

Number: WG17658



Llywodraeth Cymru
Welsh Government

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Welsh Government

Evidence Paper

Evidence submitted by the Welsh Government to the Commission on Devolution in Wales

Date of issue: 18 February 2013

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The Commission issued a Call for Evidence on 29 November 2012 in respect of Part II of its remit. The Welsh Government welcomes the opportunity to contribute to the debate which the Commission has initiated. This Evidence constitutes the Welsh Government's formal response.

Summary

General

- The Commission's report can be expected to contribute to the developing constitutional debate in the UK later in this decade. It should take a broad view, seeking to establish a longer-term vision for the governance of Wales within the changing UK.
- The Commission should bear in mind the growth of support for devolution in Wales since 1999, and Welsh people's wish for the devolved institutions to play an increasingly important part in the governance of Wales.
- The Welsh Government's evidence reflects four considerations: a commitment to a devolved future for Wales within the United Kingdom; that the devolved institutions should have the powers most likely to enable them to improve the quality of life of people in Wales; the importance of having a simpler and clearer settlement, which enables decisions affecting Wales to be taken in Wales, with clearer accountability; and the need for prudence and caution in the Welsh Government's financial affairs, in difficult economic times.

Proposals on Legislative and Executive Competence

- There should be a new Government of Wales Act, establishing a devolution settlement for Wales based on a "Reserved powers" model of legislative competence for the Assembly. This would clarify accountability, and reduce the likelihood of conflict between the Welsh and UK Governments. Under such a model, the Assembly should be able to remove or modify UK Ministers' powers in areas of devolved competence. The model (i.e. the list of matters Reserved to Westminster) should be capable of adjustment from time to time without the need for primary legislation.
- The Welsh Government sees no case for reducing the Assembly's existing legislative powers. These should be preserved in a new devolution settlement, and certain of the limitations on the existing powers should be removed. Examples include the limits on legislative powers in relation to Water, where the Assembly's legislative competence should henceforth extend up to the geographical border with England; should include competence in relation to sewerage; and should cease to be vulnerable to unilateral Secretary of State intervention powers. Similarly, most of the

limitations on legislative competence on Local Government matters should be removed. But the Welsh Government does not argue for legislative powers for the Assembly in relation to Broadcasting; the existing limitation should stay, at least for the present.

- 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.
- We make detailed proposals for new legislative powers for the Assembly under our recommended "Reserved Powers" model of devolution. Responsibility for elections in Wales should lie with the Assembly, which should also have legislative competence on devolved tax issues following the Commission's First Report. In transport, we seek new powers for the Assembly in relation to speed limits, bus regulation, taxi regulation and ports. We are separately discussing new responsibilities in relation to Rail. We also argue for enhanced legislative competence in relation to Social Welfare and Families, and in relation to Equality.
- We believe that Policing and Justice (including criminal justice) should in principle be matters of devolved competence. But the potential costs and risks are such that we do not feel able to argue for transfer of criminal justice and administration of justice responsibilities at the present time; these should be matters to be devolved in longer time, without the need for new primary legislation. Devolution to the Assembly of responsibility for policing in Wales can and should be undertaken, however; and the Welsh Ministers should have executive responsibilities in relation to youth justice.
- The existing executive powers of the Welsh Ministers should be retained. Powers in relation to consenting of large scale energy generation (other than nuclear power), and on civil contingencies, should be transferred to the Welsh Ministers for exercise in Wales; and it should be for the Welsh Ministers to discharge Minister of the Crown functions in areas of devolved legislative competence. The Welsh Ministers' powers in relation to certain marine matters, currently exercisable only in relation to the Welsh inshore area, should be extended to encompass the Welsh offshore area. They should also gain new powers in respect of certain public appointments.
- While it would not be appropriate to establish a separate legal jurisdiction for Wales now, such a development is very likely in the longer term and action can be taken which would help to ensure a smoother transition to such a jurisdiction in due course. These include achieving a more clearly Welsh identity in the higher courts of England and Wales; new Welsh offices for the Court of Appeal and the High Court; and acceptance of the principle that the legal business of people in Wales should be administered and dealt with in Wales wherever possible. The Assembly should have

legislative competence in respect of Administrative Justice issues within areas of devolved competence, and the Assembly and the Welsh Ministers together should have powers enabling coherence to be created in relation to devolved Administrative Justice in Wales. The Welsh Ministers should be able to refer law reform projects to the Law Commission on the same basis as UK Ministers can do now.

Implementation

- A Bill giving effect to these proposals should include provision to confirm the title “Welsh Government”, and its Welsh equivalent “Llywodraeth Cymru” as the legal name of the devolved administration; but changes to the Assembly’s electoral arrangements should only be made with the Assembly’s consent and supported by a clear mandate from a UK General Election.
- All transfers of responsibilities from the UK Government to the Welsh Government should be accompanied by full budgetary transfers, subject to independent scrutiny and with the possibility of independent arbitration to handle unresolved disagreements about the size of appropriate transfers.
- Given that the Commission’s Final Report will not be published until early 2014, the Welsh Government appreciates that it will be for the UK Government and Parliament elected in 2015 to make decisions on the Commission’s recommendations. It understands that changes to the Assembly’s legislative competence, such as are proposed here, are unlikely to take effect until a new Assembly is elected in 2020 or 2021; but considers that changes to Ministers’ executive competence can take place at a mutually agreed time before that, as the current settlement continues to develop organically.
- The referendum in 2011 confirmed the Welsh electorate’s support for the Assembly to be an institution with extensive legislative authority for Wales. In the Welsh Government’s view, the proposals set out in this evidence do not raise any new issues of constitutional principle that would make another referendum necessary or appropriate before they could be implemented.

Introduction: The Context of the Commission’s Work

1. In the Welsh Government’s view, the proposed timetable for the work of the Commission is particularly significant. The Commission will submit its final Report in the spring of 2014. The referendum on Scottish independence will very probably be held later in that same year. Whatever the outcome of the referendum, it is likely to initiate a fundamental reconsideration of the United Kingdom constitution in following years. The powers and responsibilities of the devolved institutions in Wales, and their relationships with other UK governmental institutions, will inevitably feature in that debate, and the work of the Commission should help to inform and guide those discussions. In recent speeches, the First Minister has talked of a future United Kingdom “which is politically diverse, looser, and combines several centres of democratic accountability”, and the proposals in our evidence are fully consistent with that. The Welsh Government invites the Commission to view its task as one of helping to establish a firm foundation for the longer-term governance of Wales within the United Kingdom; its recommendations should therefore not simply address current issues and controversies, but propose a framework of governance for Wales, and powers for its devolved institutions, for many years to come.

2. In addressing these fundamental constitutional issues, the Commission should have particular regard to Welsh public opinion as it has developed over the years since devolution was introduced in 1999. The Welsh Government assumes that the Commission will undertake its own opinion-testing, but we draw attention to the data¹ on public attitudes to Welsh governance issues published since devolution took effect (provided by the Wales Governance Centre, Cardiff University):

Table 1: Who has Most Influence Over ‘the Way Wales is Run’? (%) 2001-2012

| <i>Response</i> | <i>2001</i> | <i>2003</i> | <i>2007</i> | <i>2010</i> | <i>2011a</i> | <i>2011b</i> | <i>2012</i> |
|------------------------------|-------------|-------------|-------------|-------------|--------------|--------------|-------------|
| NAW | 16 | 21 | 33 | 25 | 19 | 23 | 27 |
| UK Govt | 61 | 54 | 50 | 54 | 55 | 52 | 52 |
| Councils | 15 | 14 | 5 | 5 | 7 | 8 | 5 |
| EU | 3 | 4 | 6 | 6 | 7 | 7 | 5 |
| Don’t Know | 5 | 7 | 6 | 10 | 12 | 10 | 11 |
| <i>Number of Respondents</i> | 1085 | 988 | 884 | 1475 | 3029 | 2569 | 1039 |

¹ 2001 Wales Life and Times Survey, 2003 Wales Life and Times Survey, 2007 Welsh Election Study, 2010 Welsh Election Study, 2011a Welsh Referendum Study pre-referendum wave, 2011b Welsh Referendum Study post-referendum wave, 2012 YouGov poll for Wales Governance Centre.

