



Ein cyf/Our ref: MA-C/FM-/0014/15

David Melding AM
Chair
Constitutional & Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff

11th November 2015

Dear David

Draft Wales Bill Inquiry: written evidence

Further to my letter of 30th October please find attached my written evidence on the draft Wales Bill to assist the Committee with its work.

In the Welsh Government's view, this Bill will be one of great constitutional significance, both for Wales and for the Union; it will redefine the role and place of the Welsh devolved institutions in the governance of the United Kingdom. As the Secretary of State himself said in his speech on 17 November 2014 launching what became the St David's Day process, "We have a unique opportunity to reshape the future of our Union". The content of the Bill should therefore be approached from the standpoint of constitutional principle, with a view both to strengthening Welsh devolution and securing the place of Wales within a reformed Union. We have set out our views on some of the broader questions on the future of the Union in Written Evidence to the House of Lords Constitution Committee in respect of its Inquiry into "The Union and Devolution", and our Evidence to your Committee in respect of the Wales Bill needs to be seen in that context.

I am copying this to other Committee Chairs.

I look forward to meeting you and your colleagues on 16th November.

Yours sincerely

CARWYN JONES

Competence tests currently under Part 4 of and Schedule 7 to the Government of Wales Act 2006

1. Does the provision relate to one or more subjects listed in Part 1 of Schedule 7?

If yes, go to question 2

If no – the provision is outside competence unless:

- (a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
or
(b) it is otherwise incidental to, or consequential on, such a provision.

2. Does the provision fall within any of the exceptions in Part 1 of Schedule 7?

If no, go to question 3.

If yes – the provision is outside competence unless:

- (a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
or
(b) it is otherwise incidental to, or consequential on, such a provision.

3. Does the provision apply otherwise than in relation to Wales or confer, impose, modify or remove (or give power to do so) functions exercisable otherwise than in relation to Wales?

If no, go to question 4.

If yes –the provision is outside competence unless:

- (a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
or
(b) it is otherwise incidental to, or consequential on, such a provision.

4. Do any of the restrictions in Part 2 of Schedule 7 apply having regard to any exception to those restrictions in Part 3 of that Schedule?

(a) Does the provision remove or modify (or confer power to do so) any pre-commencement function of a Minister of the Crown?

(b) Does the provision confer or impose (or confer power to do so) any function on a Minister of the Crown?

(c) Does the provision modify any of the provisions listed in the table in paragraph 2(1) of Part 2 of Schedule 7 (having regard to any relevant exceptions)?

(d) Does the provision make modifications of (or confer power to do so) any provision of an Act of Parliament other than GoWA 2006 which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund?

(e) Does the provision make modification of (or confer power to do so) any functions of the Comptroller and Auditor General or the National Audit Office?

(f) Does the provision remove or modify (or confer power to do so) any function or Her Majesty's Revenue and Customs?

(g) Does the provision confer or impose (or confer power to do so) any function on Her Majesty's Revenue and Customs?

(h) Does the provision modify provisions of GoWA 2006, other than those provisions referred to in paragraph 5(2),(3) and (4A) of Part 1 of Schedule 7?

If yes, the provision is outside competence.

If no:

5. Does the provision extend otherwise than only to England and Wales?

If yes – the provision is outside competence.

If no:

6. Is the provision incompatible with the Convention rights or with EU law?

If yes – the provision is outside competence.

If no – the provision is within competence.

Competence tests under section 108A and Schedules 7A and 7B of the proposed Wales Bill

1. Does the provision extend otherwise than only to England and Wales?

If yes – the provision is outside competence.

If no:

2. Does the provision apply otherwise than in relation to Wales or confer, impose, modify or remove (or give power to do so) functions exercisable otherwise than in relation to Wales?

If no, go to question 3:

If yes, is the provision:

(a) ancillary to a provision which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly), and

(b) does it have no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision.

If no – the provision is outside competence.

If yes:

3. Does the provision relate to reserved matters (see Schedule 7A)?

If yes – outside competence.

If no:

4. Does the provision breach any of the restrictions in Part 1 of Schedule 7B, having regard to any exception to those restrictions in Part 2 of that Schedule? (See questions 5 to 11)

5. Does the provision modify “the law on reserved matters” (see paragraph 1(2) of Part 1 of Schedule 7B)?

If no, go to question 6.

