



Legislative Consent Memorandum Report: Wales Bill

Background

1. On 1 May 2014, Jane Hutt AM, the Minister for Finance, laid a Legislative Consent Memorandum (“LCM”) concerning the Wales Bill (“the Bill”), pursuant to Standing Order 29.2. A written statement, required under Standing Order 30 was also laid on 1 May, setting out modifications to Welsh Ministers’ functions which are outside the Assembly’s legislative competence and consequently not dealt with by the LCM.
2. On 6 May 2014, the Business Committee referred the LCM to the Constitutional and Legislative Affairs Committee and the Finance Committee, setting a deadline to report of 26 June 2014.

The Bill

3. The Bill was introduced on 20 March 2014 and completed its passage in the House of Commons on 24 June 2014, having been carried over to the 2014-15 session. It received its first reading in the House of Lords on 25 June 2014. The LCM considers the Bill as amended.
4. According to the LCM:

“The UK Government’s expressed policy objectives for the Bill are to make the National Assembly for Wales (“the Assembly”) and the Welsh Government more accountable to the people of Wales for raising the money they spend, and to improve the system of elections to the Assembly.”¹

¹ Paragraph 3

Provisions for which the Assembly's consent would be required

5. According to the LCM, the provisions in the Bill for which consent is sought are listed below:

- Clause 6 – Taxation: introductory
- Clause 7 – Amendments relating to the Commissioners for Revenue and Customs
- Clause 14 – Welsh tax on transactions involving interests in land
- Clause 17 – Welsh tax on disposals to landfill
- Clause 21 – Budgetary procedures

6. A detailed description of each of the provisions is provided in the LCM, together with the Welsh Government's view on them.

Consideration

7. We considered the LCM at our meeting on 19 May 2014.

8. We note that the provisions referred to in the LCM:

- are not currently within the legislative competence of the Assembly but seek to modify that competence by extending it;
- implement a number of the recommendations of the Silk Commission's first report.

9. **The provisions referred to in the LCM could not be made by the Assembly and we therefore have no objection to the LCM.**

10. There are however some matters on which we wish to comment.

Commencement of Clause 8

11. Clause 6 (Taxation: introductory) and clause 8 (Welsh rate of income tax) insert new sections 116A – 116K into the *Government of Wales Act 2006* about taxation, while clause 9 (Welsh basic, higher and additional rates of income tax) inserts new taxation sections into the *Income Tax Act 2007*.

12. Clause 6 contains a general power to add various new devolved taxes to the 2006 Act. The power to add the income tax provisions set out in clause 8 is subject to a majority voting in favour in a referendum (under clause 11) and is to be exercised by an Order in Council, which requires the consent of the National Assembly.

13. Clause 13 provides for the income tax provisions in clause 8 to be commenced by an Order from Her Majesty's Treasury.

14. In our view, this is an unwelcome division of power that has the potential to cause legislative confusion and delay. It would be more sensible for the powers in clause 13 to be commenced by Welsh Ministers and, if necessary, a new provision included requiring Her Majesty's Treasury to be notified of the commencement.

15. Commencement by Welsh Ministers would replicate the position following the March 2011 referendum when the Assembly Act provisions were commenced by Welsh Ministers in accordance with section 105(2) of the 2006 Act.

Conferral of functions under clause 8

16. Clause 8 inserts Chapter 2 (Income Tax) and new sections into Part 4A of the *Government of Wales Act 2006*. Clause 8 contains an innovative approach to the conferral of powers on the National Assembly. Instead of conferring competence on the National Assembly to legislate on a subject, it confers a much more limited power to pass a resolution regarding the Welsh rates of income tax. This can be contrasted with the competence to legislate granted in relation to devolved taxes such as the competence relating to the tax on transactions involving interests in land (Chapter 3, and inserted by clause 14) and the tax on disposals to landfill (Chapter 4 and inserted by clause 17).

17. It may well be that the approach is appropriate in this case as the tax will apply across the UK and the Assembly's decision will fit within the framework of UK tax legislation. Nevertheless it is important that this should not be seen as a precedent. The Assembly should, save in exceptional circumstances, be granted legislative competence (subject to any exceptions that may be considered appropriate) rather than piecemeal powers.

Clause 8 and Assembly Standing Orders

18. In light of paragraph 16 above, clause 8 therefore confers a new function on the Assembly and it has highlighted a gap we believe exists in the Assembly's standing orders, namely that there is no mechanism for the Assembly to agree changes to its functions (rather than its competence) that arise as a consequence of UK Acts. We believe that such a mechanism should exist within the Assembly's standing orders (and could, for example, be achieved by an amendment to Standing Order 29).

