions in the Bill's provisions. Furthermore, it seems highly unlikely that this might emerge from the scrutiny process itself (especially, given very limited time for pre-legislative scrutiny). Previous governments' responses to key constitutional commissions (for example, the Richard Commission, 2002-04) have also offered little progress towards a strategic and sustainable solution to an inherently flawed

¹ Study of Parliament Wales Group, evidence to *Silk II*, URL: <http://webarchive.nationalarchives.gov.uk/20140410093206/http://commissionondevolutioninwales.independent.gov.uk/files/2013/03/Wales-Study-Group-of-the-Study-of-Parliament-Group.pdf>

model of devolution in Wales. We regard these as missed opportunities to establish a working consensus about Wales's place within the UK and to ensure an appropriate and stable constitutional architecture for Wales in the future.

Change from a conferred to a reserved powers model of devolution

The Richard Commission report (2004) alluded to the “jagged edges” of the devolution “settlement”. We have long argued that a switch to a reserved model offers an opportunity for a clearer, cleaner, more intelligible settlement. Of course, it is widely accepted that a reserved powers model will always bring new challenges, simply through the need to explicitly detail what previously did not need setting out in the same way. There is no such thing as complete legislative certainty, and we have noted elsewhere that whilst the reserved power model provides greater clarity and intelligibility, it is not perfect, and anomalies and loopholes will remain².

However, despite a consensus on a change to a reserved model in the St David's Day process, we regard the Bill to fall short in terms of its delivery on that cross-party consensus and a principled approach to revising the settlement. In short, the Bill demonstrates an absence of positive expression of the principles behind a reserved model. Rather than a clear, strategic overview and rationalisation of competences at each level, the overly-long and detailed list of reservations resembles more a collation of specific reservations requested by individual Whitehall departments, with no thought or consideration as to the wider implications for the Assembly and the Welsh Government.

We regard this as an inappropriate and anachronistic approach to shaping a new reserved model. Neither does it appear to reflect a mature and respectful interchange between two legitimate legislatures/administrations. Furthermore, it runs counter to the expressed wishes of the Welsh people for more powers³ and the desire expressed in the Silk Commission and elsewhere to develop a culture of equal and respectful inter-parliamentary and inter-governmental relations.

More specifically, we consider the new Schedule A and Schedule B to usher in new uncertainties regarding the Assembly's legislative competence. This is a fundamental flaw for a Bill that claims it is delivering “a devolution settlement which provides greater accountability to the Welsh people”.

We agree with the Presiding Officer that the fundamental test applied to the Bill is that there should be no row-back in the existing competences of the Assembly and Welsh Ministers. The

² McAllister, L. (2013), UK Changing Union seminar on a reserved model of devolution for Wales, (House of Commons, London)

³ See Beaufort Research for the Silk Commission in August 2013: <http://tinyurl.com/lqvnmdx>

reservations detailed in Schedule 7B are excessive, with the spirit seemingly based more on retention than subsidiarity. The change to a reserved model should be at least neutral in respect of the competence of the Assembly; the Bill would not appear to guarantee this. Specifically, Clause 1 (new section 108A (3)) and Schedule 7b (para 2, 3 4) include additional 'necessity' tests by which to determine the legislative competence of the Assembly. It is hard to square this with the aspirations of clarity, autonomy, simplicity and even workability. We have seen the Presiding Officer's correspondence with the Secretary of State on the vulnerability to Supreme Court intervention over how these necessity tests might be interpreted. We agree. If the next phase of devolution in Wales is predicated on delivering a stronger Wales within the Union and on an equal footing with other devolved legislatures in the UK, then the Bill fails as it introduces additional hurdles for the Assembly to legislate.

Given the Bill fundamentally changes the basis by which legislative competence is granted to both the Assembly and to Welsh Government Ministers, this needs to be as clear and as certain as possible. The foundations set out here are opaque and contestable.

