NATIONAL ASSEMBLY FOR WALES CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE INQUIRY INTO THE DRAFT WALES BILL

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Introduction

1. This submission is in response to the Committee's request for evidence relating to the above Draft Bill. It addresses one specific aspect of the draft Bill, namely the proposed restriction on the lesgislative competence of the Assembly set out in the new Schedule 7A paragraph 8 which the draft Bill would introduced into the Government of Wales Act 2006 *("Ministers of the Crown, government departments and other reserved authorities").*

2. An assessment of the effect of the provision in question is directly relevant to two of the terms of reference of the Committee's Inquiry, namely:

   - 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; and

   - The extent to which the proposed new framework changes the breadth of the Assembly's competence to make laws.

3. The fact that this submission is confined to the specific issue identified above does not imply that it is the only provision of the Bill which is worthy of comment. The author believes, however, that he can best make a contribution to the Committee's consideration of the Bill by concentrating on this provision (and associated matters).

Criteria against which provisions of the draft Bill should be assessed

4. The draft Bill is intended to deliver a manifesto commitment to "clarify the division of powers begween Wales and the UK Government".[2] One of the ways in which that is intended to be achieved (and to which the central provisions of the draft Bill give effect) is by reforming the model for defining the Assembly's legislative competence. The conferred powers model of the Government of Wales Act 2006 is to be replaced by a reserved powers model, in line with the pattern of the Scotland Act 1998 and (in

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[2] https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> accessed 6.11.15 (p 70).

a modified form) of the Northern Ireland Act 1998. Broadly, the Assembly is to be able to legislate on any matter unless it is specifically reserved to Westminster whereas at present it can only do so to the extent that legislative competence in relation to that matter has been specifically conferred on the Assembly.

5. The manifesto commitment referred to above was itself a reflection of the aspiration of the UK Government, set out in its policy document "Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales" (February 2015)[3] to make the Welsh devolution settlement "clearer, and more stable and long-lasting".

6. It follows that, in order to meet the criteria set by the UK Government itself, the re-definition of the legislative competence of the Assembly brought about by the draft Bill should be:

- Clear, enabling everyone with an interest in how Wales is governed (including those directly involved in the running of UK and devolved institutions) to know, with as much certainty as possible, whether a particular proposal is, or is not, within the Assembly's powers; and
- Stable and long-lasting, so that the need for future further structural reforms is minimised and those who hold office at Westminster and in Cardiff can concentrate on using devolved powers as effectively as possible rather than being distracted by questions relating to the nature of those powers and whether they are adequate or not.

7. Neither of the above criteria can ever be fully satisfied. Differnt aspects of law and government do not take place in water-tight compartments. The line between what is intended to be devolved and what is not can never be defined with total certainty. There will always be some potential for disagreement. And as society changes the consensus as to where the line should be drawn will inevitably change. An advantage of a constitution that is neither codified nor entrenched is that as unforeseen circumstances arise they can be met by minor adjustments to the details of the devolution settlement. But it is axiomatic that the potential for uncertainty and conflict should, as far as possible, be minimised.

8. It is also axiomatic that the changes to be brought about by the draft Bill should not reduce the current legislative competence of the Assembly. The move from a conferred powers model to a reserved powers model should, itself, be neutral in its effect on the substance of the Assembly's legislative competence. Nothing in "Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales" nor in the 2015

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3 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.pdf> accessed 6.11.15 (p 8).

Conservative Manifesto nor in any statements on the proposed legislation by the Secretary of State suggest that the draft Bill is intended to roll back the current powers of the Assembly. On the contrary, UK Government policy, in relation to all the devolved institutions, is that their powers should, if anything, be widened.

Does the draft Bill satisfy these criteria?

