

SECOND DRAFT PROPOSED AMENDMENTS

1.4.20 Leave out second sentence

2.2.15 replace first three sentences as follows:

If the Act simply listed the subjects set out in Box 2.5 and gave the Assembly legislative power on all issues that came within that subject, the Assembly's powers would be relatively straightforward to understand. However it is not that simple. Each subject has text that explains or illustrates what that subject is intended to mean. In the case of 14 out of the 20 subjects, the explanation is in turn followed by exceptions that apply to that subject and to all subjects. There are also general exceptions. Anything that is covered by an exception is outside the Assembly's legislative competence.

2.5.5 replace penultimate sentence by following:

Their report was published in 2013 and proposed a mechanism for MPs from England (or England and Wales, when appropriate) to express their views on legislation that is to apply only in that territory – a sort of parallel to the legislative consent procedure in the devolved legislatures. They also proposed that a Devolution Committee should be established in the House of Commons to consider devolved implications of UK legislation.

2.6.2 before last sentence, insert:

, even if as distinguished a commentator as the current Deputy President of the Supreme Court has argued that “the United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts.”¹

2.6.3, line 1, replace “suggested” by “general”

2.6.4, line 1, replace “is” by “appears”

Omit para 4.4.6

Replace Paras 4.4.8 and 4.4.9 with following single paragraph:

A fifth argument in favour of a reserved powers model is that it would enable the settlement to be re-drawn, but this time based on clearer and more logical principles. Schedule 7 of the Government of Wales Act 2006 was drafted quickly, by force of circumstance. There was an expectation that it could be amended at leisure. In the event the referendum that brought it into force was triggered earlier than had been expected.² Much evidence that we

1 Speech by Baroness Hale to Legal Wales conference, Llandudno, 2012

2 The 2005 Memorandum by the Secretary of State and First Minister referred to above stated “*Such a referendum [on law-making powers] ought only be triggered on*

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

4.6.2 it would be helpful to include a text box containing the PO's very well thought out suggestions for how reservations should be drafted

Para 4.6.3 – move to after para 4.5.8

Recommendation after 4.7.5: leave out first sentence and insert: "There should be a general transfer of pre-devolution Minister of the Crown powers to Welsh Ministers, subject to any necessary exceptions."

Recommendation 5 after 5.2.14 – last line, leave out "should" and insert "could"

Replace para 5.3.7 by following:

In Chapter 9 we mention a number of technical areas where we received evidence in favour of devolution that we were not able properly to assess. There will be still further areas that have not been mentioned to us, or that will arise in the future. Another part of the remit of the Committee we propose would be to consider, using the principles we have articulated, where responsibility should lie for such issues.

Recommendation R6 after para 5.3.9, leave out d. and e. Also move this Box to after para 5.7.4 and include in it the recommendations R7 (after para 5.4.9) and the R8 (after 5.6.9)

Replace paras 5.6.4 to 5.6.9 by following:

the basis of a broad political consensus in Wales in favour of primary powers. There is no suggestion that there is such a consensus at this time, nor is there likely to be one for many years to come". In fact, it was called for by the first Assembly operating under the Government of Wales Act 2006.

We received evidence that there should be greater consultation and more discussion between the UK and Welsh Governments as policy is developed, and that there is a need for better comparative information and analysis of the economy and public services across the countries and regions of the United Kingdom, with this information shared between governments.

It is in the interests of all that the UK and Welsh governments should work together to share best policy and delivery practice, especially as devolution has encouraged policy divergence in a number of areas. Better comparative data and analysis would enable comparisons of different approaches taken by the different administrations and should develop the potential for devolution to be used as a 'policy laboratory'. In this context, we would encourage both administrations to be open to considering and adopting policies from other administrations in the United Kingdom and further afield.

Any data sharing would be aided by developing and publishing more comprehensive and consistent comparative data across the countries and regions of the United Kingdom. An example might be data in relation to the economic impact of UK Government spending in areas such as defence.