If yes:

*Is the modification ancillary to a provision which does not relate to reserved matters **and** has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision?*

If yes, go to question 6.

If no, the provision is outside competence.

6. Does the provision modify the private law (see paragraph 3(2) of Part 1 of Schedule 7B)?

If no, go to question 7

If yes:

*Is the modification (1) necessary for a devolved purpose or (2) is ancillary to a provision made which has a devolved purpose **and** has no greater effect on the general application of the private law than is necessary to give effect to that purpose?*

If yes, go to question 7.

If no, the provision is outside competence.

7. Does the provision modify the criminal law?

If no, go to question 8.

If yes:

*(ii) Is the modification ancillary to a provision which has a devolved purpose **and** has no greater effect on the general application of the criminal law than is necessary to give effect to the purpose of that provision?*

If yes, go to question 8.

If no, the provision is outside competence.

8. Does the provision modify any of the provisions listed in the table in paragraph 5(1) of Part 1 of Schedule 7B (having regard to relevant exceptions)?

If yes, the provision is outside competence

If no, go to question 9

9. Does the provision make modifications of (or confer power to do so) any provision of an Act of Parliament (other than this Act) which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund?

If yes, the provision is outside competence

If no, go to question 10.

10. Does the provision modify provisions of the Wales Bill/Act, other than those provisions referred to in paragraph 7(2)(3) and(4) of Part 1 of Schedule 7B?

If yes, the provision is outside competence,

If no, go to question 11.

11. Does the provision:

(a) remove or modify (or confer power to do so), any function of a reserved authority;

(b) confer or impose (or confer power to do so) any function on a reserved authority;

(c) confer, impose, modify or removed (or confer power to do so) functions specifically exercisable in relation to a reserved authority, or

(d) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority?

If no, go to question 12.

If yes, has the appropriate UK Minister consented to the provision?

If yes, go to question 12.

If no, the provision is outside competence.

12. Is the provision incompatible with the Convention rights or with EU law?

If yes, the provision is outside competence.

If no, the provision is within competence.

THE DRAFT WALES BILL
Written Evidence submitted to the Constitutional and Legislative Affairs
Committee by the Welsh Government

Introduction

1. The Welsh Government welcomes this opportunity to set out its views on the draft Wales Bill which was published on 20 October 2015.
2. The Independence referendum in Scotland, just over a year ago, marked a turning point in the constitutional governance of the United Kingdom. At that time the UK Government committed to developing a new and fair settlement that applies to all parts of the United Kingdom, stating that they wanted Wales to be at the heart of the debate on how to make our United Kingdom work for all our nations. For Wales this commitment manifested itself in the St David's Day process and the subsequent publication of the draft Wales Bill we have in front of us today.
3. It is with regret that the Welsh Government cannot agree that this draft Bill is either balanced or fair. The inquiry your Committee conducted earlier this year on the UK Government's proposals for further devolution to Wales identified four main principles that needed to be reflected in any new constitutional settlement. We continue to support your call for a Bill that enshrines the principles of subsidiarity, clarity, simplicity and workability. This Bill, as currently drafted, provides for none of these. The Welsh Government takes no pleasure in saying this, but this proposed Bill will be the third constitutional settlement for Wales in less than twenty years and neither of its predecessors has provided the long-term stability that devolution in Wales so richly deserves.
4. As this Committee has seen in the past, the frequency of questions arising as to the competence of the National Assembly to legislate in a number of areas is all too common. This was one of the reasons why we advocated moving from a conferred powers model to a reserved powers model. However, the reserved powers model proposed by the UK Government is, to all intents and purposes, a mirror of the current model and therefore proposes for us what is merely a technical change. Our call for a reserved powers model was not a call for a technical change in the drafting of the settlement. In calling for a reserved powers model, we have consistently advocated that decisions should be based on the principle of subsidiarity through which everything should be devolved unless there is a good reason for it to be retained at the UK level.
5. Furthermore, the draft Bill introduces a number of new constraints either by way of Ministerial consents or complex legal tests. All of these would result in a multiplication of the number of 'problem' areas within the devolution settlement.
6. We therefore believe that the draft Wales Bill does not offer a solution as currently drafted.

