

The Rt Hon Alun Cairns MP
Secretary of State for Wales
1 Caspian Point
Caspian Way
Cardiff Bay
CF10 4DQ

21 June 2016

Dear Alun

Wales Bill

I am writing following our meeting on 19 May and the subsequent introduction of the Wales Bill.

I welcome the progress that has been made in improving the Bill. However, considerable work is still needed to ensure it can provide a more durable settlement.

This letter outlines my initial assessment of the Bill and highlights several concerns which need to be addressed. I am sure more issues will come to light as the scrutiny process gets underway in Parliament and in the Assembly.

I have made it a priority for the Assembly to establish a committee with responsibility for scrutiny of the Wales Bill. I hope that any concerns identified by the committee, and me as Llywydd, can be addressed through ongoing, constructive discussion.

There will inevitably be some matters on which we will disagree, such as the convention on Parliament legislating on devolved matters, which I will continue to pursue through the other means.

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English



Timetable for the Bill

The Wales Bill is a significant piece of constitutional law that will reshape devolution in Wales. You will also be aware, of course, that the Assembly must give its consent before the UK Parliament can pass the Bill. Given this, and the fact that it still requires a considerable amount of improvement, I am concerned that only two days has been allocated to the committee stage of the Bill.

The parliamentary programming of the Bill must ensure that sufficient time is available for there to be meaningful engagement for Parliament with the issues identified by the Welsh Government and National Assembly. A pause on the committee stage until after the summer recess would enable this to happen, therefore I ask you to reconsider this.

The Constitutional and Legislative Affairs Committee has been established this week. There are also significant areas which should be of interest to other subject committees which are unlikely to meet before July. It is essential that the parliamentary timetable takes account of this to enable robust scrutiny of this important Bill if it is to provide a more durable settlement.

Tests for legislative competence

I welcome the progress made on moving towards a more workable reserved powers model, in particular the removal of the necessity test in relation to the private law and criminal law. However, in relation to the criminal law restriction (paragraph 4 of new Schedule 7B to be inserted into the Government of Wales Act 2006), a number of concerns remain, including the open-ended nature of the categories of offences which the Assembly cannot modify. The fact that Parliament can add to the offences in each of those categories at any time could effectively result in a frequent redrawing of the Assembly's competence. It is true that any such change would require the Assembly's consent, but I fear that in practice the UK Government Department with responsibility for criminal justice may not be alert to that fact and that Parliamentary Bills may be introduced and proceed without the proper procedures for consulting the Welsh devolved authorities having been followed. Hence, provisions such as these risk reducing the clarity and indeed the integrity of the settlement.

Another aspect of the criminal-law restriction that concerns me is the prohibition on the Assembly modifying the law about "sentences and other orders and disposals in respect of defendants in criminal proceedings". This could, it seems to me, be interpreted as preventing the Assembly from specifying minimum or maximum sentences for offences it creates, and from modifying the sentences for

existing offences. Such a constraint would roll back significantly from the Assembly's current competence and would not be appropriate. I hope that this is not the intention of the provision. I am sure that our officials can work together to ensure that the scope of the prohibition is both acceptable and clear.

The absolute prohibition on legislating in any way at all that "relates to" a reserved matter, without any ancillary competence such as the Assembly currently has under section 108(5) of the Government of Wales Act 2006, also remains a serious concern. I understand and accept that the drafting of the Bill mirrors the Scotland Act 1998. However, the Scottish settlement will remain significantly wider than the post-Wales Act Welsh one, principally because of the Scottish Parliament's almost unfettered ability to make civil and criminal law for Scotland. It is that difference in the scope of "core" competence which justifies a limited ancillary competence for Wales.

I would welcome further discussions with you about how these issues can be addressed, so that the legislation is clear and workable.

A distinct legal jurisdiction

The purpose and effect of the provisions recognising Welsh law are unclear and serve no obvious legal purpose. My view is that the simplest legal solution to providing a clear boundary for Welsh laws is through establishing a distinct legal jurisdiction. I recognise that the improvements to the legislative competence tests provide greater clarity as to the Assembly's ability to legislate on criminal and civil matters and the areas in which the UK Government wishes to maintain consistent laws in Wales and England. However, given the increasing body of Welsh law, I do not consider a provision expressly referencing a single jurisdiction as helpful.

Justice impact assessments

You will be aware that the Assembly's Standing Orders require the publication of an assessment of the costs of an Assembly Bill. Therefore, the inclusion of a further requirement on this specific matter is unnecessary and runs contrary to an important principle to me - and a principle that I know you seek to respect - that the Assembly should have the power to determine its own affairs and procedures.