There may be a particular role here for the National Audit Office and the Wales Audit Office. While recognising that the Audit Offices are responsible for setting their own priorities, in consultation with the National Assembly's and the House of Commons' Public Accounts Committees, we believe that both could play a significant role in reporting on comparative policy approaches and performance outcomes. An example of good practice was the June 2012 National Audit Office report on Healthcare across the United Kingdom. To do this, each Audit Office should have the ability to obtain appropriate data from both UK Government and Welsh Government departments.

5.7.2 inset "must" after "Governments"

5.8.2 leave out "The National Audit Office and the Wales Audit Office should be commissioned to conduct a joint audit of intergovernmental relations between the two governments."

6.2.18 repeats (rather better) some of the same material as in 5.6.4 ff (this also applies to Recommendation R13 later)

6.2.19 – we need to think further about whether we want to suggest a model for new taxes etc predicated on the conferred powers model

6.3.6 – is the last sentence correct?

6.3.25 – should we omit references to APD?

Replace 6.3.39 and 6.3.40 by:

Giving Wales more powers as we recommend would benefit the people of Wales by providing the Welsh Government with an opportunity to develop a more strategic and effective approach to transport in Wales. Such an

integrated transport policy, along the lines of that in Scotland,³ would fit our principles well, in particular simplicity, coherence and accountability.

Replace 6.4.19 by following:

The BBC and S4C are not the only public service broadcasters. The commercially-run ITV and Channels 4 and 5 also have public service obligations. In the case of ITV, the recent decision to award a Wales franchise is welcome, as is ITV's existing Welsh coverage. Channels 4 and 5 have little or no discernible Welsh output. There are also a host of wholly commercial undertakings that broadcast in Wales on radio or television. Whether or not they respond to Welsh needs is a matter of their commercial judgement, and there is an intense pressure in radio, especially with the switchover to digital, to minimise local content. Across the whole sector, apart from the BBC and S4C, there was concern from our witnesses that, in a multi-channel world where linear television is under pressure from the internet, there is an increasing risk of a decline in the Welsh content of broadcasting. It is important that the regulatory framework around broadcasting seeks to mitigate this risk, and our recommendations about strengthening the Welsh representation on Ofcom are aimed at addressing that issue. In addition, we hope the Welsh Government will actively and publicly monitor developments in this field and will consider what interventions might be appropriate.

After para 6.4.19, do we want to include a para along the following lines:

Before analysing the costs of our proposals, we want to record our disappointment that senior management of the BBC were unwilling to meet us, despite several requests and our willingness to meet them in London. This is not what we would have expected from a body funded by the public and which therefore ought to be responsive to an official Commission like ours. It contrasts with the way that BBC management did give evidence to the Calman Commission.

6.8.7 and Box – a bit thin on what the Social Union is. Better to scrap the box and include Calman's definition in the paragraph, as below:

Wales forms part of a social as well as economic union with the rest of the United Kingdom. The Calman Commission emphasised that the social security system and the pooling of risk and redistribution which goes with it forms a vital part of the social union, and that the social union underpins and complements the United Kingdom's economic and monetary union. The Calman Commission analysis here is helpful: *'there are many social ties that bind the UK together: family, professional, cultural. But there are also some*

³ Transport Scotland's remit incorporates: rail and trunk road networks; major public transport projects; national concessionary travel schemes; impartial travel services; coordinating the National Transport Strategy for Scotland; liaising with regional transport partnerships, including monitoring of funding; sustainable transport, road safety and accessibility; local roads policy; aviation, bus, freight and taxi policy; ferries, ports and harbours; the Blue Badge Scheme.

common expectations about social welfare. Social security payments are available and are paid on the same basis to people across the country, according to their needs. This principle of fairness should not be undermined, though some benefits may be administered locally where they intersect with devolved policies like housing’.

7.2.2 – is there something wrong here in the references to coal? GoWA suggests that environmental consequences of coal are devolved

7.2.4 – replace first sentence by “Consents for onshore power generating infrastructure below the threshold of 50MW are devolved, and are dealt with by local planning authorities in Wales.”

7.2.4 – add at the end: “Welsh Ministers would, however, have the right of decision in respect of any offshore development if the applicants proceeded through the rather cumbersome procedures of the Transport and Works Act 1992.”