Principles to underpin the reserved powers model

7. As the Secretary of State for Wales himself said in his speech on 17 November 2014 launching what became the St David's Day process, "*We have a unique opportunity to reshape the future of our Union*". The content of the Wales Bill should therefore be approached from the standpoint of constitutional principle, with a view both to strengthening Welsh devolution and securing the place of Wales within a more coherent and therefore stronger Union.
8. This position is underpinned by the clear view of the people of Wales expressed in the 2011 referendum which gave a mandate for an effective Welsh legislature and confirmed the electorate's wish that the National Assembly should have primary legislative powers of broad scope.
9. The comparatively narrow nature in UK terms of the Welsh devolution settlement, and the single legal jurisdiction of England and Wales, have led in the past to the drawing of an incoherent boundary between reserved and devolved areas of activity. Disagreements about where the boundary lies (as has repeatedly happened, for example in relation to local government and the police service) hinders the development of joined-up policy and leads to tensions between administrations. This is in marked contrast to the position in Scotland and Northern Ireland where the devolved administrations have genuine coherent autonomy within the devolved areas.
10. The UK Government's proposal for resolving the issues that arise when there are significant connections between what is devolved and what is not, is to limit further the powers of the National Assembly. This would be done by maintaining a narrow settlement and by making more powers subject to Ministerial consent or by introducing new complex legal tests. Our solution is to move the boundary so that these tensions can be avoided and a more coherent and stable, and therefore long-lasting settlement, can be developed.
11. The Welsh Government considers that, as was agreed by the National Assembly on 7 October 2015, "*the creation of a Welsh legal jurisdiction would be the most desirable and effective legal framework to accompany the implementation of a reserved powers model for devolution*". The retention of the existing England and Wales jurisdiction will result in a measure of complexity for the Welsh settlement which is incompatible with the Secretary of State's aspirations for clarity and workability. The reservation of policing also introduces complexity into the delivery of emergency services in Wales, as does the executive reservation of civil contingencies.
12. As stated during the First Minister's response to the debate in the National Assembly:

"The jurisdiction goes further than simply the way the law is actually administered; jurisdiction is at the heart of the drafting of the Wales Bill. If you don't have a separate jurisdiction, you make it far harder to draft a Bill that defines powers. And so we are in a situation where we're the only legal jurisdiction anywhere in the world where there are two legislatures within the same jurisdiction. It means that defining the powers of each legislature becomes progressively more difficult because of that issue."

13. The Lord Chief Justice recently said that *“it is right for me to say that there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions”*. As an interim measure, this could mean the creation of a Welsh legal jurisdiction that is distinct but not separate from that of England – a Welsh legal jurisdiction supported by a shared Courts system, run by the Ministry of Justice with the same judiciary and administrative system, buildings, etc as now. The Welsh Government will be undertaking further work with regard to the thoughts of the Lord Chief Justice over the coming weeks.
14. As a Government we believe that the Lord Chief Justice’s comments are worthy of further consideration by the UK Government. If that is not to be the case then a number of issues highlighted in the following sections will need to be addressed.

Assessment of the proposed Reserved Powers Model

15. At present, the National Assembly’s legislative competence is founded in s.108 of and Schedule 7 to, the Government of Wales Act 2006. The new Bill replaces s. 108 with a proposed new s.108A, and Schedule 7 is replaced by two new Schedules, 7A and 7B.
16. It is a matter of public record that the Secretary of State for Wales shared a draft of the proposed s.108A and Schedules 7A & B with the Welsh Government and the National Assembly for Wales on 31 July 2015. The Welsh Government responded formally with two letters which it has subsequently published, one on 7 August and another on 7 September setting out our initial views and latterly our more detailed position.
17. This paper does not fully re-rehearse the arguments made in these letters but sets out the key areas where further discussions with the UK Government are of paramount importance to the Welsh Government before we can consider supporting the Wales Bill as proposed in draft.
18. In a Report published earlier this year, your Committee argued that the proposed new reserved powers model should be assessed against the principles of subsidiarity, clarity, simplicity and workability. Accepting that there is some measure of overlap between the last three of those principles, the Welsh Government agrees with that conclusion.
19. So far as subsidiarity is concerned, this is principally relevant to the proposed new Schedule 7A, which lists, at some length, the individual reservations proposed by the Secretary of State. The First Minister set out his views on this in his letter of 7 September to the Secretary of State. In the Welsh Government’s view, the list of reservations the Secretary of State has proposed in Schedule 7A includes a significant number which either do not seem to us to be appropriate for inclusion in a document of constitutional importance such as the Wales Bill will be, or which cover matters far better suited to National Assembly rather than Parliamentary attention, being only of particular significance internally to Wales. **We therefore believe that the number of reservations in Schedule 7A can and should be significantly reduced, without impact on the UK Government’s legitimate interests in respect of Wales.**

