Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
29 June 2015

Meeting time:
13.30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

For further information please contact:
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Agenda

1 Introduction, apologies, substitutions and declarations of interest

2 Evidence in relation to UK Government's Proposals for Further Devolution to Wales (Pages 1 - 11)

Rt.Hon Carwyn Jones AM, First Minister

Carys Evans, Deputy Director, Constitutional Affairs and Inter-governmental Relations

CLA(4)-18-15 - Paper 1 - Research Briefing

3 Evidence in relation to UK Government's Proposals for Further Devolution to Wales (Pages 12 - 21)

Dame Rosemary Butler AM, Presiding Officer
Elisabeth Jones, Director of Legal Services

Adrian Crompton, Director of Assembly Business

CLA(4)-18-15- Paper 2 – Written Evidence from Presiding Officer

4 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Pages 22 - 24)

CLA(4)-18-15 - Paper 3

Negative Resolution Instruments

CLA548 - The Regulation of Private Rented Housing (Information, Periods and Fees for Registration and Licensing) (Wales) Regulations 2015
Negative procedure; Date made: 7 June 2015; Date laid: 12 June 2015; Coming into force date: 7 July 2015

CLA552 - The Emissions Performance Standard (Enforcement) (Wales) Regulations 2015
Negative procedure; Date made: 15 June 2015; Date laid: 16 June 2015; Coming into force date: 8 July 2015

CLA553 - The Environmental Damage (Prevention and Remediation) (Amendment) (Wales) Regulations 2015
Negative procedure; Date made: 17 June 2015; Date laid: 19 June 2015; Coming into force date: 19 July 2015

Affirmative Resolution Instruments

CLA549 -The Higher Education (Designation of Providers of Higher Education) (Wales) Regulations 2015
Affirmative procedure; Date made: Not stated Date laid: Not stated Coming into force: Not stated

CLA550 -The Higher Education (Amounts) (Wales) Regulations 2015
Affirmative procedure; Date made: Not stated Date laid: Not stated Coming into force: 31 July 2015

CLA551 -The Higher Education (Fee and Access Plans) (Wales) Regulations 2015
Affirmative procedure; Date made: Not stated Date laid: Not stated Coming into force: 31 July 2015

5 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

(vi) the Committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; or is preparing itself to take evidence from any person;

6 Consideration of Evidence

7 European Briefing (Pages 25 - 32)

Briefing from Gregg Jones via video-link

CLA(4)-18-15 - Paper 4

8 Final Report on Regulation and Inspection of Social Care (Wales) Bill (Pages 33 - 70)

CLA(4)-18-15 - Paper 5 - RISC Report

9 Statutory Instrument Consent Memorandum (SICM 5) Report (Pages 71 - 73)

The Hazardous Waste (Miscellaneous Amendments) Regulations 2015

CLA(4)-18-15 - Paper 6 - Report

10 Additional Learning Needs and Education Tribunal (Wales) Bill

Agenda Item 2

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Y Fonesig Rosemary Butler AC
Dame Rosemary Butler AM

Llywydd
Presiding Officer

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
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24 June 2015

Dear David

Thank you for inviting me to provide evidence to your inquiry. I am sure the Committee's work will provide a valuable contribution to the ongoing debate and very much look forward to its conclusions.

In my roles as Presiding Officer, Chair of the Assembly Commission and Chair of the Business Committee, my overarching aims are to make the Assembly a strong, accessible and forward-looking democratic institution and a legislature that delivers effectively for the people of Wales.

I therefore welcome the St David's Day announcement and recognition that the Assembly should be able to determine its own affairs, like any other parliament, and that it should be placed on a firm and permanent footing. I also welcome the proposal to give the legislative consent process a statutory basis as the current non-statutory process does not, in my view, provide a sufficiently robust safeguard. I look forward to seeing the UK Government's proposals for a reserved powers model. My support for the new model will be contingent on it meeting three criteria, namely clarity, workability and no roll-back from the Assembly's existing competence. I provide more detail on all of these matters in the attached paper.

I consider it essential that the Assembly itself agrees its new competence through appropriate and robust engagement with Parliament, similar to the mechanism offered by section 109 GOWA 2006. In this instance I would not consider the usual legislative consent process to be sufficient.

