

National Assembly for Wales
Plenary pack

Plenary Pack on the Draft Wales Bill

Date of debate: 13 January 2016

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Date of debate: 13 January 2016

Stephen Boyce

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01.Introduction

The **Draft Wales Bill** was laid in Parliament by the UK Government on 20 October 2015.

The Draft Bill is the prelude to new legislation on devolution in Wales which draws on the recommendations of the Silk II report and the St David's Day discussions. The intention of the UK Government is to publish the Bill itself early in 2016 and to have an Act on the statute books by early 2017.

The Draft Bill sets out a new devolution settlement for Wales in terms of a **reserved powers model** which lists the subjects on which the Assembly cannot legislate, rather than those on which it can, as under the current model. The reserved powers model, together with the tests of competence to be applied to legislation, will create the framework within which devolution in Wales will operate in future.

The Draft Bill also provides the Assembly with powers in new areas such as energy, transport, local government, and its own functions (including Assembly elections and the number of AMs). It also places in statute the permanence of an Assembly for Wales and the Welsh Government and sets out the arrangements for agreeing Westminster legislation on devolved matters.

Since the draft Bill was published the Secretary of State has announced his intention to use the Bill to **remove the requirement for a referendum**, before partially devolving income tax to Wales.

The Assembly's **Constitutional and Legislative Affairs Committee** examined the Draft Bill during November and published its **report** on 4 December 2015. The House of Commons **Welsh Affairs Select Committee** also scrutinised the Draft Bill but has not yet published its report. The two Committees took evidence together in the Senedd on 9th November.

The Research Service has produced a **brief summary of the main provisions in the Draft Bill and the issues raised in scrutiny – this is included as an annex to this document**. A more detailed summary of the written evidence on the Draft Bill received by the Constitutional and Legislative Affairs Committee can be found on the **Research Service page** of the Assembly website.

02.Key Documents

20 October 2015 - *The Draft Wales Bill*

The document includes the text of the Draft Bill as well as the **explanatory memorandum**.

27 February 2015 - UK Government, **Powers for a purpose: towards a lasting devolution settlement for Wales**, Command Paper Cm 9020 (PDF, 838KB).

3 March 2014 - Commission on Devolution in Wales (the Silk Commission), **Empowerment and responsibility: legislative powers to strengthen Wales - 'Silk Part II report'**,

03. Statements and press releases

18 December 2015 – National Assembly for Wales: News Release: **Draft Bill 'made for Wales, not with Wales' says National Assembly committee.**

20 October 2015 – UK Ministerial Statement

In a **written statement** on the Draft Bill the Secretary of State said:

The Secretary of State for Wales (Stephen Crabb): I am pleased today to publish the draft Wales Bill for pre-legislative scrutiny.

The draft Bill sets out the Government's plans for a stronger, clearer and fairer devolution settlement for Wales that will stand the test of time. It implements the commitments made in the St David's Day agreement and set out in the Command Paper Powers for a Purpose: Towards a lasting devolution settlement for Wales (CM 9020), published in February.

The key measures include a new reserved powers model for Welsh devolution, similar to the one which currently operates in Scotland, providing a clear and complete boundary between devolved and reserved subjects. The draft Bill devolves important new powers for Wales in areas such as energy, transport and local government and Assembly elections. It also provides greater powers to the Assembly over its own affairs, including the ability to change its name.

The new devolution settlement provided for in the draft Bill will create a stronger Wales within a strong United Kingdom. It will work better for the people of Wales and allow more time for the Welsh Government to focus on delivering growth, jobs and better public services.

I am grateful to the Welsh Affairs Committee for agreeing to undertake pre-legislative scrutiny of the draft Bill and I look forward to receiving their report. The Government will continue discussions with the Welsh Government on the detail of the reserved powers model alongside pre-legislative scrutiny. It is vital that we deliver a robust new devolution settlement that works for the people of Wales.

20 October 2015 - Wales Office: press release: **A stronger Wales within a strong United Kingdom**

20 October 2015 - Welsh Government statement

The First Minister, Carwyn Jones AM, made a statement in plenary on 20 October 2015. (See below)

20 October 2015 - Presiding Officer's statement

The Assembly's Presiding Officer, Rosemary Butler AM, issued a statement to coincide with the launch of the Draft Bill.

16 November 2015 - Presiding Officer Dame Rosemary Butler AM: News Release: **'A Clear, Workable and Durable Constitutional Settlement': Presiding Officer sets out constructive amendments to Draft Wales Bill.** The Presiding Officer set out her suggestions for improving the clarity and workability of the Draft Bill in the form of substantive amendments.

