



Constitutional and Legislative Affairs Committee:  
Inquiry into the draft Wales Bill

**Institute of Welsh Affairs response**

**About the IWA**

The Institute of Welsh Affairs (IWA) is an independent think-tank. Our only interest is in seeing Wales flourish as a country in which to work and live. We are an independent charity, funded by a range of organisations and individuals. We provide a platform for intelligent debate and work with our members to generate ideas for practical change in our four priority areas: the economy, education, health & social care, and governance.

**Context**

Following the Scottish referendum, the IWA established an online constitutional convention to crowdsource people's views on the future of Wales, and the UK. Over two months 11,000 people, mostly within Wales, took part in the discussion, which focussed on the economy, welfare and the future of Wales, its role in the UK and Europe. The IWA's Constitutional Convention found a consensus around four key findings;

- That performance should be the main motivating factor in terms of new powers,
- Ambition is key, and Wales should have the provisions to achieve its ambitions,
- Wales should be free to explore different policies from the UK Government,
- Policies around the UK and the Union have been dealt with in an ad-hoc and reactive manner, failing to offer cohesive thought to address the role of the union as a whole, and each nation's part within it.

Between 2012 and 2015, we were a partner in the [UK's Changing Union project](#), alongside the Wales Governance Centre, and Cymru Yfory. The project looked at the future of the union and the Welsh devolution settlement. Its work over the three years included extensive publications, reports and events. At the end of the project, a final statement was developed, which included a final section on Wales. The issues raised were around:

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- ending the constant changes to the constitutional arrangements affecting Wales by providing a stable, lasting settlement to meet the needs of present and future generations of Welsh people;
- adopting a reserved powers model to eliminate as far as possible ambiguity and uncertainty in the powers attributed to Wales, so as to ensure that they are readily understood by all in Wales and at all levels of government;
- enhancing effective democratic accountability in Wales, through the transfer of taxation powers, and the creation of a better balance between the executive and an empowered legislature;
- extending the powers of the National Assembly for Wales, to enable the Welsh Government to deal effectively with its challenging economic and social agenda;
- and creating a larger National Assembly, better equipped to deal with its new functions, in particular its new financial responsibilities.

The research from these two projects will form the basis of our response to the Welsh Affairs Committee's pre legislative scrutiny of the draft Wales Bill, published in October 2015.

Our response will seek to answer the two specific questions, as outlined by the Committee.

**Are the Government's proposals, particularly in respect of the reserved powers model, sound? If not, how could the draft Bill be improved?**

The UK's Changing Union Project recommended the adoption of 'a reserved powers model to eliminate as far as possible ambiguity and uncertainty in the powers attributed to Wales'. The adoption of this principle in the St David's Day agreement was encouraging, but its expression in the Draft Wales Bill is of great concern.

Far from clarifying the boundaries of devolved and non-devolved powers the Bill, as drafted, makes the line even more 'jagged' - to use the phrase Lord Richard used to condemn the 2006 Act settlement.

By casting around Whitehall Departments to invite them to claim legislative areas that they wish to reserve to Whitehall, the Government have taken an approach which adds to the complexity of the settlement, and increases its instability - the exact opposite of what was intended by contributors of the IWA's online Constitutional Convention.

It appears that if passed in its current form the next Wales Act could run counter to the clear wishes of the Welsh people in the 2011 referendum on further powers.

We are concerned that the draft Wales Bill could see a return to the complex and much criticised consents system, challenging the legitimacy of many Welsh Acts already passed by the National Assembly for Wales, and have received Royal Assent.

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The reaction to the reserved powers model outlined in the Bill has demonstrated much of this ambiguity. We have already seen debates between the Welsh Government and the UK Government over which Acts already passed would be within the devolved competencies not excluded by this proposed reserved powers model. The [analysis of Assembly Acts](#), published by the UK Government on November 5th, demonstrates an early example of the conflict and debate that would ensue over the Assembly's competences if this reserved powers model were to be implemented. The UK Government have claimed that five of the 25 Acts passed by the Assembly would not be within competence under the new legislation, while First Minister Carwyn Jones has claimed that only three of the Acts would have been passed without Ministerial Consent being needed.

There are two clear issues here. The first is that some Acts passed by the Assembly, and receiving Royal Assent between 2011 and 2015, would have required Ministerial Consent if put forward after the implementation of this draft Bill. This clearly demonstrates that the Bill represents a backward step for the Welsh devolution settlement, against the clear wishes of the Welsh electorate, expressed in a referendum on the legislative powers in 2011 that envisaged moving away from a system of consents and competence orders. The second issue is the lack of clarity enshrined in this model, as clearly demonstrated by the disparity in each government's legal assessment of the implications of such as model.

The discussion around a reserved powers model in Wales has been based on providing a clear and stable devolution dispensation for Wales. The Secretary of State for Wales himself, called for a 'clear, robust and lasting devolution settlement for Wales' in a speech hosted by the IWA in November 2014. Yet, the model for reserved powers offered in the draft Wales Bill does not fulfil that vision.