Table 2: Who ought to have Most Influence Over ‘the Way Wales is Run’? (%) 2001-2012

| <i>Response</i> | <i>2001</i> | <i>2003</i> | <i>2007</i> | <i>2010</i> | <i>2011a</i> | <i>2011b</i> | <i>2012</i> |
|------------------------------|-------------|-------------|-------------|-------------|--------------|--------------|-------------|
| NAW | 54 | 54 | 72 | 54 | 53 | 53 | 51 |
| UK Govt | 25 | 27 | 17 | 29 | 25 | 27 | 26 |
| Councils | 16 | 13 | 8 | 9 | 10 | 10 | 10 |
| EU | 1 | 1 | 0 | 1 | 1 | 1 | 0 |
| Don't Know | 4 | 5 | 3 | 7 | 11 | 9 | 11 |
| <i>Number of Respondents</i> | 1085 | 988 | 884 | 1475 | 3029 | 2569 | 1039 |

3. These data show consistently, over a long period and regardless of the changing political complexions during that time of governments in London and Cardiff, a belief that the UK Government still has preponderant influence in the way Wales is run, together with a strong aspiration that the devolved institutions should play a more significant role in the governance of our country in the future. In the Welsh Government’s view, the Commission should reflect that aspiration in its recommendations relating to the balance of responsibilities as between Westminster and Whitehall on the one hand, and the National Assembly and the Welsh Government on the other.

Our Approach to the Issues

4. In preparing this evidence, the Welsh Government has borne in mind four considerations:

(i) First, the Welsh Government is firmly committed to a devolved future for Wales **within the United Kingdom**; as noted in paragraph 1 above, we look to the Commission to produce proposals which can “establish a firm foundation for the longer-term governance of Wales within the United Kingdom”. As the First Minister said in a lecture to the Institute of Welsh Politics at Aberystwyth in November 2011, “Devolution is concerned with the best structures of governance for the United Kingdom as a whole, compatible with the fundamental unity of the country. I am committed to that. So I will not support new proposals for devolution which have the potential for long-term damage to the UK”. The Welsh Government considers that the proposals in this submission for the development of the constitutional settlement for Wales are fully consistent with that overriding concern for the continuing integrity of the United Kingdom.

(ii) Secondly, where we make proposals for enhanced powers for the devolved institutions, we do so having in mind the principle of “powers for a purpose”. We wish the Welsh devolved institutions to have those powers which, used well, are most likely to enable us to improve the quality of life of people in Wales. Again to quote the First Minister’s Aberystwyth lecture, “Our institutions of government should enable the particular needs of people in Wales to be most effectively addressed. That means that governmental developments elsewhere within the UK may be of only limited significance. We need a constitutional settlement which reflects distinctive Welsh circumstances. We should learn from others – certainly – but never blindly follow. The flexibility inherent in devolution, its potential for allowing the development

of local solutions to local circumstances, should allow that to be done". So, in this evidence, we argue for a restructuring of Welsh devolution based on a "Reserved Powers" model of legislative devolution, as Scotland has, but we do not seek simply to replicate the Scottish devolution settlement for Wales. Instead we make proposals for the development of devolution based on a Reserved Powers model which we think best suits distinctive Welsh circumstances.

(iii) Thirdly, we think it is important to achieve a long term settlement that is both simpler and clearer than the present arrangements, and which enables decisions affecting Wales to be taken in Wales (while ensuring the constitutional, fiscal and economic Reservations of power to Westminster inherent in membership of the Union). Moving to a Reserved powers model of devolution will help with achieving clarity, and in addition the extension of powers proposed below will ensure that accountability for delivery of the key front line public services in Wales rests primarily with the National Assembly and the Welsh Government. This is already the case to a substantial degree, but there are gaps which are hard to justify from first principles, and our proposals would remedy this.

(iv) Finally, we recognise the need, in difficult economic times, to demonstrate prudence and caution in our financial affairs. Any major changes to responsibilities will need to be planned for and introduced over time, in line (we suggest) with the timetable for implementation proposed at the end of this paper. The financial implications of our taking on new responsibilities which would have major implications for our budgets would need to be agreed, and full implementation might be subject to phasing. Many of the functions and responsibilities we propose below should be capable of accommodation within existing Welsh Government structures; for others, capacity would need to be built up over time. The key issue is to create a sustainable structure, within a realistic timetable running over several years.

The Current Settlement

5. From the Welsh Government's perspective, devolution is not about how each of Wales, Scotland and Northern Ireland is separately governed. Rather it is about how the UK is governed, not by one but by four administrations, in a relationship which is not hierarchical. So the administrations of all four territories, including the UK Government in respect of England, have their separate responsibilities and accountabilities, which must be recognised and respected by all the other partners, as part of the joint enterprise of the governance of the UK. Consistently with that, the executive powers of the Welsh Ministers within common areas of devolved competence are to a considerable degree equivalent to those of Ministers in the other administrations; but the legislative powers of the Assembly are, even after the 2011 referendum, significantly more limited than those of their equivalents, both in the way that those powers are specified, and in their scope. The ability of the National Assembly to take legislative action to improve the quality of life of people in Wales is to that extent inhibited, and in this evidence we make proposals to rectify that.

6. Legislative competence is currently devolved to Wales under a "conferral" model. The Assembly has only the competence that has been conferred on it expressly by Parliament. This means that the Assembly can legislate only about the subjects listed in Schedule 7 to the Government of Wales Act 2006 (and those

subjects are in nearly all cases qualified by Exceptions, which have the effect of limiting the Assembly's ability to legislate on the subjects in Schedule 7). In contrast, legislative competence in Scotland is based on a "reservation" model. This means that the Scottish Parliament can legislate about any matter, provided that that matter has not been expressly "reserved" from its competence. The reserved matters are listed in Schedule 5 to the Scotland Act 1998.

7. The Welsh Government is 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. Many potential subjects of legislation are simply not mentioned at all in Schedule 7, leaving their status, devolved or non-devolved, vague and uncertain. The current Welsh model involves devolved subjects and exceptions to those subjects, but unlike in Scotland there is a potential third category, which is subjects that are not devolved despite there being no mention of them. So in assessing a competence issue consideration is required not only of what is devolved and what is excepted but also of what *might* be devolved under the conferral model, and hence what may *not* (yet) be devolved (even though those subjects are not referred to at all). This is complex, as these subjects are by definition unknown and undefined. The Welsh model therefore lacks important clarity and certainty, and much time is spent addressing potential arguments about whether provisions of a Bill relate to such undefined subject-matter. The reserved powers model deals with this more neatly. Everything is devolved unless it is listed among the reservations, and while the list of reservations in the Scotland Act 1998 is long, overall the position is, we believe, far more coherent.

8. This is constitutionally important, for two reasons. First, a devolution settlement which cannot clearly specify the respective responsibilities of Parliament on the one hand and the Assembly on the other results in confused accountability; ordinary citizens cannot be clear which legislature is responsible for what, and which should be held accountable for failure adequately to address particular matters of public concern. Secondly, constitutional arrangements should be designed to minimise the possibility of conflict between tiers of authority. Under the current structure, the UK Government can, and may sometimes feel driven to, argue that the Assembly cannot pass certain provisions because they relate to topics that are not expressly listed in Schedule 7 – and this even if those topics are not set out in the Government of Wales Act as Excepted matters. There is considerable potential for conflict on such occasions, with the Welsh Government arguing that a provision "relates to" a subject listed in Schedule 7, and the UK Government arguing that it should properly be seen as "relating to" a topic that is Excepted or not listed at all. Dealing with differences such as this consumes the time and effort of many civil servants in London and Cardiff on far too many occasions; and each such case has the potential for significant dispute between the two Governments. The Scottish model of reserved powers is clearly superior in its specification of the respective legislative responsibilities of the two Parliaments. That is important both for the practical conduct of day to day public administration, and for minimising the number of disagreements between the Governments.

9. So, in the Welsh Government's view, a new Government of Wales Act, reserving powers to the UK Parliament where appropriate (we say more about this below), and devolving the rest to the Assembly, would secure a major improvement

in certainty in the allocation of legislative competence as between Parliament and the Assembly in respect of Wales. This would clarify accountability, and reduce the likelihood of conflict between the two Governments. We invite the Commission to recommend accordingly.

10. However, any improvement in terms of clarity would be immediately undermined if the new scheme contained the same blanket restriction on removing or modifying powers of UK Ministers as currently exists (by virtue of provision in Part 2 of Schedule 7 of the 2006 Act). There are many of these powers, built up over the years, scattered widely across many areas of law, including devolved areas, such that the restriction has the potential to continue to be a major stumbling block for even the simplest Assembly legislation in respect of matters on which there can be little doubt that they should be for the devolved legislature in Wales. This is not a new issue. In 2009 the Report of the All-Wales Convention concluded:

“The problem with this General Restriction is that it seems to introduce an element of uncertainty into the scope of the National Assembly for Wales’s law-making powers. There is no composite list of relevant Minister of the Crown functions, therefore how can there be clarity on the extent of the National Assembly for Wales’s law-making powers...?”