04. Assembly Business

3 November 2015 - Plenary: Debate on the Draft Wales Bill [Transcript](#) | [Watch Session](#)

20 October 2015 - First Minister: plenary **statement** Draft Wales Bill [Transcript](#) | [Watch Session](#)

04.1. Constitutional and Legislative Affairs Committee

The Constitutional and Legislative Affairs Committee undertook scrutiny of the Draft Bill in November 2015.

Oral evidence sessions:

23 November 2015 meeting: [Transcript](#) | [Watch Session](#)

Oral evidence: Rt Hon Stephen Crabb MP, Secretary of State for Wales; Geth Williams, Wales Office; Sue Olley, Wales Office

16 November 2015 meeting [Transcript](#) | [Watch Session](#)

Dame Rosemary Butler AM, Presiding Officer; Adrian Crompton, Director of Assembly Business, Assembly Commission; Elisabeth Jones, Director of Legal Services, Assembly Commission

Rt Hon Carwyn Jones AM, First Minister; Hugh Rawlings, Director of Constitutional Affairs and Intergovernmental Relations, Welsh Government

9 November 2015 concurrent meeting with the Welsh Affairs Select Committee. [Transcript](#) | [Watch Session](#)

Professor Thomas Glyn Watkin and Emyr Lewis, Partner and Regional Senior Partner, Blake Morgan

Professor Richard Wyn Jones and Professor Roger Scully, Wales Governance Centre

Written evidence to the Committee

Constitutional and Legislative Affairs Committee: **Report on the UK Government's Draft Wales Bill**, December 2015

Constitutional and Legislative Affairs Committee report: **The UK Government's Proposals for Further Devolution to Wales**, July 2015

04.2. Other Assembly Committees

The following Committees also considered the Draft Wales Bill in relation to issues affecting their portfolios. They subsequently submitted **written evidence** to the Constitutional and Legislative Affairs Committee.

01. Children, Young People and Education Committee

02. Enterprise and Business Committee

03. Health and Social Care Committee

04. Environment and Sustainability Committee

05. Communities, Equalities and Local Government Committee

06. Finance Committee

07. Public Accounts Committee

05.Pre-legislative scrutiny at Westminster

05.1. House of Commons Select Committee on Welsh Affairs

The Welsh Affairs Committee has conducted pre-legislative scrutiny of the Bill.

Oral evidence sessions:

9 December 2015: Meeting Transcript | Parliament TV

Rt Hon Stephen Crabb MP, Secretary of State Geth Williams, Deputy Director, Constitution and Corporate Services, Wales Office Sue Olley, Legal Adviser, Wales Office

30 November 2015: Meeting Transcript | Parliament TV

Alun Ffred Jones AM, Chair of the Environment and Sustainability Committee, National Assembly for Wales

23 November 2015: Transcript Parliament TV

Kay Powell, Policy Adviser, Law Society of England and Wales Huw Williams, Law Society of England and Wales Hefin Rees QC, Chairman, Association of London Welsh Lawyers Alan Trench Rachel Banner, True Wales Annie Mulholland, True Wales Roger Cracknell, True Wales Meeting

16 November 2015: Meeting Transcript | Parliament TV

Dame Rosemary Butler AM, Presiding Officer, Adrian Crompton, Director of Assembly Business, and Elisabeth Jones, Director of Legal Services, National Assembly for Wales

9 November 2015: Meeting Transcript | Parliament TV

Andrew R.T. Davies AM, Leanne Wood AM, Kirsty Williams AM; William Graham AM, Chair of the Enterprise and Business Committee, National Assembly for Wales; Sir Paul Silk, Chair of the Commission on Devolution in Wales

Rt Hon Carwyn Jones AM, First Minister of Wales, Hugh Rawlings, Director of Constitutional Affairs and Intergovernmental Relations (**Transcript**)

26 October 2015: Meeting Transcript | Parliament TV

Rt Hon Stephen Crabb MP, Secretary of State for Wales, Geth Williams, Deputy Director, Constitution and Corporate Services, and Sue Olley, Legal Adviser, Wales Office

– **Written evidence**

– **Correspondence**

06. Further information

Links to a number of documents and other sources relating to the Draft Wales Bill, including correspondence between the Welsh Government and the UK Government, can be found on the **Research Service page** of the Assembly website.

