

## **RESERVED/CONFERRED**

### **4.1 Arguments in favour of conferred powers model**

- 4.1.1 Should allow what is devolved to be clearly set out – including specific non-devolved areas.
- 4.1.2 No benefit from moving to a reserved powers model if very little change in terms of powers; would mean a longer, more complicated schedule setting out all the powers reserved.
- 4.1.3 Presumption in favour of devolution would transfer risk to National Assembly of future, forgotten or poorly-defined policy issues.
- 4.1.4 Argument of SoS/FM in 2005 – complication of reserving fundamental legal principles and large aspects of law.
- 4.1.5 Flexibility and appropriateness to Wales's circumstances.
- 4.1.6 Ultimately, onus of proof that a matter does not come within a conferred area rests with those who want to show that it does not.

### **4.2 Arguments in favour of reserved powers model**

- 4.2.1 More stable, as shown by Scottish settlement, which can accommodate routine clarifications.
- 4.2.2 Better alignment between demands to change the settlement and the ability to change it.
- 4.2.3 More certainty on the scope of the settlement, with the boundary clearly defined. Therefore Assembly more confident of being able to use its powers.
- 4.2.4 Would be more straightforward for Westminster and the UK Government to follow three reserved settlements – currently internationally anomalous.
- 4.2.5 It was suggested in evidence to the Commission that the fact that none of the over 200 bills passed by the Scottish Parliament have been referred to the Supreme Court by a UK Law Officer demonstrates the reserved powers model is more clear and less likely to create conflict (though we heard other suggestions).
- 4.2.6 Reservations would be more clearly and hopefully coherently defined – in practice, the exceptions currently treated more seriously – eg, the UK's evidence, and the reserved powers model would reflect that.
- 4.2.7 Difficult, but not impossible, to reserve fundamental principles of English and Welsh law/areas of law.

### **4.3 Assessment against the Commission's Principles**

- 4.3.1 Ultimately, and without regard to further changes to the settlement we propose, the reserved powers model fits better with the Commission's

principles of clarity, coherence, accountability, subsidiarity, stability, effectiveness and efficiency.

- 4.3.2 As the non-devolved powers will be clearly set out as reservations, the non-reserved powers should be more coherent than a set of specific devolved powers.
- 4.3.3 The specificity on powers not available, rather than those that are, should allow law-makers to be more confident in making viable legislation, creating greater effectiveness of the settlement.
- 4.3.4 As law-makers are likely to be more confident in the law, and with a clearer settlement less likely to generate uncertainty or impasses for the Supreme Court to resolve, the system of law-making should also be more efficient.
- 4.3.5 The public should be clearer on the role of Parliament and the Assembly in their everyday lives.
- 4.3.6 As a reserved powers model would clearly define decisions that must be taken at the Westminster-level, by default all appropriate decisions will be taken more closely to the citizen, which may not be achieved in a conferred powers model, even where it seeks to achieve subsidiarity.
- 4.3.7 Ultimately, the position should be also more stable, with Westminster's sovereignty allowing it to clarify areas of responsibility it has retained for itself if required (as seen with the Antarctic Act) as an in-built mechanism for righting the settlement if problems are found, in a way the Assembly cannot do for itself under the conferred powers model.

#### **4.4 How a Reserved Powers model would operate**

- 4.4.1 Acknowledge the process of drafting a new Government of Wales bill will require a clear political commitment, and a period of engagement between the Welsh Government and UK Government (and National Assembly/WAC?). We set out the timetables later in the report.
- 4.4.2 Advantage of the reserved powers model is that it would show clearly the matters that would not be devolved within the United Kingdom.
- 4.4.3 The Presiding Officer and Attorney General would continue to consider whether a bill of the Assembly is within scope.
- 4.4.4 While some power can currently appear to be both devolved and non-devolved, a reserved powers model ought to make clear that, unless stated otherwise, an issue is devolved.
- 4.4.5 However, the reserved powers model is not a panacea, and would not in itself make the Welsh settlement perfect – England and Wales will remain the most intertwined countries of the United Kingdom. It would require a continuing political and administrative commitment to making the settlement work according to the public's will.
- 4.4.6 Nor will the reserved powers model of itself increase the NAW's powers

