

David Melding AM
Chair
Constitutional and Legislative Affairs Committee

11 November 2015

Dear David

Implications of the draft Wales Bill for the Finance Committee

Members of the Finance Committee have considered the implications of the draft Wales Bill in relation to the work of the Committee. We have attached, as an annex, a summary of all the issues we considered, but we would particularly refer your attention to the following main points:

Welsh public authorities (paragraphs 6-11 of the annex) - The draft Bill creates confusion in relation to Assembly's ability to legislate, e.g. to confer, remove or modify the functions of the Wales Audit Office, the Auditor General for Wales and the Public Services Ombudsman for Wales (PSOW). In this Assembly the Public Audit (Wales) Act 2013 has been passed, and the Finance Committee is currently consulting on a draft Bill in relation the extending the powers of the PSOW and it is not clear whether either of these pieces of work would be within the competence of the Assembly had this draft Bill already been passed in its current iteration.

Financial framework (paragraphs 12-25 of the annex) - We note that the Bill makes no change to the provisions inserted into the Government of Wales Act 2006 by the Wales Act 2014. Consequently, we are disappointed that the draft Bill does not provide the required competence to enable the Assembly to legislate in relation to the fiscal framework arising from the conferment of these new fiscal powers, particularly in relation to the devolved taxes. The need for such legislation was identified in our extensive inquiry into best practice budget processes and we think this is essential in affording



the Assembly the ability to competently manage the new fiscal powers afforded by the Wales Act 2014.

Devolved taxes (paragraphs 26-27 of the annex) – The Wales Act 2014 conferred specific powers on the Assembly in relation to fiscal devolution and we are very concerned that some of the provisions in the draft Bill will make legislating in relation to specific taxes problematic.

I hope you find the committees consideration of the draft Bill useful. As a Committee we would like to acknowledge the assistance of Ian Summers, in preparing this response. Due to the far reaching implications of the financial considerations of the draft Bill, I am copying this letter to David Davies MP, Chair of the Welsh Affairs Committee.

Yours sincerely,

A handwritten signature in black ink that reads "Jocelyn Davies". The signature is written in a cursive, flowing style.

Jocelyn Davies AM

Chair



Annex 1

Further details of the implications of the draft Wales Bill for the Finance Committee

Specific Reservations

1. Schedule 7A Part 2 identifies reservations in relations to Financial and Economic Matters, specifically relevant to the Finance Committee are:

A1 Fiscal, economic and monetary policy (with exceptions relating to devolved taxes, including their collection and management, and local taxes to fund local authority expenditure (for example council tax and non-domestic rates)

A2 The currency

A5 Dormant accounts

2. *Silent Subjects*: The A1 Reservations relating to the control over UK public expenditure, the exchange rate, the Bank of England and the Office of Budget responsibility do not appear as exceptions in the Government of Wales Act (GOWA) and may have been regarded as ‘silent subjects’. In addition Reservations A2 and A5 do not equate to current exceptions under GOWA and may also be regarded as ‘silent’ subjects. The Assembly can currently legislate on subjects that are neither subjects nor exceptions in Schedule 7 to GOWA, (as explained by the Supreme Court in the *Agricultural Sector (Wales) Bill* judgment). Therefore, where these silent subjects have been converted into reservations, there is a reduction of competence.
3. *The National Audit Office and the Comptroller and Auditor General*: In Schedule 7 to GOWA the restriction on modifying enactments relating to the Comptroller and Auditor General or the National Audit Office is excepted where the Secretary of State consents. There is no equivalent exception to this provided for in the draft Bill arguably widening the protection afforded to these bodies and a consequent loss of competence.
4. Additionally, the A1 reservations relating to the National Audit Office, the Comptroller and Auditor General and the Office of Budget Responsibility do not



have an equivalent Scottish reservations. Similarly, there is no Scottish equivalent to reservation A5. We are interested in why the Assembly has not been afforded the same competence as Scotland in relation to these reservations.

5. *Government borrowing and lending*: Reservation A1 contains a specific reference to ‘government borrowing and lending’. We would like to recommend that clarification is provided in relation to this, as it is not immediately apparent whether ‘government’ is a reference to the Welsh Government or to the UK Government.

