

Electoral Reform Society Cymru response to the Inquiry into the draft Wales Bill



November 2015

Introduction

Electoral Reform Society (ERS) Cymru campaigns to build a better Welsh democracy. We seek to strengthen democratic governance, maximise voter participation, and ensure fairness and equality are the principles at the heart of our elections.

The Society views better democracy as essential for better governance. In the devolved context, a clear delineation of where power lies goes hand in hand with good accountability and good scrutiny. The mechanics and process of how devolved democracy functions: how well the process is understood, as well as the National Assembly for Wales' capacity to scrutinise government effectively, are therefore vital to making better policy for Welsh citizens' quality of life.

ERS Cymru welcomes the fact that the draft Wales Bill has adopted many of our recommendations on devolving powers on elections and size (of the National Assembly) to the National Assembly; as well as our recommendation on a 'supermajority' requirement for such changes.

ERS Cymru also welcome a move to a Reserved Powers model, and believe it has the potential to allow for: a more coherent delineation of powers; clearer scope for better policy-making, and for the UK Government to better grapple with devolution in Wales.

However, the bill as drafted raises concerns, and we address some areas the Committee may wish to explore on the possible effects of the draft Wales Bill in terms of clarity and the way power is delineated. This is a complex piece of legislation and we acknowledge that some parts of the legislation are clarified as the scrutiny process goes on. We hope that our

points and questions raised for areas for further inquiry will be useful to the Committee's scrutiny.

1. Response to the following questions:

- **the proposals included in relation to the permanence of the Assembly and Welsh Government;**
- **the proposals for the Assembly to gain powers over its functioning (for example in relation to its name, number of Assembly Members and electoral powers for the Assembly);**

ERS Cymru welcomes the proposals to devolve powers to the National Assembly for Wales over its functioning. The Society submitted evidence to the Silk Commission in favour of more Assembly Members and published a detailed report 'Size Matters: Making the National Assembly more effective' on why there is a need for more Assembly Members to better hold a powerful Welsh Government to account.¹ The report illustrates how the Assembly is small by international comparison leading to a scrutiny gap, and recommended that 100 Assembly Members would be a suitable number for a more effective legislature.

With the Assembly set to gain power over new areas (such as taxes) this scrutiny gap will stretch the Assembly's scrutiny further, so it is important that the Assembly is able to get on with dealing with capacity in the next Assembly term. Not doing so could further erode scrutiny and affect the quality of Welsh democracy still further.

The proposals for 'protected subject-matters' to require a two-thirds majority of all seats in the Assembly (set out in Clause 20) are sensible and follow our recommendations. They provide for a suitably high threshold to change the 'rules of the game' and require strong cross-party support for change, and allow consensus-building on these issues. This 'supermajority' also fits with other precedents within the Assembly, such as the number required for dissolution of the Assembly and calling an unscheduled Welsh general election, and changing the Assembly standing orders.

¹ 'Size Matters: Making the National Assembly more effective' (ERS/Changing Union 2013), available at: <http://electoral-reform.org.uk/sites/default/files/Welsh-Assembly-Size-Matters.pdf>

Given that local elections are not explicitly written as exceptions to be reserved (as, for example Police and Crime Commissioner elections are), our understanding is that powers over the voting system used for local government elections in Wales are also devolved. We welcome this, and would support the adoption of the Single Transferable Vote (STV) in local elections in Wales in future.

We also welcome the devolution over the franchise, and would support the adoption of Votes at 16 in all Welsh elections and referendums, following the positive experience in the engagement of young people in the Scottish referendum on independence. We would also support full power over elections so that Welsh Government can adopt or pilot schemes of weekend voting and electronic voting.

The Society welcomes the proposals outlining the permanence of the Assembly and Welsh Government within the UK framework, but notes that its significance is largely symbolic. In terms of constitutional powers, the House of Commons under parliamentary sovereignty would retain the power to dissolve the Assembly (whether it could do so politically is another question).

