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GOVERNMENT RESPONSE TO THE WELSH AFFAIRS COMMITTEE REPORT ON PRE-LEGISLATIVE SCRUTINY OF THE WALES BILL

I wrote to you back in March to thank you and the Committee for your pre-legislative scrutiny of the draft Wales Bill, and I am now pleased to enclose the Government's response to your report.

The Bill makes Welsh devolution clearer by introducing a reserved powers model to clarify the division of powers between the National Assembly for Wales and Parliament. It makes Welsh devolution stronger by devolving important powers to the Assembly that can make a real difference to people's lives, in areas such as energy, transport and local elections in Wales. It recognises the importance of the Assembly and the Welsh Government, by confirming they are a permanent part of the UK's constitutional arrangements. It also gives the Assembly more control over its own affairs, enabling it to change its name to "Welsh Parliament", decide the system for electing its members and determine who should vote in Assembly elections.

The Bill has been much improved as a result of pre-legislative scrutiny, and many of the changes reflect those recommended in your Committee's report. We have removed the necessity test in the context of Assembly modifications of the private and criminal law; removed the blanket restriction on the Assembly legislating about Minister of the Crown functions in devolved areas and; reduced the number of reservations. The Bill also removes the requirement for a referendum before introducing the Welsh Rates of Income Tax, allowing the Welsh Government to become more accountable to people in Wales by becoming responsible for raising more of the money it spends. The Bill also recognises the existence of a body of Welsh law made by the Assembly and Welsh Ministers which forms part of the law of England and Wales.

I appreciate that the further changes to the Bill will not have been scrutinised by the Committee before introduction, and I would, of course, be glad to meet to discuss these changes and the Bill as a whole.

We have listened carefully to the debate on the Bill during its pre-legislative scrutiny and I believe that the Bill published today responds to many of the questions that were raised. In so doing it provides the basis for a robust, more durable devolution settlement for Wales. There is more work to do to fine tune the Bill, and ensure the Assembly's consent for its provisions. I look forward to working with you and MPs on all sides of the House during its parliamentary passage.



Rt Hon Alun Cairns MP
Secretary of State for Wales

DRAFT WALES BILL: UK GOVERNMENT'S RESPONSE TO THE WELSH AFFAIRS COMMITTEE'S PRE-LEGISLATIVE SCRUTINY REPORT

The Government welcomes the Welsh Affairs Committee's report on its pre-legislative scrutiny of the draft Wales Bill. We are grateful for the Committee's thorough and detailed consideration of the draft Bill and to those who provided evidence to the Committee.

We have carefully considered the Committee's report prior to introduction of the Bill, and this memorandum sets out the Government's response to the Committee's recommendations and conclusions.

Recommendations

Reserved and Conferred Power Models

1. Whilst we welcome the discussions that are ongoing between the Wales Office and the Welsh Government on the draft Bill, these discussions should have concluded prior to the draft Bill being published. This dialogue would have aired some of the views that have been shared with us in this inquiry and would have informed the drafting of the Bill. However, the drafting of the Bill is the responsibility of the Secretary of State. (Paragraph 16)

The Government shared a draft of the reserved powers model with the Welsh Government and the National Assembly for Wales's Presiding Officer at the end of July 2015. Inter-governmental discussions took place before and after the draft Wales Bill was published.

The Government acknowledges that the Wales Bill, as introduced, has been modified significantly compared to the draft Bill we published for pre-legislative scrutiny in October 2015. We believe it was right to publish the Bill in draft to enable a wide-ranging debate on the future shape and structure of devolution in Wales. Discussions between the Government and the Welsh Government have continued during the pre-legislative scrutiny period, and have contributed greatly to the modifications we have made to the Bill.

The Government has also spoken to a large number of stakeholders, opinion formers and interested parties about the draft Bill, helping to shape the changes we have made. The pre-legislative scrutiny undertaken by this Committee, and the Assembly Constitution and Legislative Affairs Committee, has also helped to shape the final Bill.

It would not have been possible to introduce a Bill to this timescale if discussions with the Welsh Government had needed to conclude first.

The St David's Day Process

2. We note that the desire for political consensus was the overwhelming driver of this settlement. (Paragraph 22)

The Silk Commission included representatives from each of the political parties in the fourth Assembly. But those representatives could not bind their political parties to the recommendations that the Commission made.

