

## **Huw Irranca–Davies AM**

Chair, Constitutional and Legislative Affairs Committee

29 September 2016

Dear Huw

### **The UK Government's Wales Bill**

Thank you for your letter of 18 July about the work currently being undertaken by your Committee on the Wales Bill. In that letter, you invited us to write to you with our views on the Bill, particularly the impact of the reservations on our remit and any changes to the views expressed by our predecessor committee on the draft Wales Bill.

### **General observations**

The Committee considered the Bill on 15 September. We remain supportive of the move to a reserved powers model, which we believe has the potential to clarify the devolution settlement in Wales. However, we maintain that such a model must be specifically tailored to Wales, taking full account of the developments in devolution thus far, including the outcome of the 2011 referendum to increase the powers of the National Assembly.

Regrettably, this does not seem to have been achieved in the Bill before us which, as with the draft Bill, provides for a considerable number of complex tests of competence. It is our view that the cumulative effect of these tests amounts to a significant constraint on the Assembly's ability to legislate, rolling back competence in a number of policy areas.

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In addition to the competence tests, our predecessor Committee expressed concerns about the sheer number and breadth of the reserved matters listed in the draft Bill and the impact this would have on the Assembly's ability to legislate effectively. Unfortunately, this situation does not seem to have improved in the Bill currently before Parliament, and many of the concerns we raise in this letter mirror those already expressed by that Committee about the draft Bill.

Taken together, the competence tests and the extensive list of reserved matters under the Bill are likely to mean that the Assembly has fewer powers to legislate than at present. We find this unacceptable.

In the remainder of this letter, we expand on the concerns expressed above about the competence tests and the reserved matters, providing practical examples where possible.

### **The 'relates to' test**

Under the reserved powers model, Assembly legislation must not 'relate to' a reserved matter. As such, any Assembly legislation which has more than a 'loose or consequential connection' with any reservation in the Bill will be judged to be outside competence. Our predecessor noted with concern that there were more than 200 reservations listed in the draft Bill. We are dismayed to see that this is still the case in this Bill. Within the remit of this Committee alone, these new arrangements could be deeply detrimental to the Assembly's ability to pass (or modify) legislation in significant policy areas where it is currently able to do so. The following examples illustrate this point.

#### *Reservations relevant to the Committee's remit*

##### Employment

Our concern here relates to employment rights and duties. Under the current conferred powers model, employment is not listed as a devolved subject in Schedule 7 – as such, it is a 'silent subject' and the Assembly is able to legislate in



this area, provided that the legislation relates to a devolved matter and does not relate to an exception.

The Wales Bill, however, turns employment from a silent subject into a reservation, thus preventing the Assembly from legislating in any significant way on matters like employee rights and the minimum wage. Therefore, under the Wales Bill, the Assembly would not be able to pass legislation which related to employee rights and the minimum wage even if that legislation also related to a devolved matter such as 'social welfare'. This represents a significant and unacceptable reduction in the Assembly's current legislative competence.

#### Licensing of sale and supply of alcohol

We share the concerns of our predecessor about the reservation of the sale and supply of alcohol. The consumption of alcohol is a serious health issue and is an area where the previous Committee has undertaken a significant amount of work. We were concerned to hear recently<sup>1</sup> from the Minister for Social Services and Public Health that, although keen to introduce minimum unit pricing because of the associated public health benefits, the Welsh Government believed that the Wales Bill might be a "stumbling block" to this if it were to remove the Assembly's competence to legislate in this area.

#### Police powers under the Mental Health Act 1983

The Committee has recently considered and reported on an LCM for the Policing and Crime Bill. Amongst other things, the Bill extends the powers of the police under the Mental Health Act 1983 to enter premises in order to remove people who suffer from a mental disorder and to take them to a place of safety. It also provides certain safeguards as a check on those extended powers, including greater controls over what kind of place can be used as a 'place of safety'. These provisions are currently within the legislative competence of the Assembly

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<sup>1</sup> RoP, Health, Social Care and Sport Committee, 15 September 2016, para 178



because they relate to subjects listed in Schedule 7, and ‘policing’ is not an exception. As such, the Assembly’s consent is needed before the UK Parliament can legislate in this area.

Under the Wales Bill, however, ‘policing’ is a reservation. Therefore, the parts of the Bill that were the subject of the recent LCM would be outside the Assembly’s competence if they were judged to relate to policing in more than a loose or consequential way. This would be the case even if those parts of the Bill could also be judged to relate to the prevention of mental disorders or care of vulnerable persons, which are not reserved matters under the Bill. In this event, an LCM would not be needed and Parliament would be able to legislate freely in an area where previously the consent of the Assembly would have been sought.