Restrictions

6. *Auditable bodies*: Currently, heading 14 of GOWA confers competence on the Assembly to legislate, subject to the general restrictions set out in Part 2 of Schedule 7 to GOWA, in relation to the audit, examination and inspection of auditable public bodies. Auditable bodies are:
 - a) the Assembly,
 - b) the Assembly Commission,
 - c) the Welsh Government,
 - d) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions,
 - e) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers, and
 - f) persons established by enactment and having power to issue a precept or levy.
7. The draft Bill provides that a matter would be outside the Assembly’s legislative competence if it relates to a reserved matter or breaches any of the restrictions in Part 1 of Schedule 7B. Whilst the expression “auditable bodies’ is not expressly referred to being reserved, the Assembly’s ability to legislate in respect of bodies which may be considered to be “auditable bodies” is potentially subject to the caveats included in Paragraph 8 of Schedule 7B in respect of “reserved authorities”. The definition of “reserved authorities” refers to “public authorities” and “Welsh public authorities”, with the Assembly only having competence in relation to Welsh Public Authorities, which are defined as follows:



“Welsh public authority” means a public authority whose functions—

(i) are exercisable only in relation to Wales, and

(ii) are wholly or mainly functions that do not relate to reserved matters.”

8. The definition of “Welsh public authority” is potentially more restrictive than the definition of “auditable body” currently contained in GOWA and the restrictive nature of the test for “Welsh public authority”, in particular the need to ascertain a body’s functions in full as part of that test, makes it difficult to establish whether a body is a “Welsh public authority”. The definition appears to be based on the assumption that devolved public bodies only have functions which are exercisable in relation to Wales. There are also difficulties around the requirement for a body’s functions to be functions “wholly or mainly functions that do not relate to reserved matters”. This gives rise to a significant evidential burden and the potential that a body could fall out of this requirement over time.
9. We think this confusion over a Welsh public authority is particularly relevant to some aspects of the Finance Committee work, in relation to the WAO/Auditor General for Wales and the Public Services Ombudsman for Wales (PSOW) as it is not possible to categorically state that the WAO and/or the Auditor General and the PSOW are or are not “Welsh public authorities”.
10. If the definition applies and they are not “Welsh public authorities” there will a loss of competence e.g. to confer, remove or modify their functions, as they will be either be reserved or be beyond the scope of the Assembly’s powers in the absence of consent from a UK Government Minister under paragraph 8(1) of Schedule 7B as they exercise some functions otherwise than only in relation to Wales and/or have a number of functions which relate to reserved matters.
11. We think this uncertainty could be overcome by expressly providing for the Auditor General for Wales, the WAO and the PSOW to be expressly stated to as “Welsh public authorities”.



Issues relevant to Standing Order 19 – Finance

12. *Budgetary procedures:* The Wales Act 2014 amended Schedule 7 of GOWA by inserting a new paragraph 13 into Part 1 of Schedule 7 providing that budgetary procedures are within the Assembly’s legislative competence. The current finance provisions in GOWA are not satisfactory for a mature legislator. In line with the Silk Commission’s reports, we believe the Assembly should have maximum flexibility to legislate on finance and accountability provisions. Our inquiry into budget best practice has recommended a Bill should be introduced that would modernise the budget process and create common up to date accounting and audit provisions for all Welsh public bodies. We accept and agree that some safeguards need to be maintained by Westminster.
13. The current provisions for considering and approving budgets are:
 - Existing provisions are Sections 120(2) and 125 to 128 of the 2006 Act;
 - The Wales Act 2014 conferred legislative competence on the Assembly to repeal or amend these provisions (and to a limited extent Section 119 which deals with information to be provided by the Secretary of State on estimated payments) so that the Assembly can modify its budget process.
 - The draft Bill preserves the powers conferred by the 2014 Act (para 7(2)(d) and 7(5) & (6) of schedule 7B).
14. The enhanced competence conferred by the 2014 Act enables the Assembly to legislate in relation to procedures for scrutinising and setting the annual budget of Welsh Ministers, other relevant persons and any other body receiving payments from the Welsh Consolidated Fund by virtue of an enactment (either Parliamentary or Assembly), and would allow the Assembly to pass an annual Finance Act in place of the current annual budget motion. As the Assembly also has competence for devolved taxes, these procedures could include the determination of the tax rates in relation to such taxes, tax receipt forecasts, variances, borrowing for current and capital purposes and amounts for repaying borrowing in addition to authorising how much “relevant persons” may spend.
15. Sections 131 to 134, 137 to 139 and 141 to 142 of GOWA apply to the appointment of accounting officers and the preparation and audit of accounts for