The Government therefore established a process, which because known as the St David's Day process, to establish which recommendations made by the Silk Commission in its second report had political consensus to be implemented.

The Government does not share the Committee's view that the St David's Day process provided an insufficiently robust foundation from which to develop a stable and lasting new devolution settlement for Wales. Rather, we contend that it ensures broad political support for the principle of a reserved powers model of Welsh devolution and the powers we committed to devolve under the St David's Day Agreement.

Arriving at the list of reservations in the draft Wales Bill

3. There is a range of ways in which Government departments could have gathered views on where the devolution boundary should lie. One end of the spectrum would include an approach similar to that adopted for the Government's work on the balance of competences between the UK and the EU, whereby Government departments would consult widely and look in depth at each subject area. The results of the write-around suggest that the Whitehall departments replied with a list that maps out the existing legislative competence. We note the Secretary of State's comments that there has been pushback from the Wales Office with regard to the list of reservations, and we would welcome examples of where this has happened, and how Westminster departments responded. (Paragraph 26)

4. It is in the interests of everyone that this settlement is long lasting and we are concerned that the approach to drawing up the reservations could undermine this. We conclude that a more hands-on approach from the Wales Office would have been preferable, whereby each department was asked to consult widely and was then challenged as to what they were and were not proposing should go on the list of reservations. (Paragraph 27)

5. We acknowledge that the Secretary of State has sought to refine the list of reservations in the draft Bill. However, the process of moving from a conferred powers model to a reserved powers model means it was always likely to produce a list of reservations as mapped out by Whitehall departments. (Paragraph 33)

As the Secretary of State for Wales noted in his letter to the Committee of 5 November 2015, the process of developing the list of reservations in the draft Bill was iterative. The Wales Office worked closely with other government departments and the Office of Parliamentary Counsel in preparing the list. This process opened out subsequent to publications of the draft Bill, with Wales Office engaging in detailed discussions with the Welsh Government on the reservations included in the list.

The starting point in developing the reserved powers model was the current devolution settlement - the twenty devolved subjects listed in Schedule 7 to the Government of Wales Act 2006. The first task for government departments was to map out the existing legislative competence conferred on the Assembly. Departments were then asked to consider appropriate reservations to capture this within the model. In doing so, departments considered whether broadly equivalent reservations exist in relation to Scotland and Northern Ireland; whether the Assembly has legislated in a subject area in which departments were considering reservations and whether the UK Government has transferred executive powers to Welsh Ministers via a Transfer of Functions or Designation Orders.

As part of this process, the Wales Office adopted a hands-on approach, challenging and testing the output of departments. As this was part of the policy development process the Government cannot provide specific examples.

The Government acknowledges that there was a great deal more work to do, subsequent to publication of the draft Wales Bill, to modify and amend the list of reservations. But publication of the draft Bill last October enabled a wide-ranging and informed debate on the devolution boundary to be put in place by the new reserved powers model for Wales. It enabled stakeholders to offer their views on the reservations. And it has enabled us to get

the boundary right: we believe that the list of reservations in the Wales Bill is the right list, with each reservation supported by a clear rationale in the accompanying explanatory notes.

Principles for identifying reservations

6. The UK Government did not set out to change the principles underpinning the delineation of the devolution boundary but accepted the current settlement as its starting point. Departments were then asked to consider a number of additional factors when considering reservations. However, we are not clear about what guidance Departments were given. Furthermore, it is not clear to us what the process was that then resulted in the final list. (Paragraph 37)

The additional factors that departments were invited to consider were set out in the Secretary of State's letter to the Committee of 5 November 2015 and are repeated above (see Recommendation 4). As noted above, the starting point in developing the reserved powers model was the current devolution settlement.