This is not a theoretical problem, as the recent reference by the Attorney General to the Supreme Court of the Local Government Byelaws (Wales) Bill shows. Further, it has been an issue more often than not in the Welsh Government’s current legislative programme. The removal or modification of functions should, generally speaking, be uncontroversial (although the Byelaws case shows how even apparently uncontroversial instances can result in Supreme Court litigation), but dealing with them is a significant administrative burden that can cause delay and divert resources from more productive use.

11. Within a reserved powers model, what is needed is consideration of whether there are any devolved areas in which Ministers of the Crown should retain functions and which should therefore become “reserved matters”. The general restriction on modifying or removing Minister of the Crown functions should be removed. The idiosyncratic nature of the other general restrictions in Schedule 7 to the 2006 Act will also require reconsideration in any new settlement based on a reserved powers model. Retention of a statutory “purpose” test will also be required and, at least, an equivalent to section 108(5) of GOWA 2006 to enable the Assembly to make appropriate provision to enforce or give effect to Assembly legislation, and to affect non-devolved matters if that is consequential or incidental on changes to devolved law. These statutory arrangements are likely to continue to be needed in a new Government of Wales Act to secure an appropriate balance between devolved and non-devolved powers, given the fact that legislation on a subject applying in Wales has historically often been entwined with legislation on that subject as it applies in England.

12. Finally, under a reservation model of devolution, a mechanism is required, short of primary legislation, which would be available to keep the list of reservations up to date and, by agreement, adjust the balance of responsibilities of Parliament and the Assembly as circumstances change. The Scotland Act 1998 provides for an

Order in Council procedure to deal with this; the Welsh Government would be content for a similar procedure to be provided for Wales.

Proposals

A. The Existing Legislative Competence of the National Assembly

13. The Welsh Government sees no case for reducing the Assembly's existing legislative powers, as set out in Schedule 7 to the Government of Wales Act 2006, which were strongly endorsed by the Referendum result in 2011. These therefore should continue to exist (by virtue of not becoming matters Reserved under a new Government of Wales Act), although to the extent discussed below the Exceptions to the powers conferred by Schedule 7 should in substance be expressed in a new Act as matters Reserved to the Westminster Parliament.

So:

(i) Health and Health Services should continue to be matters for the Assembly's legislative competence, save that the Exceptions listed under the Health field in Schedule 7 to GoWA 2006 (for example, Abortion, Human Genetics and related matters, and Xenotransplantation) should generally become matters Reserved to the UK Parliament.

(ii) Education and the Welsh Language should continue to be matters for the Assembly's legislative competence, although the two Exceptions to the existing legislative competence in Schedule 7 relating to the Research Councils, and the use of the Welsh language in the courts should become matters Reserved to Westminster (given, in the case of the courts, that we are not proposing an early transfer of responsibility for the administration of justice).

(iii) Agriculture, Food and Rural Development, Economic Regeneration and Development, Environment, Housing and Flood Defence should all continue to be matters within the legislative competence of the Assembly, subject to a limited list of specific Reservations generally reflecting current Exceptions in Schedule 7.

(iv) The Assembly already has broad legislative competence in relation to Water but this is subject to two Exceptions which we wish to see removed as they are no longer appropriate. We want to remove the Exception relating to the licensing and regulation of any licensed water supplier within the meaning of the Water Industry Act 1991. We also wish to remove the Exception relating to the appointment and regulation of any water undertaker whose area is not wholly or mainly in Wales. This would ensure that the Assembly had legislative competence in relation to all matters relating to water, including licensing and the appointment and regulation of water undertakers, and that this competence extended to the geographical boundary with England in line with the legislative competence for other Acts of the Assembly. In addition to removing these Exceptions, we seek to secure new legislative competence for the Assembly in relation to sewerage. This would complement the Assembly's broad competence in relation to water and other environmental matters. We wish to ensure that legislative competence for sewerage extends up to the geographical boundary with England. We also propose removal of the existing

Secretary of State unilateral intervention power in the case of functions relating to water. There is an important interdependency between Wales and England in terms of water resource management, water supply and water quality. We consider that any concerns about potential adverse impact in England in relation to these matters would be more appropriately addressed through inter-governmental mechanisms that set out the basis for co-operation and joint working between the respective Governments.

(v) The Assembly also has broad legislative competence in relation to Planning matters but this is subject to an Exception for development consent under the Planning Act 2008. We wish to see this Exception removed i.e. that no updated version becomes a Reserved matter in a reformed devolution settlement. The Welsh Government will be publishing a Planning White Paper later this year setting out its proposals for reforming the Planning system in Wales, including in relation to devolved infrastructure developments. Legislative competence for the Assembly in relation to the consenting of energy generation (with the exception of nuclear power) and related energy infrastructure would enable the Welsh Ministers to ensure that a significant reform of the Planning system to achieve more integrated and streamlined decision-making for infrastructure developments in Wales (taking appropriate account of sustainability and environmental matters) could include energy developments and related energy infrastructure.

(vi) Culture should remain central to the Assembly's legislative competence, but the Welsh Government does not agree with those who argue that, within this field, Broadcasting should now be devolved. Television and radio now form just one element of a much wider range of platforms for digital communications. In a rapidly evolving digital environment we do not believe that it would be sensible now to attempt to devolve responsibility for broadcasting or certain elements of broadcasting. The vital role that broadcasting institutions play in creating a common cultural citizenship for people across the UK would not be strengthened by any attempt to divide responsibility for broadcasting institutions among its constituent parts. However, we acknowledge that the broadcasting landscape is changing rapidly. There is no guarantee that the structures currently in place will remain in the future, and the Welsh Government will respond according to developments. We do however believe that this vital UK role can in the meantime be reinforced by measures aimed at strengthening the particular contribution which the broadcasters make in each of those constituent parts. We also believe that it is essential to improve the accountability of UK broadcasting institutions to the National Assembly and to Welsh viewers and listeners. This improved accountability can best be delivered by strengthening the position of Welsh Ministers with regard to appointments made to the regulatory bodies governing broadcasting in Wales. We make specific proposals about this below.

(vii) Local Government should continue to fall within the Assembly's legislative competence, and of the Exceptions to this subject in Schedule 7, we believe that only the following should continue to be matters Reserved to the UK Parliament: Registration of births, marriages, civil partnerships and deaths (no advantageous policy purpose for people in Wales could be achieved by taking these powers); Sunday trading; and electoral registration. The Welsh Government believes that the following existing Exceptions to the Assembly's general competence in relation to

local government are no longer justified, and should **not** therefore become matters Reserved to the UK Parliament, but be within the Assembly's legislative competence: administration of elections in Wales; licensing of sale and supply of alcohol, provision of entertainment and late night refreshment; Anti-Social Behaviour Orders (as part of the devolution of policing, community safety and crime prevention proposed below); and the provision of advice and assistance overseas by local authorities, in connection with carrying on there of local government activities. The functions of coroners, and responsibility for the licensing of exhumations, should however be Reserved to Westminster.

(viii) The Assembly should continue to have legislative competence for most Public Administration in Wales, and this should extend to (i.e. no new Reservation imposed in respect of) Administrative Justice in relation to matters within the Assembly's devolved competence (for example, creation of complaints and redress systems, and administrative tribunals dealing with matters within that devolved competence). This is discussed further in the section below on the case for a separate legal jurisdiction for Wales.

B. New Legislative Competence Defined by Way of Reservation

14. As argued above, the legislative powers of the Assembly should henceforth be expressed through a reservation model of competence. This section of our evidence sets out proposals for matters (over and above the specific points set out above) which should be Reserved to Westminster, and so specifies by implication what additional legislative competence the Welsh Government believes the Assembly should have. For convenience of comparison, the proposals broadly follow the order in which Reserved Matters are presented in Schedule 5 to the Scotland Act 1998 (but we reiterate that our proposals do not seek simply to replicate the Scottish settlement, but are aimed to address specific Welsh circumstances).

(i) **Maintaining and Protecting the United Kingdom.** Consistently with our overriding concern for the maintenance of the integrity of the United Kingdom, we believe that responsibility for legislating on the fundamentals of the UK's constitution in relation to Wales should lie with Westminster. So, matters such as the Crown (including succession), the UK Parliament, the civil service, and the registration and funding of political parties, should all be matters Reserved to Westminster.

So far as Elections are concerned, Westminster should be responsible for legislation on elections to the House of Commons and to the European Parliament. But, as the Welsh Government has argued in its response to the Wales Office consultation paper on future electoral arrangements for the National Assembly, there should be no Reservation to the UK Parliament of powers in respect of elections to the Assembly, or to Welsh local authorities (save that the Exceptions to the Assembly's existing legislative powers, in respect of the local government franchise and electoral registration, should be confirmed as matters Reserved). So the Assembly should have a general power to legislate on Welsh elections (including the administration of elections, terms of office for local councillors, and voting systems) subject to those Reservations, and possibly with a special procedure, such as a special majority, being required if it chooses to legislate on Assembly elections.

