Llywodraeth Cymru
Welsh Government

Mark Parkinson
Joint Secretary
Commission on Devolution in Wales
1 Caspian Point
Cardiff CF10 4DQ

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Dear Mark

I am writing in response to your letter of 29 July which asks:

1. How would a Reserved powers model "be developed from the existing conferred powers model and subsequently introduced"?

2. What are the relative merits of the Scotland Act/Northern Ireland Act models for enabling the transfer of functions at a later date?

These questions are considered below.

General principles

A new Government of Wales Act would be required to restructure the Welsh settlement on a Reserved powers basis, but this would not, in our view, be "developed from the existing conferred powers" settlement. It would require a different approach, starting from the definition of those powers to be Reserved.

It is worth noting that the current conferred powers settlement is constructed on the foundations of a model of executive devolution which in 1997 placed the National Assembly in a role of exercising powers originally conferred by Parliament on the Secretary of State. As is normal with powers delegated to Ministers, these were defined quite narrowly. Subsequently, legislative competence was given to the Assembly in relation to those subjects within which executive powers had already been transferred. Consistently with the previous devolution of responsibilities, the scope of that competence is still carefully delineated by Schedule 7 to the Government of Wales Act 2006 ("GOWA 2006"), and Westminster and Whitehall consider it necessary to police the boundaries of the settlement to ensure that the devolved institutions do not exceed their powers. In spite of the deepening of the powers achieved by the GOWA 2006, including primary legislative powers following the 2011 referendum, the existing settlement therefore retains the "limiting" ethos implicit in executive devolution.

Parc Cathays
Caerdydd
CF10 3NQ

Cathays Park
Cardiff
CF10 3NQ

Ffôn • Tel: (029) 2082 3952
GTN:1208
Ffacs • Fax: (029) 2082 3952
Ebost • Email:Carys.Evans@wales.gsi.gov.uk

GOWA 2006 has been described by the Supreme Court as a more cautious transfer of power than occurred in, for example, the Scotland Act 1998. The cautionary nature of the current settlement is seen not only in its fundamental structure, as discussed above, but also in a variety of restrictions on the Assembly's competence, breach of any of which renders the legislation in question unlawful. The most obvious of these is a relic from the days when only executive (i.e. ministerial) power was devolved in Wales and which protects Minister of the Crown (i.e. UK Government) functions in areas of legislative competence that are otherwise recognised as devolved – e.g. health, the Welsh language, local government.

This complex, multi-layered system of limitations and restrictions creates a variety of legal impediments to the ability of the democratically elected devolved legislature to legislate in the interests of the Welsh people. Where these multi-faceted legal questions arise they can only finally be resolved by the Supreme Court.

In any settlement of power of this nature, there will always be legal boundaries that will inevitably require to be tested in appropriate cases. But, in the Welsh Government's view, a settlement cannot be coherent, stable and workable when serious disputes can arise over whether, for example:

(a)power over the provision of a health service, the prevention, treatment and alleviation of illness, injury and disease includes consent to human organ and tissue donation;

(b)power over agriculture includes the terms and conditions on which farmers engage agricultural workers; or

(c)power over the functions of local authorities includes power to create a new localised procedure for the making of local byelaws which involved the removal of a defunct Minister of the Crown power.

The infrastructure of the current settlement has the potential to *regularly* throw up such questions, not as to the outer-limits of the settlement but at the centre – i.e. on matters that are obviously otherwise devolved (or are in the Scotland and Northern Ireland settlements). Such a structure lacks the necessary quality of reasonable clarity and certainty that an *enduring* settlement should achieve.

Guidance will, of course, be gleaned for the future interpretation of the settlement by judgments given by the Supreme Court when devolved legislation is referred to it. However, the very fact that the current system throws up such serious questions with such regularity creates, at the very least, the perception that in law-making in Wales the judicial role is equivalent to the role of the democratically elected legislature – i.e. that the legislation passed by the National Assembly does not have the quality of law unless and until franked by the Supreme Court. This blurs the separation of powers and has serious consequences for the legitimacy of the settlement, the devolved institutions and the devolved law.

