

July 2015

The UK Government's Proposals for Further Devolution to Wales

INTRODUCTION

1. In February 2015, the UK Government published a Command Paper "Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales"¹ ("the Command Paper"). This was published after cross party talks following the publication of the Silk Commission's second report ("Silk II").²
2. At the same time, the Smith Commission published their report, following the independence referendum, making recommendations about further devolution in Scotland.³
3. The Queen's Speech in May 2015 stated that the UK Government will bring forward a Wales Bill to enact the UK Government's proposals set out in the Command Paper. It is expected that a draft Bill will come forward in autumn 2015.
4. Ahead of the draft Bill, we conducted a short inquiry into the proposals. We took oral evidence from an expert panel: consisting of Professors Thomas Glyn Watkin and Adam Tomkins, and Emyr Lewis; and from the First Minister; and the Presiding Officer.
5. Our work focused on three main areas:
 - Reserved Powers Model;
 - Permanence of the Assembly; and
 - Legislative Consent Procedure.

OVER-ARCHING THEMES

6. It is clear that there is a desire for a lasting settlement that will not need to be extensively revisited in the short term. We hope that this mutual desire can be marshalled into a process that is consultative, productive and results in a durable settlement which delivers for the people of Wales. We believe that is vital to avoid

¹ HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales*, February 2015.

² Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, March 2014.

³ The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, November 2014.



the continued focus on the constitutional arrangements for devolution, rather than the positive impact devolution can bring to the quality of life in Wales. It is perhaps telling when a constitutional academic says that too much time is being spent on the constitution.⁴ Should the draft Bill reach the statute book, Wales would have had three pieces of fundamental law in less than 20 years.

The process

7. Both the First Minister and the Presiding Officer told us that they welcomed the open approach being taken by the Secretary of State for Wales (“the Secretary of State”). The First Minister said the Secretary of State gave the impression that the discussions about reservations will take place “freely and openly”⁵. The Presiding Officer said he had been “very receptive”⁶. However, there was a real concern that a lack of understanding of devolution across Whitehall could result in a list of reservations that are longer than the exceptions that currently apply.⁷
8. We will comment later in more detail about the drafting of the reservations, but as a general point we would strongly encourage Whitehall departments to adopt the approach to this process that has been set by the Secretary of State.
9. As the work on the draft Bill progresses, we want to see a clear and open process. This should include enabling both the National Assembly and Westminster to consider both the draft and final Bill.

We recommend that the UK Government sets out a clear timetable for the legislation; the timetable should enable both the Houses of Parliament and the National Assembly to scrutinise both the draft and final Bill.

We recommend that the National Assembly ensures there is committee capacity to scrutinise the draft and final Bill.

The UK Constitution

10. The proposals for further devolution are an important political and constitutional event for Wales. However, we are well aware that this is just one of many debates about devolution happening across the UK. While our work has focused on three specific areas, our considerations have encompassed these more general constitutional issues.

11. Emyr Lewis told us:

⁴ Constitutional and Legislative Affairs (“CLA”) Committee, 22 June 2015, RoP [82]

⁵ CLA Committee, 29 June 2015, RoP [104]

⁶ CLA Committee, 29 June 2015, RoP [146]

⁷ CLA Committee, 29 June 2015, RoP [157]



“...we need to look at what comes to Wales in the context of what’s happening across the UK...we have been looking through the wrong end of the telescope. Rather than looking first of all at the union and identifying the functions of the union and what the union is for in contemporary times, we have been looking at this from the point of view of what we can allow to Wales.”⁸

12. We note the calls which have been made for a constitutional convention. If we are to have the durable settlement that we genuinely feel is wanted, the case for a constitutional convention becomes more and more convincing. We think consideration should be given to developing a convention, which would help ensure a sustainable constitutional settlement across the UK. It would also help address issues such as the permanence of devolved institutions and legislative consent procedures. While being sympathetic to the calls, we do not believe that the draft Wales Bill should be held up for such work to be undertaken.

English Votes for English Laws

13. After the Committee had taken oral evidence, but before this report was published, the UK Government published plans for ‘English Votes for English Laws’⁹. The House of Commons is scheduled to vote on these proposals in September 2015. As the outcome was unclear at the time of drafting our report, we have not taken them into account.
14. This is a complex issue, which we acknowledge could have an impact on the consideration of legislative competence for the National Assembly. As we have not taken evidence, or considered the issue in any detail, our conclusions do not take into account these developments. It may be an issue that we wish to revisit in the future.