7.2.8 – at end, add “, though we note in this context the heightened debate in parts of Wales about shale gas extraction through fracking. The same arguments about the balance between protecting the local environment and the United Kingdom’s energy needs arise here as they do in relation to on-shore wind development.”

7.2.12 – first sentence, leave out “to improve the constitutional settlement in this area” and insert “All have their adherents, and there are plausible arguments in favour of each.”

7.2.13 – leave out “or subsidiarity”

7.2.18 – I would myself go for a threshold of 500MW for all types of generation

7.2.20 – omit paragraph (also affects recommendation) (is this the same issue as covered in section 7.5?)

Replace 7.2.15 by following:

Increases to the current threshold of 50MW onshore and 1MW offshore might balance subsidiarity and effectiveness. The National Assembly has a long-standing cross-party consensus in favour of increasing the threshold to 100MW for offshore and onshore generation. The larger the generation capacity, the greater its contribution to United Kingdom security of supply. But deciding where the cut-off threshold ought to be is not simple, and risks appearing arbitrary. Box 7.2 below provides more information on the scale of energy projects in Wales. This indicates that if the threshold were set as high as 500MW, this would still leave all generation in Wales with a Great Britain-wide significance in UK Government control.

7.2.21 – leave out last three sentences and insert: “In the context of giving a wider consenting powers to the Welsh Government, we recommend that the responsibility for consenting to associated developments should be aligned with the responsibility for consenting to the principal development. However, in the case of major projects in Wales that remain a responsibility of the UK Government, there should be a statutory obligation to take into account the policies both of the Welsh Government and of the local planning authority both in respect of the associated development and of the main project.”

7.3.1 – replace paragraph by following:

Water and flood defence are devolved to the National Assembly for Wales under Schedule 7 of the Government of Wales Act 2006. This means that water supply and water resources management are devolved. However, water industry regulation is not devolved. Schedule 7 contains two exceptions to the devolved competence of the Assembly relating to water. These exceptions are the appointment and regulation of water undertakers whose area is not wholly or mainly in Wales and the licensing and regulation of water suppliers within the meaning of the Water Industry Act 1991. Sewerage is also not devolved.

Replace para 7.3.8 by following:

Based on our principles of subsidiarity, accountability and coherence, we believe the presumption should be in favour of aligning respective competences with the geographic border. The legislative authority of UK Ministers over water undertakers in parts of Wales is anomalous, and there is a particular problem that some citizens in England (customers of Dwr Cymru, Dee Water and Albion Water) are subject to Welsh legislation, something on which they have no representative voice – a concern mentioned to us by a number of English Members of Parliament.⁴

At the same time there is clear evidence that water issues need to be considered on an inter-governmental and river basin basis. Appointing different water undertakers on the two sides of the border where infrastructure is shared would be extremely complicated, and there is also a potential downside if the administrative border cut across the operations of a single water undertaker. The undertakers told us that it would be possible for them to operate under different regulatory arrangements on the two sides of the border, but that there would be a degree of complexity. We would not want to see anything done that would increase costs to consumers.

There is clearly a balance of considerations here. In principle, the administrative boundary should define the limit of Welsh Government competence. However the interests of both English and Welsh consumers and producers are also important. We would like to see more work done cooperatively between the two governments so that, as far as possible, the Welsh Government makes decisions on water inside Wales, and the UK Government makes those decisions in respect of England. We believe that, as a first step, a formal intergovernmental protocol for resolving water issues should be agreed with this aim in mind.

Replace para 7.3.10 by following:

The powers of intervention of the Secretary of State are also anomalous. In principle, it seems unjust for any Minister to be able to overrule an elected body's wishes without means of redress or challenge. The formal intergovernmental protocol in relation to water we recommend earlier should

⁴ Welsh customers of English companies are represented by their MPs. Welsh customers of Welsh companies are represented by their AMs.

include protection of the rights of English consumers of water from Wales and vice versa, The Secretary of State's powers of intervention should be replaced by a mechanism within the protocol.