the Welsh Consolidated Fund (WCF), the Welsh Ministers, the Assembly Commission and whole of government accounts. They are currently 'protected provisions' in that they cannot be amended by way of an Act of the Assembly. There are no exceptions to this prohibition. This position is replicated in Schedule 7B of the draft Bill.

16. The Bill makes no change to the provisions relating to financial provisions as currently contained in GOWA. These provisions are in the nature of conferred powers. A general unamendable provision, providing that resources may only be used by Welsh Ministers, the Assembly Commission and other bodies financed directly from the Welsh Consolidated Fund, only if authorised by the Assembly, would better reflect the ethos of a reserved powers model.
17. Whilst the current provisions relating to the preparation of accounts is unchanged, these may be now be regarded as being unduly restrictive. As 'protected provisions' they are subject to the General Restriction 7 as set out in Schedule 7B and cannot be amended. Any ancillary provision would, depending on its purpose, be subject to the relevant test set out in section 108A potentially reducing the scope of the Assembly to legislate in relation to the designation of accounting officers, the preparation and audit of accounts and their laying before the Assembly.
18. We would make the following recommendations for changes to allow the Assembly the required competence over budgetary procedures:
 - a) Whilst the current provisions are satisfactory, we believe they are of a conferred nature and not within the spirit of a reserved powers model. We would recommend that paragraphs 7(5) and (6) of schedule 7B be removed and replaced with a general unamendable provision requiring that resources may only be used by the Welsh Ministers, Assembly Commission and other bodies financed directly from the WCF, only if authorised by the Assembly. This could be by the existing budget motion process or in accordance with any replacement legislation enacted by the Assembly.



- b) With regard to the flow of funds in and out of the WCF, we agree that the Assembly should not be able to amend Sections 117 and 118 of GOWA 2006 (requirement for the WCF and payments into it by the Secretary of State and to Welsh Ministers by the UK government more generally). Section 118(2) could be combined with Section 120(1) with a requirement that Welsh Ministers, Assembly Commission and other direct funded bodies should be paid into WCF – subject to any provision of an Assembly Act for disposal of/accounting for such sums.
 - c) We think that the Bill should be amended to repeal Section 119. This section had a purpose in the early days of the Assembly before the advent of resource budgeting but is now of little relevance and should be removed.
 - d) We agree that Section 120(1) and (3) to (7) should not be capable of amendment by the Assembly but recommend that we press for an amendment to allow the Assembly to add to the list of relevant persons (but not remove any of the existing four entries).
 - e) We also agree that Section 124 should not be capable of amendment, except to amend references to a budget motion (should the Assembly legislate to change the budget approval mechanism), and to add to the list of relevant persons. This section would also benefit from an additional unamendable provision requiring that sums charged on or paid out of the WCF should not be applied for any purpose other than that for which they were charged/paid out.
 - f) In addition we recommend that the Assembly should be able to amend sections 129 and 130 subject to the protection of section 124 being retained in Westminster legislation.
19. Sections 131 to 134, 137 to 139 and 141 to 142 of GOWA are the existing provisions for the appointment of Accounting Officers and the preparation and audit of accounts for the WCF, Welsh Ministers, Assembly Commission and a whole of government account. Schedule 7B does not allow the Assembly to amend these provisions. The Assembly is, however empowered to make or amend provision for the appointment/designation of accounting officers and the preparation and audit of accounts for other devolved public bodies. These GOWA sections are prescriptive and the prevention on them being amended is an impediment to the



Assembly legislating for a modern common framework for the preparation and audit of accounts.