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Llywydd
Presiding Officer

I am forwarding a copy of this letter and the attached paper to the Secretary of State for Wales.

Yours sincerely

Rosemary Butler

Dame Rosemary Butler AM,
Presiding Officer

POSITION ON ISSUES OF INTEREST TO THE COMMITTEE

Permanence of the Assembly

I firmly agree with the Silk Commission's recommendation that the Assembly should be recognised as permanent. The Assembly is an accepted part of the political landscape and should be acknowledged as such. As I set out to the Secretary of State for Wales in my contribution to the St David's Day process, I believe that this should be done in line with provision made for the Scottish Parliament. Both institutions should be treated equally in this respect, and their permanence enshrined in the same way.

The provisions in the Scotland Bill as introduced on 28 May 2015, are likely to set a precedent for similar provisions in a future Wales Bill. Clause 1 of the Scotland Bill[1] provides for the permanence of the Scottish Parliament. It remains unchanged from the earlier draft clauses, and states that: '*A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements.*'

Several reports on the preceding draft clauses have highlighted concerns in relation to their ability to achieve genuine permanence for the devolved institutions, given the doctrine of UK Parliamentary sovereignty. The most that can be achieved through setting out such a provision in an Act of Parliament is a strong political signal that the devolved institutions are a permanent feature of the constitutional arrangements of the UK. Various methods have been suggested as to how the permanence of the devolved institutions could be more deeply entrenched, including the need for a two-thirds majority in the House of Commons, consent of the devolved legislature, or the electorate (via a referendum). I would be in favour of seeing such legal safeguards, and especially those requiring the approval of the people of Wales and their Assembly. I believe that including such safeguards in statute would reinforce the political message that any change should not simply be a decision of Parliament.

Legislative Consent Procedure

I strongly advocate that the Assembly's legislative consent procedure, currently an inter-governmental convention, should be a formalised parliamentary mechanism and given a similar statutory footing, as I called for in my evidence to the Silk Commission.

As with permanence, provision in the Scotland Bill (and the earlier draft clauses) are likely to set a precedent for similar provisions for Wales. I have two concerns relating to the legislative consent procedure. The first relates to how it will be expressed in statute, the second relates to its scope.

[1] Scotland Bill Part 1 Section 1

First, I share the concerns of others[2] that clause 2 of the Scotland Bill (unchanged from the earlier draft clauses) will not achieve a robust statutory basis for the Sewel convention.[3] Rather than making the convention a judicially enforceable rule, it merely enshrines a political guide, whilst use of the word '*normally*' in the clause further weakens its legal significance. I support the suggestion made by the Political and Constitutional Reform Committee that this could be avoided by setting out explicitly the circumstances where consent would not be required.

In relation to the scope, under the current convention, the range of situations in which the Assembly's consent is sought remains narrower than is the case for Scotland.[4] As recommended by the Silk Commission, I would wish to see the convention - and any statutory expression of it - apply at least as broadly to Wales as in Scotland.

In summary, this means that a statutory legislative consent mechanism should cover at least any UK Bill, or any statutory instrument amending primary legislation (as set out in Standing Order 30A) applying to Wales for any purpose:

- within the legislative competence of the Assembly; or
- which alters the legislative competence of the Assembly; or
- which alters the executive competence of the Welsh Ministers.

As recommended by your Committee in its report on the legislative consent motion relating to the Wales Bill (June 2014), there is also a case for going beyond the current Scottish convention, to include UK Bills which alter the functions of the Assembly, without altering competence.

The clause as drafted in the Scotland Bill deals only with the UK Parliament's ability to legislate on matters within Scottish devolved competence. It does not deal at all with the situation where a UK Bill seeks to amend that competence. This is a situation in which it is even more important for Parliament to recognise a limitation on its power and I would wish to see that reflected in any provision in the future Welsh Bill.

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[2] House of Commons, Political and Constitutional Reform Committee, Ninth Report of Session 2014-15, Constitutional implications of the Government's draft Scotland clauses, HC 1022, 16 March 2015, House of Lords, Constitution Committee, Tenth Report of Session 2014-15, Proposals for the devolution of further powers to Scotland, HL Paper 145, 24 March 2015 and Scottish Parliament, Devolution (Further Powers) Committee, New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, May 2015

[3] House of Commons, Political and Constitutional Reform Committee, Ninth Report of Session 2014-15, Constitutional implications of the Government's draft Scotland clauses, HC 1022, 16 March 2015

[4] As set out in Standing Orders of the Scottish Parliament, Chapter 9B

I would hope that the Wales Office draws on experience from the scrutiny of the Scottish clauses and addresses these issues, as well as providing for an extension of the scope of the Welsh legislative consent process as set out above.