Foreign Affairs and Defence should also be matters for Westminster, as should “Home Affairs” matters such as National Security, Immigration and Nationality, Extradition, and Emergency Powers.

(ii) Financial and Economic Matters

Macro-economic issues (for example fiscal, economic, and monetary policy and the regulation of financial services and financial markets) are all matters which should be Reserved. But the taxation Reservation should be made subject to an Exception, to enable the Assembly to legislate on devolved taxes (including in relation to their collection and management) in light of the Commission’s First Report on fiscal powers for the Assembly, with a mechanism, such as an Order in Council procedure, to allow for additions to the list of devolved taxes without the need for new primary legislation. In addition, the Exception should be expressed so as to remove the existing doubts about competence in relation to council tax and allow the Assembly to legislate on local taxes i.e. those such as council tax and non-domestic rates, which help to fund local authority expenditure.

The Exception should also permit the Assembly to legislate on the Community Infrastructure Levy (CIL). Building on the provisions in the Planning Act 2008, the Community Infrastructure Levy Regulations 2010 (including subsequent amendments) enable local planning authorities in England and Wales to levy a financial charge on certain types of development to facilitate the delivery of infrastructure to support development set out in their adopted development plan. The Regulations specify thresholds and the types of development that can be subject to a charge, examples of which include residential development, retail and employment. Currently, and notwithstanding its interaction with the town and country planning system (which is very largely devolved), the CIL is non-devolved as it has been considered by the UK Government to have the characteristics of a tax and therefore should be outside the Welsh Government’s powers. If the recommendations in the Commission’s First Report are accepted, this objection falls. Giving the Assembly legislative competence in this area could assist the Welsh Government’s integrated planning and infrastructure, regeneration and economic objectives, reducing inequalities and promoting economic growth across a broader physical area.

Finally under this heading, we would ask the Commission to take full account of the wider ramifications of the recommendations made in its First Report. The Commission’s First Report contained a recommendation that the Assembly should gain control of its own budgetary procedures. (These are currently provided for in Part 5 of the 2006 Act, which an Assembly Act is generally prohibited from amending). We agree in principle with this proposal, and under a Reserved powers model, this matter should fall within the Assembly’s legislative competence. In addition, the Commission has recommended that stamp duty land tax should be devolved to Wales and the Welsh Government agrees with that recommendation in principle. There may be implications for the process of registering land and property sales in Wales that follow from the proposal to devolve stamp duty. At present, land and property transactions are administered on an England and Wales basis through the Land Registry. (Scotland operates a separate system, which may make

devolution of stamp duty to that country more straightforward from an institutional perspective).

Discussions on practical aspects of devolving stamp duty land tax to Wales are at an early stage, and we have not yet identified a preferred model for proceeding with that recommendation (assuming of course that Parliament agrees that the Assembly should have these powers). As further discussed later in this evidence, the Welsh Government does not see a good case for establishing a separate Land Registry for Wales. However, we would ask the Commission to bear in mind that any proposals it makes in relation to land registration will need to be consistent with its previously stated recommendation to devolve stamp duty land tax.

(iii) Trade and Industry, Energy and Employment

As the Calman Commission Report pointed out, “There is a long-established UK single market in goods, labour, capital and knowledge. This can be seen across many sectors – manufacturing, finance, retail and services. Free trade across the UK, and a free flow of talent and skills, underpin economic growth throughout the country”. Recognition of this reality needs to inform our approach to the allocation of the relevant legislative responsibilities. So, Company formation, regulation and dissolution, Insolvency, Competition, and Intellectual Property are all matters which should be Reserved, to help secure the continued effective operation of the internal market across the United Kingdom (although the Commission may wish to consider the case for an Exception to enable the Assembly to legislate in relation to companies created by public authorities in Wales).

The Welsh Government appreciates the importance of maintaining the UK’s internal market in goods and services, and so such matters as Product standards, safety and liability, and Weights and Measures should be Reserved, subject to Exceptions to maintain the Assembly’s existing competence in these areas. So far as Consumer Protection is concerned, Welsh consumers currently have the benefit of comprehensive and specialist consumer advice from UK or GB-wide bodies. Consumer protection in general is not currently devolved, and much of the legislative framework on consumer protection is in any event determined by European legislation. This should be a matter Reserved to Westminster, although the Assembly’s existing competence should be maintained in relation to food, agriculture and horticultural products, fish and fish products, seeds, fertilisers and pesticides, and the representation of consumers of water, as should Welsh Ministers’ executive functions in respect of Consumer Focus (Wales) and the consumer councils for water and public transport.

No change is proposed in relation to postal services, responsibility for which is not currently devolved, although the Assembly’s existing competence in respect of financial assistance for the provision of services should be maintained. Energy (other than in relation to the consenting of energy generation as set out under paragraph 13(v) above), Employment rights, and Health and Safety should all generally be matters within the exclusive legislative competence of the UK Parliament and so Reserved to Westminster, although the Assembly’s existing legislative competence in relation to these matters (for example, on the environment, and the encouragement of energy efficiency) should not be reduced, and should in

any event be no less than that of the Scottish Parliament and the Northern Ireland Assembly. More is said below about the need for additional Ministerial, as distinct from legislative, powers in relation to Energy.

(iv) **Transport**

Aviation, shipping and maritime safety, road and vehicle standards, and driver licensing should be Reserved to the UK Parliament, but the Welsh Government is seeking further powers for the Assembly in order to promote road safety, and to improve public transport services, in Wales. The Assembly's existing powers, set out in Schedule 7, should be extended (if necessary by appropriate Exceptions to Reservations) in order to give the Assembly competence in relation to speed limits, bus regulation, taxi regulation and ports. We also see scope for change in relation to rail, as explained below.

Powers to set speed and drink driving limits would enable reforms to enhance road safety in Wales. We are committed to driving up standards in bus services and are working with the industry, local government and passenger groups to drive improvement through the substantial funding that we provide. We believe that powers in relation to bus regulation would enable us to address certain gaps in the current framework, and ensure a level playing field for operators, while meeting our ambitions for improved services that meet the needs of bus users. This is a critical component of our approach to integrated transport and would make an important contribution to enhancing access to jobs. It is particularly important to our tackling poverty agenda given that people living in poverty rely on bus transport more than other groups. Competence in relation to taxi licensing would enable the Welsh Government to promote greater consistency of standards across local authority areas. Powers in relation to ports could encompass harbour revision orders and oversight of Trust ports and ensure that we maximise the economic development potential of ports. It should be acknowledged that ports in Wales range from large ports of UK significance such as Milford Haven, to very small ports such as Saundersfoot with only local significance, and that this may merit a differentiated approach

The Welsh Government also sees scope for change in the devolution settlement as it applies to rail services and rail infrastructure, and we are currently pursuing these options with the Department of Transport as part of the planning for the new Wales and Borders franchise. We will be consulting on rail policy later this year and will explore options for change in rail powers as part of that process.

As part of, or if necessary as an alternative to, the extension of legislative competence, the Welsh Ministers are seeking additional executive powers of regulation and direction in relation to some or all of rail, buses, ports, taxis and road safety, as set out above.

(v) **Social Security**

While it would in theory be possible to devolve responsibility for Social Security (including Child Support and Pensions) to the Assembly and Welsh Government (as is the case in Northern Ireland), the Welsh Government would not support such a

proposition, for two reasons. First, any such move could expose the Welsh Government to unmanageable budgetary risks, and as we said earlier, our approach to the issues requires that we do not lightly enter into new commitments having such potentially damaging financial consequences. Secondly, we believe that the pooling of risks and responsibilities across the countries of the United Kingdom, so securing a common level of social protection for all our citizens, is fundamental to that continuation of the UK to which we are committed. The Welsh Government is clear, therefore, that Social Security is a matter that should be Reserved to Westminster.

(vi) **Policing and Justice**

Any examination of the powers of the National Assembly must include consideration of the criminal justice system. We have looked at the scope for devolution in terms of the longer term governance of Wales, as well as the potential benefits for the delivery of justice to Welsh citizens. We have also examined the potential costs, disadvantages and risks.

