

Chapter 4 – The model of devolution

4.1 OVERVIEW

- 4.1.1 This chapter explains the legislative framework within which the Welsh devolution settlement currently operates, and the arguments received for change. We compare the different models and set out how we see the future of the devolution settlement in broad terms.
- 4.1.2 The model of devolution was one of the topics most frequently raised in evidence. Almost all the views expressed were in favour of the reserved powers model, although the UK Government was supportive of the existing model.

Box 4.1: Evidence on the model of devolution

The UK Government said: *'The Welsh settlement is satisfactory and works well in practice'*.

The Welsh Government told us that they were clear *'that the reservation model is a technically superior method of devolving legislative competence on a devolved legislature. In our view, the conferral model is incapable of prescribing with any degree of certainty exactly what the Assembly can legislate about... The Welsh model... lacks clarity and certainty and much time is spent addressing potential arguments about whether provisions of a Bill relate to... [an] undefined subject-matter'*.

The UK Changing Union project's submission argued that *'a conferred powers model creates confusion, complexity and uncertainty for the Welsh and UK Governments, Assembly Members, MPs and Peers, and the Welsh public.... A reserved powers model would do away with most limbo areas. It would mean much more certainty about the basic subject-matter competence of the Assembly. It would save much work for Welsh Ministers, their staff and the Assembly Commission. It would begin to put the relationship between Cardiff Bay and Westminster on a more adult footing. It would provide clarity for the public and civil society. It is the right solution and the right moment to adopt it'*. Its 'Our Future' project also support a move to a reserved powers model.

The submission from the Hywel Dda Institute of Swansea University's School of Law concluded that *'the reserved powers model is, in principle, superior in terms of accessibility, clarity, stability, sustainability, effectiveness and consistency with the principle of subsidiarity'*. They also addressed the issue of how to reserve the legal system under a reserved powers model: *'So the challenge of identifying and treating separately those kinds of provision which relate to matters of general private or public law would not be a totally new one [referring to the 1978 Scotland Act]. Whilst the view that it would be "complex" and "uncertain" is to be respected, this does not mean that it should not be undertaken if the benefits of doing so are great enough'*.

Cardiff Law School believed that, under the principles of clarity, coherence and subsidiarity, the conferred powers model was inadequate, and that moving to the

reserved powers model *'represents the next logical step in the process of devolution'*.

Constitutional trainers and consultants Your Legal Eyes suggested that the Northern Ireland model of devolution was the *'best model which could be adapted to fit Wales' needs'*.

Aberystwyth University's Institute of Welsh Politics set out that the *'merits of the "reserved powers" model akin to Scotland are well developed and include establishing clearer, simpler, more effective and accountable arrangements for Wales'*.

The Equality and Human Rights Commission Wales's submission gave support for the reserved powers model, but noted an advantage the present conferred powers model had afforded Wales: *'In general terms the Scottish model gives greater powers and provides clarity in relation to what is devolved and what is reserved. However, some constitutional and equalities experts... have noted that the devolved model in Wales has enabled the Welsh Government to take steps not available to the Scottish Government. For example, equality standards have been built into regulatory frameworks in Wales... As the regulation of equality and human rights is reserved to the UK Government, the Scottish Government was unable to include equality in its regulatory regimes'*.

Professor Alan Trench said: *"Moving to a 'reserved powers' model of conferring functions on the National Assembly would have a number of significant benefits. It would provide for greater legal certainty, and reduce the possibility of functions widely understood by the general public to be devolved being held to be beyond devolved law-making competence on grounds of what may be seen as 'technicalities'. The reserved powers model provides for greater certainty about devolved competence at the margin, as it means those claiming devolved legislation is beyond competence have to identify the reservation that limits it, rather than forcing those claiming it is within competence to point to the power or powers making it lawful."*

Professor Thomas Watkin said: *'The first choice, therefore, that needs to be made is between these two approaches [conferred and reserved powers]. Logically, neither is different from the other in its result. The basis on which the choice is to be made must therefore rest on other factors. The breadth of the legislative competence being devolved may well loom large and be thought to be an important, possibly decisive, factor in making the choice. If very broad powers are to be devolved, it will be simpler to set out {not x} [ie what is not devolved]; if fairly narrow powers are to be devolved, setting out x [ie what is devolved] will be simpler'*.

Submissions in favour of the reserved powers model were also received from SNAP Cymru, Community Housing Cymru, the Parliament for Wales Campaign, the Wales Council for Voluntary Action, UCAC Teaching Union, the Bevan Foundation, the Children's and Older People's Commissioners for Wales, Unite Wales, Citizens Advice Cymru, Gofal, Wales Study Group of the Study of Parliament Group, the Electoral Reform Society Wales, Cymdeithas yr Iaith Gymraeg, Federation of Small Business Wales, Federation of Master Builders, BMA Cymru Wales, and RSPB Cymru.