20. We also draw attention to a drafting aspect of the proposed Schedule 7A. In very many places, individual reservations are stated as “*The subject-matter of [specified Acts of Parliament]*”. **In the Welsh Government’s view, this drafting approach is defective; the reservation as drafted does not explain on its face exactly what is being reserved**, and so does not achieve the simplicity and clarity which both we and the Secretary of State are seeking in the new settlement. Furthermore, it is not always clear why particular Acts have been specified in this way; for example, the list of such Acts in the ‘Employment and Industrial Relations’ field is considerably longer than the equivalent for Scotland, but we have had no explanation as to why that should be so.
21. Schedule 7B needs to be assessed by reference to the principles of clarity, simplicity and workability. **The Welsh Government has considerable difficulty with what is proposed in this Schedule**. One way of assessing the impact of the provisions is to compare the tests required for deciding whether a provision in a Bill is within competence under the existing settlement with the tests that would have to be applied if the new Bill’s provisions were in place. Annex 1 sets out, in text form, flow charts identifying the questions that have to be asked in respect of each Bill provision under each settlement. **The current settlement presents its own complexities, but it will be seen from Annex 1 that the settlement proposed in the Wales Bill, far from resolving any of these, imposes new layers of complication entirely at odds with the Secretary of State’s aspiration for a clear and robust settlement**.
22. We have a number of concerns with the detail of Schedule 7B. At present, the National Assembly can modify the law of contract, common law and other areas of private law and criminal law wherever those modifications *relate to* a devolved subject. This might include, for instance, simplifying how contracts work in, or creating a criminal offence in relation to, areas of devolved life where that is appropriate to make Assembly legislation effective. **The draft Bill significantly curtails this ability, by limiting the National Assembly’s power to modify the private law to provisions which are either ‘necessary for a devolved purpose’ or ‘ancillary’ to another provision within competence, and limiting the National Assembly’s power to modify the criminal law solely to provisions which are ancillary to another provision within competence**. In both cases, the provisions are further prohibited from having any greater effect on ‘the general application [whatever that might mean] of the private or criminal law’ than is *necessary*. But preventing the Assembly from modifying the criminal law for a devolved purpose is too restrictive. **The choice about whether it is necessary, appropriate or expedient to modify the private or criminal law for a devolved purpose is one properly for the National Assembly, not for the courts, but this new limitation dramatically increases the likelihood of Assembly legislation being challenged in the courts**.
23. There is then an entirely new and very broad general restriction on the National Assembly’s power – i.e. the inability to modify ‘the law on reserved matters’. **The need, in the Welsh context, for this restriction has not been adequately explained; what is it about a reserved powers framework that requires it when it was not required under the conferred powers model?** A reserved powers model means that the National Assembly cannot legislate in relation to reserved matters unless doing so is consequential or incidental. The restriction will, therefore, bite only on such provisions and it is not clear why such an

elaborate and complex restriction is needed. It applies a ‘no greater effect... than is *necessary*...’ test. ‘Necessity’ can mean different things in different contexts; this makes it very difficult to predict how the test will be interpreted by a court, and makes the settlement unstable, unclear, and, ripe for further legal challenge. Under these provisions decisions about how best to give effect to Welsh laws would therefore shift inexorably from elected Assembly Members, accountable to the electorate, to unelected judges.