9. Unfortunately, the provision high-lighted by this submission (the new Schedule 7A paragraph 8) fails to meet the above criteria. Rather than making an understanding of the extent of the Assembly's powers clearer, it will make the extent of those powers more difficult to understand. Rather than (at least) maintaining the breadth of the Assembly's current legislative powers it will in fact narrow them. If enacted in its present form the draft Bill would be likely to render the devolution settlement less, rather than more, stable. It would inevitably generate continuing conflict between Cardiff and Whitehall and calls for further legislative reform in order to remove the defect would be inevitable.

10. It is true, of course, that the practical impact on the Assembly's legislative competence is imposible to quantify in advance. That impact would depend on the precise content of future Assembly legislation. It would also depend on the extent to which UK Ministers were willing to grant the consent which Schedule 7A paragraph 8 requires (in those cases where the content of that legislation called for such consent). But the example of the Local Government Bylaws (Wales) Bill illustrates the dangers. The UK Government were unwilling to give consent to Assembly legislation, not because they had any objection to the effect of the legislation but rather because it contained a provision which appeared to reduce their control over future Welsh legislation on the same subject. In the end, the Supreme Court[4] ruled that under the Government of Wales Act 2006 as it stands, consent of UK Ministers was not needed.

11. The draft Bill as currently drafted, would reverse the decision of the Supreme Court in the above case and would eliminate the ability of the Assembly (at least without a different attitude on the part of the UK Government to that exhibited in 2012) to make the kind of routine refom made by what is now the Local Government Bylaws (Wales) Act 2012.

How does Schedule 7A paragraph 8 reduce the present legislative competence of the Assembly?

12. Paragraph 8 contains one of the proposed restrictions on the Assembly's legislative competence. By sub-paragraph (1):

[4] 2012 [UKSC] 53.

"(1) A provision of an Act of the Assembly cannot—

(a) remove or modify, or confer power by subordinate legislation to remove or modify, any function of a reserved authority,

(b) confer or impose, or confer power by subordinate legislation to confer or impose, any function on a reserved authority,

(c) confer, impose, modify or remove (or confer power by subordinate legislation to confer, impose, modify or remove) functions specifically exercisable in relation to a reserved authority, or

(d) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority,

unless the appropriate Minister consents to the provision."

13. The "appropriate Minister" referred to above is the Secretary of State (i.e. the UK Government) or, where the "reserved authority" in question is HM Revenue and Customs, the Treasury. A "reserved authority" means a (UK) Minister of the Crown or government departement or any other public authority, apart from a Welsh (i.e. devolved) public authority.

14. This provision needs to be compared with the restriction currently imposed by paragraph 1 of Part 2 of Schedule 7 to the Government of Wales Act 2006:

"(1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown.

(2) A provision of an Act of the Assembly cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.

(3) In this Schedule 'pre-commencement function' means a function which is exercisable by a Minister of the Crown before the day on which the Assembly Act provisions come into force."

15. The above has to be read together with Part 3, paragraph 6 of the same Schedule:

"(1) Part 2 does not prevent a provision of an Act of the Assembly removing or modifying, or conferring power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown if—

(a) the Secretary of State consents to the provision, or

(b) the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) Part 2 does not prevent a provision of an Act of the Assembly conferring or imposing, or conferring power by subordinate legislation to confer or impose, any function on a Minister of the Crown if the Secretary of State consents to the provision."

16. Both these sets of provisions - the current ones and the proposed ones - have the common aim of protecting existing functions of UK Ministers of the Crown from being removed or modified by Assembly legislation without the consent of the UK Government. The issue of why such protection is needed, and whether it is still justified, is discussed below. But, leaving aside the question of whether the protection afforded by the 2006 Act is justified, the effect of the new Schedule 7A paragraph 2 would be to extend that protection substantially, by:

- Extending the protection beyond Ministers to include government departments and other public authorities (other than Welsh public authorities);
- Removing the limitation of protected functions to "pre-commencement functions" (i.e. those which existed before May 2011);
- Removing the exception to the restriction which currently applies to provisions which are "incidental to, or consequential on, any other provision contained in the Act of the Assembly".[5] This provision was crucial to the decision of the Supreme Court in relation the Local Government Bylaws (Wales) Bill, so that, as referred to above, its omission from the proposed Schedule 7A paragraph 8 would reverse that decision if similar facts were to arise in the future.