Policing and criminal justice are the only mainstream public services which are not devolved in Wales, even though their day-to-day work involves substantial interaction with devolved services. As the Counsel General observed in a speech to the Society of Legal Scholars in November 2012, “There are great advantages in having devolved responsibility for these services. Each part of the UK has its own unique challenges to face in relation to crime, and these are dictated by a number of factors; such as population density, terrain, cultural trends, the structure and organisation of police forces, and many others. By maintaining powers over policing and criminal justice at a more local level, it can be easier for devolved administrations to promote and encourage efficiencies through a restructuring of administrative services within their territorial boundaries while focusing on tackling the crimes which most greatly affect their communities”.

The status quo is in the Welsh Government’s view increasingly hard to justify, and we believe that a devolved criminal justice system should form part of the long term vision for Welsh governance; we invite the Commission to agree with that conclusion. Devolution would have practical benefits in enabling the criminal justice system to respond to the evidence on crime in Wales, as well as our particular delivery challenges. There is scope to drive a concerted approach to reducing offending and re-offending, through the Welsh Government’s public service reform programme, which engages all public service partners in prevention and service integration. This would enable us to link criminal justice reform more closely with the devolved services that can have a significant impact on offending and criminality, such as health (particularly mental health and substance misuse), education, social services, housing, and employment and training.

However, this vision is probably not achievable in the short term. If the benefits of transferring responsibilities to the devolved institutions are to be maximised, devolution has to include a full and fair transfer to the Welsh budget of **all** the costs associated with the relevant services that are attributable to Wales, as well as fair provision for additional risks and liabilities, revenue and capital, acquired as a result of devolution. In addition, there should be recognition of the need to build and extend

capacity and expertise in order to support the exercise of the new powers. Prior to any extension of competence, the Welsh Government must be satisfied about this. Anything less would impose a burden on the Welsh budget which, acting as we must in the Welsh public interest, it would be irresponsible of us to seek to shoulder, even in less difficult funding circumstances than we currently face.

The size of the criminal justice portfolio requires us to take these potential costs extremely seriously. Based on published figures, we estimate overall costs at around £1.2 billion, of which around £900 million would represent new funding responsibilities. In addition, there would be substantial associated liabilities and operational risks. Ensuring a satisfactory resource transfer would be essential - even a small variance between the negotiated settlement and the actual costs involved in running the service would impose significant additional pressure on rest of the Welsh budget.

Given these costs and risks, **the Welsh Government does not feel able to pursue the devolution of criminal justice (including, for example, prosecution and probation services, prisons, and sentencing) in its entirety at this stage, although that does remain our longer-term intention.** Provision to achieve this should be provided for in a new Government of Wales Act so that devolution can be implemented on an agreed basis at some future time without the need for further primary legislation. We also consider that no purpose would usefully be served in our seeking immediate responsibility for the whole of the administration of justice (i.e. the organisation and operation of courts and most tribunals in Wales), before the Welsh Government assumes responsibility for criminal justice policy. The future of Wales may hold the possibility of a legal jurisdiction separate from England which may involve such developments as devolved responsibility for criminal justice, administration of the courts and so on. Any new settlement that results from consideration of the Commission's work should not act as a barrier to any appropriate development in this regard. Therefore, the Welsh Government is of the view that the settlement should provide for the possibility of, for example, full transfer of responsibility for criminal justice matters and the administration of the courts without the need for further primary legislation and should provide for greater flexibility in the powers of the Assembly as regards such matters pending any decision to effect full transfer of such matters in Wales. We do however believe that **devolving legislative and executive responsibilities for the police service, together with equivalent responsibilities for community safety and crime prevention,** in line with the implementation timetable proposed in this paper, would be both practicable and involve more manageable risks than our taking on criminal justice as a whole, while having the potential to deliver significant benefits for the people of Wales.

In concluding that, as indicated above, our assuming responsibility for criminal justice must be a longer-term objective, we recognise that the arguments are particularly finely balanced in respect of the youth justice system, where the case for devolving responsibility is strong. Youth Justice is one of the small number of children's policy areas that are not already devolved, and devolution would enable us to extend our rights based approach, in line with the UN Convention on the Rights of the Child, and integrate youth justice into our wider children's policy agenda. We would then be in a stronger position to take forward innovative approaches in relation

to youth justice, in order to more effectively prevent offending by young people, and to keep young people out of the justice system as far as possible. In addition, whilst the youth justice system as a whole is not devolved, local authorities and local health boards have statutory duties as part of Youth Offending Teams. This reflects the (devolved) responsibilities local authorities have for education, social services provision, and children's services, and those of health boards in relation to child and adolescent mental health services, and services for young people who misuse drugs or alcohol, all of which can have a significant impact on levels of offending by young people.

However, we do not believe these arguments are sufficient to justify full legislative competence in relation to youth justice in isolation from the remainder of the system, given the benefits of maintaining a cohesive criminal justice system. There would be significant practical, financial and policy challenges both in splitting responsibility for youth courts from that for the rest of the courts service and in splitting legislation on criminal offences and penalties applying to young people from those applying to adults. But although we have concluded that we should not seek full legislative competence for the youth justice system at this point, we believe **there is a strong case for seeking executive competence, primarily concerning functions set out in the Crime and Disorder Act 1998, relating to the youth justice system.** We believe that these powers offer the potential to shape the delivery of youth justice services to better reflect Welsh circumstances, whilst maintaining the cohesion of the system across England and Wales as a whole. It would also represent an important interim step towards our longer term objective for devolution of the criminal justice system as a whole. We invite the Commission to recommend accordingly.

We do however propose that the Assembly should have legislative responsibility for policing, by which we mean the governance and administration of the police service in Wales. We are also seeking legislative powers in relation to community safety and crime prevention, where there is extensive overlap with the functions of devolved services - notably local government, the NHS and the fire and rescue service. (In terms of a Reserved Powers model, this would mean Reserving to Westminster, at least for the time being, legislative responsibility for Criminal Justice, but with the Reservation drafted so as not to diminish the Assembly's existing powers to legislate in relation to criminal offences and penalties for devolved purposes; and also Reserving the administration of justice in so far as it covers the civil courts and non-devolved tribunals).

The importance of policing within and across our communities cannot of course be exaggerated. Nevertheless, we regard the Police as essentially a service working principally within the criminal justice system alongside other services devolved and non-devolved, and already organised very much on a territorial basis within Wales (though split into four Forces). The transfer of responsibility for the policing service creates no issues of principle as to governance of and within the United Kingdom, and would be entirely consistent with the purpose of devolution, to bring public services to communities closer to, and more directly accountable to, those communities.

Devolution of policing would enable us to realise some of the operational benefits outlined above in relation to criminal justice more widely, by fully engaging the police

service in joint planning and delivery with other local public services. Community safety and crime prevention are integral to work at the all Wales, regional and local levels to improve the wellbeing of communities: increasingly the Welsh public and Welsh institutions are looking to the devolved government to provide leadership on these key issues of concern. Policing is the only emergency service that is not devolved; remedying this would enable stronger joint working with the other emergency services, and would align with our proposals on resilience (discussed below). These are areas where there is already positive collaboration based on goodwill, but there is scope to put this on a stable long term footing with clarity of powers and leadership at the Welsh level, and appropriate democratic accountability to the Assembly.

In the event of devolution, collaboration and interoperability, both between police forces within Wales and across the border, and between the police and other public services, would remain central to the Welsh Government's approach. We recognise that crime does not respect borders, and we believe we could ensure that any devolution of responsibility would not impact on the critical relationships between Welsh forces and their English counterparts. We would also expect Wales to continue to benefit from, and contribute to, the expertise of the Association of Chief Police Officers, who have a key role in sharing ideas and driving improvement. The current pace of change in policing has increased the need for coordination and collaboration, and the working relationship between the police service and the Welsh Government must remain close and effective.

There is no reason why devolution of policing should weaken Wales's links with the specialist services formerly provided by the National Policing Improvement Agency, including in relation to the College of Policing and the newly established Police ICT company. Nor do we believe it would be difficult to agree practicable arrangements for handling inspection and complaints. Devolution should make no difference to the National Crime Agency's responsibilities (for tackling organised crime, strengthening the UK's borders, and fighting fraud and cyber crime) which will have a UK wide remit.

We understand that there will be challenges in devolving responsibilities for policing (as well as certain aspects of youth justice) ahead of other associated public services such as Probation and the Prison Service. We recognise the need to ensure that the essential links between the police service, the Crown Prosecution Service and the courts are maintained. We are confident that a workable and coherent system can be delivered, building on our collective experience of managing the existing interfaces between devolved and non-devolved services, and working with and exploiting the distinctive Wales structures that exist across much of the criminal justice system.

