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Chair, Constitutional and Legislative Affairs  
Committee

29 September 2016

Dear Huw

## Wales Bill

Thank you for your letter of 18 July 2016, regarding the Constitutional and Legislative Affairs Committee's current scrutiny of the Wales Bill. We very much appreciate the opportunity to feed into that process.

As you are aware, our predecessor committee considered the draft Wales Bill with three specific things in mind:

- Was the draft Wales Bill clear?
- Did it affect the Assembly's competence in relation to children, young people and education; and
- What did the draft Bill mean for the Assembly's ability to legislate in the future.

In considering the Wales Bill now, the Committee believes that these three areas are still very relevant, and looked at the impact of the Wales Bill along these same broad lines. In general terms, the views of the Children, Young People and Education Committee (CYPE) remain as set out in our letter to the Secretary of State in November 2015. Of particular concern are (a) the roll back of competence in specific areas, and (b) the clarity of the reservations.

These two areas are likely to cause concern across Assembly Committees. This response sets out the specific concerns of CYPE Committee, in relation to the effect of the Bill on matters within its remit, together with general observations of Committee members.



## **Is the Wales Bill clear and are there ways it can be made clearer?**

The Bill contains over 200 specific reservations, wide-ranging general reservations, new “necessity” tests and broadened requirements for consents. The combination of these tests and reservations has made it difficult to assess with confidence the impact of the Bill on those areas that fall within the Committee’s remit.

Unfortunately the Explanatory Notes that accompany the Bill do not explain or rationalise why certain reservations have been included or expressed as they have been. There is also no overarching principle that enables a clear understanding of why certain reservations have been included and how wide reaching they will be. This has made scrutiny more difficult, and in relation to many reservations listed below, further clarification as to the extent of their effect is required.

## **Does the Wales Bill affect the Assembly’s current competence in relation to children, young people and education?**

During our discussions (both on the draft Bill and the Wales Bill) the Committee identified specific reservations which appear to reduce the Assembly’s competence in relation to children, young people and education and the matters that affect them:

### **Reservation 37 – The prevention, detection and investigation of crime**

This reservation is potentially very wide and could have significant implications if the Assembly wished to legislate in areas concerning child protection, for example.

The exception to this reservation (areas where the Assembly will have competence) would allow the Assembly to legislate in relation to “powers of entry, search and seizure relating to the investigation of an offence of a kind provision for the creation of which is within the Assembly’s legislative competence.” However, despite the inclusion of this exception, this reservation is potentially wide-ranging and it is not clear without further clarification what this particular restriction could cover. The Committee is concerned that this reservation could limit the Assembly’s power to legislate, and believes that further clarification on the intention of reservation 37 is required.

### **Reservation 61 – Charities**

As drafted, this reservation could impinge on the Assembly’s ability to legislate in relation to private schools with charitable status as well as, for example, institutions in the Higher and Further Education sectors.

The explanatory notes state that the “reservation will not affect the ability of the Assembly or Welsh Government to confer, impose, or modify functions of public bodies operating within devolved areas who also happen to be charities”. While



explanatory notes can be a useful interpretative tool for the courts, they have no legal effect and could be changed prior to Royal Assent. Therefore, for the sake of clarity, the Committee believes that the explanation provided in the explanatory notes should be placed on the face of the Bill.

## **Reservation 174 to 177 – Family relationships and children**

Under GOWA, specific elements of family law were devolved. These are listed under GOWA as being:-

*“(a)Welfare advice to Courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and  
(b)Welsh family proceedings officers.”*

However, these areas are no longer listed as exceptions in the Bill and it is unclear whether the reservations as drafted would remove this limited competence that the Assembly currently possesses. The Committee believes that the position must be made clear.

Reservation 175 includes “Parenthood, parental responsibility, child arrangements and adoption.”

In the interpretation section “child arrangements” is defined as including the subject matter of Part 2 of the Children Act 1989. Part 2 covers Court Orders with respect to children in family proceedings and would have been regarded in any event as coming within the “family law and proceedings” exception in heading 15 of Schedule 7 to GOWA. The inclusion of Part 2 in the reservation makes no change in the Assembly’s legislative competence. However, the reservation does not limit itself to only Part 2 of the Children Act as it merely “includes” it under “child arrangements”. The explanatory notes are unhelpful and give no further detail. The Committee believes that further clarification is needed before a clear conclusion can be reached that this does not represent a change in the legislative competence of the Assembly.

More significant, and of greater concern to the Committee, is that reservation 175 includes adoption. Apart from inter-country adoption, adoption services (such as the recruitment of adopters, training, matching and post-adoption support) is currently devolved in its entirety. This change would only leave the Assembly competence in relation to adoption agencies and their functions. This is clearly a reduction in the Assembly’s current legislative competence, and the Committee cannot support this.



Reservation 176 includes the subject-matter of Parts 4 and 5 of the Children Act 1989 and other proceedings related to the care, supervision or protection of children. However, it is not clear whether “subject matter of Parts 4 and 5” means the contents of Parts 4 and 5. If so, for clarity, the Committee believes this should be confirmed by the UK Government or preferably a definition inserted into the interpretations section of the Bill.