Lord Morris of Aberavon was also in favour of the reserved powers model, as was the Presiding Officer in her oral evidence to the Commission.

4.2 CURRENT ARRANGEMENTS

- 4.2.1 Following the referendum in March 2011, the National Assembly for Wales was empowered to make primary legislation in the 20 broad policy areas set out in Schedule 7 (see Box 2.5). Thus the areas where the National Assembly can legislate are conferred upon it, and listed in the statute. This is known as the *conferred powers model*.
- 4.2.2 The corresponding legislation for Scotland and Northern Ireland sets out the areas where the devolved legislature cannot legislate – areas that are reserved to the UK Parliament. This is known as the *reserved powers model*. This model was also in place in Northern Ireland between 1921 and 1972.
- 4.2.3 The Richard Commission recommended the reserved powers model for Wales, but the then Secretary of State for Wales and then First Minister provided a memorandum to the Welsh Affairs Committee in 2005¹ explaining why this model was not that used in what became the 2006 Act.
- 4.2.4 In many of the twenty Subjects under Schedule 7, there are also exceptions, which specify particular aspects of that Subject that are non-devolved. These exceptions apply across the settlement. For example, ‘Broadcasting’ appears as an exception under the Subject of ‘Culture’ and is not specifically included under the Subject of ‘Welsh Language’. The exception applies across all Subjects, so that the National Assembly cannot legislate for the use of Welsh language in broadcasting.
- 4.2.5 A Member in charge of any Assembly Bill has a statutory obligation to state that the Bill he or she is introducing is within the National Assembly’s legislative competence. For government Bills, this is a Welsh Government Minister, so it falls to the Welsh Government to ensure that any Bill it introduces in the National Assembly is within the National Assembly’s competence. Determining whether a proposed Bill is within the competence of the National Assembly is also a key responsibility of the Presiding Officer, who must provide Assembly Members with a memorandum setting out his or her judgement on an Assembly Bill when it is introduced. The Presiding Officer’s memorandum does not prevent consideration of a bill that he or she has judged to be outside the National Assembly’s competence.
- 4.2.6 Once a bill has been passed by the National Assembly, and before it is submitted for Royal Assent, the Attorney General (or the Counsel General) has 28 days to consider whether the Bill as a whole, or any provision of the Bill, is within competence. If the Attorney General or the Counsel General believes it is not, either may refer the question to the Supreme Court to determine. This has happened on two occasions since the National Assembly received its full law-making powers in May 2011. The first was the reference

¹ Welsh Affairs Committee (2005) – *Government White Paper: Better Governance for Wales: Minutes of Evidence – Annex 2 – Primary Legislative Competence of the Assembly – Commentary*

by the Attorney General of the Local Government Byelaws (Wales) Act, which was passed by the National Assembly in July 2012. The Supreme Court delivered a judgement in November 2012 that it was within competence.² The second was the Agricultural Sector (Wales) Bill, passed in July 2013 and again referred by the Attorney General. The Supreme Court is expected to hand down a judgement on that Bill after the publication of this report.

4.3 ARGUMENTS IN FAVOUR OF THE CONFERRED POWERS MODEL

- 4.3.1 The evidence we received was overwhelmingly in favour of a reserved powers model, but we fully explored the arguments in favour of a conferred powers model.
- 4.3.2 The first argument in favour of conferred powers is the incremental argument. It is suggested that the conferred powers model reflects the incremental transfer of legislative responsibility that has characterised devolution in Wales to date, and that it is logical to build up competence step-by-step by conferring specific powers, rather than listing all possible powers in a list of reservations and deleting them individually. It is also claimed that, in transferring competence from Parliament to the National Assembly, it is clearer to specify each newly conferred power.³
- 4.3.3 The second argument is that the conferred powers model has a presumption against powers in new or non-identified areas being held by the National Assembly. A reserved powers model would change the presumption of where a non-identified power would lie. Currently the UK Parliament would be responsible for any issue not specifically devolved to the National Assembly. Under a reserved powers model, the presumption would be that the National Assembly would be responsible for anything not specified as being reserved. This would mean any issues that were not considered at the time the legislation setting out the settlement was passed would be devolved by default. This would also apply to responsibilities relating to new policy areas and, for example, technologies not yet invented. While this “residual authority” issue is seen by some as an argument in favour of a conferred powers model, others see it as an argument in favour of a reserved powers model. However, it is an important consideration to bear in mind.
- 4.3.4 The third argument is that there is a pragmatic case for a conferred powers model if most powers are retained by the UK Government, simply because a list of conferred powers would be shorter than a list of devolved powers. As it was put to us, “if you are asked whether you have been to Europe, you would say ‘yes, everywhere except Sweden’ if you have visited a lot of countries, or ‘yes, I’ve been to France, Spain and Italy’ if you have visited only them”. Given that the devolution settlement in Wales is narrower in scope than that of

² UK Supreme Court (2012) - *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* UKSC 53

³ The international evidence which we reviewed suggests that where there is a process of devolution from a formerly unitary state, there is often a conferred powers model with the residual authority remaining with the federal government as in Belgium and Spain.