Reserved Powers

As I stated in evidence to the Political and Constitutional Reform Committee[5] and to the Silk Commission, the current conferred powers model of legislative competence is unsatisfactory. I have long advocated the move to a reserved powers settlement and so welcome the commitment in the St David's Day announcement to do so.

That said, a shift to a reserved powers model is not a panacea in itself. My support for any proposal that the UK Government brings forward will be conditional on it meeting three key criteria:

- Clarity;
- Workability; and
- No roll-back on the current competence of the Assembly.

The fundamental organising principle for the devolved settlements should be subsidiarity - the centre should reserve to itself only what cannot be done effectively at devolved national level. Such a principles-based approach to designing a reserved powers model would provide a stable and sustainable basis for the settlement.

Clarity

The legislative competence of the Assembly should be, above all, clear - not just for the legal profession, but for the people of Wales. This is a fundamental issue of democracy - the people should be able to understand who makes the laws by which they live.

A move to reserved powers does not in itself guarantee clarity. Indeed, a poorly designed reserved powers model would result in a less transparent and understandable situation than we have today. The clarity of the settlement will depend on the number of reservations (and exceptions from those reservations - and carve-outs from those exceptions!), and the degree of detail with which they are drafted.

The Scottish model illustrates this - with the Supreme Court stating that it '*may not strike one as a model of clarity.*'[6] This lack of clarity stems from a number of causes, but perhaps most importantly the lack of an organising

[5] PO evidence to HoC Political and Constitutional Reform Committee, Dec 2014
[6] Lord Hope in Martin and Miller v Her Majesty's Advocate (Scotland) [2010] UKSC 10, paragraph 3

principle justifying the reservations and guiding interpretation - I return to this concept of a principles-based approach below.

Further issues related to the Scottish model include:

- The number of reservations and exceptions, covering some 21 pages of the Scotland Act 1998, which the Supreme Court deemed '*long and complicated*'[7];
- The fact that reservations are drafted according to a number of differing models, making interpretation complex;
- The fact that provisions dealing with the interface between reserved and non-reserved topics (in particular, in relation to civil and criminal law) are overly complicated.

The Northern Ireland Act 1998 provides a shorter and simpler list of excepted matters (the equivalent to "reserved" matters in Scotland) and of reserved matters (matters which are temporarily reserved). However, similar to the Scottish model, it is inconsistently drafted, reducing clarity. A great strength of the Northern Ireland system, however, is that neither civil nor criminal law is generally excepted, or reserved, from competence.
Even if the Welsh settlement is to continue to be more 'cautious' than that for Scotland and Northern Ireland, it is essential that it is clearer than it is today - and, preferably, clearer than its Scottish and Northern Irish comparators. Having a large number of complex reservations and exceptions will not achieve that clarity, and indeed may be less clear than our current model.

Workability

I wholeheartedly agree with the Supreme Court's repeated view in relation to both the Scottish and Welsh settlements - that they should be '*stable, coherent and workable*'. I believe that we should aspire to a settlement that does not rely frequently on the courts for interpretation. Legal certainty and predictability are generally recognised to be desirable characteristics of a democratic system and the delay and uncertainty inherent in legal challenges are bad for Wales as a maturing democracy.

The workability of a reserved powers model is wider than the clarity issue, but essentially the same principles apply. The greater the number of reservations and the more complex they are, the more difficult it will be for the Assembly to legislate holistically on matters rationally related to each other, without crossing into reserved areas.

Related to this criterion is the issue of transfer of powers to the Welsh Ministers. As set out in correspondence to the Secretary of State for Wales (January 2015), as part of a move to reserved powers, I would expect to see a

[7] Imperial Tobacco v Lord Advocate [2012]

general transfer, of all remaining UK Ministerial powers in areas of Assembly competence, to the Welsh Ministers. This would be in line with what occurred in Scotland at the inception of their devolution settlement- by virtue of section 53 of the Scotland Act 1998 - and would cover prerogative and other Crown executive functions, not only statutory functions. My interest in this regard is not to increase the powers of the Welsh Ministers, but rather to remove obstacles to the holistic legislative competence of the Assembly.

