

## Submission to Inquiries into the Draft Wales Bill

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This submission firstly responds to the proposed reserved powers model in the Draft Wales Bill. Then, it provides more specific responses informed by on-going academic research relating to climate action and renewable energy, and intergovernmental relations.

### 1. The proposed reserved powers model of legislative competence in the Draft Wales Bill

The case for adopting a 'reserved powers' model as the basis of the constitutional arrangements for Wales is well established and is reflected in the evidence to the Commission on Devolution in Wales. In principle, the model should provide a means to respond to the complexities of the arrangements, the lack of clarity, uncertainty and incoherence of the Assembly's competences and the division of competences between Wales and the UK level implicit in the current Part 4 of the Government of Wales Act 2006 'conferred powers' arrangements. A 'reserved powers' model akin to Scotland can establish clearer, simpler, more effective and accountable arrangements for Wales. These type of characteristics would support the Secretary of State's commitment to a 'clear and lasting devolution settlement'.

However, in practice, the reservations and exceptions and complexities in the model outlined in the draft Wales Bill suggests that it differs greatly from the clarity of the Scottish 'reserved powers' model. At the most basic level, this is illustrated in comparing Schedule 5 of the Scotland Act 1998 outlining Reserved Matters which is 18 pages in length and Schedules 7A and 7B in the draft Wales Bill which are 41 pages in length. The level of complexity is clear in their framing as general reservations and their exceptions and specific reservations in Schedule 7A and general restrictions and general exceptions to the general restrictions to the Assembly's legislative competence in 7B. Interpretation is likely to be susceptible to conflicting interpretations and potentially a high level of judicial dispute.

The complexity of the proposed arrangements could have far-reaching implications for the operation of devolution in Wales. This is far from the clearer and simpler arrangements that numerous inquiries have recommended since 1999. The aim is arrangements that can be communicated to Welsh citizens to increase their awareness of and engagement with the process of holding government to account. This draft Wales Bill will be the fourth model of devolved government to be introduced in Wales. It is imperative that this attempt ensures clear and lasting devolution arrangements in line with the Secretary of State's vision. A clear and workable 'reserved powers' model is integral to this.

### 2. Comments on extending the legislative competence of the National Assembly for Wales:

Clause 17 Granting of energy consenting powers up to 350 MW to the Welsh Government

Clause 17 of the Draft Wales Bill provides the Assembly with new powers to grant planning consents for generating stations with 350MW capacity or less on land and sea. This expansion in the Welsh Government's limited consenting powers is in line with the recommendations of the Silk Commission Part II report (Recommendation 15).

Research comparing Scottish and Welsh constitutional competence relating to climate policy included detailed consideration of the implications of its renewable energy powers in both cases to their commitments and action in these areas.<sup>1</sup> Both cases faced significant

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<sup>1</sup> This research jointly undertaken with Professor Nicola McEwen, University of Edinburgh and was published as an article: Elin Royles and Nicola McEwen (2015) 'Empowered for Action?'

constitutional constraints with regards to energy policy but Scottish powers were more extensive given its power, derived from the 1989 Electricity (Scotland) Act, to grant or withhold planning consent for the construction of overhead transmission lines and new generating stations in excess of 50 megawatts (MW) for offshore wind farms and (prior to 2011) hydro-electric power stations. In 2011, the threshold for applications for hydro-electric generating stations was raised to in excess of 50 MW, giving local planning authorities greater control over small scale hydro. At that point, the Scottish Government also had its own Renewables Obligation, a key tool in promoting industry investment in renewable energy throughout the UK, replaced by the Contracts for Difference regime. Comparison of the constitutional powers in both cases pointed that Wales' executive powers for electricity planning consent were equivalent to those afforded to local planning authorities in Scotland.