Scotland or Northern Ireland, legislation setting out the powers reserved to the UK Parliament would be long and complicated. This argument was cited by the then First Minister for Wales and the Secretary of State for Wales in 2005. As more powers are devolved, this argument becomes weaker.

- 4.3.5 There is also an argument based on the single England and Wales jurisdiction. The 2005 memorandum of the First Minister and Secretary of State suggested that changing to the reserved powers model could inadvertently result in Wales becoming a distinct legal jurisdiction by default. To prevent this fundamental change, the extent of law-making powers would therefore need to be circumscribed. This could be achieved under a reserved powers model only by specifically reserving fundamental legal principles and basic legal rules to the UK Parliament. The 2005 memorandum claimed this would be very complex, and might not even be possible.
- 4.3.6 There is also an argument of appropriateness. The current Secretary of State for Wales also set out in his June 2013 speech at the Wales Governance Centre⁴ his view that the conferred powers model allowed the flexibility and surety that was appropriate to Wales's historical and geographic circumstances.
- 4.3.7 A final point made to us in evidence was that the conferred powers model could allow a more generous interpretation of the devolved powers than a reserved powers model. For example, legislation could be more far-reaching within a conferred subject area than it might be with stricter limits set in a reserved powers model. This is because the onus of proof that a matter is not within competence would rest with those arguing that it goes beyond the subject area, or relates to an area listed as an exception, or to a non-devolved area. Of course, this would only be an argument in favour of the conferred powers model if one were to favour a more expansive settlement.

4.4 ARGUMENTS IN FAVOUR OF THE RESERVED POWERS MODEL

- 4.4.1 The first argument in favour of a reserved powers model is that of clarity. With a clear set of reservations, the limit of the devolution settlement should be more apparent and so allow the National Assembly to legislate with confidence. As the Law Society told us, *'It could be argued that the combining of express references to subjects in Schedule 7 with exceptions leads to doubt as to whether a legislative provision came within a subject or an exception, thus possibly leading to legal challenge'*. This was an argument advanced by several others. Essentially, the conferred powers model includes a list of what is devolved, and a second list of exceptions – leaving aside the exceptions to exceptions. Comparing these lists creates uncertainty, and issues addressed by neither list could be contested. A reserved powers model would remove

⁴ Wales Office website (June 2013) – Speech - *Welsh Secretary delivers 'Wales in the Continuing Union' speech*

what might be called ‘grey areas’ that characterise the present settlement. In short, there would be only one list.

- 4.4.2 There is another aspect to the lack of clarity in the current conferred powers model. The Hywel Dda Institute’s evidence pointed to the fact that exceptions in one Subject area apply across the settlement (see 4.2.4 above). This can cause confusion because of the apparently rather arbitrary choice of the Subject under which they appear. The Institute gave the example of subsidence caused by coal mining, which appears as an exception under the Subject of Economic Development, but could appear in a range of other Subjects or have the extent to which it applies more clearly enunciated. The whole Schedule needs to be consulted and considered before determining competence. This is contrasted with a more straightforward reservation in the Scottish settlement, which has more specific reservations that would apply to a subject area rather than cross-cutting exceptions.
- 4.4.3 The second argument is that a reserved powers model would be simpler. It was frequently pointed out to us that the present conferred powers model is particularly complex, with extensive executive Ministerial powers often not aligned with legislative powers and the need to acquire consent if legislation would affect the pre-commencement powers of the Secretary of State. The consequence is that it is difficult to know just how extensive the settlement is, creating uncertainty for legislators, business and individual citizens and lawyers.
- 4.4.4 We were told very firmly in both Scotland and Northern Ireland by the parliamentary authorities, by Ministers and their officials, and by the legal profession that the reserved powers model was inherently preferable to the conferred powers model. In the case of Scotland, the Secretary of State at the time immediately prior to devolution, Donald Dewar, had been most insistent, we were told, that the conferred powers model contained in the Scotland Act 1978 should not be contained in the Scotland Act 1998. Speaking in the House of Commons in July 1997, he said:
- “A... crucial difference from 1978—I shall telescope this—is that we have moved to define the reserved rather than the devolved powers, to ensure maximum clarity and stability. Anyone looking at the 1978 Act would see a somewhat grudging document, which would have required frequent updating. There would have been a greater danger—I put it no higher than that—of arguments over vires. We wished to minimise the difficulties of interpretation and to allow for maximum flexibility in future. We have done so.”⁵*
- 4.4.5 A third argument in favour of a reserved powers model is that it would be more stable over time. As foreseen by Donald Dewar, the reserved powers model appears to provide greater structural stability than the conferred powers model. The uncertainty over vires encountered in the first two years of full primary law-making powers in Wales has been striking, with two Bills