After 7.3.14, Rec 28 b. – leave out “with a view to alignment”. And is this a new committee we are recommending, as it appears here, or is the Standing Committee mentioned in Ch 5 intended to do the work (this is what 7.6.2 implies)

7.5 – are we confident that we have heard enough evidence on this? Should it move to the final part of Chapter 9?

8.3.43 First sentence: do not tribunals have responsibility in areas of dispute between private individuals as well – eg Rent Tribunal?

After 8.3.52, replace Recommendation 38 by “If criminal law is devolved, there is a strong case for devolution of responsibility for prosecution.”

After 8.3.52, leave out Recommendation 41 and insert “or civil” after “criminal” (twice) in Recommendation 40

9.6.8 and 9.6.9 – some text is missing, and 9.6.9 is not clear. Could these paras be amalgamated?

Replace paras 9.8.4 and 9.8.5 as follows (and remove first part of recommendation)

Changes to the election process for the National Assembly, such as those discussed in the Wales Office's Green Paper, are beyond our terms of reference. However we suggest that the administration of local government elections, including rules for their conduct, should be devolved. As in Scotland, electoral registration and the franchise for local elections should not be devolved.

Replace paras 9.9.1 to 3 by following:

As discussed in Chapter 5, a number of matters have been raised in evidence on which we have not made recommendations. These include the devolution of the law of marriage and burials and licensing law (both devolved in Scotland and Northern Ireland); and the devolution of responsibility for setting bank holidays (to some extent devolved elsewhere). There are also some highly technical issues (such as how to ensure a consistent approach to mental capacity tests across the devolution settlement while maintaining the existing executive functions of Welsh Ministers in the health area) and some recondite issues (for example, it is not clear why the current exception to local government powers in relation to overseas activities was ever made, nor even to what it refers) where we make no recommendation.

We have not come to conclusions in these cases, and a number of others, because we have not had the opportunity to take sufficient evidence from the specialists whom we would be duty bound to consult before we came to a firm view. Further issues will undoubtedly arise in the future – one issue will be the handling of employment law issues after the Supreme Court has given judgement on the agricultural wages legislation.

10.3.4, replace last sentence by following: “This problem will grow substantially once the Assembly begins to scrutinise tax legislation, and will grow even further if the important additional responsibilities we are recommending in this report are given to the National Assembly.”

10.3.15, at end, add (and omit para 10.3.19):

But, as we recommended in our First Report,⁵ there should also be a general relaxation of the provisions of the Government of Wales Act that regulate the Assembly's financial procedure. The Scotland Act 1998 is minimalist in this area, requiring a basic minimum and leaving details of budgetary procedure to the Scottish Parliament - procedures there are now very satisfactorily regulated by an Act of the Scottish Parliament, the Public Finance and Accountability (Scotland) Act 2000. The constraints upon the National Assembly should similarly be removed, and it should be given the freedom to choose its own financial procedure in a way that best suits the institution. The private legislation procedures recently adopted by the Assembly, and regarded by experts as superior to those in either Westminster or Scotland, show what can be done.

Omit para 11.3.1

After 11.5.6, amend R70 to read: “Whitehall Departments’ capacity in dealing with Welsh matters should be strengthened, and Departments should be clearer about their responsibilities (or lack of them) for the different parts of the United Kingdom.”

Paras 12.3.4 to 12.3.9 and Box 12.3 are not very clear. I suggest that they be replaced with the following (which fundamentally says the same things):

In theory it may be possible to introduce very many of our recommendations through secondary legislation. The Government of Wales Act provides a process for transferring powers from the UK Parliament to the National Assembly by using secondary legislation known as Orders in Council to amend Schedule 7. These Orders in Council must be approved by the National Assembly and by both Houses of Parliament. It is a process that has been used on several occasions since devolution.

Some witnesses even argued that a reserved powers model would not require primary legislation and could be legislated for by Order in Council. However in practice we think that the UK Government would regard this as a legislative change that ought to be subject to full consideration in Parliament in a way that secondary legislation is not. We agree.