- 4.4.7** We discuss later how we suggest the operation of the settlement, and how any future modifications – such as responsibilities in new areas or issues not considered in the drafting (such as Antarctica) can be considered and settled
- 4.4.8** Significant issue would be residual powers – or unnamed areas of responsibility. Currently, they would rest with Westminster, as they are not conferred. Significant risk transfer under reserved powers model, as they would be assumed to be devolved. Hence need for strong political commitment, and acknowledge that ultimately, Westminster is sovereign and can re-define reservations overtime.
- 4.4.9** There would need to be a reservation drawn up to respect the aspects of law that would not be devolved, for example, private law, law of contract.
- 4.4.10** Would not change the nature of devolution (as opposed to law-making/tax-raising), nor scope in itself, so do not believe a referendum is required.
- 4.4.11** Some evidence referred to alternative models of Scotland or Northern Ireland. Subject to our suggested implementation below, we do not believe Northern Ireland's model would be required for Wales's different circumstances, and so would recommend a single list of reservations.
- 4.4.12** Some evidence linked reserved powers and separate legal jurisdiction. Discuss below.
- 4.5 Minister of the Crown Functions**
- 4.5.1** The model of devolution relates to the legislative powers of the National Assembly. Issue that arose in evidence, perhaps particularly in light of the Supreme Court consideration of the Local Government Bye-Laws Bill, was the Minister of Crown functions, that is, the executive functions of UK Ministers.
- 4.5.2** Whereas Minister of the Crown functions in devolved areas were transferred in general terms to Scottish Ministers in the Scotland Act 1998, they have been transferred to Welsh Ministers on a case-by-case basis and the Government of Wales Act 2006 requires consent before amending or removing these powers. This requires close reading of relevant statute before introducing Assembly Acts in order to identify any Minister of the Crown functions, some of which may be rather anomalous, as implied by the Supreme Court's consideration of the Bye-Laws Bill.
- 4.5.3** In order to promote coincidence between legislative and executive competence, unless there is a reason otherwise, the Commission believes that a future Government of Wales Act should include a general transfer of Minister of Crown functions in devolved (that is, non-reserved) areas, with any specific functions in devolved areas that UK Ministers continue to require being set out clearly.
- 4.5.4** In the meanwhile, recommend expeditious consideration of proposed NAW legislation by UK Government to ascertain whether Minister of Crown powers are affected, and presumption in favour of permitting any change proposed.

## JUSTICE

- 7.3.1 The 'justice system' is a shorthand term for something very complex.
- 7.3.2 The over-riding principle of our recommendations is that access to justice is paramount and that therefore the justice system should be brought as closely as possible to the community it serves while maintaining the quality of justice dispensed.
- 7.3.3 Criminal justice should be distinguished from civil justice.
- 7.3.4 In criminal justice, there are a number of stages: the determination by the legislature of what is a crime; the deterrence and prevention of crime; the detection of offences; the prosecution of offenders; the determination of guilt; the imposition of penalties (ranging from on-the-spot fines to life imprisonment); the treatment of offenders; the system of appeals; the treatment and rehabilitation of offenders.
- 7.3.5 Civil justice is the system under which disputes between people, businesses and other organisations are determined. It is governed by statute, by legal principles such as tort and by the rules of the court. Examples are family law and commercial law.
- 7.3.6 There is also public law and administrative justice, governing the way in which public bodies work.
- 7.3.7 Separate arrangements for Wales should not be established 'just to be different': giving responsibility for strategic direction to Welsh institutions does not preclude using mechanisms which operate on an England and Wales basis in order to take advantage of existing experience, provided this is consistent with the principle of local access to justice enunciated above.
- 7.3.8 In relation to criminal justice, we believe that the NAW should have responsibility in those areas that have the greatest impact on the community and the day-to-day lives of the citizens of Wales – reflecting the principle above.
- 7.3.9 So we have proposed the devolution of policing, while ensuring that there remains co-operation in dealing with serious crime.
- 7.3.10 We also believe the treatment and rehabilitation of youth offenders should be executive devolved to Welsh Ministers.
- 7.3.11 In due course, the treatment and rehabilitation of adult offenders in the community should also be devolved to the National Assembly for Wales.
- 7.3.12 It will be logical then to see the devolution of responsibility for prisons, though we recognise that there will need to be cross border cooperation, and that serious offenders may need to be dealt with on a Wales and England basis. We recognise the practical difficulties in this area and suggest a feasibility assessment as a first step. Whatever the results of this, we propose that a formal mechanism be established for Welsh Ministers to contribute to policy development on adult offender management.