⁵ House of Commons, Official Report 31 Jul 1997: Column 462

being referred to the Supreme Court by the UK Government, and a number of other Bills where the National Assembly was uncertain of its competence.⁶ For Scotland in particular, it has been quite to make minor amendments to the settlement, rather for the UK Government to challenge legislation. For example, 168 minor modifications to the Scotland Act were made in the first decade of devolution – nine of which adjusted the powers of the Scottish Parliament.⁷

- 4.4.6 A fourth argument is that it would bring greater certainty. A particular argument comes with the residual powers, that is, subject areas not specifically identified in the devolution statute. In a conferred powers model, the National Assembly may be unable to pass specific legislation without certainty it is conferred. It would then have to seek Parliament's agreement for the devolution act to be amended to clearly devolve the specific area, or ask Parliament to legislate on its behalf. In a reserved powers model, if Westminster seeks to legislate in an area that is not reserved to it specifically, it can either legislate in that area or amend the devolution Act to reserve it. Traditionally, either approach would be with the agreement of the devolved legislature, though this is not strictly required for a sovereign Parliament. In a reserved powers model, the means for changing the settlement is better aligned with the desire to do so.
- 4.4.7 A fifth argument is that it would bring greater consistency and coherence across the United Kingdom, and that it is illogical to have both conferred and reserved devolution models in one nation state. There are advantages in structural symmetry between the three devolution settlements, even if the detail of what is devolved is different in the three countries. The United Kingdom appears to be unique in the world in operating two different models of devolution. Westminster and Whitehall could more clearly see the responsibilities for which it maintains day-to-day responsibility if they are expressed through three sets of reservations, many of which will be common to all the devolution settlements. It will also be beneficial in the development of common jurisprudence, particularly at the Supreme Court, for cases involving the operation of the devolution settlements.
- 4.4.8 A [sixth] argument in favour of a reserved powers model is that it would enable the settlement to be re-drawn, but this time based on clearer and more logical principles. Schedule 7 of the Government of Wales Act 2006 was drafted quickly, by force of circumstance. There was an expectation that it could be amended at leisure. In the event the referendum that brought it into force was triggered earlier than had been expected.⁸ Much evidence that we received, including from the UK Government, focused on the problems

⁶ For example, the BBC has reported doubts being raised over the National Assembly for Wales (Official Languages) Act 2012 in October 2012 and the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill in June 2013

⁷ An example given on the UK Government's web pages on the Scottish Settlement is the updating of the Scottish settlement to make clear a new Research Council is reserved to the UK Parliament. Had the Scotland Act not been amended, the Scottish Parliament would have been able to legislate for this new body. Gov.UK – Scotland Office and Office for the Advocate General (October 2013) – *Maintaining and strengthening the Scottish devolution settlement*

caused by the specific wording of the exceptions within the current settlement. That could perhaps be remedied by redrafting the current Schedule 7, but this would be unlikely to command wide support or to provide as satisfactory an outcome as a reserved powers model. Moving to a reserved powers model would be an opportunity to legislate for well-argued and rational reservations, drafted in a robust, considered and coherent way – reservations that the UK Government would have to defend publicly and before Parliament.

- 4.4.9 A final and practical argument in favour of the reserved powers model would be that it reduces the risk of litigation. Whereas two Bills of the National Assembly have been referred to the Supreme Court by the UK Government since 2011, there have been no such references of legislation passed by the Northern Ireland Assembly or the Scottish Parliament.⁹ Between them, they have passed over 200 Acts. It was argued in evidence that this suggests an inherent problem in the conferred powers model, and that a clearer legislative model would avoid the costs, confusion and delay associated with Supreme Court referrals.
- 4.4.10 As far as the connection between reserved powers and a separate jurisdiction is concerned, we understand from our discussions, including some with former Parliamentary Counsel, that reserving the fundamental principles of law and basic legal rules would be possible under a reserved powers model. Hence a separate jurisdiction would not necessarily be a consequence of such a model.