Silent subjects and the list of reservations

7. Under the draft Bill, many previously “silent subjects” will now be reserved. Some of these, for example international relations, are uncontroversial. There are strong opinions about others, and about whether this constitutes a reversal of the Supreme Court's decision in relation to “silent subjects” in the agricultural wages case. This will be an area of contention in the final Bill, so it is important that the Government does the hard work now to ensure that the list of reservations is justifiable as a whole. This will be necessary to satisfy the National Assembly of Wales, which will be asked to pass a Legislative Consent Motion for the Bill. Each subject will also have to be individually justifiable as they will be scrutinised during the Bill's passage. This is a large task, and requires collaboration and discussion with other key stakeholders. This pre-legislative process will have kick-started that process, which should help overcome these future challenges. (Paragraph 42)

8. In this Chapter, we have identified a number of criticisms concerning the reservations in the draft Bill. We recommend that Whitehall be given a second attempt to come up with a list of the powers to be reserved. However, departments must be given clear guidance about the questions they should ask themselves before deciding whether or not to reserve a power. This guidance should make clear that UK Government departments should be considering what they need to reserve or devolve. It must be published prior to the publication of the Bill, so that the final list of reservations can be assessed against the criteria given. We further recommend that, at the same time, the UK Government carries out a consultation exercise with the Welsh Government regarding their expectations. This exercise should both make the final list of reservations more coherent, and also provide a defensible justification for each decision, which will have to be expressed when the final Bill is debated. (Paragraph 43)

The subjects about which the conferral model is silent are one of the elements that make the current model of devolution in Wales so unclear and incomplete. The current model is silent about many areas of policy such as defence, the Crown and foreign affairs which no-one is sensibly proposing should be devolved.

Those subjects which it is proposed should be reserved to the UK Parliament are set out in new Schedule 7A (Schedule 1 to the Bill). The list includes an exception to the employment and industrial relations reservation (Section H1) for the subject-matter of the Agricultural Sector (Wales) Act 2014, reflecting the outcome of the Supreme Court's judgment on agricultural wages. The Government gave serious consideration to that judgment, to the

Supreme Court's other judgments in relation to Welsh devolution and to the Court's judgments on Scottish devolution, in drafting the new model.

In his 29 February announcement, the then Secretary of State for Wales committed to shortening the list of reservations in the draft Wales Bill, with fewer reservations and a robust rationale for those included in Wales Bill.

The Government has held frequent and wide ranging discussions with the Welsh Government and Assembly Commission on the list of reservations. We have also analysed each reservation with the UK government department responsible for the policy to establish:

- i. Whether the subject area covered by the reservation should be devolved or reserved;
- ii. If a subject area should be reserved, whether a reservation overlaps or duplicates other reservations in the list; and
- iii. Whether reservations can be merged or expressed in more accurate and succinct terms.

The outcome of this work is the list of reservations in Schedule 1 to the Wales Bill. The list sets out a shorter, more succinct and more accurate list of reservations than appeared in the draft Wales Bill. The explanatory notes that accompany the Bill provide a clear rationale for each reservation included in the list.

Separate or distinct legal jurisdiction

9. We recognise that there is a growing body of Welsh law differing from that which applies in England, and that the requirement of the draft Bill to maintain the unified legal jurisdiction of England and Wales has raised a number of complex supplementary issues. (Paragraph 51)

10. Witnesses discussed the advantages of both separate and distinct jurisdictions. The majority of witnesses recommended the creation of a distinct legal jurisdiction, and it is recognised that this would provide a solution to issues associated with the reservation of civil and criminal law and necessity clauses. This proposal has been unanimously supported by the National Assembly of Wales. (Paragraph 52)

11. The term 'distinct legal jurisdiction' need not entail establishing a separate legal jurisdiction with a separate system of courts and separate legal professions. (Paragraph 53)

We believe the single legal jurisdiction of England and Wales serves Wales (and England) well, and should be maintained. We do not agree that the body of Assembly law now, or in the short to medium term, merits the cost, disruption or disadvantages to Wales that establishing a separate legal jurisdiction would entail. The body of Assembly law is of course growing, and will continue to grow, but the quantum of Assembly law is small, and will remain small, compared to the body of law that is common to England and Wales.

We also disagree that there is a case for a "distinct" jurisdiction for Wales. There have been a number of different interpretations as to what a "distinct" jurisdiction entails, but a common thread has been a distinct body of law for Wales administered by a common judiciary for England and Wales. We consider the current, single legal jurisdiction to be fit for purpose.

The Government sees little to distinguish, in practice, between a "distinct" and separate jurisdiction. We believe that no case has been made to justify such a fundamental change, and will not be taking forward these recommendations.