RESERVED POWERS MODEL

15. The UK Government has committed to introducing a reserved powers model. We welcome this commitment.
16. Both the First Minister and the Presiding Officer have indicated that the model is not a guarantee of a clear settlement¹⁰, and that the “devil is in the detail.”¹¹
17. Professor Thomas Glyn Watkin encapsulated this:

⁸ CLA Committee, 22 June, RoP [118]

⁹ Cabinet Office, *English Votes for English Laws: Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum*, July 2015.

¹⁰ CLA Committee, 29 June 2015, RoP [137]

¹¹ CLA Committee, 29 June 2015, RoP [5]



“It’s not the way the room is described from the outside or the inside that matters, but the room for manoeuvre that one has.”¹²

18. He went on to add that “what is needed is space in which to manoeuvre legislatively.”¹³

Principles of the new model

19. The First Minister told us:

“the list of reserved powers should be quite a short list, and of course it should be ensured that the list of the powers to be reserved is not so broad as to mean that we wouldn’t be able to legislate at the end of the day.”¹⁴

20. The Presiding Officer made it clear what she thought was the key principle for the new model:

“I genuinely feel the fundamental organising principle for a devolved settlement should be subsidiarity. I think Westminster, whether it be the UK Government or the UK Parliament, should only reserve matters that cannot effectively be devolved at national level. I think in the European context, subsidiarity works and it’s understood, and I think subsidiarity would also help explain why matters are reserved and can provide a sustainable basis for settlement. I think, absolutely, that is the way forward.”¹⁵

21. We strongly support this view. In written evidence, the Presiding Officer summarised it as “the centre should reserve to itself only what cannot be done effectively at devolved national level.”¹⁶ The arguments put forward by the Presiding Officer that there is a principle based approach to the reservations is one which we endorse. This view was supported by the expert panel.¹⁷

22. Alongside subsidiarity, the other core principles in drafting the new model should be:

- Clarity;
- Simplicity; and
- Workability.

¹² CLA Committee, 22 June 2015, RoP [16]

¹³ CLA Committee, 22 June 2015, RoP [40]

¹⁴ CLA Committee, 29 June 2015, RoP [36]

¹⁵ CLA Committee, 29 June 2015, RoP [152]

¹⁶ CLA Committee, 29 June 2015 [CLA\(4\)-18-15 Paper2 - Written Evidence from the Presiding Officer](#)

¹⁷ CLA Committee, 22 June 2015, RoP [32]



23. Without these basic principles, we do not believe we will have an enduring settlement. It is essential that the drafting of the reserved powers starts from these principles, instead of a long list of reservations generated by individual Whitehall departments.
24. We heard conflicting evidence from the First Minister and the Presiding Officer about the clarity of the current Scottish model, and whether they would wish to have something similar in the new provisions for Wales. We note that the Supreme Court has said that the Scottish model “may not strike one as a model of clarity”¹⁸ which would seem to support the Presiding Officer’s view.

We recommend that in drafting the new Wales Act, the UK Government uses the principle of subsidiarity as the starting point.

Annex B of the Command Paper

25. Annex B sets out an “illustrative” list of where the UK Government thinks reservations would be needed. It also states that the list reflects the current devolution settlement, and does not take into account the proposals set out elsewhere in the Command Paper.
26. All the witnesses were concerned about Annex B. Emyr Lewis said that if the Annex was a “preview” of how the UK Government view the process, then it was “of great concern”.¹⁹
27. The First Minister put it in very stark terms:
- “...if all these reservations were put into place, we would be in a position that was where we were pre-1999, and even pre-Welsh Office. For example, if you reserve civil law and procedure and criminal law and procedure, you can pass no laws here. It would mean that we would be so restricted, it would effectively destroy the 2011 referendum result.”²⁰
28. All of the witnesses concurred with the First Minister’s concerns about the wholesale reservation of civil and criminal law.²¹
29. Building on Professor Watkin’s room analogy, Professor Tomkins emphasised the need for space in the law:

¹⁸ CLA Committee, 29 June 2015 [CLA\(4\)-18-15 Paper2 - Written Evidence from the Presiding Officer](#)

¹⁹ CLA Committee, 22 June 2015, RoP [21]

²⁰ CLA Committee, 29 June 2015, RoP [10]

²¹ CLA Committee, 22 June 2015, RoP [21]

“...the more you want to enshrine these matters in law, the less room for manoeuvre you’ll have. Laws and rules limit discretion. So, if you want to maximise the room for manoeuvre, if you want to maximise the room for discretion, then the way to do that is by having a very good faith open and transparent relationship with other parties who are on the other side of it – with the Government.”²²

30. We will come onto the important issue of inter-governmental relations later, but this is a view that resonated with us.
31. We noted the First Minister’s views that he thought Annex B was a “wish list from Whitehall departments”; that he didn’t think the UK Government “shares the same view” and that the publication of Annex B was “unfortunate”.²³

Assembly consent

32. The National Assembly will have to give its consent to the Bill. The First Minister was clear that if the reservations looked similar to those in Annex B:

“We would not recommend to the Assembly that a legislative consent memorandum should go forward supporting the reservations.”²⁴

33. We agree strongly that the Assembly should only give consent to the Bill if it is fully satisfied with the details of the reserved powers model.