Evidence has already been provided from legal experts, and ERS Cymru will leave matters such as a distinct or separate legal jurisdiction and the effect of reserving matters of private law and criminal law en bloc to legal expertise. We will here focus on the areas of relevance devolved, how a reserved powers model should delineate powers and provide a clearer settlement, and how to best conduct processes of constitution building and deciding on the shape of our democracy in the UK.

2. Response to the following questions:

- **the extent to which the proposed reserved powers model of legislative competence is clear, coherent and workable, and will provide a durable framework within which the Assembly can legislate;**
- **the tests for determining competence as set out in section 3 and Schedules 1 and 2 to the draft Bill;**

- **the extent to which the proposed new framework changes the breadth of the Assembly’s competence to make laws;**
- **the proposed legislative powers available in specific subject areas as a consequence of Schedules 1 and 2 to the draft Bill;**
- **the implications of the draft Bill for the constitution of the United Kingdom**

The rationale behind a move towards a reserved powers model is for better clarity than the current ‘conferred powers’ system. A system that is clearer about the delineation of responsibility – and the principles under which it is decided how those powers and responsibilities are delineated – will be clearer for the public, for governments, politicians and political parties, and policy makers and practitioners within and outside government.

A well-implemented reserved powers model should be able to delineate those responsibilities in a clearer fashion. Put simply, saying ‘these are what you cannot do’ is simpler than saying ‘here is a list of everything you can do’. This should allow for clearer policy formulation, as governments and practitioners will know where they stand. It should also lead to a more coherent system allowing for better joined-up policy as there would be fewer ‘jagged edges’ to negotiate during the policy-making process. This is why ERS Cymru has supported a ‘reserved powers’ model.

However, to what extent clarity and coherence is achieved depends on the implementation of a reserved model in the drafting of the Wales Bill. The evidence provided so far suggest that this is not likely to lead to coherence and clarity.

The Assembly Commission’s response indicates that this particular implementation places more rather than fewer obstacles on the path of policy formulation for policy-makers in Wales.² The ‘necessity test’ (Schedule 2; new Schedule 7B, section 2) appears predicated on the need for Westminster approval (and those of UK Ministers) for Welsh policy in substance as well as form, and also allows for multiple interpretations. In particular the clause stating that competency is determined if it ‘has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision’ replaces one blurred border

² National Assembly Commission Analysis (September 2015), available at <http://www.assembly.wales/deposited%20papers/dp-1481-11-16/dp-1481-11-16.pdf>

of conferred powers with another in the reserved model, and works against clarity, coherence and workability.

In its strictest form, a policy could be seen as 'necessary' only if there is no other alternative policy available using other levers (whether that policy would be viewed as inferior by the Welsh Government would be immaterial). This does not allow for great scope in policy making, is open to constant challenge, and sets obstacles to good joined-up policy-making.

There are other wider interpretations of 'necessity' noted by the Commission in relation to European Court of Human Rights' case law, which can vary from a 'strict' interpretation of 'necessity' to a wider view of 'necessity' as similar in meaning to 'proportionate', where the higher court interferes only when a policy choice is based on a position that is 'manifestly without foundation'.³ How 'necessity' will be interpreted in the context of the draft Wales Bill is not predictable. However, it is likely that interpretations will need to be tested and so Welsh legislation is likely to continue to end up in the Supreme Court.

This means that, as drafted, the devolved settlement and where power lies will likely remain a movable feast, dependent in the medium-term on interpretation and jurisprudence. Indeed, whereas the parameters of the current settlement have been tested and so have been delineated to some degree by Supreme Court judgements, we may begin the process anew with the new draft Wales Bill.