The Government does however recognise the need for the distinctiveness of Wales to be fully reflected within the single legal jurisdiction. The Bill confirms in statute the existence of a body of Welsh law made by the National Assembly for Wales and Welsh Ministers which forms part of the law of England and Wales.

Welsh laws should also feed through into efficient and effective arrangements for the administration of justice in Wales, from matters such as amending court rules to judicial training.

The Government has therefore set up a working group of officials, including representatives from the Lord Chief Justice's Office, to examine these arrangements in detail and recommend how we could improve them. This work will move forward alongside the Bill, and the group will engage with the Welsh Government in making recommendations to improve the current system.

The 'necessity tests' as applied to modification of criminal law and private law

12. We note the difficulties caused by the inclusion of "necessity" in the test for legislating to modify criminal or private law, to modify the law on reserved matters or so as to apply beyond Wales. The comparison with Scotland is not sound. In Scotland, "necessity" is used in the context of consequential or incidental modifications of the law on reserved matters but those reserved matters do not include criminal or private law. (Paragraph 63)

13. We conclude that "necessary" is the wrong test. Its application is uncertain but it risks creating too high a threshold for the Assembly to reach before it can legislate. (Paragraph 64)

14. We recommend that the test of "necessity" is replaced. A number of alternatives have been provided to us, including proposals put forward by the Assembly. We recommend that, in response to this Report, the Wales Office provides an assessment of the suitability of these options. (Paragraph 65)

The Government listened carefully to the concerns expressed about the "necessity test" as it applies to the private law and criminal law. The then Secretary of State for Wales announced on 29 February that the tests would be removed. The Wales Bill enables the Assembly to modify the criminal law for a devolved purpose, except for a short list of offences and core elements of the criminal law which we consider should remain consistent across the single legal jurisdiction of England and Wales. As for private law, the necessity test has been removed. These changes provide the Assembly with the means to modify the criminal/private law for a devolved purpose in order to help enforce its legislation.

The Wales Bill however retains the test of necessity in the two other contexts presented in the draft Bill. First, when the Assembly legislates in relation to England. Clause 3 of the Bill enables the Assembly to legislate in relation to England if the provision is ancillary to a provision of an Act of the Assembly (or Assembly Measure), or to a devolved provision of an Act of Parliament, subject to the "necessity test".

The Government believes it is right that the Assembly continues to be able to legislate in relation to England in order to address cross-border issues. But in doing so there is a very obvious democratic deficit. It is right therefore that in legislating in relation to England the Assembly is subject to the necessity test: that an Assembly provision can have *no greater effect otherwise than in relation to Wales than is necessary to give effect to the purpose of that provision*.

Second, when the Assembly modifies the law on reserved matters, it will be subject to the same test as applies in Scotland. Paragraph 1(1) of new Schedule 7B (Schedule 2 to the Bill) prevents a provision in an Assembly Act from modifying the law on reserved matters. The

law on reserved matters is defined in paragraph 1(2) as any UK Parliament enactment or rule of common law, the subject matters of which is a reserved matter in new Schedule 7A (Schedule 1 to the Bill).

Paragraph 2 sets out an exception to this, so that the Assembly can modify the law on reserved matters if the modification is ancillary to a provision with a devolved purpose and has *no greater effect on reserved matters than is necessary to give effect to the purpose of that provision*. This test has worked well under the Scottish settlement, and allowed the Scottish Parliament to make consequential changes to the law on reserved matters for a devolved purpose which, without this flexibility, the Assembly would not be able to do (and where provision would need to be made in Parliament, by Orders made under section 150 of the Government of Wales Act 2006).

The Government has given a great deal of thought as to whether the “test of necessity” is the right test to apply in all four circumstances in which it was set out in the draft Bill. We concluded that in the case of modifications to the private law and the criminal law it was not. But in relation to the Assembly legislating (in an ancillary way) in relation to England, and the law on reserved matters, we believe that “necessity” is the right test; we believe it strikes the right balance in providing flexibility for the Assembly to legislate in an ancillary way in areas outside devolved competence whilst ensuring such provisions do not go further than they need to.