### **Modifying the law on reserved matters**

In addition to not ‘relating to’ a reserved matter, Assembly legislation under the Wales Bill must not ‘modify the law’ on reserved matters. As noted by our predecessor, this is a very fine distinction and one which captures a vast amount of law, as it encompasses all of the law on all of the reservations provided for in the Bill.

It serves to further restrict the Assembly’s ability to legislate in a way that we consider to be unacceptable, as it means that Assembly legislation will only be able to modify that vast amount of law if it is doing so in an ancillary way and there is no greater effect than necessary to give effect to the purpose of the Assembly legislation. Further, the question of whether something is ‘necessary’ is likely to be something that will have to be decided by the Supreme Court.

### **The criminal law**

In addition to the above, we share the concerns of our predecessor about the limiting effect of the provisions in the Wales Bill relating to the use of the criminal law.



We agree with the previous Committee that it is the legitimate role of a democratically elected legislature to decide how to enforce its legislation and to do so in a way that it considers appropriate. In our view, the provisions in the Wales Bill relating to modifications to the criminal law place an unacceptable limitation on the Assembly's ability to enforce obligations and secure rights via its legislation.

The following example is a clear roll-back of Assembly competence in the criminal law.

#### Sexual exploitation of children

As referred to above, the Committee recently considered a Legislative Consent Memorandum for the Policing and Crime Bill. In addition to extending certain police powers, the LCM seeks consent for Parliament to legislate to amend the definition of "sexual exploitation" in the Sexual Offences Act 2003, so that the definition of "recording" indecent images of a child includes "streaming" and "transmitting" indecent images of a child.

Under the current settlement, this matter is within the Assembly's competence as it relates to a subject within Schedule 7 and 'sexual offences' is not a specific exception. However, under the Wales Bill, Assembly legislation will not be able to modify or create any sexual offence. The Policing and Crime Bill's amendment to the definition does modify/create a sexual offence, and therefore this would be outside the Assembly's competence. As such, no LCM would be needed.

#### **Minister of the Crown (UK Government) consent**

Our predecessor expressed concerns about the requirements in the draft Bill for the UK Government to give consent to Assembly legislation that affect the functions of Ministers of the Crown, government departments and reserved authorities. We agree that these requirements present a significant risk to the Assembly's ability to legislate in a comprehensive and consistent way, and we are therefore disappointed to see them reflected in the Bill before us.



Again, we have sought to illustrate this point with the following practical example.

#### E-cigarette duties on reserved authorities with workplaces in Wales

The Public Health (Wales) Bill was originally intended to prohibit the use of e-cigarettes generally across workplaces in Wales. As part of that prohibition, it imposed certain duties on managers of workplaces, including requiring managers to put up signs in the workplace. Currently this is within the Assembly's competence, there are no relevant exceptions, and UK Government consent is not needed.

However, under the Wales Bill, UK Government consent would be needed to impose such duties on reserved authorities with workplaces in Wales (such as the DVLA, Crown Prosecution Service, Land Registry), as those duties would amount to imposing functions on reserved authorities.

If UK Government consent was not given, the duty to take steps to stop persons using e-cigarettes and the duty to put up signs would not apply to buildings occupied by reserved authorities. This would result in an inconsistent application of those duties across Wales.

#### **Closing remarks**

Overall, we share the view of our predecessor Committee that the Bill will not deliver a clearer and stronger settlement in Wales which is durable and long lasting. Instead, we are concerned that there will be a rolling back of competence, and that there will continue to be considerable room for interpretation, with the inevitable need for early and even repeated recourse to the Supreme Court. On this last point, we believe there is some merit in exploring the options for making available a mechanism to work through any exceptions to reservations that have been inadvertently missed out of the Bill, where there is good will on both sides to do this. This may help to reduce the need for the Court's involvement, certainly in the early days of implementation should the Bill be enacted. While there is a special legislative process that can be used to change **some** aspects of the



devolution settlement, that process can be cumbersome and slow and is unlikely to be flexible enough to deal with the uncertainties that will arise under the new settlement.

Yours sincerely,

A handwritten signature in black ink, appearing to read "David Lloyd". The signature is written in a cursive style with a large initial 'D'.

Dr Dai Lloyd AM  
Chair, Health, Social Care and Sport Committee

