

Rt Hon Stephen Crabb MP
Secretary of State for Wales
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Your ref:
Our ref: PO/RB/BA

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Dear Stephen

Draft Wales Bill - Necessity Tests

As you know, my evidence to the Welsh Affairs Select Committee and the Assembly's Constitutional and Legislative Affairs Committee, provided options for alternative drafting of some of the tests of competence in the draft Bill. I offered these in the spirit of cooperation and in the hope that their adoption would bring the Bill closer to my goals of workability, clarity and no roll back.

I have since asked my officials to undertake further work, in particular, to consider how tests of necessity relating to the private and criminal law could be simplified and improved. These two areas seem to me to have been particularly criticised in the evidence submitted to the two committees.

The appendix to this letter therefore, sets out:

- practical improvements to the draft Bill that should address the concerns of the UK Government and the Assembly in respect of the private and criminal law;
- a pragmatic and straightforward proposal to enable the implementation of a distinct legal jurisdiction for Wales;

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Llywydd
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- constitutionally appropriate mechanisms to manage the impact on England of law made by the Assembly; and
- a way to simplify greatly the general restrictions that the draft Bill places on the competence of the Assembly by addressing cross-border issues separately.

This aligns with the report of the Constitutional and Legislative Affairs Committee, which particularly supported further exploration of the concept “of a distinct Welsh jurisdiction as a means of delivering a clearer, more workable settlement”. I firmly agree and believe that resolving these issues would be a major step forward in agreeing a new devolution settlement for Wales.

I hope that you will find them valuable and look forward to discussing them with you.

Dame Rosemary Butler AM
Presiding Officer

cc Rt Hon Carwyn Jones AM, First Minister
Andrew R T Davies AM, Leader, Welsh Conservatives
Kirsty Williams AM, Leader, Welsh Liberal Democrats
Leanne Wood AM, Leader, Plaid Cymru
David Melding AM, Chair, Constitutional and Legislative Affairs
Committee
David Davies MP, Chair, Welsh Affairs Select Committee

Private and criminal law – the need for distinct jurisdictions for Wales and England

The Explanatory Notes to the draft Bill state that the restrictions relating to the private and criminal law are “intended to provide a general level of protection for the unified legal system of England and Wales”, to ensure “protection for the broad principles of private law of England and Wales” and to prevent the Assembly from legislating “for the purpose of changing the criminal law itself” (as opposed to legislating for the purpose of enforcing “devolved provisions”).

I take from this that the concerns of the UK Government relate to one or both of the following:

- (a) ensuring that the Assembly cannot legislate to change certain broad principles of private law, and can alter the criminal law only to enforce devolved provisions; and/or
- (b) retaining a “unified legal system of England and Wales”.

I do not see these as the same thing. The first requires justification, though it is at least capable of relatively clear definition.

The second, on the other hand, is much less clear and more restrictive of the Assembly as a legislature. Such a legal system no longer exists, in the sense that there is a body of law that applies purely in relation to Wales. Moreover, that law is made in the Welsh language as well as in English, and both carry the same legal weight.

To seek to prevent future divergence is to run fundamentally counter to the principle of devolution – not of further devolution, but simply of devolution. I trust, therefore, that you will understand why I have serious concerns about this constraint.

Central to the argument is the concept of “jurisdiction”– a word that is used by different people to mean different things, with widely differing practical and financial implications. It has been raised by many commentators, including academics and expert legal practitioners, up to and including the Lord Chief Justice himself. In my view, the way forward is to think in terms of ‘distinct’ rather than ‘separate’, jurisdictions for England and for Wales.

Private Law

The simplest and clearest way to prevent the Assembly from affecting the “private law” as that applies in England, is to split the “England and Wales” jurisdiction into two “distinct” jurisdictions, one of England, and one of

Wales. In my view, the use of the word "distinct" is a useful way of branding a pragmatic option that I would suggest as a solution to the "private law" issue.

This proposal was put forward in a joint publication by the Wales Governance Centre of Cardiff University and the Constitution Unit of University College London, *Delivering a Reserved Powers Model of Devolution for Wales*¹. On page 25, the report states,

"a Welsh legal jurisdiction might be distinct, but need not be separate from that of England, nor need it necessarily be established as a devolved matter.... It could remain a "reserved" matter, under Westminster's control, and continue to share judges, legal professions and other institutions with England. The High Court and Court of Appeal would cease to be those of "England and Wales", but become those "of England and of Wales", with judges being appointed to sit in both sets of courts and solicitors and barristers admitted in both England and Wales. The courts would be able to apply the law of England or the law of Wales, according to the circumstances."

