

Preliminary Memorandum Wales Bill

Purpose of Memorandum

1. On Tuesday 7th June 2016 the UK Government introduced the Wales Bill in the House of Commons. It is common ground between the UK and Welsh Government that the Bill will require the Legislative Consent of the National Assembly.
2. The Bill will be subject to scrutiny by the Assembly's Constitutional and Legislative Affairs Committee (CLAC), and that consideration will no doubt help to inform the debate on the Legislative Consent Motion to be tabled by the Welsh Government in due course. The motion will cover all aspects of the Bill, as amended, which require the Assembly's consent, but Members will no doubt also wish in due course to take account of any associated draft Transfers of Functions Orders (see para 26 below), as well as the outcome of negotiations on relevant non-statutory materials such as the proposed fiscal framework.
3. This memorandum provides an initial summary of the Bill as introduced. References to clause numbers below are as in the Bill on introduction. The Welsh Government will table a detailed Legislative Consent Memorandum when amendments have been made and the Bill is in the later stages of the Parliamentary process.

Introduction

4. A draft Wales Bill was published for pre-legislative scrutiny on 20th October 2015. In November, the Welsh Government published evidence setting out its major concerns with the draft Bill, followed by supplementary evidence making the case for a distinct Welsh legal jurisdiction. <http://www.senedd.assembly.wales/mgConsultationDisplay.aspx?id=205&RPID=1006597274&cp=yes> [DWB 7 Supplementary]. The Welsh Government's analysis was endorsed by expert stakeholders and by CLAC <http://www.assembly.wales/laid%20documents/cr-ld10468/cr-ld10468-e.pdf>.
5. In March 2016, the Welsh Affairs Committee recommended the Bill should be paused to enable substantial further work before introduction. The Bill as introduced includes changes made as a result of pre-legislative scrutiny, and of discussions with the Welsh Government and the Assembly Commission.
6. The Welsh Government has welcomed these changes, but has made clear that further significant amendment will be needed before it will be in a position to consider promoting a Legislative Consent Motion. The First Minister set out his initial response to the Bill in a statement on 8 June and in a letter to the Secretary of State on 9 June (<http://gov.wales/about/cabinet/cabinetstatements/2016-new/walesbill/?lang=en>).

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Background

7. The policy intent of the Bill is to give effect to the UK Government's proposals for responding to the second report of the Commission on Devolution in Wales (the Silk Commission), as well as for applying some of the recommendations of the Smith Commission, enacted in the Scotland Act 2016, to Wales.
8. The UK Government established what became known as the St David's Day process in November 2014. Its aim was to determine where there was political consensus to implement the Silk recommendations.
9. In the Command Paper, *Powers for a purpose: Towards a lasting devolution settlement for Wales*, published on 27 February 2015 (<https://www.gov.uk/government/publications/powers-for-a-purpose-towards-a-lasting-devolution-settlement-for-wales>), the UK Government set out its proposals for taking forward those recommendations where in its view there was consensus for change. Those recommendations requiring legislative change are provided for in the Bill.

Summary

10. The Bill amends the Government of Wales Act 2006 (GoWA) in order to recast the devolution settlement on the reserved powers model. This is the model that underpins the devolution settlements for Scotland and Northern Ireland. The UK Government's stated aim is to provide a clearer separation of powers between what is devolved and what is reserved, enabling the Assembly to legislate on any subject except those specifically reserved to the UK Parliament.
11. The Bill declares that the Assembly and the Welsh Government are permanent parts of the UK's constitutional arrangements, and that the UK Parliament will not normally legislate in devolved areas without the consent of the Assembly.
12. The Bill devolves new powers to the Assembly and the Welsh Ministers including:
 - a. powers for the Assembly to manage its own affairs, including deciding its name, and legislating for its own electoral arrangements;
 - b. legislative competence in relation to elections, most ports, speed limits, bus registration, taxi regulation, sewerage, and the consenting of energy projects up to 350MW in size;
 - c. executive responsibility (through the transfer of Ministerial powers) for: marine licensing and conservation, energy consents in the Welsh offshore region; and the licensing of onshore oil and gas extraction.
13. The Bill amends the Wales Act 2014 in removing the requirement for a referendum prior to the devolution of income tax.

Main provisions

Constitutional provisions

14. Part 1 of the Bill makes provision for the constitutional status of the Assembly, its legislation, and its self governance, including:

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- a. a declaration that the Assembly is a permanent part of the UK's constitutional arrangements and may not be abolished except on the basis of a decision of the people of Wales voting in a referendum
- b. a declaration recognising the existence of a body of Welsh law
- c. a declaration that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly
- d. enabling the Assembly to legislate on elections, including the franchise, registration and electoral system (requiring a two-thirds majority for changes to the Assembly's electoral arrangements)
- e. providing that the Presiding Officer (as opposed to the Clerk to the Assembly) should submit Assembly Legislation for Royal Assent
- f. provision enabling the Assembly to make its own arrangements for financial control and audit, composition of Committees etc, and removing the Secretary of State's supervisory role
- g. provision for the Assembly to change its name
- h. provision amending the Wales Act 2014 provisions requiring a referendum prior to the devolution of income tax.