17. The potential impact of these differences is far-reaching:

- They would prevent the Assembly in future from legislating without the consent of the UK Government so as to impose duties relating to devolved matters on government departments and other UK public authorities. Provisions such as those in the Welsh Language (Wales) Measure 2011, which provide for Standards of service through the medium of Welsh to be imposed on public authorities, whether devolved or not, would in future require the consent of the UK Government;
- They would enable the protection of UK Government functions in devolved fields to be entrenched – the protection would apply not only to pre-commencement functions but also to ones re-enacted or even created under new legislation;

[5] Schedule 7, paragraph 6(1)(b) quoted above.

- It would no longer be possible for the Assembly to remove or modify Minister of the Crown functions in ways which were merely incidental or consequential to legislation on devolved matters, without the consent of the UK Government.

How can the position be remedied?

18. An obvious solution would be simply to remove the differences identified above, for example by restricting the protection given by the new paragraph 8 to Ministers of the Crown, by applying it to pre-commencement functions only and by including an exception for incidental or consequential provision.

19. The writer believes, however, that the proposed Schedule 7A, paragraph 8 is merely a symptom of a deeper weakness of Welsh devolution and that, if the aim of a genuinely clear and stable devolution settlement is to be achieved, it is that underlying weakness that needs to be addressed. Merely applying a sticking-plaster to a provision whose existence is itself an earlier expedient designed to avoid removing that weakness would not be satisfactory. It is significant to note that the Scotland Act 1998 contains no provision corresponding to Schedule 7A paragraph 8 (or to the current Schedule 7, paragraphs 1 and 6). The need to include such a provision in legislation intended to align the Welsh devolution settlement more closely to those of Scotland and Northern Ireland is enough, in itself, to sound a warning.

The weakness of Welsh devolution

20. Both the Scottish Parliament and the National Assembly for Wales were established, in 1998, on a foundation laid by existing executive decentralisation. Certain Ministerial functions of UK Ministers had already been transferred to territorial Ministers, the Secretaries of State for Scotland and for Wales. In each case the Secretary of State headed a territorial department – Scottish Office and Welsh Office, respectively. But there were fundamental and far-reaching differences between the ways in which powers were transferred to the two departments, flowing from the different constitutional and legal relationships between the two countries and the UK as a whole.

21. The office of Secretary of State for Scotland was created (actually re-established since such an office had existed in the 18th century) in 1885. But the Scottish Office which was then created to support the Secretary of State inherited a separate system of administration for Scotland which was an inevitable consequence of the continued existence of a Scottish legal system and Scots law. The exercise of UK government functions through a Scottish arm of the administration, headed by a Scottish minister, was not merely a political aim but also a practical necessity.

22. That practical imperative did not apply in relation to Wales. Wales and England share a common legal jurisdiction and, prior to devolution, common legislation. Although, by the time the Assembly was established, the Secretary of State for Wales was also responsible for a wide range of ministerial functions it was often a matter of convenience, rather than of any underlying strategy, which led to particular functions being exercised in Cardiff rather than by a Whitehall department. The position has been graphically described by the last Permanent Secretary of the pre-devolution Welsh Office (and first Permanent Secretary of what is now the Welsh Government), Sir John Shortridge:

> "The founding legislation—the Government of Wales Act 1998—simply took a snapshot of the Welsh Office's powers at the point of devolution and transferred them to the Assembly. This meant that the powers had some jagged edges—the Welsh Office had opportunistically accreted powers to itself over the years, and there was thus no overarching conceptual framework."[6]

23. The jagged edges of Welsh devolution were evident in the enactment which transferred to the new Assembly all the executive functions which had been previously exercised by the Secretary of State for Wales.[7] Few additional functions, i.e. functions previously exercised by other Ministers, were transferred, even where these related to fields of government which were being devolved. This was the case even though the reason why the function had been exercised from Whitehall rather than from Cathays Park was purely one of administrative convenience.