Separate v. distinct jurisdiction

A major weakness of the Bill comes from the disproportionate focus on marrying the numerous reservations and powers with the *status quo* of the 'highly integrated border and the single jurisdiction with England', rather than on designing a bespoke model in itself. In the light of the acceptance of the permanence of the Assembly, and set against constitutional practice elsewhere in the common-law world where each legislature has its own legal jurisdiction⁴, it is expected that the body of Welsh law (already significant) is likely to grow exponentially. Hence, the move towards either establishing a separate Welsh jurisdiction or formally distinguishing it within an England and Wales jurisdiction is inevitable in our view. We would have expected the Bill to have assisted this move, rather than maintaining the integration and, very conceivably, exacerbating disputes over competence⁵.

UK Ministerial involvement

Our reading of Schedule 7B, paragraph 8 is that it clearly serves to reduce the legislative competence of the Assembly. The "necessity" clause/condition for Ministerial consent is extended to areas even when within the existing devolved competence (i.e. on the Welsh language and around "reserved authorities"). Again, this part of the Bill reflects a mindset different to that expressed by the Secretary of State and within the St David's Day process. The Silk Commission had recommended the establishment of a Wales Intergovernmental

⁴ Wales Governance Centre/Constitution Unit, UCL, (2015), *Delivering a Reserved Powers Model of Devolution for Wales*.

⁵ To date there has been some analysis on a separate Welsh Jurisdiction (see Constitutional and Legislative Affairs Committee, December 2012; Wales Government Centre / UCL, September 2015)

Committee to discuss and agree on the boundaries between reserved and non-reserved matters. This seems to us to be a commendable innovation that better reflects the maturity of devolution and is properly respectful of the status of ministers and officials in Wales and London.

It is important to match legislative competence for the Assembly with the executive responsibilities of Ministers. This should be in keeping with the current position of devolution and with regard specifically to all executive functions in the devolved areas, in line with that followed in Section 53 of the Scotland Act 1998.

Capacity Issues

We have long stressed that the intrinsic capacity issues around devolution, and especially within the Assembly, threaten the principles of clarity, workability and durability. In recent work with the National Assembly Remuneration Board, we have attempted to demonstrate how current capacity within the Assembly has restricted effective and proper scrutiny. Alongside a generally weak media, such a small legislature, where is a complement of only around 42 ‘backbench’ AMs to discharge scrutiny across all committees, the vast majority of members sit on 2 or 3 committees. This poses real challenges of capacity, especially time and expertise. Moreover, in a unicameral legislature, it is critical to get legislation right first time.

Of course, on a practical level, we acknowledge that existing capacity issues cannot be addressed in time for the fifth Assembly. However, added competences are likely to pose additional pressures on the limited number of ‘backbench’ AMs and potentially exacerbate existing scrutiny deficits.

Positives

There are a number of elements in the Bill which are to be welcomed. These include:

- Establishing the transfer of further, relevant powers to the Assembly and to Welsh Ministers in matters of marine and maritime matters, speed limits and energy (all of which should be uncontroversial). However, we would also support the transfer of key competences on water, policing, and railways.

- Annex C, giving the Assembly competence around its own name, constituencies, number of members, and elections. These proposals seem to us to be well-framed and suitably flexible and balanced, with appropriate protections (‘super majorities’ of two-thirds of all AMs) around instigating change. Were there to be devolution of policing set out in this or a future Bill, then we would also support the devolution of elections for the Police and Crime Commissioner elections to

the Assembly.

In specific relation to the size of the Assembly, we have made the case for additional AMs on several occasions, both in academic writings⁶ and in evidence to committee enquiries⁷. This has centred on the need for adequate political capacity to properly create conditions for Members to prepare for scrutiny on the substantial matters within their remit. We note that the size of Wales's population relative to the number of its representatives is currently at the high end, compared to legislatures elsewhere. We have suggested that a 'critical mass' of at least 60 'backbench' elected members is the minimum required for a legislature to carry out its core functions. Historically (and stimulated by the Richard Commission, 2004), the figure of 80 AMs has been mooted. We believe things to have progressed since then and have suggested⁸ that if the legislative capacity and workload reaches levels similar to Scotland, then the number of AMs should increase to comparable levels—a figure of between 100-120⁹ AMs most likely ensuring optimal capacity for the Assembly. This is critical to check and balance the influence of a powerful executive.