19. As a consequence, we consider that this issue should be considered further and pursued by the Business Committee. In so doing, we recognise that this may involve discussions between the Welsh and the UK Government

(as a consequence of *Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales*).

Clause 24 in relation to the Law Commission

20. Clause 24 (The work of the Law Commission so far as relating to Wales) introduces provisions for the Law Commission to provide advice and assistance to the Welsh Ministers. It does not, however, include reference to “a comprehensive programme of consolidation and revision of statute law in devolved areas” as the Committee sought in a letter to the Secretary of State – see correspondence at Annexes 1 and 2 to this report). We remain disappointed at the absence of such provisions.

Power to make supplementary, consequential, etc provision under clause 27

21. In our letter to the Secretary of State (at Annexe 1 to this report) we expressed concern that clause 27 has the potential to undermine the devolution settlement because it could permit the UK Parliament to amend a Measure or Act of the Assembly without the Assembly’s consent. While we note the Secretary of State’s response (at Annexe 2 to this report), we are of the view that a statutory requirement for consent to be provided contained within the Wales Bill provides a better, more robust mechanism than relying on the existing legislative consent process. For that reason, we remain concerned about clause 27.

The Welsh Government’s Explanatory Memorandum

22. The LCM considers the Bill as amended. However, this is not made clear in the text of the LCM and accordingly it is difficult to follow whether provisions for which consent is required are contained in the Bill itself as introduced or as a result of a tabled amendment.

23. For example, clause 7 of the Bill as introduced does not require the Assembly’s consent. However, an amendment tabled by the UK Government, (subsequently agreed in the Committee of the Whole House on 6 May 2014), inserts a new subsection (14) and it is for this provision that consent is required. Yet information related to this position is not contained in the Explanatory Memorandum text for clause 7.

24. While we acknowledge that paragraph 2 contains a link to Bill documents including amendments, we consider that the Explanatory Memorandum should be much more transparent in identifying the precise nature and origin of the provisions for which consent is sought.

25. As we have indicated recently in our report on a supplementary LCM for the Deregulation Bill,² we consider it good practice to provide information about who tables amendments and the relevant amendment numbers assigned to them to enable their progress to be tracked in UK parliamentary proceedings.

26. This would allow for effective scrutiny and ensure that the Assembly was fully informed and absolutely clear about the nature of the provisions for which its consent is being sought.

² Constitutional and Legislative Affairs Committee, *Legislative Consent Memorandum Report: Deregulation Bill: Amendments in relation to Agricultural Holdings Act 1986, Breeding of Dogs Act 1973 and Breeding and Sales of Dogs (Welfare) Act 1999*, June 2014

Annexe 1

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Constitutional and Legislative Affairs Committee

March 2014

Draft Wales Bill

I refer to the draft Wales Bill, which was published by the UK Government on 18 December 2013.

We have been taking a close interest in this Bill given its constitutional significance.

In particular, we have seen your exchange of correspondence with the Presiding Officer on the draft Bill. We would like to place on record our endorsement of the points she has raised.

There are some additional points we would like to make based on our consideration of the draft Bill and the work of our committee over the last few years.

Budgetary procedures

We fully support the Silk Commission's recommendation to give the Assembly control over its budgetary procedures (recommendation 32 of *Empowerment and Responsibility: Financial Powers to Strengthen Wales*), in line with position in Scotland. In our view, this would be a pragmatic and

sensible approach, allowing the Assembly to take advantage of the new financial powers being provided through the draft Bill in a co-ordinated and efficient way.

Clause 21: The work of the Law Commission so far as relating to Wales

In 2012, we conducted an inquiry into a separate Welsh jurisdiction. Most witnesses were supportive of having a body to review Welsh law and that its membership should be flexible and draw on expertise in the law schools and the profession. We recommended that:

a body should be entrusted with reviewing and assisting with the consolidation of Welsh law. Such a body could form part of the existing Law Commission for England and Wales or be a newly established body.

We note that clause 21 of the draft Bill inserts new provisions into the *Law Commissions Act 1965* in order to impose a new duty on the Law Commission to provide advice and information to the Welsh Ministers directly. This makes it clear that the Welsh Ministers will be able to refer law reform matters to the Law Commission themselves. However, the draft Bill does not place Welsh Ministers on the same footing as UK Government Ministers or Scottish Ministers, with regard to the Law Commission or the Scottish Law Commission, respectively. For instance, the Law Commission will not be under a duty to provide the Welsh Ministers with a comprehensive programme of consolidation and revision of statute law in devolved areas.

We believe that placing a duty on the Law Commission would ensure that the Welsh legal constitution develops in a clear, coherent and logical way. Such a duty would send a clear message about the importance of law reform in Wales and will ensure that this work can be planned and undertaken in a timely way, and in line with the developing body of Welsh law.