20. We would press for an amendment that would allow these provisions to be repealed or amended. In line with the spirit of the reserved powers model and the Silk Commission recommendations, the Bill should also contain an unamendable provision requiring the Assembly to ensure that legislative provision is made for the designation of accounting officers, the preparation and audit of accounts, and the laying of those accounts before the Assembly.
21. In relation to the above, we would also recommend that we should specifically request that the Assembly be empowered specifically to modify/repeal any provision in relation to functions currently exercised by the Treasury in relation to designating accounting officers, specifying responsibilities of accounting officers and giving directions in respect of the preparation of accounts. This is notwithstanding any general restriction on amending or repealing functions of Ministers of the Crown without consent. The reason for this request is to enable the harmonisation of accountability provisions and seek parity with Scotland in this regard where such functions are exercised locally rather than by the Treasury. In the future, we would envisage that such Treasury functions would be exercised by the Welsh Government. Devolution in Wales is now mature and the original reason for Treasury having these functions was in large measure due to the original constitution of the Assembly as corporate body without a legally separate executive – this has not been the case since GOWA 2006 took effect.
22. The provisions relating to the AGW's value for money audit and other performance audit functions are currently set out in sections 135 and 140 of GOWA 2006, Sections 145 to 145D and paragraph of 8 of schedule 6 to GOWA 1998, paragraph 11 of schedule 2 to the Care Standards Act 2000, paragraph 19 of schedule 1 to the Public Services Ombudsman Act 2005, and paragraph 13 of schedule 1 to the Commissioner for Older People (Wales) Act 2006. Assembly legislation has also include such provision for bodies established since 2006 (e.g. the Welsh Language Commissioner).



23. The 2006 provisions and sections 145, 145A and 146A(1) of GOWA 1998 cannot be amended by the Assembly (see paras 5 and 7 of the draft schedule 7B) which is inconsistent as the similar provisions in the other enactments are capable of amendment. It is also restrictive as it would prevent the Assembly from legislating to create a common set of VFM audit provisions that would apply to all devolved public bodies.
24. In line with the spirit of the reserved powers model and the Silk Commission reports, we recommend that an amendment is brought forward to remove these restrictions and the inclusion of an unamendable provision requiring the Assembly to ensure that legislative provision is made for the AGW to carry out and report on examinations into the economy, efficiency and effectiveness with which the Welsh Ministers, Assembly Commission and other devolved public bodies have used their resources in discharging their functions.
25. Paragraph 5 of schedule 7B prevents the Assembly from amending sections 2(1) to (3), 3(2) to (4), 6(2) to (3) and 8(1) of the Public Audit (Wales) Act 2013. These provisions relate to the appointment, removal and operational independence of the Auditor General and were originally in section 145 and schedule 8 to GOWA 2006. We agree that these provisions should remain unamendable.
26. *Issues relating to devolved taxes:* The Wales Act 2014 amended GOWA to confer competence on the Assembly in relation to devolved taxes. In the draft Bill Reservation A1 includes the exception of 'Devolved taxes, including their collection and management'. However, we believe the draft Bill, in its current form, raises significant questions in relation to the Tax Collection and Management Bill ("the TCM Bill") currently before the Assembly. The TCM Bill contains a number of provisions which could relate to reservations contained in the draft Wales Bill depending on the interpretation of *relates to* in section 108A(2) which is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. In particular:
 - General Reservation 3: the Civil Service of the State – section 116B of GOWA currently permits the appointment of civil servants to a tax collection and management authority.



- General Reservation 6: Jurisdiction, courts and tribunals – the TCM Bill provides e.g. for certain matters to be referred to the First Tier Tribunal.
 - General Restriction 4: criminal law and civil penalties – there is currently no restriction on the Assembly legislating on criminal matters as long as the legislative provision relates to a conferred subject. The creation of offences and sanctions will either form part of the conferred subject or come within competence as a result of section 108(5). The new restriction reduces the Assembly’s competence by introducing a new necessity test.
 - Specific Reservation 38: the prevention, detection and investigation of crime – such powers are to be included in the TCM Bill.
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27. We are concerned that subsequent bills establishing particular devolved taxes will raise concerns similar to those above as the provisions of the TCM Bill will apply to each tax.