There also needs to be fuller consideration of how any additional AMs might be elected (in our opinion, driven by principles of fair representation, maximising the value of votes cast, and promoting diverse representation). Any review of the Assembly's size should be part of a wider consideration of Wales's elected representatives at all levels of government.

- Establishing the permanence of the Assembly as a fundamental part of the UK constitution.
- Section 23 removing control over the composition of Assembly Committees and Section 24 removing the involvement in proceedings by UK Government Ministers. The attendance by the Secretary of State for Wales was appropriate when the Assembly had limited legislative powers and needed to be kept informed of Westminster legislation. However, the removal of such powers of intervention

⁶ McAllister, L. and Stirbu, D.S. (2007) - 'Developing Devolution's Scrutiny Potential: A Comparative Evaluation of the National Assembly for Wales's Subject Committees', *Policy and Politics*, vol. 35, no.2, 289-309

Stirbu, D.S. and McAllister, L. (2011) – 'An Exercise in Democratic Deliberation: The All Wales Convention's Contribution to Constitutional Change', *Contemporary Wales*, vol. 24, 64-85

⁷ April 2009 - Joint Written evidence to the All Wales Convention

⁸ Cole, M., McAllister, L. and Stirbu, D., (2014) 'The capacity of the National Assembly for Wales', UK Changing Union Project, Cardiff: Wales Governance Centre, URL: http://www.clickonwales.org/wp-content/uploads/Chapter_1.pdf

⁹ Also see oral evidence from Prof. L. McAllister, on *Silk II*, 12 March 2013, URL: <http://webarchive.nationalarchives.gov.uk/20140410093206/http://commissionondevolutioninwales.independent.gov.uk/files/2013/11/Oral-Evidence-Session-Prof-Laura-McAllister-Stephen-Brooks-and-Owain-ap-Gareth.pdf>

appropriately reflect the maturity of the Assembly and will contribute both to developing a more far-reaching and self-sufficient Assembly and more constructive inter-institutional relationships. The Secretary of State for Wales's engagement with the Assembly should continue but with less prescriptive formal arrangements and on a more balanced, reciprocal basis.

Summary

There are some important areas of the Bill that are to be welcomed but overall, we consider the negatives to outweigh any progress contained therein. The Bill falls considerably short of its stated objectives to create a clear and lasting devolution settlement in Wales. In using this as a legitimate aspiration, we commend the Richard Commission report, alongside the Commission on Devolution in Wales (Silk) proposals and the principles underpinning them, as more appropriate foundations for such an important Bill.

We also agree that the starting point for devising a reserved power model should be linked to the principle of subsidiarity and retain far fewer features of the conferred powers model¹⁰. The manner by which the Bill passes powers to the Assembly and Ministers (the lowest common denominator between the St David's Day process consensus, and the views of individual Whitehall departments) would appear to be out of step with both the wider trajectory of devolution and the dominant spirit of relations between the UK and Wales. It pays little regard to the wider constitutional context in the United Kingdom, where dynamics in Scotland, England and at the level of the Westminster Parliament (EVEL, for instance) require holistic consideration to ensure their wider implications for both Wales and the Union are properly understood.

Overall, it is hard to see the Bill as a step forward to achieving the aspirations expressed by the Secretary of State in the Bill's foreword and elsewhere. There are far too many reservations which do not serve to add greater protection to legitimate UK interests over non-devolved areas; they merely further confuse the legislative scope of the Assembly and its government, whilst threatening the overall intelligibility of the new settlement.

We commend a more strategic, mature and rational approach to advancing the next important stage of devolution in Wales. This should not be rushed and should be driven primarily by the will of the Welsh people in the first instance, but also sensitive to views expressed both by the National Assembly Commission and the Welsh Government based on their practical experience of operating devolution.

¹⁰ Evidence from Dame Rosemary Butler, Presiding Officer of the National Assembly, 16 November, 2015

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