24. Despite the huge changes in the structure of devolved institutions in Wales since 1999, the executive functions of the Welsh Government are still largely defined by the National Assembly for Wales (Transfer of Functions) Order 1999.

25. When the 1998 Act was replaced by the Government of Wales Act 2006 the new legislative competence of the Assembly (as set out in the current Schedule 7) was based on the same pattern of executive functions as that inherited from the Welsh Office in 1999. UK Ministers continued, and continue, to exercise large numbers of statutory functions even in fields which are generally regarded as "devolved".

26. An example of such a situation is section 266 of the Town and Country Planning Act 1990 which empowers ministers to grant planning permission (either directly or on appeal from the local planning authority) to a statutory undertaker (electricity, gas, telecommunications etc.). That power (under section 266 of the Act) was retained by UK Ministers (except in relation to water and sewerage undertakers).[8] So, for

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[6] J Shortridge,"Public Money and Management" (Chartered Institute of Public Finance and Administration) (March 2010))

[7] The National Assembly for Wales (Transfer of Functions) Order 1999.

[8] The entry in the 1999 Transfer of Functions Order setting out the exceptions to the transfer of executive functions under the Town and Country Planning Act 1990 is set out as an Appendix to this paper.

example, an electricity, gas or telecommunications undertaker can appeal to a UK Government Minister against a refusal of planning permission by a local planning authority instead of to Welsh Ministers, even though purely planning issues are involved. For reasons explained below,[9] the position is different in relation to Scotland.

27. The purpose of paragraphs 1 of Schedule 7 of the Government of Wales Act 2006 is to protect the *status quo*, in terms of the division between those executive powers which are devolved and those which are not. The purpose of the proposed Schedule 7A paragraph 8 is to do the same. As already discussed, however, the protection proposed by the draft Bill actually goes significantly beyond that currently provided and, as a result, would diminish the Assembly's current legislative competence.

The alternative approach

28. The Scotland Act 1998 approaches the matter of executive functions in devolved fields in a different and much more logical way. Section 53 of the Scotland Act simply provides that pre-commencement functions of Ministers of the Crown are henceforward, so far as they are exercisable *within devolved competence*, to be exercised by Scottish Ministers instead. Sections 22 and 23 of the Northern Ireland Act 1998 have the same effect although expressed in a more complex way, reflecting the particular history of devolved government in Northern Ireland since 1921.

29. In the case of both Scotland and Northern Ireland the common approach adopted, therefore, was to provide that (subject to a very small number of specific exceptions which are set out clearly in each devolution statute) the devolved governments exercise executive functions on exactly the same matters as those on which the devolved legislatures can legislate.

30. The draft Bill declines to follow that approach. Instead, it retains the current section 58 which limits the powers of Welsh Ministers to those which have been specifically transferred to them or conferred on them since devolution. In other words it does not confer on them executive powers generally throughout the devolved fields.[10]

Why was the approach taken in relation to Scotland and Northern Ireland not adopted in relation to Wales?

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[9] Paragraph 28. See also section 218 of the Town and Country Planning (Scotland) Act 1997 (the equivalent provision in relation to Scotland to section 266 of the Town and Country Planning Act 1990 in relation to England and to Wales.

[10] Confusingly, the draft Bill seeks to introduce a new section 58A which relates to the exercise by Welsh Ministers of "Executive functions of Her Majesty", i.e. common law powers of the Crown, which are quite different from functions conferred specifically on Ministers of the Crown by legislation and whose practical importance is limited

31. The transfer to devolved Ministers of all existing executive functions in relation to devolved subjects has obvious benefits. It is consistent and easy to understand and not only simplifies the activities of the respective governments but also enhances public understanding of what the respective roles of the UK Government and the devolved Government are. There are no issues of principle which would make this approach any less applicable in relation to Scotland than it is in relation to Wales.