We would echo repeated calls across Wales for the UK Government to revisit the model offered, and take the time to get this right.

Welsh devolution does not exist in a vacuum. As the IWA's Constitutional Convention showed, there are concerns over the ad hoc nature of devolution across the UK. At the same time as this unclear and potentially regressive model is being offered to Wales, powers are being devolved to cities across the north of England, which will give extensive control over public services to elected mayors, despite an almost wholesale rejection of these roles in 2012. Where is the thought behind the role of the UK as a whole and each of its nations?

While we do not underestimate the constitutional challenge presented here, it is crucial to the future of the Union that it should work smoothly on the basis principles consistently applied. The contrast between the reserved powers model on offer in Wales, and that enacted by the Scotland Act 1998, and its extension in 2012, is significant.

The principles of clarity and consistency should be a key concern in a reworked model.

**Do the provisions of the draft Wales Bill deliver the policy intentions of the UK Government? Could the wording of the draft Bill be improved or changed?**

In a [speech hosted by the IWA on November 17th last year](#) the Secretary of State for Wales, Stephen Crabb, outlined his ambitions for the future of devolution for Wales.

He stated:

*“In short, I want a clear, robust and lasting devolution settlement for Wales:*

- *A settlement that ends the constant, tiring debate about powers which has characterised Welsh politics for 15 years but which has so little resonance with Welsh voters, and lets the Assembly and the Welsh Government get on with the job of delivering economic growth and improving public services. Wales has great economic potential – as this week’s UK Investment Summit in Newport will show. So let’s end the arguments about devolution and focus on getting the Welsh economy in gear;*
- *A settlement that fosters cooperation not conflict between either end of the M4;*
- *And a settlement that works for the people of Wales, where they understand which decisions are being taken at the UK-level, and which are taken here in Cardiff. And why.”*

This speech was clear that a new settlement would enhance accountability and clarity, a move that we welcomed. The draft Wales Bill, however, fails to achieve the aspirations the Secretary of State for Wales set out.

Let’s take each of these points in turn.

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This echoes our constitutional convention, which found that the debate around powers has overshadowed discussion about the performance of the Welsh Government.

One of the key recommendations from the IWA Constitutional Convention’s discussion on the economy was that Wales should use its powers to the full to deliver economic growth and close the wealth gap with the rest of the UK. In the field of energy for example, we found that extra powers are required to achieve the potential for growth. But whilst some further powers are to be devolved, the use of powers will be constrained by the lack of clarity within the settlement. In

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her evidence to the Assembly the Presiding Officer, Dame Rosemary Butler, said: “If the UK Government proceed with the proposals presented in the draft Bill, further Supreme Court referrals and/or other legal challenges to Assembly legislation will be inevitable”. This will directly and adversely impact on the task of delivering economic growth.

Furthermore, the opaque nature of the settlement will make it harder to hold a Welsh Government to account for any policy failures.

Far from a lasting settlement that ends the debate around powers to allow for a greater emphasis on performance, the draft Bill lacks the coherence of the recommendations of the Commission on Devolution in Wales (the Silk Commission). The process leading up to the St David’s Day agreement prioritised short-term political expediency above the thoughtful and evidence based analysis of the cross-party commission. As a result there are significant areas missing from the settlement - including policing, railway services and water - that will ensure this debate continues. This can certainly be seen in evidence to the Committee on November 9th, where the First Minister of Wales outlined two areas he thought merited devolution: teachers’ pay and water. Instead of the clear and relatively short exceptions listed in the Scotland Act 1998, this piecemeal approach to reserved powers has resulted in more than 200 reservations that may be subject to future debate. This does not lend itself well to a mantra of performance over powers.

*“A settlement that fosters cooperation not conflict between either end of the M4;”*

Since the publication of the Bill in October the relationship between the Welsh Government and the UK Government has been strained, and it has been played out in public. Whilst some of this is inevitable given the differences in political composition, it is exacerbated by the flaws in the settlement.

If the Welsh Government is to require additional consent from Westminster Ministers for legislation that would previously have been within its competence, the relationship between the two governments will surely be tested to breaking point.

Within any settlement, we believe that intergovernmental relations should be supported through an established process, such as the Wales Intergovernmental Committee, suggested within the Silk Commission’s findings. A committee of this nature could also be conducive to an easier forum for discussion around issues with this kind of legislation, and formalise discussions instead of the very public debate we’ve seen within the media since the draft Bill was published.

*“And a settlement that works for the people of Wales, where they understand which decisions are being taken at the UK-level, and which are taken here in Cardiff. And why.”*

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In a letter to the Welsh Secretary on the 2nd September the Assembly Presiding Officer said that “The draft proposals would leave the Assembly with less clarity over its powers than it currently has and less able to function effectively as a legislature”.

The draft legislation fails to offer a clear and lasting settlement with simple lines drawn between what Westminster and Cardiff Bay are responsible for.

Given this, it is very unlikely that the Bill can fulfil the aim to increase understanding among the people in Wales.

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