24. The draft Bill significantly extends the requirement for Ministerial consents to Assembly legislation. UK Government consent would be required for the Assembly to be able to modify:

- *any* UK Minister function, even if it is within the Assembly’s devolved competence. It is hard to see how this can be reconciled with the Secretary of State’s aspiration for a clearer boundary between devolved and reserved spheres?
- *any* UK government department function, again even if within devolved competence,
- *any* function of a reserved authority (the definition of which is extremely wide: for example, it includes the water industry regulator, OfWAT, notwithstanding that the activities of this body are of fundamental importance to Wales).

25. The practical effect of these new consent requirements is that Assembly legislation will be vulnerable to delay, or worse still, frustration, by Whitehall. This is irreconcilable with the Secretary of State’s expressed desire for “*a settlement that fosters co-operation not conflict between either end of the M4*”, and for “*Welsh laws to be decided by the people of Wales and their elected representatives.*”

Other Bill Provisions

26. As noted above, the Welsh Government has had sight of 31 of the 33 clauses of the draft Bill only since the afternoon before publication on the 20 October 2015. Our comments must therefore be of an interim character until we have had time to analyse the detailed drafting. That said:

- We welcome clause 1, confirming that the devolved institutions form a permanent part of the UK’s constitutional arrangements, but we are aware that the equivalent provisions in the Scotland Bill are being considered for strengthening, and we believe that the two sets of devolved institutions for Scotland and Wales should be treated equally in this respect in the two Bills;
- So far as the statutory underpinning of the Sewel Convention (clause 2) is concerned, we believe that the clause provides an incomplete statement of the convention. It needs to be stated explicitly that Parliament will not, without the Assembly’s consent, legislate in a way which impinges on the Assembly’s legislative competence. This lacuna needs to be corrected (as it should also be in the Scotland Bill);
- We strongly support the provisions which will enable the Assembly to become, in effect, a self-governing institution (with its procedures largely

specified in its Standing Orders rather than by statutory provision), enable it to decide on its own electoral system and, if it wishes, to choose a new name (and we are content with the proposal that super-majorities should be required in the Assembly in respect of those latter matters); and

- We will be giving careful consideration to the drafting of the clauses providing various enhancements to the Assembly's and the Welsh Ministers' respective competences, and Welsh Government officials will be discussing these as necessary with the Secretary of State's officials before the Bill is made ready for formal Introduction into the House of Commons next year.

An Incomplete Bill

27. As the Secretary of State has made clear, inter-governmental discussions about the Bill will continue in parallel with the Committee's pre-legislative scrutiny process. The Committee should therefore be aware that in those discussions we will be seeking additional Bill provision, as follows:

- The First Minister has written to the Secretary of State, identifying certain matters in respect of which the Smith Commission made recommendations for additional powers for Scotland and which the First Minister considers should equally be made available to Wales. Examples include provision that public sector bodies should be able to operate rail franchises in Wales, devolution of responsibility for road signs, and new powers to regulate Gaming Machines. Devolution to Scotland of each of these is now provided for in the Scotland Bill, and we will be seeking equivalent provision for Wales;
- There is then a set of issues, some of which were referred to in our Evidence to the Silk Commission but on which the Commission made no recommendation, in respect of which we believe devolution would now be appropriate. Examples here are that the Assembly should have legislative competence in respect of Alcohol Licensing and the Community Infrastructure Levy (both of which are designated as reserved in the draft Wales Bill), and executive competence in respect of Civil Contingencies, where transfer of these responsibilities would reflect the reality that in emergency situations in Wales, it will usually be the First Minister who will be expected to take the political lead in the handling of the matter.

Conclusion

28. The Welsh Government believes that the draft Wales Bill on which the Committee is undertaking this review as part of the UK Government's pre-legislative scrutiny process is not fit for purpose in its current form. The Welsh devolution settlement would continue to be incoherent and unstable. Importantly, it would also be extremely difficult to understand. This all impacts upon democracy in Wales and the respect that people have for institutions of Government in London and Cardiff. The Welsh Government will continue to work with the UK Government to deliver a Wales Bill that reflects the mandate given by the people of Wales in the 2011 referendum and consolidates the work of the Silk Commission.

**Welsh Government
November 2015**