Police revenue funding is currently split three ways between the Home Office, the council taxpayer and the Welsh Government. Devolution resource transfer negotiations would relate to the Home Office police grants (capital and revenue) paid to Welsh Police and Crime Commissioners (PCCs) for the funding of the Welsh forces. These will include general revenue police grant and floor funding, specific revenue grants and capital grants. For 2012-13, this amounts to over £300 million but provision during the current Spending Review period has reflected decisions to

make substantial cuts to police budgets and we would want to make a thorough assessment of the level of funding needed to provide for sustainable police services in Wales. Provision would also be needed for the Welsh share of the England and Wales budgets for functions including: specialist support services, inspection, regulation, professional training and complaints, along with the Welsh share of any specific grants for community safety and crime reduction, whether paid to PCCs or otherwise deployed in relation to Wales. Further, a policing team would be needed within the Welsh Government to support Ministers in exercising their powers. Overall, and as set out below, devolution must be conditional on a full and fair transfer of the relevant resources to the Welsh Government. But we believe that the figures are manageable, and that a fair settlement is achievable.

(vii) Social Welfare and Family Issues

The Assembly already has significant legislative competence in the field of Social Welfare, and these powers should be built upon under a Reserved powers model. The Welsh Government wishes to ensure that the Assembly will be able to legislate in relation to the powers and responsibilities of public authorities in connection with vulnerable adults and children, including taking children into care, and fostering and adoption (public child law). We do not seek powers for predominantly private law aspects of family relationships. One way of expressing this might be to Reserve to Westminster legislative responsibility for the 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. Remaining family matters could be within the Assembly's legislative competence.

(viii) Equal opportunities

For purely pragmatic reasons, it is not possible for the Welsh Government to argue that the Assembly should have full legislative powers in relation to equalities issues. If equality were not reserved, it would require the Welsh Government and the National Assembly to take over the full range of responsibilities currently carried out at the UK level, including implementing all developments in EU equality legislation into law in Wales. This is impractical in resourcing terms. Devolved competence should however be strengthened or clarified, by way of appropriately drafted Exceptions to the Equality reservation, in the four ways set out below. (The Welsh Government considers that the Assembly already has competence over these areas to some extent, but believes that that competence should be put beyond doubt, and enhanced).

- (a) The National Assembly should be given primary legislative competence in relation to the three aims of the Public Sector Equality Duty in the 2010 Equality Act in relation to the devolved public sector.

The Equality Act 2010 included provision for a new Public Sector Equality Duty (PSED) and also gave Welsh Ministers the power to introduce Specific Equality Duties for Wales, to guide public authorities operating in devolved fields of responsibility on how to comply with the PSED. These duties came into force in April 2012 and are the foundation of the Welsh Government's strategy for equality. However, the current legal position is

that, if the UK Parliament were ever to repeal the PSED, the Specific Duties would themselves fall.

The National Assembly needs clear primary legislative competence to determine how public bodies operating in areas of devolved responsibility should drive forward equality. It should therefore have competence over the three aims of the current PSED and so should be able to legislate about how the devolved public sector:

- (i) eliminates discrimination, harassment, victimisation and other conduct that is unlawful under UK primary equality legislation (currently the Equality Act 2010);
- (ii) advances equality of opportunity in respect of the protected characteristics under UK primary equality legislation (currently age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation);
- (iii) fosters good relations between the different equality groups protected by UK primary equality legislation.

The competence should include the ability to place duties on the devolved public sector for the above purposes. This would enable a coherent articulation of the PSED and Specific Duties in Wales; strengthen the ability to drive public service improvement and improve citizens' lives; and ensure that, should the approaches of the UK and Welsh Governments to delivering equality diverge, the National Assembly would be able to determine the approach that devolved public bodies should take to equality or, for example, give a power to the Welsh Ministers to do so.

- (b) The National Assembly should have full competence over the socio-economic duty in section 1 of the 2010 Act and its objective of reducing inequality of outcome resulting from socio-economic disadvantage, in respect of the devolved public sector.

The causal factors behind poverty and inequality are closely inter-linked. They need to be tackled together. The Welsh Government is therefore working to take forward its Tackling Poverty Action Plan and its statutory Strategic Equality Objectives in tandem. Work on equality for people with protected characteristics, and work on socio-economic inequality more generally can be integrated more effectively if the National Assembly has competence in respect of the devolved public sector over the socio-economic duty provided for under section 1 of the 2010 Equality Act, and its objective of reducing inequality of outcome resulting from socio-economic disadvantage.

- (c) The National Assembly should have competence to give functions to the Equality and Human Rights Commission and change its accountability structure, to ensure they match the devolved competence on equality which is being sought for the Assembly.

The Equality and Human Rights Commission (EHRC) is an organisation with responsibilities throughout Great Britain. There are some advantages in this, but the current settlement contains some conspicuous anomalies.

In particular, the EHRC is solely accountable to Ministers of the UK Government, despite the fact that Ministers in all parts of Great Britain have responsibilities on equality. EHRC needs to develop into a body which is jointly accountable to Ministers of the devolved administrations in Great Britain as well as to the UK Government, recognising the equality responsibilities that they all have. In addition, the National Assembly should have competence to add to the functions of the EHRC in Wales for the purposes of the clearer equality competence which we seek for the Assembly.

- (d) The National Assembly should have full competence over whether, and the extent to which, positive discrimination on the grounds of the protected characteristics in the Equality Act 2010 is permitted in public appointments to the boards or governing bodies of devolved public sector organisations in Wales.

There is significant under-representation of people from many of the protected groups in public appointments to the boards and governing bodies of devolved public sector organisations in Wales. The Equality Act 2010 allows positive discrimination only in very limited circumstances. For the avoidance of any doubt the Welsh Government is seeking full legislative competence for the Assembly over whether and the extent to which positive discrimination is permitted in public appointments to the boards or governing bodies of devolved public sector organisations in Wales. This will strengthen the ability of the Welsh Government to address this long-standing and fundamental issue.

C. New Executive Powers for the Welsh Ministers

15. The Welsh Government has proposals to make under this heading, but our starting point is that the existing executive powers of the Welsh Ministers should be retained; we are not aware of any sound arguments for transferring any of these back to the UK Government. Our new proposals are these:

(i) First, we believe that Minister of the Crown functions within the Assembly's devolved legislative competence (as enhanced by giving effect to the proposals in this evidence), even if deriving from legislation enacted before the Assembly formally assumed its responsibilities in 1999, should be discharged only by the Welsh Ministers. In our view, it would make no sense to confer broad legislative competence on the Assembly while leaving stray Minister of the Crown functions within the scope of that competence, surviving from earlier days, beyond the executive competence of the Welsh Ministers.

(ii) Secondly, we consider that the Welsh Ministers should (like the Scottish Ministers) be able to exercise specific executive powers in relation to matters outside the Assembly's legislative competence. We have made suggestions to this effect in the earlier section dealing with Transport, and in relation to Youth Justice. We offer two further examples here (these being merely illustrative of the general proposition):

(a) The Welsh Ministers should have executive responsibilities in relation to the **consenting of large scale energy generation** (other than nuclear power) and related energy infrastructure, including consenting in the Welsh inshore and offshore marine areas. The Welsh Ministers are responsible for consenting to the majority of large-scale infrastructure developments in Wales, with consents for large-scale energy generation and related energy infrastructure being a notable exception. We believe that there are compelling arguments, which we set out below, to devolve executive functions regarding the consenting of large-scale energy generation (other than nuclear power, which has its own specific arrangements) and related energy infrastructure – and that doing so would help the UK Government to reach its challenging targets for increasing the amount of energy generated from renewable sources. And, as with the extension of marine nature conservation and marine licensing powers to the Welsh offshore marine area (see (iii) below), our having executive responsibilities for energy consenting in Welsh seas would allow the Welsh ministers to plan for the whole of its marine area far more effectively in order to support sustainable development.

- *Enhanced democratic legitimacy and accountability.* Greater democratic legitimacy and local accountability would be secured if decisions on large scale energy developments that affect Wales, its communities and its landscapes, were made in Wales, as they are in Scotland, Northern Ireland and England. Welsh Ministers, as set out in *Energy Wales* (2010), want to maximise the economic opportunity of the transition to a low carbon economy whilst ensuring that best practice is followed in balancing returns and benefits to developers and communities from energy developments.
- *Ensuring consistency and credibility for investors.* The split competence in the consenting regime for energy developments in Wales does not create a stable and predictable investment framework for energy developments. Devolving the consenting powers for large-scale energy generation and effectively integrating them with related planning and environmental permitting processes would enable Wales to develop a more integrated, efficient and effective approach to consenting energy developments.
- *A consenting regime that is attuned to local circumstances.* We are faced with the significant challenge of transition to a low-carbon economy. A consenting regime that is attuned and sensitive to local issues, whilst being mindful of the pressing need for increasing low-carbon energy generation, is better placed than the current arrangements to address this challenge. The Welsh Ministers, with their wide-ranging functions in relation to economic development, planning, transport, the environment and community engagement and development, are better placed to engage with developers and local communities and to make decisions which effectively balance national priorities with a detailed understanding of local issues and circumstances.
- *There are no credible technical or engineering objections to extending these devolved arrangements to Wales.* The National Grid is highly interconnected and works as a single system. Despite this, it has proved possible to function with devolution of large-scale energy consents in

Scotland and Northern Ireland. There is no practical reason to treat Wales differently to the other devolved administrations.

