



THE LEARNED SOCIETY OF WALES

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Learned Society of Wales comment on the Draft Wales Bill

The Learned Society welcomes the opportunity to comment on this Bill.

The Learned Society of Wales (LSW) is an all-Wales, pan-discipline educational charity, operating on an independent basis and providing public benefit including expert scholarly advice on a variety of public policy issues related to science, engineering, medicine, arts, humanities and social sciences. Established in 2010, the Society has access to the considerable strengths of over 380 distinguished Fellows based in Wales, the UK and beyond.

The Society supports the aim of delivering a 'stronger, clearer and fairer devolution settlement for Wales' that will 'stand the test of time' based on a coherent and fair reserved powers model. It therefore endorses the aspirations contained in the draft. Wales deserves a more cogent devolution of powers, a model of devolution which is intelligible, and laws which are widely accessible, following the recommendation of the Silk Commission.

The Bill contains specific proposals which are particularly positive, such as providing in law for a permanent devolved assembly or parliament, removal of unnecessary controls over the composition of internal Assembly committees, deletion of involvement of UK ministers in Assembly proceedings, placing the Sewel Convention on a legislative basis, and the transfer of powers concerning energy, transport and electoral reform. It is to be welcomed that the Assembly will be able to decide its own composition and mode of election and to consolidate existing and new laws so as to improve their accessibility.

However the draft also raises broad constitutional concerns:

- a) The lists of reservations in Schedule 7 appear excessive, particularly when compared to the list of reserved powers in the Scotland Act 1998 and with their 'relates to' legislative competence tests obscure and complicate what is presented as a clarification of powers and actually represent a reduction in the Assembly's powers. The mix of General Restrictions set out in Part 2 of this Schedule, some of which are general and some specific, taken with the exceptions and interpretation provisions within, are a recipe for confusion.
- b) The effect is to undermine the capacity of the Assembly to make or modify laws - its essential function - potentially frustrating the Welsh people and their elected representatives. Most fundamentally the expectation shared by almost everyone that the National Assembly should be free to legislate in non reserved areas is not met.
- c) Moreover, the Secretary of State has the power to intervene to prevent an Assembly Bill becoming law on several grounds. This role is essentially a matter of judgement, capable of being overruled by the Houses of Parliament, who then become the final arbiter of whether the National Assembly can act, contrary to the spirit of devolution, and to the principles espoused in Explanatory Notes.
- d) The opportunity to clarify and simplify law making in Wales has not been sufficiently realised. Devolution to Wales in three Acts has so far been an accumulation of piecemeal decisions. Coherence and the application of clear principles is overdue, and if anything the problems would be exacerbated by the provisions in the Bill.

We have a number of detailed observations:

- a. As drafted the Bill removes some of the Assembly's existing competences. Examples include teachers' pay and conditions, clawing back the Supreme Court's rulings on the scope of the Assembly's powers which the Court considered had been intended by Parliament, and expanding the current

requirements for Minister of the Crown consents. These requirements are already more extensive than those which characterise Scotland's devolved settlement. Such an extension is constitutionally objectionable in that it greatly expands executive control over Wales's democratically elected legislature. It does this in two ways. Most obviously, it provides Whitehall with a direct veto power over National Assembly legislation. Not only that, but given that it is the Welsh Government who would be required to negotiate with Whitehall over these consents, it will also increase the power of the Welsh executive over the legislature in Cardiff Bay. The proposed system of Minister of the Crown consents will also create unnecessary delays and frustration in the process of enacting National Assembly legislation as well as, almost inevitably, generate conflict between devolved and central government. As an alternative, we propose the general devolution of Minister of the Crown consents with the retention of specific reservations for specified bodies. This would bring the situation in Wales into line with that pertaining in Scotland.

- b. The draft insists on a unified England and Wales jurisdiction and fails to recognise the practical existence of three bodies of law - those of England and Wales, those of England only, and those which apply only in Wales. This last category will grow as the National Assembly legislates. In the view of the Society, developments and Acts will determine how jurisdiction will evolve. It is unhelpful now to insist artificially on a unified system which is unnecessary and serves to fetter the powers of the Assembly.
- c. The power of the National Assembly to legislate on matters affecting the Welsh language is obviously right. Yet because this competence cuts across reserved areas, the outcome in the draft bill would be a diminution of powers and a potential recipe for confusion and conflict.

Specifically:

- i. Reserving Sunday Trading flies in the face of the history of distinctive law-making for Wales and the precedent of legislation regarding the Sunday opening of public houses.
- ii. Reserving the licensing of opencast mining while devolving land restoration would appear nonsensical.
- iii. Reserving ports after their turnover reaches a certain threshold provides a disincentive for the Welsh Government to improve them.
- iv. Reserving alcohol licensing would appear to frustrate broader health promotion initiatives.

In conclusion we welcome the intention to legislate and recognise the positive features of the draft Bill.

The Learned Society believes that the substantial issues which we have identified can be improved in its progress through Parliament and that the eventual Act can better meet the desirable aims set out by the Government. We welcome the Secretary of State's willingness to consider amendments which could improve the delivery of stated objectives of the Bill. It is important that civil society has adequate time to consider and comment on a complex Bill. It will be helpful if further consideration could identify a clear principle underlying the reserved areas and reduce and make more cogent those which remain necessary. The emphasis on the unity of the legal jurisdiction of England and Wales unnecessarily restricts devolution.

The Learned Society looks forward to consideration of two options; either that England and Wales should be a shared or joint jurisdiction within which the National Assembly has unfettered power to change the criminal and private law as it extends to Wales or a distinct Wales jurisdiction is created to sit within the current England and Wales legal institutional framework.