A more appropriate approach would be for detailed discussions on such matters to take place through formal inter-Governmental mechanisms and for the Welsh Government to properly address justice costs in the Explanatory Memorandum.

Reservations

Your predecessor said he had “instructed officials in the Wales Office to work through the list of reservations with Cabinet colleagues, to see where the number of reservations can be reduced and the list simplified.” The list of reservations continues to be extensive and complicated, with no clear guiding principles articulated. It is difficult to assess the extent of reduction and simplification. It would be helpful if you could set out what has changed and how.

A large number of reservations is drafted by reference to “the subject matter” of parts of other Acts. This was an area of concern for the Constitutional and Legislative Affairs Committee. This approach adds further complexity to the Bill and uncertainty regarding the extent of the Assembly’s legislative competence.

UK Government Consents

There has been some welcome progress in reducing the restrictions placed on the Assembly, as contained in the draft Bill. However, the provisions relating to consents remain complex and lengthy. They appear at various places throughout the Bill, which adds to this complexity.

I am concerned that the Bill would still deprive the Assembly of the ability to remove or modify a concurrent function of a UK Minister, even where to do so is incidental or consequential. This would constitute a roll-back of the Assembly's current competence and would, effectively, reverse the Supreme Court’s decision in the case concerning the Local Government Byelaws (Wales) Act 2012.

The requirements for UK Government consent for the Assembly to confer or impose functions on “reserved authorities”, remove or modify their functions, change their constitutions or confer, impose, modify or remove functions “specifically exercisable in relation to “reserved authorities” all also constitute roll-backs from current competence.

Welsh Public Authorities

The Bill includes a list of “Welsh public authorities”, in relation to which the Assembly will have competence with no need for UK Government consent. There are a number of organisations missing from this list which should be included. I have asked my officials to provide your office with details of the organisations which have been omitted.

Financial provisions

I welcome the progress made in relation to devolving finance, accountability and audit competence. However, several issues remain regarding the details of these provisions, which are subject to ongoing discussion with your officials.

A particular concern in this regard is that the Bill should include a protection that subsequent Welsh legislation must provide that that funds should only be issued from the Welsh Consolidated Fund with the authorisation of the Assembly, and should be used in accordance with the purpose for which they were authorised.

Provisions relating to Assembly operational arrangements

I am pleased to see that more powers have been devolved to the Assembly relating to its internal arrangements. However, there are a few provisions which include an unnecessary amount of prescription, such as the super-majority requirement and justice impact assessment, which I expect our officials will discuss further.

Power to vary date of General Elections of the Assembly

As we discussed when we met, powers to vary the date of an ordinary general election and a separate duty to propose a date of an extraordinary general election should be transferred from the Secretary of State to the Presiding Officer (not to Welsh Ministers), and should mirror equivalent provisions in the Scotland Act.

Commencement provisions

I would like to see some of the operational provisions, such as the repeal of the 2006 Act provisions relating to the make-up of Assembly committees and the duty on the Secretary of State to participate in Assembly proceedings in relation to the Queen's Speech, being commenced at the earliest opportunity.

Income Tax varying powers

The Bill provides for the transfer of income tax varying powers to the Assembly by order, without prior consultation with either Welsh Ministers or the Assembly. In my view, it is a matter of principle that such a transfer should occur only with the Assembly's agreement.

Transitional Provisions

I am keen to ensure that the transition to the new competence model should not impact on the Assembly's ability to function as an effective legislature. It is not appropriate for the UK Parliament to mandate that Assembly Bills would fall as a result of the transition. I am particularly concerned that this will result in curtailed Stage 1 scrutiny of Bills before the specified day; or that no Bills will be introduced at all in the 3 months prior to the "principal appointed day" to avoid the risk of any falling.

I am sure we can find a solution so that the Assembly will be given freedom to set its own procedures around the transition; and that the impact on the Assembly's ability to legislate will be minimal.

I look forward to having the opportunity to discuss these issues and others as the Bill proceeds through Parliament. I hope that we can work together in a constructive way to deliver a settlement that is workable, clear and provides a firm foundation for the Assembly's future.

Copies of this letter have been provided to the First Minister, leaders of the political groups in the Assembly, the Chair of the Constitutional and Legislative Affairs Committee and to Nia Griffith MP, Hywel Williams MP and Mark Williams MP.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Elin', is positioned above the typed name.

Elin Jones AM
Presiding Officer