Preserving current competence - no roll-back

This mainly refers to the 'silent subjects', i.e. those topics neither specifically listed in Schedule 7 to the GOWA 2006 as subjects, nor exceptions from competence. In light of the Supreme Court judgement on the Agricultural Sector (Wales) Bill, I firmly believe that the 'silent subjects' should not automatically become reservations in the new Wales Act.

Of course there are topics within these 'silent subjects' which should properly be reserved to the UK Government, such as the constitution or defence, and it would be unrealistic to stand against the reservation of such topics.

However, if other 'silent subjects', such as employment law, or - crucially - civil and criminal law, are reserved without strong caveats, this would represent a significant roll-back from competence as interpreted by the Supreme Court in the case of the Agricultural Sector Bill.

A principles-based approach

As set out above, the absence of an organising principle, justifying reservations, makes interpretation problematic. The fundamental principle for the devolved settlements should be subsidiarity - the centre should reserve to itself only what cannot be done effectively at devolved national level.

If, instead, the approach taken is a piecemeal consideration of what powers, in each subject area, Whitehall departments consider to be unsuitable for devolution to Wales - perhaps merely on the basis of history - , then this is far less likely to achieve the three criteria set out above. Such an approach will undoubtedly need revisiting in the future - and the near future - rather than providing the '*clear devolution settlement for Wales which stands the test of time*' as referred to in the Secretary of State's foreword to the Powers for a Purpose Command Paper.[8]

Alternative approaches are suggested in the following annex prepared by the Assembly's Director of Legal Services.

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[8] Powers For A Purpose: Towards A Lasting Devolution Settlement For Wales, February 2015

Annex: Approaches to a reserved powers model.
Elisabeth Jones, Director of Legal Services, National Assembly for Wales

The current primary test for whether a Bill provision is within or outwith the competence of the National Assembly is whether the provision "relates to" one or more subjects listed in Part 1 of Schedule 7 to the Government of Wales Act 2006 ("GOWA 2006"), or whether it "falls within" an exception listed in the same Part (section 108(4) (a)) of GOWA 2006. The Act instructs the courts that they must determine this question "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".

This is usually referred to as the "relates to" test. In the current conferred powers model, it operates in a generous way which enables the Assembly to make holistic legislation for a particular purpose, provided that that purpose does not fall within an exception in GOWA 2006. This generous operation stems from the fact that the Supreme Court has interpreted the words "relates to" as meaning "having more than a loose or tenuous connection with".

However, in a reserved-powers model, the same words would operate to constrain competence - as they currently do in the Scottish settlement. Any Assembly Bill provision that had more than a loose or tenuous connection with a reserved matter would be outside competence. That has not caused too many problems in the Scottish context - because the Scottish Parliament has such wide non-reserved powers. But if the new Welsh settlement contains many reservations, or wide reservations, or both, the current "relates to" test will inevitably prove a severe constraint on the Assembly's ability to make workable, holistic legislation for Wales.

In other words, the wording of the test for competence, and the reservations themselves, are inherently linked.

A principles-based approach could determine, the test for whether something is within or outside competence. In other words, the Wales Act could lay down that the question whether a Bill provision was within competence or within a reserved matter must be interpreted in the light of one or more principles set out in that Act - such as the principle of subsidiarity.

Alternatively, principles such as subsidiarity or effectiveness (in other words, workability) could be used to shape the wording of the new test for competence.

Returning to the issue of the essential link between the wording of the test and the number and/or width of the topics reserved, the following suggestions illustrate a number of alternative approaches.

- The settlement could consist of a small number of reservations, drafted conceptually, and combined with a strict test for them to apply. By "strict" I mean "narrow" - a test that would allow the Assembly to legislate holistically, without constantly being blocked by widely-interpreted reservations - in contrast to the current "relates to".
- Or the settlement could contain a larger number of reservations, more precisely and narrowly drafted. In this case I would again argue for a similarly strict test for application.
- Another model might be a hierarchy of reservations, with different tests for each tier of that hierarchy. For instance, the current wide 'relates to' test could be applied to topics that, under the subsidiarity principle, would properly be reserved to the centre (defence, constitution, foreign affairs). There might then be a second tier of topics, currently reserved, but potential candidates for future devolution under the subsidiarity principle, with a stricter test for application. Cross-cutting fields of law (contract, tort, property and criminal law) should be included in this tier if they are to be reserved at all.