Before embarking on an explanation of a potential methodology for the development of a reserved powers model, we must first be clear about what such a model means for the powers of the Assembly.

A Different Approach

The advantages of moving to a Reserved model of competence, are set out in paragraphs 5-12 of the Welsh Government's evidence to the Commission of February 2013 and rest on the need to maximise clarity and certainty of competence, and to minimise the possibility of conflict between governments.

This will not be achieved by a reserved powers model that merely divides the same powers but in a different way. Any attempt to create the same division of powers as currently exists but by way of reservations will simply create a mirror image of the current settlement and replace one set of complex boundary questions with another set of equally complex boundary questions. A reserved powers status quo model, therefore, is not an answer.

Consistently with this, the Welsh Government's evidence made the case for removing the general restriction on modifying or removing Minister of the Crown functions. Thus, in constructing the Reserved powers model, consideration will be needed as to whether there are any devolved areas in which areas covered by Minister of the Crown functions should remain non-devolved and which should therefore become Reserved matters.

This impediment to the Assembly's ability to legislate without the Secretary of State's consent is, moreover, a blunt instrument. The effect of it is that, with some exceptions, the absence of such consent *automatically* renders the relevant provision of National Assembly legislation unlawful.

To achieve the quality of reasonable certainty and clarity that a new settlement should aspire to, there should be reassessment of the need for this special protection for Minister of the Crown functions. If protection is needed, the policy area to which those functions relate should be considered for a potential, targeted reservation from the powers of the Assembly. There is no special justification for treating a non-devolved area differently, in terms of the Assembly's power, depending upon whether there are Minister of the Crown functions relating to that area or not.

The negative impact of this restriction in terms of clarity and certainty outweighs considerably the benefit to the UK Government of controlling the Assembly's power. The benefit to the UK Government of a safety net that indiscriminately catches all provisions touching on Minister of the Crown functions is disproportionate to the objective sought to be achieved.

Northern Ireland & Scotland Acts 1998

In constructing their case for a new settlement on a Reserved powers model, our Ministers considered the case for following the Northern Ireland model. This includes three categories: matters on which the Northern Ireland Assembly can legislate (transferred), matters on which the Assembly cannot generally legislate save in limited circumstances with the Secretary of State's consent (excepted) and matters on which the Assembly can generally legislate but only with the agreement of the Secretary of State (reserved).

The Welsh Government does not wish to argue for this approach in respect of Wales, as it would put any Secretary of State (including the Secretary of State for Wales) in a new and enhanced supervisory role vis a vis the Assembly in respect of legislation on "excepted" and "reserved" matters. Creating such a category of matters would militate against one of the key principles of our evidence, which is to minimise the possibility of conflict between governments. It would also be a retrograde step from GOWA 2006 to some extent because section 108(5) of that Act already confers power on the Assembly to make provision in non-devolved areas in limited circumstances without the need for Secretary of State consent.

Therefore we advocate a settlement structured as in Scotland which has only two categories: matters Reserved to Westminster and matters on which the Parliament can legislate. We see no need for a middle category, which was created to fit the very specific circumstances of Northern Ireland.

Parliamentary legislation on devolved matters

We are arguing for a scheme of legislative devolution with an ethos different from the current scheme, which might be described as executive devolution with legislative competence "add-ons". But it is worth restating the fundamental point that this (unlike executive devolution, which does involve transfers of responsibility) would not mean the divesting of powers of Parliament to the Assembly. Provision would be made so that Parliament could continue to legislate for Wales (as it can in respect of matters devolved under the current settlement), although by convention, it would do so only on matters within devolved legislative competence with the Assembly's consent.