(b) The Welsh Government has very limited formal powers in respect of **civil contingencies**, although it exercises a de facto role of leadership and co-ordination. A recent Wales Audit Office report on 'Civil Emergencies in Wales' concluded that 'the Welsh Government's remit for routine leadership and coordination of civil contingencies is particularly unclear. In addition, the expectation that the Welsh Government will routinely provide some leadership to the organisations that are accountable for civil contingencies is also potentially confusing, because the Civil Contingencies Act 2004 does not appear to empower the Welsh Government in this way'. We believe that transfer of the Ministerial functions in Part 1 of the Civil Contingencies Act 2004, with full transfer of the necessary resources, would recognise the Welsh Ministers' de facto role and clarify accountability.

(iii) Thirdly, the Welsh Ministers already have executive responsibilities for marine conservation, including marine protected sites, and marine licensing in the Welsh inshore area. These responsibilities should be extended to the Welsh offshore area. This would allow the Welsh Ministers, who are the marine planning authority under the Marine and Coastal Act 2009 for both the Welsh inshore and offshore areas, to plan for and manage the whole of Welsh seas more coherently, including fisheries in the offshore for which the Welsh Ministers are already responsible. The outcome would be to maximise the part Welsh seas play in contributing to the UK's High Level Marine Objectives, the shared vision of 'clean, healthy, safe, productive and biologically diverse oceans and seas' and the sustainable development framework outlined in the UK Marine Planning Statement adopted by all four administrations.

(iv) Finally, we consider that there are responsibilities in respect of certain public appointments which should now be devolved. The appointment of the Welsh member of the BBC Trust, and also the Chair and members of the S4C Authority, should be made only with the agreement of the Welsh Ministers. Recognising the important role to be played by Ofcom in the regulation of broadcasting, we also believe that it is essential that the Ofcom Board should feature one member specifically charged with representing the views of Welsh citizens, and that this member should also be appointed with the agreement of Welsh Ministers. Finally, the Welsh Ministers should have a right of consultation in respect of a Crown Estates Commissioner with special responsibility for Wales.

There is also the question of the responsibility for recommending the appointments of Lord Lieutenants. Currently, this is a UK Government function, although the administrative work in relation to these appointments, and to Lord Lieutenants' budgets, is undertaken by Welsh Government officials. These arrangements appear to the Welsh Government to be outdated now that the First Minister of Wales is both a Crown appointee and Privy Counsellor, able to make recommendations to Her Majesty in his own right. The UK Government has not thus far accepted the Welsh Government's argument for transfer of this responsibility; we look forward to reading the UK Government's evidence to the Commission covering this matter.

D. A Separate Legal Jurisdiction for Wales?

16. The Welsh Government launched a consultation on whether there should be a separate legal jurisdiction for Wales in March 2012. The key features of a separate jurisdiction are a defined territory with a distinct body of law, and distinct institutional machinery including a legislature, courts and judiciary. Sixty eight responses were received. The advantages and disadvantages of having a separate legal jurisdiction were discussed at length in a number of the responses, and the exercise has generated valuable material on the issues involved. Many of those in favour of establishing a separate legal jurisdiction acknowledge that whilst this may not be an immediate prospect, there is a likelihood – perhaps even an inevitability - that it will occur at some stage in the future, or develop gradually over time, as the divergence between the law in Wales and England increases, and that preparatory steps are desirable now in order to facilitate and manage this change.

17. The case for establishing a separate legal jurisdiction is intimately related to the developing constitutional position of the UK, and Wales' place within it. Ultimately, at least in relation to the administration of justice, it is a constitutional/political rather than a legal question: should Wales have its own courts system, operating alongside its already-existing legislature and executive? But the question needs also to be addressed in the context of the Welsh Government's responsibilities for Policing and Justice. In his lecture to the Society of Legal Scholars in November 2012 previously referred to, the Counsel General said:

“If...the Welsh Government cannot at present move forward with proposals for taking on Policing and Justice responsibilities, the case for a separate legal jurisdiction may be considerably weakened. It would be of limited or even dubious worth pursuing a Single Legal Jurisdiction “in principle” if Welsh Ministers and the Assembly did not also obtain a reasonably full set of powers in relation to Justice; crucial aspects of the supposedly separate jurisdiction would still be the responsibility of the Ministry of Justice. Thus, arguably, establishing a separate jurisdiction without transferring the relevant responsibilities to Welsh Ministers and the Assembly would simply amount to asking the Ministry of Justice to run two parallel systems, one for England and one (albeit to perhaps lesser extent) for Wales. They would not be likely to agree to this, and even if they did, it is not obvious why the inherent confusion would be of benefit to people in Wales”.

18. As noted above, the Welsh Government has concluded that it cannot now seek powers for the devolved institutions in relation to Criminal Justice and the administration of justice in Wales, although this remains our longer-term ambition. It follows that, for the reasons given by the Counsel General, a move to a separate jurisdiction now would not be likely to be of benefit to the people of Wales. The Welsh Government does consider, however, that we should prepare for a time when a separate legal jurisdiction may be necessary and beneficial. As part of that preparation, the Welsh Government will aim proactively to enhance the Welsh identity within the joint jurisdiction of England and Wales and to develop the foundations on which any separate Welsh legal jurisdiction could be formed should a decision be taken to do so in the future.

19. Generally, the legal business of people in Wales should be administered and dealt with in Wales wherever possible. A number of useful preparatory steps,

properly reflecting the realities of devolution and developing legal divergence, can be taken which could help to ensure a smoother transition to a separate legal jurisdiction in the longer term. These include

- achieving a more clearly identifiable Welsh identity in the higher courts: the Welsh Government has, for example, argued for a Welsh member of the Supreme Court, and it is our view that the Constitutional Reform Act 2005, in making it a requirement that the members of the Supreme Court should between them have experience in the law of each part of the United Kingdom, in fact requires this. If necessary, however, the position should be put beyond doubt, and the Commission could usefully recommend accordingly.
- establishing an office of the Court of Appeal in Wales as soon as possible, and a formal commitment given to hold hearings of appeals in Welsh cases in Wales wherever possible. Consideration should also be given to the establishment of a Welsh Division of the Court of Appeal, from which would be drawn the judges expected to sit in Welsh appeals cases.
- establishing an office for Wales of other divisions of the High Court alongside that already existing for the Administrative Court. Likewise, the highly successful Practice Direction for the Administrative Court (Wales), which requires demonstrably Welsh cases to be transferred for management and hearing in Wales wherever possible, should be extended to all cases in all courts.

We also believe that there should continue to be a requirement in **primary legislation** for at least one member of the Judicial Appointments Commission “to have special knowledge of Wales”. We are in correspondence with the UK Government about deletion of the provision in the current Crime and Courts Bill which proposes to remove this requirement from the 2005 Act and replace it with a power for the Lord Chancellor to include it in regulations.

We invite the Commission to agree with all these proposals and formulate its recommendations accordingly.

20. Reference was made above to the desirability of the Assembly having legislative competence in respect of Administrative Justice issues within areas of devolved competence. The Welsh Government is already undertaking a programme of tribunal reform and as part of that is implementing recommendations made by the Welsh Committee of the Administrative Justice and Tribunals Council in its Review on Tribunals operating in Wales. Our long term aim is to develop a coherent system of tribunals in Wales to hear appeals on all matters falling within devolved areas. There is also potential to expand the system of tribunals in Wales either by conferring new jurisdiction on existing tribunals or establishing new tribunals to hear appeals in matters relating to devolved areas. In the absence of such an arrangement there have been a number of cases where decisions have been made to confer further jurisdiction on the existing First Tier Tribunal for England and Wales, rather than establishing a new devolved tribunal in Wales. This is undesirable: Welsh Ministers and the Assembly should be enabled to bring suitable coherence to devolved Administrative Justice in Wales.