Welsh Government position

15. The Welsh Government will be proposing amendments to clarify the circumstances in which legislative consent is required, to change clause 1 in respect of the "recognition of Welsh law" and the issue of jurisdiction, and to provide for agreement on a fiscal framework prior to the devolution of income tax.

Legislative Competence

16. Part 1 of the Bill defines the legislative competence of the Assembly by inserting section 108A of GOWA (clause 3 and Schedules 1 and 2). It thus provides for a Reserved powers model of devolution in defining that competence by setting out what an Act of the Assembly may *not* do.
17. Clause 3 provides that an Act of the Assembly is outside competence if it:
 - a. extends otherwise than only to England and Wales;
 - b. applies otherwise than in relation to Wales or affects functions exercisable otherwise than in relation to Wales
 - c. relates to the reserved matters listed in the new schedule 7A (set out in Schedule 1)
 - d. breaches any of the restrictions listed in the new schedule 7B having regard to the exception to those restrictions (set out in Schedule 2)
 - e. contravenes the Convention rights or EU Law.
18. The Assembly may legislate on any matter provided it does not contravene these rules.

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19. The Bill gives the Assembly the ability to amend or repeal sections 72 to 75 and 77 to 79 of GWA, which include the requirement to establish the Partnership Council, the local government, voluntary sector and business schemes, and provisions relating to the Welsh language, equality of opportunity and sustainable development duties.

Welsh Government position

20. The Welsh Government will be seeking amendments to ensure that:

- a. the Reservations are limited to those where there is strategic UK Government interest or practical imperative for a UK or England and Wales approach;
- b. the combined effect of the Reservations and Restrictions does not inhibit the Assembly's ability to legislate effectively within its competence; and
- c. the flexibility provided by GoWA for Assembly legislation to make ancillary provision affecting matters outside its core competence is protected so as to ensure that its legislation can be made effective or enforced.

Justice

21. The Bill reserves the single legal jurisdiction of England and Wales, including the courts, judges, civil and criminal proceedings (paragraph 6 of Part 1 of the amended schedule 7A (Schedule 1)), and introduces restrictions on the Assembly's competence in relation to the private and criminal law in Schedule 7B (Schedule 2). Clause 10 introduces a new requirement that the Assembly's standing orders include a requirement for a justice impact assessment to be published on or before the introduction of an Assembly Bill.

Welsh Government position

22. In the Welsh Government's view, the Bill does not respond effectively to the implications for the justice system in Wales of the growing body of Welsh law which is the natural consequence of legislative devolution. The Bill will not provide a lasting settlement unless the jurisdiction issue is addressed. The attempt to preserve the joint legal jurisdiction has led to the inclusion of highly complex reservations and restrictions, and this creates challenges in defining competence that do not exist in respect of Scotland and Northern Ireland which have their own legal jurisdictions and justice systems. The Bill does not include a necessity test in respect of the Assembly's power to modify the private and criminal law, but those provisions and the related reservations require careful scrutiny. These issues were identified in the Welsh Government's supplementary evidence for pre-legislative scrutiny (para 4 above). The Welsh Government will be proposing amendments to provide for a Justice Commission for Wales, together with further amendments to the reservations and restrictions dealing with law and justice matters in order to improve their clarity, workability, coherence and effectiveness.

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23. The Welsh Government believes that Clause 10 is unnecessary and will be proposing an amendment to delete it.

Public Authorities

24. Clause 4 creates a new category of Wales Public Authorities. These are the authorities listed in Schedule 4 or who meet the statutory tests in new s. 157A(2) in respect of whose functions the Assembly is free to legislate within its competence. The tests are that the authority's functions must be exercisable only in relation Wales and be functions that are wholly or mainly not related to reserved matters. The list in the Schedule can be amended by Order in Council but only with the agreement of Parliament and the Assembly. All other public bodies are "reserved authorities", in respect of which, broadly speaking, the Assembly can legislate within its competence only with the consent of UK Government Ministers or where appropriate HMRC. Paragraphs 9 and 10 of the amended schedule 7B provide for exceptions from that position in respect of certain authorities and, in some cases, in respect of specific functions of certain authorities.

Welsh Government position

25. The Welsh Government is discussing with the UK Government a number of practical issues in respect of these provisions and will consider whether further amendments are needed. The interaction between the reservations in Schedule 7A and the restrictions and exceptions in Schedule 7B are complex and require careful scrutiny.