4.5 ASSESSMENT AGAINST THE COMMISSION'S PRINCIPLES

- 4.5.1 It became clear to us that we needed to take a view on the preferred model of devolution independently of our consideration of the powers that should be devolved. We formed the firm view that a reserved powers model would be superior to the current arrangements, and that it would better satisfy our principles of clarity, coherence, accountability, subsidiarity, stability, effectiveness and efficiency.
- 4.5.2 The reservations legislated for by Parliament would be drafted in a way that was clear for Parliament and defensible by the UK Government. The reserved powers would therefore be as coherent and understandable as functions of the UK Parliament. The consequence of that would be that the powers available to the National Assembly would also be more coherent.
- 4.5.3 In a reserved powers model, the settlement would set out more clearly the limits of devolved competence. We would expect law-makers to legislate with

⁸ The 2005 Memorandum by the Secretary of State and First Minister referred to above stated “*Such a referendum [on law-making powers] ought only be triggered on the basis of a broad political consensus in Wales in favour of primary powers. There is no suggestion that there is such a consensus at this time, nor is there likely to be one for many years to come*”. In fact, it was called for by the first Assembly operating under the Government of Wales Act 2006.

⁹ Nor were there any to the Judicial Committee of the Privy Council Prior to the establishment of the Supreme Court. There have been cases where challenges by businesses and others to Acts of the Scottish Parliament have been heard in the Supreme Court.

greater confidence and with greater regard to the purpose of the legislation, rather than being constrained by uncertainty about whether their intended purpose satisfies the set of conferred powers. This should allow legislation to better meet the needs and concerns of the Welsh electorate.

- 4.5.4 With a more clearly understood settlement, and a reduced possibility of doubt as to whether the subject of legislation is conferred or non-devolved, law-makers ought to have a clearer grasp of what is and is not possible. The removal of this uncertainty should enable legislation to be passed that is less ambiguous or prone to referral to the Supreme Court. This should remove some of the cost of the settlement, making it more efficient.
- 4.5.5 A clear reserved powers model would improve accountability by allowing businesses, civil society and the public at large to understand what Westminster is responsible for, and that the National Assembly is responsible for everything else. This would enable the public to feel better engaged in the political process, and to hold the responsible elected representatives to account.
- 4.5.6 Under a reserved powers model, Westminster would have to articulate the responsibilities for which it believes it ought to take day-to-day responsibility. This would mean exercising a judgement as to responsibilities that ought not to be held at a lower level. Areas that Westminster does not consider necessary to retain would be devolved. Approaching devolution in this way, rather than attempting exhaustively to identify the responsibilities that could be delivered closer to the citizens, is in keeping with our principles of localism and subsidiarity.
- 4.5.7 The process of moving, after proper discussion, to a reserved powers model would also have the advantage of allowing the settlement to be re-written in a way that would remedy the defects of haste and inconsistency that are apparent in the current model.
- 4.5.8 While we acknowledge that the conferred powers model has developed flexibly over time, a reserved powers model can also be modified over time as has happened to the Scottish settlement. The model would provide greater structural stability than the conferred powers model, for the reasons set out above.

4.6 HOW A RESERVED POWERS MODEL WOULD OPERATE

- 4.6.1 Under a reserved powers model, all powers that are not reserved are devolved. Changing models~~It should be acknowledged that moving to a reserved powers model is therefore likely to~~would mean intense discussion and be a substantial drafting exercise – though, as we have explained, this process would in itself be helpful. It would require a clear political commitment in order to ensure the necessary cross-Whitehall process of determining what should be reserved. ~~That~~This process should not involve Whitehall alone, but should be undertaken jointly with the Welsh Government. Goodwill and a willingness to collaborate will be necessary on

both sides. The National Assembly and the UK Parliament, ~~presumably through the Welsh Affairs Committee, will also need~~ are likely to wish to be consulted at the pre-legislative stage. Chapter 11 below sets out a possible timetable for this work.

4.6.2 As a Commission, we did not feel it was our role to draft a proposed Schedule of reserved powers, nor to present drafting proposals. We did, however, receive evidence from the Presiding Officer with suggestions of principles to be followed in preparing a new Schedule. We reproduce the main points in Box xx. ~~Suggestions included drafting reservations in a consistent style, or grouping schedules by style as well as subject (for example, more general reservations followed by specific ones), and to avoid using the formulation “the subject matter of the xx Act” as a means of expressing a reservation. These suggestions could form the basis of the collaboration on drafting we propose.~~

4.6.3 ~~An issue raised in our discussions was the so-called ‘destiny deficit’ of devolution—the process has been described as one without a clearly understood end.~~ The reserved powers model would reserve powers of two broad types: those that make clear that there are some responsibilities that could not be devolved without undermining the integrity of the United Kingdom as a Union, and those that are regarded for one reason or another as better exercised or an England and Wales or Great Britain or United Kingdom basis. ~~The range of powers that should be reserved are those that we do not recommend for devolution later in this chapter—matters like defence, international affairs and macro-economic policy~~ fall into the first category, and are discussed later in this chapter. Matters that that we believe should fall into the second category are discussed in other chapters.