So the delineation of powers will likely be less clear than the current settlement initially, although presumably jurisprudence and court decision will gradually clarify. The impact on this uncertainty on policy-making is to make for reticence in bold policy-making, as policy-makers are uncertain of how far they can go, and the likelihood of facing the Supreme Court acts as a disincentive toward pursuing particular policy options. This is true of practitioners within and without government. In a small country governance system, the importance of civil society to policy making is larger (Welsh Government in relative terms to other nations, has fewer staff), so the lack of clarity across the policy network is also significant, and is likely to impede bold policy making

However, the effects of such lack of clarity and scope for interpretation are difficult to predict. The Committee may wish to explore to what extent the wide scope for different interpretations could further complicate the introduction of English Votes for English Laws and the potential impact for Welsh devolution. The Speaker will be required to certify the

³ *ibid*

legislative scope of bills. With devolution arrangements being inconclusive there is potential for those decisions to be highly controversial.

If Wales' reserved powers are unclear and require delineation through practice and testing in the Supreme Court, the status of the House of Commons Speaker's judgement on what constitutes an 'English law', or an 'English and Welsh law', may have unintended effects. Within the UK parliament, the Speaker's judgement will decide what is a devolved bill (or not) for Wales when debated in parliament. While the Speaker's judgement may have no formal legal force in relation to the Supreme Court, bills will pass and decisions made on the basis of that judgement. Also, it is worth exploring whether the Speaker's judgement may have influence as a norm or precedent on how to judge what competencies come under devolved matters for Wales, and thus impact on the outcome of the devolved settlement in unanticipated ways.

On the other hand, it is plausible that the Speaker's equivalent in the Assembly, the Presiding Officer, will take a wider interpretation of what is devolved than the House of Commons Speaker. One could therefore see a widely different framework for setting legislative agendas set across the two places which could be in conflict. The Committee may wish to explore whether there is potential for complexity here also, as well as whether it poses a further potential problem for clarity and coherence over time.

More clarity and less scope for interpretation through the 'necessity test' would mitigate some of these concerns. While in the UK we often make a virtue of 'muddling through', previous experience from the role of Concordats in the First Assembly to the Legislative Competency Order (LCO) system in the Third Assembly suggest that where there is lack of clarity and a problem in delineating responsibility, a reliance on goodwill has not been enough to make devolution work effectively in practice. This has particularly been the case where constitutional disagreement has combined both the form of powers and for purposes they are to be used— a problem that the 'necessity test' is likely to reintroduce through bringing together the purpose of a power along with the form itself.

The draft Wales Bill is itself the outcome of a behind closed doors constitution-building process that promotes piecemeal change, is often a reflection of competing interests, and is prone to shaping 'jagged edges' into the constitutional settlement. Clear and open principles are needed on how to approach delineating powers and the Society's view is that a space should be allowed for rational deliberation outside the normal realm of political bargaining

and competing bureaucracies, and this is why we have called for a Constitutional Convention for the UK.

In the absence of a full citizen-led Welsh Constitutional Convention following on from the Silk process, it is vital that civil society is given the opportunity to scrutinise this Bill in detail, and that there is still space for such input and scope for changes to provide for a durable framework within which the Assembly can legislate effectively.

On the surface at least, the list of reserved powers appears to be less led by clear rationale and principles, than a fairly ad-hoc list based on competing interests within the government machinery. This suggests that the judgement of what is devolved appears to have been made to simply reflect asymmetrical power relations between the Welsh and UK Governments. It is important that the devolved institutions are able to participate in the constitutional building process on an equal footing.

While powers that the Welsh Government wishes to be devolved require strong justification through the 'necessity test', there appears to be little need to justify reserved powers on the UK Government's part. However, reserved powers should require the centre to think strategically and justify the constitutional position rather than leaving the centre able to decide on and retain whatever powers it deems necessary without justification – this is part of the ideal of a coherent settlement for the UK. Such justification, by asking the question 'what powers should be reserved and why?' could possibly provide a useful thread by which to retain coherence across different devolution models within the UK, allowing both for continuity, but also for difference, by allowing for different justification and interpretation within a clear framework across different contexts.

For further information please contact:

- Stephen Brooks on stephen.brooks@electoral-reform.org.uk or (029) 2049 6613
- Dr Owain ap Gareth on Owain.apgareth@electoral-reform.org.uk or (029) 2049 6613.

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