This means that where there are good practical reasons for maintaining a unified England and Wales approach (for example, in relation to fundamentals of the common law such as tort and contract) Parliament could, with the Assembly's agreement, continue to legislate for Wales on devolved matters. The Legislative Consent Motion process already provides the mechanism for securing the Assembly's consent in such circumstances, one on which the Assembly now has a well-developed body of experience and which generally works well. Expanding the Assembly's legislative powers would logically mean expanding the realm within which Legislative Consent Motions might be required.

This general point can be read across more generally to our evidence on the costs of devolving further powers. "Devolved" does not have to mean "stand-alone" i.e. the separate exercise of powers in all circumstances. Maintaining the same or similar systems in Wales as exist already in England and Wales does not in any way undermine the principle of subsidiarity. Just as the settlement enables a co-ordinated approach to legislation, it equally allows a joint approach to delivery, whether through UK, GB or England and Wales structures, or through cross-border protocols or other mechanisms. The effect of devolution is to *enable* the Assembly and Welsh Government to follow the approach best fitted to Welsh circumstances, and to be accountable for doing so; this may well, on occasion, justify a partnership approach with other governments or their agencies.

Constructing an enduring Welsh devolution settlement on a Reserved powers model

The First Minister has stated[1] that:

> *My view has always been that the conferred powers model is a transitional arrangement, in the same way as the legislative competence Order model was a transitional arrangement.*

The Welsh Government wishes to see a settlement that is enduring, coherent, stable and workable and which respects constitutional principles.

A settlement is not coherent if it appears on its face to provide competence over a matter but that competence is fragmented because on closer analysis it is incomplete or because the apparent competence is subject to hidden restrictions. The competence may be incomplete because it is unclear whether topics that underpin or are reasonably connected with the main subject area are also within the powers of the Assembly.

A settlement is not stable if its infrastructure requires regular modification. The mechanism by which legal powers are devolved to the National Assembly has changed fundamentally three times in the last fifteen years. A settlement is also not stable if the way in which competence is internally defined means that the competence may change depending on the circumstances.

A settlement is not workable if the democratic will of a locally elected legislature can be thwarted by the political will of the supranational executive. The practical workability of a

[1] Debate in the Assembly on 26 June 2013 on a Reserved Powers Model.

settlement must be called into question when its highly complex nature results *regularly* in the two governments who administer the settlement reaching *fundamentally opposing* views on the interpretation and application of the competence provisions.

An enduring settlement must establish an infrastructure within which powers may change over time, but which avoids a further fundamental change to or re-opening of the infrastructure itself.

A reserved powers model which maintained the status quo in terms of the division of powers would not deliver an enduring settlement. It is for that reason that the Welsh Government's evidence in February 2013 seeks a new settlement with a new approach to devolved powers for the Assembly. An enduring settlement requires a fresh approach, unfettered by the echo of executive devolution in Part 4 of and Schedule 7 to GOWA 2006, starting from the definition of those powers to be Reserved.

So, the restructured settlement would logically be constructed in three stages which will require a broad analysis of the division of powers.

Stage 1: identify what core matters should be reserved to Westminster, using Schedule 5 to the Scotland Act as a checklist or starting point;

Stage 2: identify which additional matters, over and above those identified in Stage 1, should be reserved in the case of Wales (this will include the conversion of, for example, the general restriction on Minister of the Crown functions into more targeted reservations (if necessary));.

Stage 3: examine the subjects in Schedule 7 to see whether any of the current exceptions should be reclassified as Reservations.

Stage 1 identify what should be reserved to Westminster using Schedule 5 to the Scotland Act as a checklist

As set out in paragraph 14 of our evidence, we believe that Schedule 5 to the Scotland Act 1998 may provide a useful starting point for identifying matters which should be Reserved to Westminster in a new Government of Wales Act. This does not mean that the Welsh settlement should mirror the Scottish, merely that the Schedule 5 Headings cover the territory in a useful way with Part 1 covering the constitutional foundations, and Part 2 providing a useful list of categories which all need to be considered in determining what should be Reserved.

Where a reservation in the Scotland Act 1998 forms a possible basis for reservation in a new GoWA, it will be helpful to consider the Scottish experience in order to fully understand the implications of framing a reservation in similar terms for Wales.