4.6.4 Two very important matters fall within the second category: fundamental principles of civil law, and the criminal law in its broadest sense. We have already dealt with the argument that moving to a reserved powers model would necessarily mean the creation of a separate jurisdiction by suggesting that this could be resolved by drafting. In this context, the Hywel Dda Institute helpfully referred us to the Scotland Act 1978. This Act conferred on the Scottish Assembly the power to make criminal and civil law. It expressed this by listing two groups of powers: “civil law matters” and “crime”. It is worth setting out in full these two groups. This is done in Box xx

How to define basic legal principles: a legislative example

Civil law matters were expressed as: “Natural and juristic persons and unincorporated bodies. Obligations including voluntary and conventional obligations, obligations of restitution and obligations of reparation. Heritable and moveable property. Conveyancing. Trusts. Bankruptcy. Succession. Remedies. Evidence. Diligence. Recognition and enforcement of court orders. Arbitration. Prescription and limitation of actions. Private international law.”

Crime was expressed as: “Principles of criminal liability. Offences against the person. Sexual offences. Offences against public order, decency and religion. Offences against the administration of justice. Offences related to matters

included in other Groups in this part of this Schedule. Criminal penalties. Treatment of offenders (including children and young persons and mental health patients involved in crime). Compensation out of public funds for victims of crime. Criminal evidence. Criminal procedure including arrest, search, custody and time limits for prosecutions. Recognition and enforcement of court orders. Criminal research”.

4.6.5 The Scotland Act 1978 demonstrates that it is possible to produce a legal text that defines basic legal concepts, either for conferral or for reservation.¹⁰ In the case of the new reserved powers model we recommend for Wales, it will be necessary to decide which of these fundamental principles of civil and criminal law need to be reserved to Westminster.

4.6.6 We did not receive evidence calling for either criminal or civil law in their widest senses to be devolved. Full devolution of each would be a fundamental change: the law on offences against the person could differ between Wales and England, as could the penalties for the same offences. In the civil field, there could be different property, matrimonial, commercial or inheritance law. The necessary wide public debate on the desirability of this degree of potential difference between Wales and England has not yet taken place.

On the other hand, it is worth noting that both criminal and civil law are devolved in Scotland and Northern Ireland without any apparent adverse consequences.

4.6.7 Moreover, devolution of criminal and civil law powers would not mean that the UK Parliament would no longer legislate for the United Kingdom as a whole: it has frequently done so since devolution in criminal law areas in Scotland with the consent of the Scottish Parliament. Nor would it mean that there would necessarily be great divergence in the law: it is noticeable that civil law is very similar in Northern Ireland to England and Wales despite the powers that have existed since Northern Ireland came into existence for laws to differ.

4.6.8 Moving to a reserved powers model will be an opportunity for a careful consideration to be given to the justification for reserving fundamental civil and criminal legal concepts, based on the principles set out in the last Chapter. It is very likely that most will be reserved at least at first, though we will later be proposing that aspects of the treatment of offenders (for example) should not be reserved.

4.6.9 It will also be important to ensure that the reserved powers model does nothing to restrict the ability of the National Assembly to create criminal sanctions where it is necessary to support its wider devolved law making powers, or to exercise its legislative powers in public law aspects of the civil law.

4.6.10 It would also be sensible for the existing exceptions in Schedule 7 to be a basis for reservations in the model we propose. We go on to discuss change in

¹⁰ Some of the terminology reflects ideas in Scots law and is not therefore directly transferable

~~the case of some specific exceptions later in this report after taking into account the changes which we recommend later in the report.~~