Functions of Ministers of the Crown

26. The Bill removes the general prohibition in GoWA on the Assembly modifying the powers of UK Government Ministers in devolved areas. The Assembly can, by Act, modify or remove such functions provided there is first consultation with the UK Government. It is the UK Government's intention to transfer such powers by means of a Transfer of Functions order. As stated above, the UK Government have sought to protect "reserved authorities" in a different way. However, paragraph 11 of Schedule 7B introduces a new restriction on competence to prevent an Assembly Act, without consent of a UK Minister, modifying or removing certain Minister of the Crown functions. This includes functions of Ministers of the Crown in relation to the Welsh language and functions that are exercisable jointly or concurrently with the Welsh Ministers.
27. Schedule 3 adds a new Schedule 3A to GoWA and lists those functions that are exercisable concurrently or jointly by UK Government Ministers and the Welsh Ministers. The Welsh Government understands that the intention is that this schedule merely reflects the legal operation of the Transfer of Functions Orders that were made under GoWA and the Government of Wales Act 1998. The Schedule is not intended to have any legal effect in its own right. The effect of these changes, and the new provisions for Wales Public Authorities, are intended to reduce the need for UK Ministerial consents for Assembly legislation, but such

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consents will still be needed in respect of reserved authorities and joint or concurrent Ministerial functions.

Welsh Government position

28. The Welsh Government believes that there should be a general transfer of executive functions in devolved areas, on the model adopted for Scotland. It is discussing these provisions with the UK Government, with a view to ensuring a full transfer of the relevant functions and adequate provision to protect the current flexibility that the Assembly currently has to make ancillary amendments to UK Ministers' functions.
29. The Bill requires UK government consent before a function that is exercisable by the Welsh Ministers and a UK Government Minister can be modified or removed. This means that the effect of the Byelaws Bill judgment in the Supreme Court is reversed. The Welsh Government considers this to be unacceptable and is seeking an exception that would enable an Assembly Act, as now, to remove or modify such a function without the consent of the UK government if to do so is consequential or incidental.

Fiscal Issues

30. Clause 16 removes the provision in GOWA 2014 for a referendum ahead of the devolution of income tax.

Welsh Government position

31. This provision would leave it open to the UK Treasury to devolved income tax responsibilities by order, with no requirement for consultation with the Assembly or Welsh Ministers. The Welsh Government will be proposing an amendment so that the order-making powers should not be exercisable unless there is in place a fiscal framework (covering a fair block grant offset, a long term resolution of fair funding, and increase in the Welsh Government's capital borrowing limit, and other matters), agreed by both governments.

Transitional provisions

32. Clauses 52 and 53 make provision for the transition to the new settlement. These do not yet fully reflect discussions between the Welsh Government, the Assembly Commission and the UK Government which are continuing with a view to ensuring a smooth and effective transition.

Specific policy issues

33. The Bill raises specific policy issues, arising from the list of Reservations in Schedule 1, as well as the Clauses dealing with energy, transport and so on. These are the subject of continuing inter-governmental discussions and include:

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- a. *Policing* – the Bill reserves policing which the Welsh Government believes is a front line public service and should be a devolved matter. It will be bringing forward amendments to delete these specific reservations, but other reservations, and restrictions relating to public authorities, will mean that counter-terrorism will remain reserved, and the Assembly would be able to legislate in respect of bodies such as the National Crime Agency and the British Transport Police, only with relevant Minister’s consent.
- b. *Water* – the Bill modifies the Assembly’s competence in respect of Ofwat, and extends the Secretary of State’s intervention power to include sewerage. The Welsh Government is calling for implementation of the Silk Commission recommendations, including alignment of competence with the England and Wales border, and replacement of the intervention power with appropriate inter-governmental arrangements.
- c. *Energy* – the Bill modifies the competence of the Assembly and transfers new powers to the Welsh Ministers, with a view to the creation of a streamlined consenting regime for energy projects below 350 MW, including ancillary electricity connections. Official discussions are continuing to ensure that the policy objective is fulfilled.
- d. *Marine licensing/conservation* - the Bill extends Welsh Ministers’ powers for marine licensing and conservation in the Welsh inshore region to the offshore region.
- e. *Transport* – the Bill gives the Assembly new powers in relation to ports, speed limits, bus registration and regulation of taxis.
- f. *Teachers’ pay* – the Bill reserves teachers’ pay. The Welsh Government believes this reservation is unnecessary. Inter-governmental discussions are underway to enable the transfer of executive functions and supporting funding.
- g. *Employment* – the Bill reserves employment rights and duties and industrial relations, except for agricultural wages as dealt with by the Agricultural Sector (Wales) Act 2014. The Welsh Government will propose an exception in relation to devolved public services.
- h. *Alcohol licensing* – the Bill reserves the sale and supply of alcohol. The Welsh Government believes this reservation places inappropriate and unnecessary constraints on the Assembly’s power to legislate in respect of the public health impacts.

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Conclusion

34. There is much work to do on the Bill in the coming weeks and months. The Welsh Government will be arguing for substantive amendments to enhance or protect the Assembly's existing competence, as well as technical changes to improve the Bill's coherence and effectiveness.
35. The Welsh Government will be proposing amendments at Commons Committee stage later in July and will be working with the UK Government on detailed amendments to be brought forward at Report in September. These proposals will be shared with the Presiding Officer, the leaders of the political parties and with CLAC.

Rt Hon Carwyn Jones AM
First Minister of Wales
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