No less a figure than the Lord Chief Justice has stated publicly that, in his view, such a model is both legally and practically possible. In his speech to the Legal Wales conference in Cardiff in October 2015, Lord Thomas said, "it is essential to distinguish carefully the different ways in which the term "jurisdiction" is used... There is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions".

The creation of a "distinct" Welsh jurisdiction is likely to mean that the Assembly would give up its present ancillary competence (under s. 108(5) GOWA 2006) in relation to England, or would at least see that competence restricted. I would suggest that the most constitutionally appropriate way to apply such a restriction would be a requirement for legislative consent from the UK Parliament to any Assembly Bill provision relating to England².

Alternatively, if the Assembly had no competence in relation to England at all, the Welsh Government could ask the Secretary of State to make consequential legislation for England under s. 150 GOWA 2006, where that was desirable to make Welsh legislation fully effective, or for other consequential reasons. This would mirror the position as between Scotland and England at present.

¹ September 2015

² Or the consent of MPs for English and Welsh constituencies in the UK Parliament, using a mechanism akin to that recently introduced for English Votes for English Laws.

Though I consider the creation of a "distinct" legal jurisdiction for Wales to be the simplest and clearest way of ensuring that any modifications which Assembly legislation made to "private law" affected only Wales, there are other options.

Most obvious, of course, is the kind of alternative drafting I put forward in my evidence to the Constitutional and Legislative Affairs Committee of the Assembly, and the Welsh Affairs Select Committee, and copied to you. Option 3A, which deals with "private law", provides that the Assembly would be able to modify that law only "for a devolved purpose" or in a way which is "ancillary to a provision... which has a devolved purpose". This would mean that the Assembly could not modify the law of succession, the law of contract, the law of property etc in its general application to Wales.

Combining my Option 3A with the creation of a "distinct" legal jurisdiction for Wales, would create "belt and braces" protection, both for the general application of the private law and for the law of England.

Criminal law

The ability to use the full extent of the criminal law is essential for the effective operation of the Assembly as a legislature. As all criminal offence provisions are aimed at enforcing some social policy, such as the protection of other people or of property, I do not recognise the concept of a "free-standing criminal offence". This is an expression used in the Explanatory Notes to the draft Bill to exemplify something that, in the UK Government's view, would, and should, be outside the Assembly's competence.

This aside, the principal concerns that the UK Government have concerning Assembly competence to pass criminal-law provisions are, I assume, common with those set out above in relation to the "private law". The solutions I have suggested above will apply equally in this context.

Having considered other evidence submitted to the pre-legislative work of the two Committees, I have been convinced that there is no rationale for a distinction between the private law and the criminal law restriction. Annex A, therefore, includes a slightly revised version of the alternative drafting I presented to the Committees³.

I can understand why the UK Government might also be concerned about the practical and budgetary implications of the Assembly creating new offences requiring imprisonment or increased prison sentences. I would suggest that

³ option 4A. Changes from the version submitted to the Committee are underlined; changes from the wording of the draft Bill are not shown

these should be dealt with via inter-governmental agreement on practice and finance, rather than by imposing a restriction on legislative competence.

Cross border issues

Finally, I would like to suggest that you consider separating out any concerns of the UK Government relating to cross-border issues, and dealing with these in a separate Schedule to the draft Bill. It is completely inappropriate that these are addressed by general restrictions on the Assembly's competence. These are matters that arise from the practical application of the different laws of Wales and England and should be managed as such i.e. through restrictions confined purely to cross-border scenarios. I fully accept that a suitable set of provisions would be relatively complex and would take some time to draft. However, it could allow us to greatly simplify the general restrictions in the draft Bill (and possibly also to remove or lighten some reservations), while confining the area of complexity to a specific issue, or category of issues.

Annex A

Criminal law and civil penalties

4 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the criminal law.

(2) Sub-paragraph 1 does not apply to a modification which is for a devolved purpose or is ancillary to a provision made (whether by the Act in question or another enactment) which has a devolved purpose.

(3) "Devolved purpose" means a purpose, other than modification of the private law, which does not relate to a reserved matter.