Reserved authorities

15. The National Assembly needs clarity about which bodies it can legislate for. The only alternative we heard to the proposed test was a list of bodies. A list of bodies in respect of which the Assembly can legislate could lack flexibility and would be suggestive of a conferred powers approach. A list of reserved bodies would doubtless be a long one, and even if it is meticulously produced, bodies might inadvertently be missed from it. However, there are plenty of examples of legislation which contain comparable lists, for example, the Freedom of Information Act 2000. That Act includes the power to add bodies to or remove them from the list through secondary legislation, so that any difficulties can be resolved. (Paragraph 76)

16. We recommend that the respective Governments offer indicative lists of bodies which they consider fall on either side of the proposed test. Through negotiation the aim should be to produce an agreed list alongside the Bill, which can be used as a guide. Whilst this would not be binding on successor administrations (or the National Assembly) it could help to establish the parameters of the definition, and therefore avoid disagreement. (Paragraph 77)

We agree that clarity is needed as to which bodies are Welsh public authorities (devolved) and which bodies are reserved authorities. The Bill defines Wales public authorities as public authorities whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters.

The Bill includes a list of Wales public authorities to provide clarity as to the public authorities which are devolved, and includes a power to amend the list in future by Order.

The Government agrees with the Committee’s conclusion that a list of reserved authorities would be long. We consider that a list of Wales public authorities is far shorter and much less unwieldy.

Alignment of executive and legislative devolution

17. Greater alignment of executive and legislative powers would reduce complexity and increase clarity. We welcome the UK Government's aim to align those powers and its review of pre-commencement functions, but are disappointed this review had not been completed before the draft Bill was presented to us for scrutiny. (Paragraph 82)

18. We recommend that wherever possible the UK Government transfers to the Welsh Ministers, through revision to the draft Bill, all Ministerial functions in areas of devolved legislative competence. (Paragraph 83)

The Government intends the new reserved powers model to provide a clear boundary between devolved and reserved powers.

We recognise that the existing general restriction prohibiting the Assembly from legislating on remaining Minister of the Crown functions (so called "pre-commencement" functions) in devolved areas, without consent, cuts across this key principle.

The Government is, therefore, removing this general restriction in the Wales Bill. The Bill lists those functions which will continue to be exercised concurrently or jointly between Welsh Ministers and Ministers of the Crown, and the few remaining functions which a Minister of the Crown will continue to exercise, and which cannot be modified by Assembly legislation without consent. All other functions in devolved areas will be transferred by Order to Welsh Ministers. The Welsh Ministers are required to consult the appropriate UK Minister if an Assembly Bill includes provision to amend a Minister of the Crown function not transferred by provision in the Bill nor transferred to Welsh Ministers by subsequent Order.

These changes provide clarity on the future exercise of "pre-commencement" Minister of the Crown functions. The considerable task of identifying how all pre-commencement functions should be exercised in future was facilitated by the pre-legislative scrutiny process.

Delays in obtaining Ministerial consent

19. There will continue to be occasions when it is appropriate for the National Assembly to legislate in respect of bodies not operating solely in Wales, as the Wales Office acknowledges. A process which streamlines consideration of Ministerial consent would be welcome. (Paragraph 87)

20. We recommend that the Government includes in the final Bill a procedure for the granting of Ministerial consent whereby it must be granted or refused within 60 days, in default of which consent would be deemed given. Such a procedure should also include the possibility of an extension to the time period where one was reasonably required, for example to obtain further information from the Welsh Ministers. (Paragraph 88)

The Government agrees the need for a clear procedure to obtain Ministerial consents. We believe however that the procedure is administrative, and would be best set out in guidance rather than on the face of the Wales Bill.

The Government intends to publish guidance to UK Government Department on working with the new reserved powers model for Wales. We will do so closer to the time the new reserved powers model is implemented, and will consult the Welsh Government and Assembly Commission in preparing it.

The guidance will include a deadline of 60 working days by when consent must be granted or refused. The guidance will also require the Government to give reasons where consent is refused.