We recommend that the Secretary of State endorses the principle that the National Assembly must consent to any changes to the constitutional settlement for Wales.

Section 154(2) of Government of Wales Act 2006

34. Professor Tomkins stressed the importance of section 154(2) of the *Government of Wales Act 2006*. The purpose of this section is to enable the courts to give effect to legislation, wherever possible, rather than to invalidate it merely because it could be read in such a way as to be outside the competence or powers under which it was made. It provides that in such a case, the legislation is to be read as narrowly as is required for it to be considered to be within competence.
35. This was used in the Supreme Court’s ruling on the Agricultural Sector (Wales) Bill. Professor Tomkins noted that it was interesting that in the recent ruling on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, this section was not referred to. He told us:

²² CLA Committee, 22 June 2015, RoP [55]

²³ CLA Committee, 29 June 2015, RoP [11]

²⁴ CLA Committee, 29 June 2015, RoP [29]



“The point for the committee, I think, is to ensure that, in any new Wales Bill or Wales Act, there is an equivalent of section 154.”²⁵

36. We agree with Professor Tomkins.

We recommend that the UK Government ensures that the provisions of section 154(2) of the Government of Wales Act 2006 remain in force.

PERMANENCE OF THE ASSEMBLY

37. The Command Paper states that the National Assembly and Welsh Government should be formally recognised as permanent parts of the UK constitution, and that this should be enshrined in legislation.

38. This reflects the recommendation made by the Smith Commission in Scotland. There has already been extensive scrutiny of the draft Scottish clauses by the Scottish Parliament, the House of Commons and the House of Lords.²⁶ The opinion on the clauses related to permanence has been mixed, with debate focusing around their legal significance.

39. Professor Tomkins, who was a member of the Smith Commission, told us that the Commission’s recommendation on permanence was seeking “to have UK Law recognise that which is already politically the case.”²⁷

40. He went on to add that what the law said on this issue wasn’t important, but what the “political reality” was, and that in terms of Scotland, Scottish devolution was a pre-requisite of the United Kingdom.²⁸

41. The First Minister agreed with this broad view, stating that it would be “well-nigh impossible”²⁹ to abolish the Assembly without the consent of the people of Wales.

42. We welcome the recognition of the National Assembly and the Welsh Government as permanent parts of the UK constitutional settlement. We believe this is a useful recognition of the political reality, but recognise the legal effect of such a clause

²⁵ CLA Committee, 22 June 2015, RoP [25]

²⁶ Devolution (Further Powers) Committee (The Scottish Parliament), *New Powers for Scotland*, May 2015; Political and Constitutional Reform Committee (House of Commons), *Constitutional implications of the Government’s draft Scotland Clauses*, March 2015; and Select Committee on the Constitution (House of Lords), *Proposals for the Devolution of further powers to Scotland*, March 2015.

²⁷ CLA Committee, 22 June 2015, RoP [87]

²⁸ CLA Committee, 22 June 2015, RoP [91]

²⁹ CLA Committee, 29 June 2015, RoP [40]



would be limited. The strict legal integrity of such a statement is one which a constitutional convention would be in a better position to fully explore.

LEGISLATIVE CONSENT PROCEDURE

43. The Command Paper accepts the recommendation of Silk II and states that the legislative consent procedure will be placed on a statutory basis, in “a substantively similar manner as the Government intends in regard to the Sewell Convention in Scotland.”³⁰
44. Currently, the legislative consent procedure operates under a convention enshrined in the Memorandum of Understanding and Supplementary Agreements which outline the principles of co-operation between the UK Government and the devolved administrations. It states that the UK Parliament will not normally legislate on devolved matters except when the devolved legislature has agreed.³¹
45. As with the proposals on permanence, we heard that placing the legislative consent procedure on a statutory basis would have no legal effect, but would provide legal recognition of the political reality.³² Reading across from the draft Scottish clauses, we were told that any disputes over legislative consent would still have to be dealt with politically.³³

We recommend that the UK Government places the legislative consent procedure for Wales on a statutory basis.