- 4.6.11 ~~We would expect that the roles played by the Presiding Officer, Counsel General and Attorney General in monitoring the settlement and individual pieces of legislation within it would continue, but that these roles would be somewhat simpler.~~
- 4.6.12 Although major change could happen as a result of moving to the reserved powers model, it is important to emphasise that tThe change of model of devolution does not in itself change the scope of the settlement – it does not necessarily in itself mean further devolution. Even with the changes that which we recommend later in this report, the Welsh settlement would remain the most narrowest of the three in the United Kingdom, and Wales and England will remain the most intertwined nations of the Union. There would be a continuing need to engage politically and administratively to ensure that the settlement works for the people of Wales, who are strongly supportive of some form of devolution and expect elected representatives to work and use public money efficiently, maturely and effectively. In recommending a reserved powers model, we stress that this is not the panacea that some seem to believe it to be.
- 4.6.13 In Chapter 5 we set out how we would expect the settlement to be operated, and how future proposed modifications ought to be considered. This would include issues not currently included in Schedule 7 as they are novel policy areas, or because they were not considered at the time of drafting. We suggest how such topics could be considered and incorporated in the reserved powers model.
- 4.6.14 Under the conferred powers model, residual powers (that is, powers not clearly devolved) currently rest with the UK Government. Under the reserved powers model, unless they were specifically reserved, they would be devolved. This is a significant transfer of risk from the UK Parliament to the National Assembly. The Scottish experience has shown that occasions can arise where the list of reservations ought to be amended to reflect developments. Constructive relations to ensure that the settlement operates as originally intended are crucial. While it would be entirely possible for the UK Parliament to legislate unilaterally to amend the settlement, it would be a departure from the convention of only amending the settlement with consent.
- 4.6.15 In a reserved powers model, we would expect that the roles played by the Presiding Officer, Counsel General and Attorney General in monitoring the settlement and individual pieces of legislation made under it it would continue, but that these roles would be somewhat simpler.
- 4.6.16 ~~As noted above, there could be a need for a reservation to ensure that a separate legal jurisdiction for Wales was not created by default (we discuss the issue of a separate legal jurisdiction in Chapter 8). We received helpful evidence on this issue from the Hywel Dda Institute, who told us how the Scotland Act 1978 providing for a Scottish Assembly included the conferral of~~

~~certain powers relating to fundamental legal principles and basic legal rules. Its argument that if articulation is possible for conferring powers, it is equally possible for in reserving powers, is persuasive.~~

4.6.17 While Scotland has only reservations in its statute, the Northern Ireland Act 1998 has both 'reservations', which may be devolved in the future or can be legislated on with the consent of the Secretary of State, and 'exceptions', which are the equivalent to Scottish reservations. Some evidence suggested that the Northern Ireland model might be followed in Wales. The Northern Ireland model reflects the special circumstances of Northern Ireland and the need to proceed only with cross-community consent. We, therefore, do not believe that the Northern Ireland model would provide additional benefits to Wales.

Recommendations

R.1 The existing conferred powers model should be replaced by a reserved powers model. The two Governments should agree a process and timetable for developing and agreeing the new legislation setting out the powers reserved to Westminster.

4.7 MINISTER OF THE CROWN FUNCTIONS

4.7.1 Discussion of the model of devolution relates to the legislative powers of the National Assembly rather than the executive powers of the Welsh Ministers, but the two issues are linked. An issue that arose in evidence, perhaps particularly in light of the Supreme Court consideration of the Local Government Byelaws Bill, was that of Minister of Crown functions. These are the executive functions of UK Ministers.

4.7.2 Whereas Minister of the Crown functions in devolved areas were transferred in general terms to Scottish Ministers in the Scotland Act 1998, they have been transferred to Welsh Ministers on a case-by-case basis. The Government of Wales Act 2006 includes a requirement for the consent of the Secretary of State before amending or removing these powers in a piece of National Assembly legislation, unless it is incidental to the legislation or consequential to it. This requires close reading of relevant statutes before introducing Assembly Bills in order to identify any Minister of the Crown functions that might be affected. These are sometimes obscure or anomalous, as was apparent from the Supreme Court's consideration of the Byelaws Bill.

4.7.3 In order to reduce complexity and increase clarity, we believe that a future Government of Wales Act should include a general transfer to the Welsh Ministers of Minister of Crown functions in devolved (that is, non-reserved) areas. This would promote alignment between legislative and executive competence. We understand that there may be some reasons to retain specific functions in devolved areas that UK Ministers would continue to require, and these should be set out clearly as exceptions to the general presumption that Welsh Ministers should have sole executive powers in devolved areas. The Scotland Act 1998 provides a mechanism for Scottish

Ministers' functions to be transferred to a UK Government Minister (for example, in order to procure common equipment for emergency services in Great Britain), and it would be sensible for a similar provision to be included in the new Government of Wales Act.

- 4.7.4 As stated above, there are a number of areas where executive responsibility but not legislative responsibility was transferred to the National Assembly and then to Welsh Ministers. These transfers were done on a case-by-case basis and presumably for good reason. We were made aware of areas, like civil contingencies, where it would be appropriate for the Welsh Government to continue to have certain executive functions that go beyond the National Assembly's legislative competence. These areas should be set out in a format that could be easily consulted and understood.
- 4.7.5 Meanwhile, until a new Government of Wales Act is passed, we recommend prompt consideration of proposed National Assembly legislation by the UK Government to ascertain whether Minister of Crown powers are affected. There should be a presumption in favour of permitting any change proposed provided it is within competence.