Preparing the draft Bill

21. We have heard that some of the decisions taken in the preparation of the draft Bill may hinder its workability. For example, the decision to amend the Government of Wales Act 2006, rather than replace it, means that the proposed legislation is not freestanding. Additionally, whilst we welcome the discussions that are ongoing between the Wales Office and the Welsh Government, more extensive discussions could have taken place prior to the draft Bill being published. (Paragraph 94)

The Wales Bill amends distinct sections of the Government of Wales Act 2006. In particular, it inserts a new section (108A) and new Schedules (7A and 7B) to replace the current section 108 and Schedule 7 to form the foundation of the new reserved powers model.

The Bill also gives the Assembly the power to amend a number of its own processes that are set out in the 2006 Act. The approach we have taken means that the Government of Wales Act 2006, as amended, remains the comprehensive statutory reference point for the Welsh devolution settlement. The Government does not consider that a consolidated Wales Bill would be the most efficient or effective means of delivering the new reserved powers model of devolution.

The Government has engaged with the Welsh Government in an ongoing and iterative discussion, both before and after we published the draft Bill for pre-legislative scrutiny. This dialogue has proved crucially important in taking forward the modifications made to the Bill. Publication of the Bill in draft facilitated a wide ranging debate in Wales on the future of devolution; a debate that fed into the pre-legislative scrutiny undertaken both by the Welsh Affairs Select Committee in Parliament and the Constitutional and Legislative Affairs Committee in the Assembly.

Consultation on Proposals

22. Whilst this pre-legislative process has flushed out views, it has also made it apparent that the final Bill will be significantly different to that which we have been scrutinising. That is wrong. Whilst changes and improvements are what this process seeks to provide, the weight of the evidence we received has meant we have had to focus on fundamental principles of the draft Bill rather than the specifics of the text. The Government should have focused its effort on resolving these matters of principle, before proceeding with a draft Bill. This could have been achieved through a consultation on its proposals which would also have aired these issues. (Paragraph 95)

The Government notes the Committee's comments, and is grateful for its work in scrutinising the draft Bill. This work is a critically important contribution to the pre-legislative scrutiny process; a process that has led to a thorough and vigorous debate on the future course and structure of devolution in Wales.

The Government has made significant modifications to the Bill as a direct result of pre-legislative scrutiny and the wide-ranging debate prompted by the draft Bill. But the fundamental principles underpinning the draft Bill remain: a reserved powers model as the foundation for Welsh devolution; a clear separation of powers between those devolved and those reserved; and a stronger settlement by virtue of significant further powers being devolved to the Assembly and the Welsh Ministers.

The Government contends that the draft Wales Bill exemplifies the value of pre-legislative scrutiny. It has helped to deliver a better, more new durable devolution settlement for Wales.

Timing

23. The timetable that the Secretary of State has set is challenging, but it can be done. However, the Secretary of State should not be overly committed to his stated timetable. (Paragraph 101)

24. We recommend that he take this opportunity to reflect fully on the pre-legislative process. He should also be open to the possibility of introducing a Bill later in this Session if, in his consideration, the current timetable becomes too challenging. (Paragraph 102)

The Government notes the Committee's recommendations on timing. We agree the importance of getting the legislation right, and of taking sufficient time to reflect fully on the pre-legislative scrutiny undertaken on the Bill.

On 29 February the then Secretary of State for Wales announced that the Government would introduce the Bill early in the second legislative session to give time for careful and thorough consideration of the issues raised the pre-legislative scrutiny period.

Additional provisions to be added to the Bill

25. We consider the announcement, that the power to set rates of income tax to be paid by Welsh taxpayers would be devolved without requiring a referendum, was a key change in policy. We regret the fact that the Committee did not have the opportunity to properly scrutinise this. (Paragraph 106)

During 2015 the Government recognised that the constitutional debate in Wales was evolving rapidly. There was progressively more questioning of why a referendum was necessary in order to devolve a portion of income tax. The Secretary of State for Wales discussed the issue with a wide range of stakeholders and interested parties across Wales.

At Autumn Statement and Spending Review 2015, the Chancellor of the Exchequer announced that the Government would remove the requirement for a referendum on income tax devolution. The Wales Bill provides a statutory mechanism to make this change.

The Government recognises that the relevant provisions did not form part of the draft Wales Bill, and were not therefore subject to pre-legislative scrutiny. We consider however that there is ample opportunity for Parliament to scrutinise the change during the Wales Bill's passage.