Dispute Resolution

46. We were particularly interested in those cases where there is dispute over competence. We hope that the new reserved powers model will provide greater clarity and that there will be fewer inter-governmental disagreements. However, we accept they may still, on occasions, occur. This reinforces the need for the core principles detailed in paragraphs 20-22. It is therefore important to ensure that there is an effective dispute resolution process.
47. Dispute resolution doesn't only relate to disagreements over the UK Parliament's right to legislate, but also the National Assembly's. Currently, if the UK Government doesn't believe an Assembly Bill is within competence, it can refer the Bill to the Supreme Court after the Bill has been passed. The National Assembly

³⁰ HM Government, *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales*, February 2015. Para 2.3.10

³¹ The Assembly does this by voting on a Legislative Consent Motion (“LCM”). If the Assembly does not provide consent, convention requires that the UK Government either removes or amends the clauses identified in the LCM. However, there have been disputes as to whether an LCM is required, and the UK Government has proceeded despite objections

³² CLA Committee, 22 June 2015, RoP [122]

³³ CLA Committee, 22 June 2015, RoP [125]



cannot take any action if the UK Parliament passes legislation in a devolved area for which the Assembly has not given consent. Although it can if it so wishes, pass legislation to reverse the effect of a UK Bill in Wales such as the *Agriculture Sector (Wales) Act 2014*.³⁴

48. The First Minister highlighted that there was no way of testing whether something was devolved unless the Bill is referred to the Supreme Court.³⁵
49. The First Minister was of the view that “there’s much to commend the current structure until it gets to the end of the process” and that there is no “genuine independence” at this final stage.”³⁶
50. This was a view shared by the Presiding Officer, who stated that the playing field “should be level” but that at this stage it wasn’t.³⁷ The need for a dispute mechanism was clear we were told, especially in light of the development of parliamentary procedures for “English Votes for English Laws.”³⁸
51. These views were also echoed by Professor Watkins:

“As far as the devolved legislatures are concerned, where they seek to say that something is devolved, then their decisions are reviewable in the courts, but where the UK Parliament makes a decision that something is not devolved, that’s the end of the story because, once it’s legislated, that is law and it has the sovereignty of the UK Parliament behind it. That is an extremely un-level playing field, and it’s poised to become even less level, because, if we move in the UK Parliament to a system of English votes for English laws, and a decision as to what is an English matter or what is an England-and-Wales matter is a matter solely to be determined under the standing orders of the House of Commons or by the Speaker, that, in effect, means that, on one side of the boundary, Parliament, protected by parliamentary privilege and sovereignty, decides the issue on a case-by-case basis, whereas, on the other side, it is a matter for judicial determination. Now that strikes me as being something that can only lead to very serious conflict.”³⁹

52. Professor Tomkins suggested that there could be merit in investigating a dispute management model which would be an independent, arms-length body

³⁴ The *Agriculture Sector (Wales) Act 2014* preserved the Agriculture Wages Board in Wales, following the abolition of the Board in the *Enterprise and Regulatory Reform Act 2014*. The UK Government referred the Agriculture Sector (Wales) Bill to the Supreme Court. The Supreme Court ruled that the Bill was within the Assembly’s competence.

³⁵ CLA Committee, 29 June 2015, RoP [118]

³⁶ CLA Committee, 29 June 2015, RoP [122]

³⁷ CLA Committee, 29 June 2015, RoP [168]

³⁸ CLA Committee, 29 June 2015, RoP [169]

³⁹ CLA Committee, 22 June 2015, RoP [129]



constructed in statute to make independent adjudications on matters. He cited the Office for Budget Responsibility or the Monetary Policy Committee at the Bank of England as possible examples.⁴⁰

53. We share the concerns of all witnesses, with regard to the dispute resolution element of the process. It is essential that the processes that are developed and agreed take into account the Assembly's right to legislate on devolved areas, and that there is an opportunity for the Assembly to challenge the UK Parliament, if they wish to legislate on devolved areas.
54. We believe though that these issues are best dealt with at inter-governmental level. We think that the current systems should be strengthened, and that at this time, there isn't a need for a new body to be established.
55. We acknowledge that if these systems to resolve disputes between governments are not robust, calls will grow for an independent arbiter.

CONCLUSIONS

56. The people of Wales deserve a durable devolution settlement which is simple, clear and workable. This will enable the Welsh debate to move past the constitutional debate, and to focus on how we can all best use these powers to deliver for Wales.
57. We believe that if our recommendations are followed, and in particular recommendation three (a principle based approach to the reservations), this will happen. This is a chance for all involved to seize the opportunity and deliver a lasting legacy to Wales of a devolved settlement that works.

⁴⁰ CLA Committee, 22 June 2015, RoP [140]