We therefore envisage the need for a Bill to legislate for the reserved powers model. This Bill could also be the vehicle for transferring new powers to the National Assembly (by not reserving them), and it might be particularly appropriate for it to be used to transfer powers in a significant area, like policing. It could also contain provisions that would not come into force immediately (for example, to transfer various areas of the justice system) but that could be activated later by a trigger mechanism similar to that contained

⁵ See paras 8.4.29 to 31

in the Government of Wales Act 2006 to trigger primary legislative powers. There would also be a mechanism provided for in the Bill to change the list of reservations in the future by Order in Council, in the same way as this is provided for in the Scotland Act 1998.

However, it is not necessary to wait for primary legislation to transfer new areas of responsibility to the National Assembly, albeit under the conferred powers model. New subjects could be added to the existing Schedule 7 by Order in Council. There are two advantages to this mechanism: it would allow a phased approach to the transfer of powers, and there would be no need to wait for a primary legislation slot for a Government of Wales Bill in the parliamentary timetable.

A possible scenario is that, following the 2015 United Kingdom election and the 2016 National Assembly for Wales election, a White Paper is introduced by the UK Government. This would set out what powers should be transferred to the National Assembly and over what timetable. It would also explain what was proposed to be reserved to Westminster and why.

The White Paper would be followed by Orders in Council to transfer a number of powers identified in this report (for example, in respect of transport, S4C, teachers' pay, sewerage, energy consents, and youth justice). This would in turn be followed by the Bill to create a reserved powers model, which would incorporate the transfer of powers regarded as sufficiently important to require full parliamentary scrutiny.

While this process would be taken forward by the UK Government in Parliament, the formal approval of the National Assembly for Wales and Welsh Government would also be necessary for each transfer. The joint standing committee we recommend in Chapter x should be charged immediately with undertaking the preparatory work necessary to take forward all our recommendations. The experience of drafting the 1997 and 2006 Acts demonstrates that there would need to be close collaboration between officials of both the Welsh and UK Governments during this process. Senior secondments from the Welsh Government to the Wales Office would be necessary.

Omit paras 12.3.12, 12.3.15 and 12.3.16 (consequential on amendment above)

13.3.9 replace first sentence by following: "It is not just a question of minimising the additional costs of devolution. Clear and coherent devolution, based on the more certain reserved powers we recommend, is an opportunity for a stronger and more imaginative focus on more effective and efficient delivery, so reducing cost."

13.4.1 – leave out "such as evidenced by the OECD PISA tables and comparative health data" and insert a footnote as follows: "OECD PISA tables (on educational attainment) and comparative health data are often cited as evidence"

13.4.1 – add to footnote 84: "We have held two very useful meetings with members of Sir Paul's Commission. It has been of great value that Lord Bourne is a member of both Commissions."

13.7.4 leave out “if this changed in the future” and insert “This may well change in the future, and if it does,”

Replace paras 13.7.7 to 13.7.12 by following:

It is well beyond our remit to advocate, or otherwise, a federal constitution for the United Kingdom, or to suggest that one has arisen by default. We have earlier referred to the comments of the Deputy President of the Supreme Court that the United Kingdom has become a federal state with a constitution regulating the relationships between the federal centre and the component parts. But we recognise that this view is not shared by other constitutional experts, who point particularly to the absence of any institutions for England alone.⁶

What we certainly believe is that the Union can only be based on mutual respect between the different governments and legislatures, and that there should be a recognition by all that the existence of the National Assembly for Wales and the Welsh Government, with their fundamental responsibilities for domestic policies in Wales, is now a settled part of the constitution.

Within this constitution, some believe that there should be a symmetric system of devolution for all the countries of the United Kingdom.⁷ It is interesting in this context to see how Spain is moving from asymmetric to symmetric devolution.

Our recommendations would still mean that devolution would be asymmetric as we are not advocating exactly the same powers for Wales as are held by Scotland and Northern Ireland. the devolved administrations. There is some objective justification for differences, for example, arising from the more populated Welsh border and the historic England and Wales shared legal system. However our recommendations would reduce the degree of asymmetry and bring greater long term stability.

13.7.13 add “Depending on the result of the 2015 United Kingdom General Election,”

⁶ Except the Church of England

⁷ For example, by Michael Fabricant MP