- 7.3.13 Prosecution of offenders is not just a matter for the CPS, but once policing has been devolved, the case for devolving responsibility for other aspects of the prosecution of offenders should be considered, including the CPS.
- 7.3.14 So far as the courts are concerned, below the High Court, justice is already administered in Wales by Welsh courts by magistrates (who are appointed locally) and judges who are appointed to the Wales circuit.
- 7.3.15 Cases involving laws which apply only in Wales should be heard, whenever possible, at first and second instance in Wales. (This is in the context of Law applying in Wales only but extending to England and Wales). *[we will have to recognise that this is in the context of Law applying in Wales only but extending to England and Wales]*.
- 7.3.16 The various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales. A High Court office might be established in Wales to coordinate High Court sittings in Wales.
- 7.3.17 High Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales and Welsh law. *[the High Court issue needs further discussion]*
- 7.3.18 The divisions of the Appeal Court should continue to sit in Wales on a regular basis to hear cases that arise in Wales.
- 7.3.19 Appeal Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales and Welsh law. *[comment as above]*
- 7.3.20 Welsh-domiciled defendants, appellants or plaintiffs who wish to use the Welsh language in court proceedings should be able to do so, wherever the case is heard. *[this needs further discussion, especially in circumstances where the parties do not all agree]*
- 7.3.21 It will be necessary to ensure that there are enough judges able to conduct hearings at all levels in Welsh.
- 7.3.22 Some laws created by the NAW under its devolved powers already carry criminal sanctions for breach, and we do not propose that the NAW should be limited in its power to impose criminal sanctions in areas of devolved responsibility. However whereas the criminal law has been devolved in Scotland and Northern Ireland, we do not recommend the devolution of the criminal law of England and Wales generally so that the law of theft or of offences against the person will remain the same in England and Wales. But we expect that a wider debate on these issues will emerge over time.
- 7.3.23 It will be important to ensure that the reserved powers model does not inadvertently remove the ability of the NAW to create criminal laws where it is necessary to support its wider devolved law making powers *[issue needs further discussion]*
- 7.3.24 The NAW already has wide legislative powers in the civil law area, but it will be important to protect the single economic market by ensuring that fundamental principles of civil law remain the same in Wales as in England –

this includes contract and tort. [*How do we define fundamental principles of civil law?*],

- 7.3.25 Other areas of civil and administrative law and procedure should remain the same as in England, including matrimonial, inheritance and property law.
- 7.3.26 Again, it will be important to ensure that the reserved powers model does not inadvertently remove powers from the NAW.
- 7.3.27 There should be at least one judge on the UK Supreme Court with particular knowledge and understanding of the distinct requirements of Wales and Welsh law.
- 7.3.28 Welsh Ministers should continue to have executive competence on tribunals in devolved areas of policy; and there should be clarity and coherence in the relationship between devolved and non devolved tribunals; the process of appointment, training and terms and conditions of employment should be consistent [*this area needs further discussion*]
- 7.3.29 Legal aid should not be devolved at the present time, although the UK Government should fully consult the Welsh Government and other key stakeholders to ensure that the operation of the legal aid system reflects Welsh circumstances.
- 7.3.30 Welsh Ministers should be able to propose law reform projects to the Law Commission on a similar basis to UK Government Ministers.
- 7.3.31 There should be improved access to all legislation in areas of devolved powers through publication of a consolidated body of legislation.
- 7.3.32 As an example of the liaison we are suggesting elsewhere between UK Ministers and the National Assembly, there should be a periodic report by the Lord Chancellor to Parliament and the National Assembly on how access to justice is improving in Wales.
- 7.3.33 There should be regular dialogue between the Lord Chief Justice of England and Wales and Welsh Ministers on the administration of justice in Wales.
- 7.3.34 We have concentrated on the administration of justice since the term 'jurisdiction' has several distinct meanings. Since the courts will increasingly need to deal with laws made in Wales and applying only in Wales, it is possible that, in due course, a separate Welsh jurisdiction in the sense of separate devolved courts and judiciary may develop, but for the time being we are recommending that distinctive Welsh provision in the court system should be strengthened in the administrative ways we have proposed.