32. Welsh devolved government inherited the legacy of the opportunistic way in which the Welsh Office had acquired statutory functions, with no overarching conceptual framework to the process.[11] Over 16 years have elapsed since the coming into force of the National Assembly for Wales (Transfer of Functions) Order 1999. But progress towards eliminating anomalous surviving powers of UK Ministers in devolved fields has been negligible.

33. The move to a reserved powers model provides the opportunity for achieving the aim of matching devolved legislative competence and devolved executive functions. Unfortunately, the inclusion of the restriction in the proposed Schedule 7A paragraph 8, and a failure to re-cast section 58 of the 2006 Act so that if follows the same approach as section 53 of the Scotland Act 1998 amounts not only to a rejection of that opportunity. It actually reinforces protection of the anomalous status quo.

Consequences of the attempt to protect the status quo

34. A number of undesirable consequences flow from the proposed inclusion of Schedule 7A paragraph 8:

- The opportunity to align devolved legislative competence with devolved executive functions will be missed;
- The Welsh model of devolution will continue to be unnecessarily complex and difficult to operate;
- Public understanding of the division between devolved and reserved powers will not be enhanced;
- Fundamental constitutional principles will continue to be undermined (and will, indeed, be further damages) by the existence of a power for the UK *executive* (Government) to interfere in the affairs of the Welsh *legislature* (Assembly);

[11] See paragraph 22 above.

- Opportunities for unnecessary friction between Welsh institutions of government and UK ones will continue and may well be increased;

- The UK Government will be seen (contrary to its stated aims) to be rolling back the powers of devolved government in Wales rather than making them stronger and more effective;

- Wales will continue to be subject to devolution arrangements which, even within the narrower fields devolved to Wales, are significantly inferior to those that apply to Scotland;

- Calls for yet another Wales Bill in order to remove the anomalous treatment of Wales will be inevitable.

Conclusion

35. The aims of clarifying and stabilising the Welsh devolution settlement call for:

- **the omission from the draft Bill of the proposed Schedule 7A paragraph 8 (*Ministers of the Crown, government departments and other reserved authorities)*;**

- **the inclusion of an amendment to section 58 of the Government of Wales Act 2006 (Transfer of Ministerial functions) so that it operates in the same way as section 53 of the Scotland Act 1998, i.e. by transferring to Welsh Ministers all executive functions on matters within the Assembly's legislative competence.**

Keith Bush QC

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APPENDIX

Powers under the Town and Country Planning Act 1990 transferred to Welsh Ministers - exceptions

Town and Country Planning Act 1990 (c. 8) except—

(a) sections 90(2) and 325(9);

(b) the functions of the Ministers of the Crown other than the Secretary of State for Wales under sections 90(1), 101 and Schedule 8, 170(12), 238(1)(a), 239(1)(a), 241(1)(a), 263(3) and (4), 266, 268, 305 and 336(3);

(c) the Treasury functions under sections 293(3) and 336(2).

The requirement to consult the Lord Chancellor under section 20(5) shall continue in effect.

The functions of the Secretary of State as "the appropriate Minister" (in pursuance of the definition in section 265) are only transferred so far as they relate to water and sewerage undertakers.

It is directed that the functions under sections 279(5) and (6), 304 and 321 shall be exercisable by the Assembly concurrently with the Secretary of State. The functions under section 304 shall be exercisable by the Assembly free from the requirement for Treasury consent.

The Treasury approval requirement under section 297(3) shall continue in effect.

The functions under sections 238, 239 and 241 shall apply to land vested in the Assembly under section 23 of the Government of Wales Act 1998 or otherwise which was acquired by a Minister of the Crown or other government department before it was so vested, as it applies to land acquired by the Assembly.

Paragraph 8(2)(b) of Schedule 6 shall have effect as if the references to the Welsh Office were references to the Assembly and in relation thereto the reference to the Parliamentary Commissioner Act 1967 (c. 13) shall have effect as if it were a reference to Schedule 9 to the Government of Wales Act 1998.