21. The Welsh Ministers have statutory powers to provide financial and administrative support for many of the tribunals operating in Wales. In many cases administrative support is provided by Welsh Government staff. Welsh Ministers have powers to appoint members to make procedural rules for these tribunals, but some residual functions are retained by the Secretary of State and Lord Chancellor and the retention of these residual functions makes it difficult for the Welsh Government to adopt any consistent or coherent policies for these tribunals. As these tribunals operate mainly in devolved areas there appears to be no reason why the Welsh Ministers should not possess full executive competence in relation to them. The Welsh Government considers that there is a strong case for seeking a transfer of these functions. We invite the Commission to recommend accordingly.

22. In recent times it has been suggested that a separate Law Commission should be created for Wales. There would of course be associated new start-up and running costs associated with such a development. Moreover, the Welsh Government works closely with the existing Law Commission which serves England and Wales, and continues to benefit from that Commission's work. However, under the Law Commissions Act 1965 (as amended), a Commission function is "to provide advice and information to government departments....at the instance of the Government of the United Kingdom"; in other words, UK Government Ministers are able to refer matters to the Commission for consideration, but Welsh Ministers have no such powers (whereas both Scottish and Northern Irish Ministers have equivalent powers to refer matter to their respective Commissions). Given the costs involved in setting up a separate Law Commission for Wales, but bearing in mind the Parliamentary legislation, together with Assembly legislation, and the benefits that reconsideration of particular issues by an expert body such as the Law Commission can provide, the Welsh Government does not seek the creation of an independent Welsh Law Commission at this point in time, on the basis that the 1965 Act should be amended

- a. to enable Welsh Ministers to refer law reform projects to the existing Commission on the same basis as is open to UK Government Ministers,
- b. to provide that Welsh Ministers are to be statutorily consulted about the Commission's law reform programmes and
- c. to provide for the Welsh Ministers' consent where projects or programmes engage the law on matters within the Assembly's legislative competence or their own executive competence.

We recognise however that legislative changes to the 1965 Act may take some time. In the interim, the Welsh Government proposes that a transfer of functions order under section 58 of the Government of Wales Act 2006 is brought forward to enable Welsh Ministers to refer law reform projects to the Commission on a like basis as is open to UK Government Ministers. This should include, as a minimum and as soon as possible, a transfer of the function in section 3(1)(e) of the Law Commissions Act 1965. Consideration should also be given to making the remaining Minister of the Crown function, in section 3 of the 1965 Act exercisable by the Welsh Ministers to enable it to achieve the objective of ensuring that the programme settled upon by the Law Commission will require the approval of the Welsh Ministers so far as devolved

matters are concerned and the relevant UK Government Ministers so far as non devolved matters are concerned.

23. Reference should finally be made to possible implications for the proposed Welsh Reserved Powers model of the conclusion that we should not seek to establish a separate Welsh legal jurisdiction now. First, it seems necessary to Reserve to Westminster the legislative responsibility for **charities and charity law**. At present, the High Court contributes to the regulation of charities by virtue of an inherent jurisdiction which has been amplified by statute and is vested in the Chancery Division. It applies a corpus of law of several centuries' standing. Given that there is no current intention to create a separate courts structure for Wales, the role of the Chancery Division in respect of Welsh charities will continue; further, there would be no advantage in leaving the Assembly with the power to legislate to create any new body of charities law for Wales, not least because many charities operate on a uniform basis across England and Wales, and no action should be taken to make that more difficult. We conclude that this is a case where there is a compelling practical argument for matters to be handled jointly on an England and Wales basis.

24. We reach the same conclusion in respect of the arrangements for **Land Registration**. Her Majesty's Land Registry operates on an England and Wales basis (there being separate Registries for Scotland and Northern Ireland). Its main function is to maintain the register of title to land in England and Wales. Land Registration operates within a complex framework of legislation of many years' standing, and registration itself creates legal rights – some interests in law do not take effect until they are registered. Establishing a separate Land Registry for Wales would without doubt be a complex and potentially expensive policy, and is not something the Welsh Government wishes to undertake at the present time. It follows that it would not be appropriate to leave with the Assembly the powers potentially to amend the statutory framework within which the Land Registry operates. In the Welsh Government's view, this is a matter on which legislative competence should be Reserved to Westminster, albeit with an expectation that any technical matters necessary to give effect to the devolution of Stamp Duty Land Tax are capable of resolution through joint working between the relevant authorities.

E. Other Matters

25. We make three final points:

- (i) Any Bill deriving from the work of the Commission should include provision to confirm the title "Welsh Government" (and its Welsh equivalent, "Llywodraeth Cymru") as the legal name of the devolved administration, and the Commission is asked to recommend accordingly.
- (ii) We note that the Assembly's electoral arrangements are not within the Commission's remit, and therefore submit no evidence on that matter in this paper. We nevertheless repeat our view, which has already been conveyed to the UK Government, that any changes to the Assembly's electoral arrangements (whether or not in consequence of any recommendations the Commission chooses to make on the Assembly's powers) should be made only with the Assembly's consent, and supported by a clear mandate from a UK General Election.

- (iii) Following the Supreme Court decision in **Axa v Lord Advocate**, the prospect arises of Acts of the devolved legislatures being challenged on rule of law and/or common law fundamental rights grounds. This needs to be considered in the context that currently such matters would not fall within section 112 of or Schedule 9 to GOWA 2006, so that there is currently no ability to fast-track to the Supreme Court the resolution of any such legal challenge. This is an issue that affects the other devolution settlements as well as the Welsh one, but the Commission may also consider it appropriate to consider the point in the course of its deliberations.

Costs and Resources

26. A move to the reserved powers model of devolution proposed here would mean a more extensive legislative competence for the Assembly. This in turn would imply wider executive responsibilities for the Welsh Government, and so greater potential cost of resourcing those responsibilities. It will be crucial to negotiate a satisfactory budget transfer of both running cost and programme budgets to go with any transfers of new responsibilities. Past experience suggests that these negotiations seldom result in transfers being fully funded, for three reasons: there are sometimes unexpected costs which could not have been anticipated before transfer; those negotiating on the “other side” are incentivised to offer up as little of their budget as they feel driven to; and, the loss of economies of scale from devolving a function can mean that it just does cost more to deliver an equivalent service.

27. The Welsh Government’s position is that **all transfers of responsibilities from the UK Government to the Welsh Government flowing from recommendations by the Commission must be accompanied by full budgetary transfers**. The Commission is asked to recommend accordingly. The quantification of these budgetary transfers should be subject to independent scrutiny, so that both the UK and the Welsh Governments can be satisfied that a fair reallocation of resources has been achieved. There may need to be provision for independent arbitration to handle any unresolved disagreements about the size of appropriate transfers. Again, the Commission is invited to endorse this conclusion, and recommend accordingly.

Timetable for Implementation

28. The Commission’s Report, when published in 2014, can be expected to make a major contribution to the debate on the constitutional future of the United Kingdom following the Scottish referendum (whatever its outcome). That debate will almost certainly not reach its conclusion in the lifetime of the present Parliament, and it will fall to the Parliament to be elected in 2015 to address many fundamental issues.

29. If the Commission agrees to make recommendations along the lines argued for in this evidence, and if the UK Government formed following the General Election in 2015 accepts those recommendations, the necessary UK legislation would not be likely to receive Royal Assent before 2017 (at the very earliest). The consequential subordinate legislation, and associated administrative arrangements and changes,

would then need to be put in place. In practice, therefore, many aspects of the new structure of devolution proposed here, particularly those relating to new legislative powers for the Assembly, could almost certainly not be in place before 2019. The Commission might well however conclude that changes of this scale ought not to be introduced during the lifetime of an Assembly, but that the new responsibilities ought to be assumed by a newly-elected Assembly, in other words the one to be elected in 2020 or 2021. The Welsh Government would support such a recommendation (which might fit well with timing of implementation of certain of the recommendations in the Commission's First Report), provided that the existing settlement is allowed in the meantime to continue to develop organically, including by way of transfers of the executive responsibilities to the Welsh Ministers argued for above, at a mutually agreed time.

Need for a Referendum?

30. In the Welsh Government's view, the outcome of the referendum held in March 2011 confirmed the electorate's support for the National Assembly as an institution with extensive legislative authority for Wales. We believe that, that question having been democratically and conclusively determined, the changes to the Welsh devolution settlement proposed in this submission, although potentially wide-ranging, do not raise any new issues of principle requiring a further recourse to the electorate through a referendum. We invite the Commission to recommend accordingly.

Conclusion

31. We hope that the Commission finds this evidence both helpful and persuasive. If there are any matters on which the Commission would like further information or argument, the Welsh Government would be happy to provide it. Equally, we would be happy to provide the Commission with supplementary submissions on matters not covered here which the Commission might wish to explore.

We look forward to learning the outcome of the Commission's deliberations in due course.

Welsh Government
February 2013