

THE DRAFT WALES BILL

Written Evidence submitted to the Constitutional and Legislative Affairs Committee of the National Assembly for Wales by the Secretary of State for Wales

1. I welcome this opportunity to submit written evidence on the draft Wales Bill in advance of giving oral evidence to the Committee on 23 November.

Overview

2. The draft Bill delivers a clear devolution settlement for Wales based on a new reserved powers model. Implementing the new model was a key recommendation in the Silk Commission's second report, and was supported by political consensus in the St David's Day Agreement.

3. The draft Bill also strengthens Welsh devolution by devolving important new powers over energy, transport and local government and Assembly elections that can make a real difference to the lives of people in Wales. For the first time, it will enshrine the National Assembly and Welsh Government as permanent parts of the United Kingdom's constitutional arrangements. It will enable the National Assembly to call itself a Parliament and to decide how its Members are elected - and whether 16 and 17 year olds should be able to vote in Assembly elections.

4. I should make one thing clear from the outset. In developing the reserved powers model the starting point has been the current devolution settlement: the twenty devolved subjects listed in Part 1 of Schedule 7 to the Government of Wales Act 2006 on which the National Assembly assumed full legislative competence following the 2011 referendum.

5. The UK Government established the Silk Commission following the referendum to set a course for the future of devolution in Wales. While the Silk Commission included representatives from the four main political parties in Wales, they did not have a mandate to bind their respective parties to the recommendations that Silk made. I established the St David's Day process this time last year to identify the recommendations in the second Silk report which had political consensus to be implemented. The St David's Day Agreement, announced in February, confirmed that there is consensus to base Welsh devolution on a reserved powers model, and to devolve a strong package of further powers to the Assembly, implementing many of the recommendations in Silk II. The Government is implementing or has already implemented over two thirds of the recommendations for which it is responsible; not all require primary legislative change and some are being taken forward in different ways.

6. So there has been a long, well established process which has led to the draft Wales Bill. Some commentators have called for fundamental changes to the draft legislation; for the reserved powers model to include a significant expansion of devolution, based on the principle of subsidiarity. But this draft Bill is not a vehicle for expanding devolution by the back door. It reflects the broad consensus reached in the St David's Day process.

7. Our General Election manifesto committed to implement the St David's Day Agreement in full. The Wales Bill, when introduced, will reflect the outcomes of St David's Day.

8. I believe it is time to draw a line under the constitutional debates that have dominated Welsh politics since devolution so that the Welsh Government and the Assembly can focus on using the powers they have to grow the Welsh economy, to create jobs and to deliver better public services in Wales. I believe the new settlement and the new powers devolved in the Wales Bill, along with the funding floor we will implement alongside the forthcoming Spending Review, will allow us to do that.

The Reserved Powers Model

9. The current conferred powers model of devolution in Wales lacks clarity and is incomplete. Indeed, it is silent about many areas of policy such as defence, policing, the criminal justice system and employment. This lack of definition has proved to be a recipe for confusion and dispute, and there is widespread acceptance that it is fundamentally flawed.

10. The new reserved powers model provides the clarity the current model lacks. It lists the subjects which are reserved to the UK level. The Assembly can legislate in all other areas and in relation to subjects that are excepted from those reservations. It provides a clear boundary between reserved and devolved subjects. The Assembly will continue to legislate in devolved areas as it does now. The consent of UK Government Ministers would be needed if the Assembly wished to place functions on reserved bodies.

11. I have read many incorrect and inaccurate comments about the new draft model in terms of the constraints it places on the Assembly in exercising its legislative competence. I would like to take this opportunity to put the record straight:

- **The Assembly will continue to be able to legislate in devolved areas without the need for any consent.** The Assembly will be able to legislate in any area not specified as a reservation in Schedule 1 to the draft Bill and in those areas specified as exceptions to reservations. The Assembly will need the consent of UK Ministers to legislate about reserved bodies. It is surely right that UK Ministers consent when an Assembly Bill imposes functions on reserved bodies, just as Assembly consent is obtained when Parliament legislates in devolved areas.