In the interests of clarity and transparency, we would argue for a new GoWA which defined the Reserved matters in the most accessible way consistent with legal certainty. Under some Headings in Schedule 5, the Reserved matters are specified by reference to the subject-matter of specific Acts of Parliament. This means that it is necessary to consult those Acts in order to understand what is excluded from the Parliament's competence, which carries its own risks and challenges. Other Headings describe matters on the face of the Schedule, so that the reader can easily see what is intended to be outside competence – this is the approach we would prefer to be used, wherever practicable.

Stage 2: identify which additional matters should be Reserved in the case of Wales

Our evidence specifies a number of matters which we think should be Reserved to Westminster which do not feature in Schedule 5 to the Scotland Act: Charities Law, Land Registration and the primarily private law aspects of family relationships (formation and dissolution of marriages and civil partnerships, allocation of legal parentage and consequential matters, including distribution of property and post separation parenting arrangements; and wills and intestacy).

In addition, our evidence argued that while devolution of Justice should form part of a sustainable, long term devolution settlement for Wales, this is not practicable in the short term. Therefore it will be necessary to define those matters to be included in a Justice reservation. Schedule 3 to the Northern Ireland Act 1998 offers a precedent for such a reservation, but its drafting builds on earlier Northern Ireland legislation and would need to be updated.

In the interests of clarity and simplicity, we would be looking for a reservation listing those discrete areas which comprise the Justice system, including prisons, probation, youth justice, the organisation and administration of courts and tribunals (with an exception for devolved tribunals), the judiciary, family justice (as discussed above, with an appropriate exception for public family and social welfare matters) and legal aid.

This should be drafted in such a way as to enable devolution, by agreement, at a later date. We believe the Scotland Act mechanism for achieving this, through amendment by Order of the list of Reservations, provides a suitable mechanism.

In addition, as discussed above, the Welsh Government considers that the general restrictions under the current settlement, and particularly those relating to Minister of the Crown functions, require reconsideration. We would expect the case to be made for appropriate, targeted reservations in these areas rather than a disproportionate catch-all restriction that requires the National Assembly to obtain the consent of a UK Government Secretary of State (which in some cases requires UK Government collective agreement).

Stage 3: examine the subjects in Schedule 7 to see whether any of the current exceptions should be transferred into Reservations.

Finally, it would be necessary to determine whether the exceptions to the devolved subjects as set out in Schedule 7 to GoWA should remain and be expressed as Reservations in the new Act. Some of these exceptions remain valid, others are out dated and should not become Reservations: this case is made in detail in paragraph 14 of the Welsh Government's evidence.

Introduction of a Reserved powers model

Paragraph 28 of the Welsh Government's evidence set out our suggested timetable for implementation; we accept that it will be for the UK Government to be formed following the 2015 General Election to take all this forward. Building on this the key stages might be:

Autumn 2016	Publication of Draft Bill
Summer 2017	Bill Introduction
Spring 2018	Royal Assent
2018-2020	Planning/Implementation
2021	Assembly elected with new powers

The experience of drafting the relevant White Papers, and the 1997 and 2006 Acts, demonstrates that there would need to be close collaboration between the Welsh and UK Governments, possibly including senior secondments from the Welsh Government to the Wales Office, to translate the UK Government's intentions into detailed drafting instructions.

The proposed new Government of Wales Act will present challenges, including the drafting of the Justice reservation as set out above, but we believe that, with commitment on both sides, these are manageable. Equally there will be major parts of the Bill where the drafting challenge will be helped significantly by the policy and legal experience accrued in recent years – both from operating the Assembly's existing legislative powers, and building on the Scotland Act where appropriate. In addition, we anticipate that the Commission's own Part 2 report will significantly assist the process.

The First Minister has seen this letter in draft and has approved it.

Yours sincerely

Carys Evans

Carys Evans
Deputy Director
Constitutional Affairs and Inter-governmental Relations