



THE LEARNED SOCIETY OF WALES CYMDEITHAS DDYSGEDIG CYMRU

THE NATIONAL ACADEMY — CELEBRATING SCHOLARSHIP AND SERVING THE NATION
YR ACADEMI GENEDLAETHOL — YN DATHLU YSGOLHEICTOD A GWASANAETHU'R GENEDL

Constitutional and Legislative Affairs Committee:

UK Government's Wales Bill

September 2016

Learned Society of Wales Response

The [Learned Society of Wales](#) (LSW) is an independent, all-Wales, self-governing, pan-discipline educational charity that was established back in 2010. As Wales's first National Academy of science and letters, the Learned Society of Wales, like similar societies in Ireland and Scotland, brings together the most successful and talented Fellows connected with Wales, for the shared purpose and common good of advancing and promoting excellence in all scholarly discipline across Wales.

1. The Learned Society of Wales welcomes this opportunity to submit comments on the Wales Bill 2016. In doing so, we note the growing participation of Welsh civic society in public debates, and the Society itself is an exemplar of this encouraging and positive trend in Welsh civic life.
2. We acknowledge too the readiness of the promoters of this bill and its predecessor, the Draft Wales Bill 2015, both to engage with Welsh civic society regarding their proposals and to respond to that debate. We note also, however, that the timetable envisaged for the scrutiny and possible amendment for this bill is very tight, and that consequently there is little realistic opportunity for substantial change to the proposals and their detail. We confine ourselves here therefore to broader issues of principle, rather than suggest detailed amendments, and note issues which in our view will almost certainly require further legislative action at a future date.
3. The Bill is intended to achieve 'clarity, coherence and stability' by adopting a 'reserved powers' model. In our view, it will not succeed in doing so. The structure of the constitutional arrangements remain extremely complex.
4. There are several features of its content which also undermine the stated objectives.
5. The list of reserved matters remains lengthy, and does not appear to be the result of an analysis of what needs to be retained centrally according to the principle of subsidiarity. It will remain almost impossible for the citizen to understand the division of responsibilities between UK institutions and those of Wales, to the detriment of democratic participation.
6. It is unlikely also that greater clarity will result regarding the boundary of the Assembly's legislative competence. In many cases, it may in practice be that exceptions under the existing settlement, rendering outside of competence provisions which 'fall within' them, have simply been converted into reserved matters, rendering outside of competence provisions which relate to them. This in itself may narrow the Assembly's law making powers. How the 'relates to' test will be interpreted in this new context cannot be predicted with certainty, and it is difficult therefore to be confident that periodical references to the Supreme Court will have been consigned to history.

7. It is disappointing that a clear resolution of the issues concerning Minister of the Crown functions along the lines of that contained within the Scottish devolution settlement has not been achieved. An obvious opportunity to achieve clarity and coherence has been missed.
8. As an example of specific concerns, and one of particular interest to the Learned Society, is the categorization of governing bodies of institutions within the higher education sector as public authorities. We share the concerns of universities that this categorization may result in unintended and unwelcome consequences for the institutions concerned, and we would seek assurance that the consequences are being thoroughly scoped or that universities are removed from the list of public authorities. Our question illustrates the lack of clarity and certainty in the proposed arrangements.
9. It is worth reflecting upon other consequences for Wales of such uncertainty. How likely is it, for example, that businesses will choose to locate in a country where there is a lack of clarity as to the powers of its legislature and government? A potential investor needs to know what the law is in Wales and what are the powers of the National Assembly to affect that law.
10. Clarity and accessibility of law are fundamental to democracy. . Both the administration of justice and law making are part of government. For legislation to be effective, it must be capable of being enforced or applied to resolve disputes in the courts. The late Lord Bingham of Cornhill regarded the provision of means to resolve disputes involving citizens without prohibitive cost or inordinate delay as a feature of the rule of law. Citizens in Wales, and their legal advisors, need to know what laws apply to them, and it is of little relevance whether the laws have been enacted by the UK Parliament or the National Assembly. For the citizen, Welsh law is the law which applies to them in Wales regardless of who made it. We agree. It is unhelpful if there is a plethora of laws on the same subject made by different bodies. The Law Commission of England and Wales has drawn attention to the fact that in addition to 13 Assembly Measures and Acts on education, the UK Parliament has also continued to legislate for education in Wales. Depending on how 'education law' is defined, the law which applies in relation to education in Wales is distributed between 17 and 40 Acts of Parliament, 7 Assembly Measures and 6 Assembly Acts, as well as hundreds of statutory instruments. (Law Comm No. 366; *Form and Accessibility of the Law Applicable in Wales*, ¶ 7.2, on p. 70.)
11. We note that, other than recognizing the existence of a body of Welsh law defined by source rather than application, the bill does not expressly address the practical issues relating to justice which specifically arise in Wales. We believe strongly that the administration of justice according to law within Wales needs to reflect the distinct differences which are arising. This does not mean that Wales needs a separate courts system, but it does mean that the exercise of jurisdiction by the courts in Wales (that is their administration of justice according to the body of law which applies in Wales), must reflect the fact that the laws they administer are no longer always common to those of neighbouring England. We recognise that the legal services industry is a key contributor to the British economy. That is not sufficiently the case in Wales. We would like to see stronger legal services in Wales, with Wales becoming more of a place to do legal business, and the full range of legal services available to the general benefit of the economy with the potential of devolution better exploited. We therefore urge further discussion about the establishment of a body in Wales that could examine these issues and promote legal services and education aimed at the needs of the people of Wales and the Welsh economy.
12. The devolution of revenue raising powers raises many issues. We note that allocation of revenues is largely based on the Barnett formula. When this Bill is becomes law, there will be enhanced scope for disagreements between governments and legislatures. Federal jurisdictions often have processes – sometimes intergovernmental, sometimes judicial – to provide for arbitration or determination of such disputes so as prevent one level of government having the power to impose outcomes on the other. We recommend that these avenues be investigated.

13. Brexit looms large over most aspects of life in the United Kingdom. All levels of government have a substantial capacity problem to deal with the huge number of complex issues involved. This is not the time to speculate on outcomes. But Brexit will complicate the implementation of this Bill, and its provisions will further complicate the negotiation involved to deliver Brexit. We note that currently the legislative competence of the Assembly and the powers of the Welsh government are limited by the requirement of compatibility with EU law. The bill proposes no change to that requirement, but the requirement will have to be repealed if and when the UK leaves to EU. Whatever the outcome of the Brexit negotiations, it will undoubtedly remain the case that the devolved legislatures will be prevented from enacting provisions which are incompatible with the terms by which the UK may continue to, for instance, access or be a member of the single market. If those terms are in the form of an International Treaty, then any consequent disputes regarding the compatibility of Assembly legislation with the international obligations concerned would, as things currently stand, be resolved through the intervention of the Secretary of State preventing an Assembly bill proceeding to royal assent by order subject to annulment in either the Commons or the Lords. . In other words, disinterested judicial determination of this boundary of competence would be replaced by discretionary political judgement. We believe this needs consideration in due time.

lsw@wales.ac.uk / cddc@cymru.ac.uk