Some have argued that the new model rolls back on the result of the 2011 referendum. That referendum gave voice to the vast majority of people in Wales who wanted the Assembly to gain its full law-making powers - legislative competence in all twenty areas devolved to the Assembly under the Government of Wales Act 2006. The Assembly will continue to exercise legislative competence in devolved areas under the new model. I utterly refute the suggestion that the draft Bill somehow cuts across the result of the 2011 referendum.

- **The Bill implements a reserved powers model within the single legal jurisdiction of England and Wales.** I know that a separate jurisdiction is the ambition of some critics of the draft Bill, but that is not our policy. The Bill makes no provision to alter the single legal jurisdiction, which has served both Wales and England well. But there is a need to reflect the impact on the justice system of the increasing volume of Assembly legislation, and to ensure the administrative arrangements for justice in Wales take full account of Assembly laws.

- **The Assembly will continue to be able to enforce its legislation by modifying the private law and criminal law, in the same way as it does now.** The model recognises that the Assembly has a legitimate need to modify the law in respect of devolved matters in order to give full and proper effect to its legislation. It will continue, for example, to be able to create offences and impose penalties to enforce the laws that it makes.
- **The Assembly will continue to have the flexibility to be able to make “ancillary” provision in relation to England and to modify the law on reserved matters.** The model acknowledges that the Assembly needs the flexibility to legislate outside devolved areas of competence to make laws within devolved competence work effectively. The Bill allows the Assembly to do so by making “ancillary” provision. A provision is ancillary to another provision if it provides for the enforcement of the other provision; is otherwise appropriate for making it effective; or is otherwise incidental to, or consequential on, that provision.
- **The *no greater effect than necessary* test is designed to address occasions where the Assembly seeks to enforce its laws by legislating in relation to England, the law on reserved matters and the general principles of private law and criminal law.** The model enables the Assembly to modify the general principles of the private law and criminal law if that is needed to give effect to its laws. But we do not want to see those modifications lead to significant divergence in the fundamental legal landscape of England and Wales. Any modification of private law and criminal law should be proportionate to the devolved provision the Assembly is seeking to enforce. It is subject therefore to the *no greater effect than necessary* test: any modification must have no greater effect on the general application of the private law and criminal law than is necessary to give effect to the devolved provision.

The test also applies when the Assembly enforces its laws by legislating in relation to England and where it modifies the law on reserved matters. We believe it is reasonable to set a limit on the extent to which the Assembly can legislate beyond Wales or change the law on reserved matters. The test has operated with no difficulty as part of the reserved powers model in Scotland since the start of devolution.

- **The way in which reserved authorities and Welsh public authorities are defined in the draft Bill will not change the devolution boundary or the status of these bodies.** Bodies which are “devolved bodies” now - those which exercise wholly or mainly devolved functions - will continue to be devolved under the new model.
- **The Assembly will continue to be able to legislate on the Welsh language.** The reservations listed in Schedule 1 to the draft Bill do not prevent the Assembly from legislating on the Welsh language. In particular, the equal opportunities reservation specifically excludes language from the definition of equal opportunities.

12. I am open to ideas about how the model can be improved. I look forward to the outcome of the Committee’s work, and to that of the House of Commons Welsh Affairs Committee’s pre-legislative scrutiny of the Bill, and to reading the

recommendations of both Committees on the modifications they believe will improve the draft Bill.

Conclusion

13. The draft Bill delivers a new devolution settlement for Wales and devolves important new powers as part of this. It forms part of a new devolution deal for Wales which includes, for the first time, introducing a floor for Wales's funding relative to that of England. I would also like income tax devolution to be part of the new arrangements to strengthen the bond of accountability between the Welsh Assembly and Welsh taxpayers.

14. I want a devolution settlement for Wales that is built to last. The draft Bill provides the foundation for a strong, robust settlement with a clear boundary between the powers that are devolved and those that are reserved. It will make devolution work better and give the Assembly and the Welsh Government a sharper focus on the job they have to do.

15. I look forward to receiving the Committee's contribution to the scrutiny.