Examining the strategies and policies of both governments demonstrated that both aimed to be pioneers of climate policy, particularly with regard to renewable energy, with Scotland more ambitious than Wales. In practice, during the period under consideration (up to 2014), Scotland became a front-runner in renewable energy, hosing 38% of the UK's installed renewable electricity generation capacity in 2012, including almost 90% of hydro capacity and 44% of onshore wind. Between 2003 and 2011, renewable capacity in Scotland increased by 187%, and generation from renewables by 269%. These trends were supported by government-led initiatives and investments, in addition to those of the UK government to support innovation, technological development, micro- and community-scale generation, and to improve infrastructure for off-shore development and a planning framework conducive to renewables.

In Wales, in contrast, its progress in achieving its renewable energy ambitions was more limited. Between 2003 and 2011, renewable capacity increased by 116%, but at 929MW, it represented just 6% of total UK renewable capacity. While this is in line with Wales's share of UK consumption, it is less than either the ambition or the landscape potential would suggest. Moreover, the rate of renewables growth in Wales has been slower than elsewhere in the UK.

The findings therefore suggest that greater constitutional capacity in Scotland relating to renewable energy consenting powers provided an important basis for its strong performance in achieving its targets. The Scotland Bill does not seem to substantively extend Scottish constitutional competence in this area. Section 53 of the bill formalises consultation with the Scottish Government and the Scottish Parliament in the context of renewable electricity incentive schemes. Section 54 provides Scottish Ministers with functions regarding safety zones and decommissioning of renewable energy developments in Scotland.

Consequently, our research suggests that Welsh constitutional competence in relation to renewable energy would benefit from being extended further beyond 350 MW in order to provide the basis for extending renewable energy capacity in line with the Welsh landscape potential and the climate change commitments of both the UK and Welsh Governments, the former in the context of international-level commitments. In addition, the draft Wales Bill could also replicate Section 53 of the Scotland Bill to ensure parity for Wales with Scotland by providing a formal consultative role for the Welsh Government and the National Assembly for Wales in the context of renewable electricity incentive schemes (see above).

As is evident from the Scottish case, such changes would be in line with securing a single energy market in the UK and its wider effects on energy security in the UK.

### 3. Broader issues regarding the implications of the draft Bill for the constitution of the United Kingdom

The draft Bill does not address the need for more formalised relations between the UK and Welsh Government. The limitations of the current arrangements for intergovernmental relations have been apparent since establishing devolved government in 1999. What has been repeatedly raised in governmental reports and academic analyses continues: informal, non-legally binding arrangements and a dependence on good personal relationships. These arrangements have left Wales vulnerable on many occasions, including not being adequately considered and consulted on UK legislative initiatives or on policy developments. The nature of relations and their implications is well documented and evident in a range of policy areas including trade and inward investment.<sup>2</sup>

In response, the Commission on Devolution in Wales produced detailed recommendations (3-9) to introduce more robust mechanisms for intergovernmental relations. They include a statutory Code of Practice on intergovernmental relations; a role for Welsh and UK audit bodies in the joint audit of intergovernmental relations, and a bilateral Welsh Intergovernmental Committee to oversee relations between both governments and enhance consultation, cooperation and accountability.

Given the continuing asymmetry of UK devolution, quadrilateral features of intergovernmental relations, such as the Joint Ministerial Committee cannot on their own provide an appropriate basis for relations between governments. More formal bilateral engagement mechanisms can be more attuned to the specificities and differences in constitutional arrangements and political relations between the UK and respective devolved government.

Greater consideration should therefore be given to providing stronger mechanisms for relations between governments founded on legal underpinnings in the draft Bill, in particular those outlined in the Silk Commission recommendations. Mechanisms that can enable both governments to work more closely for the benefit of Wales are integral to the stability of the Welsh constitutional arrangements and to the constitution of the United Kingdom more broadly.

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<sup>2</sup> Research on this topic was published in an article Richard Wyn Jones and Elin Royles (2012). 'Wales in the World: Intergovernmental Relations and Sub-state Diplomacy', *British Journal of Politics and International Relations* (Vol, 14, No. 2) 250-269.