Part 5 of the Children Act 1989 for example is headed “protection of children.” Although technically a title in legislation has no legal effect, the Committee believes that there needs to be an assurance that the “protection of children” is not being reserved, especially as the Assembly currently has full legislative competence in relation to “protection and well-being of children.”

### **Reservation 187 – Equal Opportunities**

Under the current arrangements the Assembly can amend equality legislation insofar as its legislation relates to equal opportunities for public authorities. While some limited competence would exist by virtue of some exceptions in the Bill, the Committee is extremely concerned that this reservation includes the subject matter of the Equality Act 2006 and the Equality Act 2010 and would therefore reduce the Assembly’s legislative competence significantly.

The Committee cannot support this reduction in legislative competence, and seeks urgent clarification as to why legislative competence is being rolled back in this respect.

### **Reservation 194 – School teachers’ pay and conditions**

School teachers’ pay and conditions are expressly reserved in the Bill. Teachers’ pay and conditions was not a devolved area under the current settlement and was protected by the current provisions on Minister of the Crown consents.

The Welsh Government have asked that this should not be a reservation and should be reconsidered especially in light of the fact that it was the UK Government that requested the Silk Commission to consider the devolution of Teachers’ Pay and Conditions. The Secretary of State for Wales gave a commitment in his letter dated 3<sup>rd</sup> September 2015 to the First Minister to give further consideration to the devolution of teachers’ pay and conditions. The Committee therefore seeks urgent clarification as to why teachers’ pay and conditions has been listed as a reservation.

### **Restrictions on Criminal law**

The Committee notes that one of the new restrictions under the Bill is that an Assembly Act must not modify or create a criminal offence in a “listed category.” Sexual offences (including offences relating to indecent or pornographic images) is included in the listed category of offences. The example below demonstrates



how the proposed settlement would reduce the Assembly's competence in relation to the criminal law and specifically affect the remit of this Committee.

#### Example - Sexual exploitation of children

In the context of sexual exploitation of a child, the definition of "sexual exploitation" in the Sexual Offences Act 2003 includes "recording" indecent images of a child. The Policing and Crime Bill amends that definition to clarify that "streaming" and "transmitting" indecent images of a child are included in the definition.

This is within the legislative competence of the Assembly because it relates to the following Schedule 7 subject:

- the protection and well-being of children.

There are no relevant exceptions (for example, sexual offences is not an exception). Therefore, this part of the Policing and Crime Bill is currently within the legislative competence of the Assembly and the Assembly's consent is needed before the UK Parliament can legislate in this area.

Under the Wales Bill, Assembly legislation will not be able to modify or create a sexual offence. The Policing and Crime Bill's amendment to the definition is modifying (or possibly creating) a sexual offence, therefore under the Wales Bill it would be outside the Assembly's competence and no LCM would be needed.

#### **How will the draft Bill affect the Assembly's ability to legislate effectively in future?**

The Committee remains concerned that the reservations, necessity tests and other restrictions in the Bill will unnecessarily constrain the Assembly's ability to legislate effectively in areas where it already has powers or functions. I refer the Committee to the example set out in our letter to the Secretary of State for Wales with regard to the designation of the Chief Officer of police as a partner on safeguarding boards.

The Committee did, however, welcome the removal of the reservation relating to the Children's Commissioner in England. This means that while the UK Children's Commissioner will remain a reserved authority, the Assembly in future could legislate to extend the remit of the Office of the Children's Commissioner for Wales subject to the consent of the relevant Secretary of State.

This represents a step forward from the current position. However, the Committee notes that any future proposals for the extension of powers for the Commissioner could still be vetoed by a UK Minister.



The Committee believes that, given the lack of clarity in the reservations and general restrictions, there must be scope to amend these in the future. The Committee acknowledges that GOWA Section 109 Orders are likely to remain in place, but that this can be a lengthy, and complicated, process. In order to secure a more streamlined process, there should be a more flexible system whereby a reservation or general restriction could be amended, possibly with the consent of a Minister of the Crown.

## **Conclusion**

The Committee has grave concerns about the proposed reduction in the Assembly's competence in areas that fall within the Committee's remit.

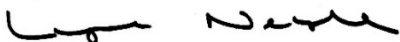
The Committee is extremely concerned about the lack of clarity in the Bill, and believes that:

- reservations should be underpinned by principles, which can be explained clearly and simply; and
- the full extent of the specific reservations should be explained in the explanatory notes accompanying the draft Bill.

The Committee believes there should be a more flexible system whereby a reservation or general restriction could be amended, possibly with the consent of a Minister of the Crown.

The Committee acknowledges that the legislative timetable for the Bill makes consideration of these matters difficult, but believes that these matters must be addressed before the passage of the Bill is complete.

Yours Sincerely



**Lynne Neagle AC / AM**  
Cadeirydd / Chair