Recommendation

- R.2 There should be a general transfer of pre-devolution Minister of the Crown powers to Welsh Ministers, subject to any necessary exceptions. In the meantime, consideration of potential Minister of the Crown powers in National Assembly Bills should be done promptly by the UK Government and with a presumption of consent.

4.8 Powers where no changes are proposed.

Box 4.3: Evidence on unchanged powers

Our opinion poll showed that a majority of people in Wales wanted no change in existing powers on tourism (93 per cent in favour of the status quo), housing (88 per cent), agriculture (86 per cent), roads (84 per cent), defence and foreign affairs (82 per cent), education (78 per cent) and health (70 per cent).

The UK Government said: *'The Welsh devolution settlement has evolved greatly over the last sixteen years, and is now wide-ranging. The Assembly and the Welsh Government are responsible for a broad range of domestic policy subjects, ranging from housing, planning and local government to health, education and the Welsh language. At the same time Wales benefits from being part of a strong United Kingdom, and Parliament and the UK Government are responsible for matters which benefit from a UK-wide, GB-wide or England & Wales approach, or where a common approach benefits everyone in the country collectively, such as economic policy, defence, security and foreign affairs'*

The Welsh Government said: *'The UK's constitutional fundamentals; Foreign Affairs and Defence; Home Affairs matters such as National Security, Immigration and Emergency Powers; most macro-economic and UK internal market matters; and*

Social Security, should all be within Westminster's exclusive remit. This should also be the case for Energy, Employment rights and Health and Safety matters. Charities and Charity law should continue to be matters dealt with on an England and Wales basis, as should Land Registration'.

The Wales in a Changing Union project said: *'We emphasise that in this paper we are adopting a broad brush approach, looking at "large" areas of competence. Detailed work will be needed to delineate precisely the extent of reserved powers. In this respect, we follow the lead of another useful starting point, the Richard Commission, which proposed the following high-level list of reserved matters:*

'the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice'.

Even within this list there are by now several areas in which the further devolution of legislative competence to Wales would be beneficial. In particular, we consider that a case can be made for devolution of legislative competence to the Welsh Assembly in broadcasting and policing'.

- 4.8.1 Within a decentralised state, certain responsibilities must rest with the central authority. We have therefore concluded that there should be no changes in powers in the following areas:
- The Constitution;
 - Macroeconomic policy;
 - Foreign Affairs;
 - Immigration;
 - Social Security; and
 - Defence.
- 4.8.2 In relation to Social Security, our opinion poll showed that there was some interest in devolving benefits and the welfare system. While some relevant aspects will be considered in Chapter XX, we agree with the evidence received that the transfer of costs and risks to Wales would not be appropriate. In keeping with our principle of equity, we do not believe that the welfare and benefits a citizen receives should be dependent on the local community's ability to pay for them.
- 4.8.3 Our terms of reference invited us to consider whether powers ought to be returned to Westminster. During our public events, we met individuals who felt strongly that particular public services had deteriorated since devolution. Our opinion poll also showed evidence of a wish among a minority of the people of Wales to return responsibility in areas like health. As health was a subject on which we received a fair amount of evidence, and given its significance within the devolution settlement, we consider it in more depth in Chapter 6. However, we received no widespread evidence that suggested that

devolution should be rolled back.¹¹ We therefore recommend no general return of powers to Westminster. In line with our principle of subsidiarity, and given the lack of evidence to the contrary, the existing devolved areas, such as health, agriculture, housing, education, culture, economic development and local government, should remain devolved.

4.9 CONCLUSIONS

4.9.1 The reserved powers model would allow a better system of devolution in Wales that would be clearer and allow lawmakers to undertake their role more confidently and with greater certainty to the benefit of the people of Wales.

4.9.2 The key arguments in favour of a reserved powers model are:

- it is inconsistent and illogical for two parts of the Union to have a reserved powers model and one a conferred powers model;
- with the development of devolution in Wales, a model which sets out what is not devolved is simpler than a model which sets out what is;
- it is clearer and empowering for people in Wales to know that if a power is not reserved, then it is devolved; and
- the introduction of a reserved powers model would be an opportunity to simplify the settlement, producing greater certainty about the scope of the powers of the National Assembly and of Ministers.

4.9.3 The choice of model does not of itself affect which powers are devolved and which are not.

4.9.4 There should be no reduction in the powers that are currently devolved to the National Assembly for Wales. The UK Parliament should continue to exercise its existing powers in the following areas:

- the Constitution;
- Macroeconomic policy;
- Foreign Affairs;
- Immigration;
- Social Security; and
- Defence.

¹¹ 3 per cent favoured fewer powers and 10 per cent favoured abolition of the National Assembly.