Regardless of the model adopted, it is essential that there is a catch-all exception from all reservations, reflecting the terms of section 108(5) of the GOWA 2006. This would bring within competence any provision that would otherwise be outside, but which was incidental to, or consequential on, competent provisions, or which provide for their enforcement, or was otherwise appropriate for making them effective. In this context, 'effectiveness' should be explicitly being defined as legal or practical (including financial) effectiveness. Effectiveness is a particularly important concept in this catch-all provision. As noted above, it is the embodiment of the "workability" criterion that is essential for legislative competence - as the Supreme Court itself has emphasised repeatedly in cases about both the Scottish and Welsh settlements.

Agenda Item 4

Constitutional and Legislative Affairs Committee

Statutory Instruments with Clear Reports

Monday 29 June 2015 13:30

CLA548 - The Regulation of Private Rented Housing (Information, Periods and Fees for Registration and Licensing) (Wales) Regulations 2015

Procedure: Negative

These Regulations are made under sections 15(1), 15(4), 16(1)(e), 19(1)(b) and (d), 21(4), 23(1)(b), 46 and 142(2) of the Housing (Wales) Act 2014 ("the Act").

The Regulations set out the information, periods and fees required for an application for registration and an application for a licence under Part 1 of the Act. That Part requires most landlords of domestic dwellings to register with a designated licensing authority. A licence is also required for persons who let or manage most domestic dwellings under that Part.

CLA549 -The Higher Education (Designation of Providers of Higher Education) (Wales) Regulations 2015

Procedure: Affirmative

These Regulations make provision for the designation of certain providers of higher education as institutions for the purpose of the Higher Education (Wales) Act 2015. In addition, the Regulations also make provision for the withdrawal of a designation and the effect of a withdrawal of designation.

CLA550 - The Higher Education (Amounts) (Wales) Regulations 2015

Procedure: Affirmative

These Regulations prescribe the maximum amount which an institution with an approved fee and access plan in force will be able to charge by way of tuition fees for full-time undergraduate courses. Regulation 3 specifies that amount as £9,000 and regulations 4, 5 and 6 prescribe lower maximum amounts in respect of certain courses.

CLA551 -The Higher Education (Fee and Access Plans) (Wales) Regulations 2015

Procedure: Affirmative

These Regulations make provision about fee and access plans as defined in section 2(2) of the Higher Education (Wales) Act 2015 ('the 2015 Act')

In particular, the Regulations set out the information required in a fee and access plan, and the matters the Higher Education Funding Council for Wales ('HEFCW') will take into account when considering the plan for approval. Higher education institutions which want courses to be automatically designated for the purpose of student support (such that students may be eligible for fee grants and loans) must have an approved fee and access plan in place. Once a plan is approved, the institution becomes subject to the provisions of the 2015 Act.

CLA552 - The Emissions Performance Standard (Enforcement) (Wales) Regulations 2015

Procedure: Negative

The Energy Act 2013 imposes an "emissions limit duty" on operators of certain fossil fuel plants. The emissions limit duty ensures that annual carbon dioxide emissions attributable to fossil fuels do not exceed certain amounts.

These regulations create a monitoring and enforcement regime in relation to the emissions limit duty for Wales. The regime includes, among other things: (i) requirements for fossil fuel plant operators to provide information to NRBW relating to generating capacity, carbon capture and storage systems, and total carbon dioxide emissions totals.

Where NRBW believes that an operator has breached the emissions limit duty, NRBW may serve an enforcement notice on the operator. NRBW may also serve a civil penalty notice on an operator who has breached the emissions limit duty.

The regulations also provide for operators to appeal against enforcement notices and civil penalty notices.

CLA553 - The Environmental Damage (Prevention and Remediation) (Amendment) (Wales) Regulations 2015

Procedure: Negative

These Regulations amend the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 S.I. 2009/995 (as amended) which implement Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage.

Agenda Item 7

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Agenda Item 8

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Agenda Item 9

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