In our view the required change could be achieved by amending section 6 of the 1965 Act to extend the definition of 'the Minister' to include Welsh Ministers in relation to the Law Commission. This would reflect the way that the Scottish Ministers are included in relation to the Scottish Law Commission. This permits Scottish Ministers to request comprehensive programmes of consolidation and statute law revision and to approve recommendations made by the Scottish Law Commission.

In light of our comments, we strongly support therefore recommendations 32 and 33 of the Silk Commission's most recent report *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*.

Clause 24: Power to make supplementary, consequential, etc provision

Clause 24 is of particular concern to us. As currently drafted, it permits HM Treasury to make consequential amendments that result from Part 2 of the

draft Bill, which could amend a Measure or Act of the Assembly. It would seem to us appropriate that any changes by the UK Parliament to an Act or Measure passed by the Assembly, *of whatever nature*, should be endorsed by the Assembly. This is a significant constitutional principle.

In our view, not requiring the consent of the Assembly has the potential to undermine the devolution settlement; it would be wholly inappropriate for a law made by the Assembly to be amended by the Treasury with the consent of the UK Parliament, potentially following discussions between the UK and Welsh Governments. Not involving the legislature that made the original law would be constitutionally incredible.

Electoral arrangements

The draft Wales Bill makes several proposals with regard to electoral arrangements. We strongly believe that it is entirely legitimate for the Assembly to have legislative competence over its own electoral arrangements. We consider therefore that the National Assembly and the Welsh Government should at least have the same powers as those granted to the Scottish Parliament and Scottish Government through the *Scotland Act 2012*.



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Ref: 66SOS14

7 April 2014

Dear David,

I am writing in reply to your letter received on 17 March, which set out your Committee's views on a number of issues pertaining to the draft Wales Bill.

You will be aware that the Wales Bill has now been introduced in the House of Commons and received its Second Reading on 31 March. This provided the opportunity for Members on all sides of the House to debate the Bill's provisions, including a number of the issues you have raised.

Your Committee will be pleased to note that clause 21 of the Bill devolves power to the Assembly to determine its own budgetary procedures. This was recommended by the Silk Commission in its Part I report and by the Welsh Affairs Committee in its pre-legislative scrutiny of the draft Bill. Devolving this power will enable the Assembly to determine the procedure for setting the annual budget and would, for example, allow for an annual Finance Act to replace the current annual budget motion.

Clause 24 of the Bill (clause 21 of the draft Bill) imposes a duty on the Law Commission to provide advice and information to Welsh Ministers. In effect, this will allow Welsh Ministers to refer matters to the Law Commission directly, whereas at present this needs to be done via a UK Government department. We believe this represents the right balance between giving further powers to Welsh Ministers to pursue legislative changes within devolved competence without imposing too onerous a duty on the Law Commission.

It would not be appropriate for Welsh Ministers to be on the same footing as the Lord Chancellor and Scottish Ministers as Wales does not have its own legal system. The Scottish Ministers are responsible for the programme of law reform at the Scottish Law Commission, and the Lord Chancellor is responsible for the programme of law reform at the Law Commission of England and Wales. In the context of those two legal systems, equivalence for Wales (and for Welsh Ministers) in this area would clearly not be appropriate.

I have considered carefully the point you raise in regard to clause 27 (clause 24 of the draft Bill). The clause empowers HM Treasury, by order, to make supplementary, incidental or consequential provision as appears appropriate in connection with bringing into force the provisions in Part 2 of the Bill (relating to Finance). An order made under this section may make modifications both to Acts of Parliament and Acts and Measures of the Assembly (and subordinate legislation), and an order including such provision is subject to the affirmative resolution procedure in the House of Commons.

You expressed concern that any change to an Act or Measure of the Assembly should be endorsed by the Assembly. As you know, the UK Government seeks the consent of the Assembly, via a Legislative Consent Motion, whenever it needs to legislate in areas of devolved legislative competence. The Bill extends the Assembly's legislative competence to include devolved taxes, and the consent of the Assembly would be sought in future if a HM Treasury order made under clause 27 sought to amend an Assembly Act relating to devolved taxes. Given this, I do not believe that we need to make specific provision in the Wales Bill.

Finally, you also call for the Assembly to have legislative competence for its electoral arrangements. The Government does not consider this Bill to be the right vehicle to consider such a change, and believes that it is best considered in the wider context of responding to the Silk Commission's Part II report.

A handwritten signature in black ink, appearing to read 'David Jones', with a large, stylized initial 'D' and 'J'.

Rt. Hon. / Y Gwir Anrh. David Jones MP / AS
Secretary of State for Wales
Ysgrifennydd Gwladol Cymru