07. Annex Draft Wales Bill:

summary of main provisions and issues identified in scrutiny

07.1. Summary of main provisions

The **draft Wales Bill** was laid in Parliament by the UK Government on 20 October 2015. The draft Bill proposes a number of significant changes to the constitutional law of Wales:

- It provides for the recognition of an Assembly for Wales and a Welsh Government as permanent parts of the United Kingdom's constitutional arrangements (clause 1);
- It gives statutory recognition to the existing convention that the United Kingdom Parliament will not "normally" legislate with regard to devolved matters without the consent of the Assembly (clause 2);
- It gives the Assembly legislative competence to change important matters such as its name, the number of Assembly Members, the manner in which Assembly Members are elected, including the franchise and the electoral system, and the length of Assembly terms. An Assembly Bill effecting certain of those changes would be subject to the agreement of a special majority: two-thirds of all Assembly Members.
- The draft Bill also proposes to give the Assembly full powers over most aspects of its own internal affairs (see clauses 23, 24 and new Schedule 7B, paragraph 7(2) of GOWA 2006, as inserted by Schedule 1 of the draft Bill).
- The draft Bill proposes to transform the Assembly's existing legislative competence from a conferred-powers model to a reserved-powers model (clause 3 and Schedules 1 and 2).
- It also devolves competence to the Assembly in additional areas (effectively, by not converting current exceptions from competence into the list of reservations in Schedule 7B, as inserted by Schedule 2).
- Finally, the draft Bill confers new executive functions on the Welsh Ministers. Some of these functions fall within areas of new legislative competence for the Assembly; others are in areas in which the Assembly still has no legislative competence (e.g. building regulations – see clause 28).

07.2. Summary of main issues

This is a brief summary of the main issues arising from the evidence received by the Constitutional and Legislative Affairs Committee during its scrutiny of the draft Wales Bill. A more detailed summary of the written evidence on the draft Bill has also been produced by the Research Service.

Overview

Although many aspects of the draft Bill have been welcomed, the evidence suggests that the overall effect is to increase the complexity and reduce the clarity of Welsh model of devolution, and to roll-back the Assembly's competence.

Clauses 1 and 2

Clause 1 of the draft Bill recognises the Assembly and Welsh Government as permanent parts of the UK's constitutional arrangements. Clause 2 states that the UK Parliament will not normally legislate on devolved matters without the consent of the Assembly.

These provisions have been broadly welcomed despite some questions around robustness and suggestions that the drafting of both clauses needs to be strengthened.

Reserved powers model

Clause 3 is the key provision in the draft Bill setting out the new reserved powers model. It amends the Government of Wales Act 2006 (GOWA 2006) by substituting section *108A Legislative competence* for section 108. It also replaces Schedule 7 (which sets out the 21 subjects on which the Assembly can currently legislate) with Schedules *7A Reserved matters* and *7B General restrictions*.

Evidence on the draft Bill highlighted the large number of reservations in Schedule 7A – in excess of two hundred - and the apparent absence of guiding principles for selecting reserved matters. It was suggested that the principle of subsidiarity should determine which matters are reserved to the UK Parliament. The Secretary of State emphasised that his intention was not to start with a blank sheet of paper but to transpose the existing model into a reserved powers model, with some additional powers for the Assembly.

Tests of 'necessity' and modification of the private and criminal law

The draft Bill sets out ten tests for competence in clause 3 and in new Schedule 7B. Some of the tests are the same as the current tests, but there are some new tests, in particular the four new 'necessity' tests.

The 'necessity' tests appear in new section 108A(3) (clause 3) and in paragraphs 2, 3, and 4 of new Schedule 7B. They create an additional test of Assembly Bills in four areas regarding the Assembly's competence to: make provisions affecting England, or modifying the law on reserved matters, or modifying "private law" or criminal law.

Evidence on the draft Bill suggests that these new tests would place additional constraints on the ability of the Assembly to legislate and would increase the complexity, and therefore reduce the workability, of the new legislation. It is argued for example that the Assembly needs the ability to amend private and criminal law in order to make legislation effective and that its current ability to do so, where the modifications relate to a devolved subject, will be curtailed. The term 'necessary', it is suggested, is capable of a range of meanings and Assembly legislation would therefore vulnerable to

legal challenge. Overall, the evidence suggests that the tests undermine the democratically elected Welsh legislature.

Minister of the Crown consents

Paragraph 8 of Schedule 7B contains a test regarding modification etc. of Minister of the Crown functions and effects on reserved authorities. This extends the scope of the existing test to a wider range of circumstances in which Ministerial consent would need to be sought. The new test has attracted criticism in terms of the uncertainty it may create, the potential for delays to legislation, and the perception of a power for the UK executive to interfere in the affairs of the Welsh legislature. Examples have been provided of Assembly Bills which would now require Ministerial consent, including the *Welsh Language (Wales) Measure 2011*.

In addition, evidence has highlighted an apparent lack of clarity in the definition of Welsh public authorities in paragraph 218 of Schedule 7A which is of particular concern given the new requirement to seek Ministerial consent to legislate about any public authority, except a Welsh public authority.

The Secretary of State argued that the consent of UK Ministers should be required where Assembly Bills impose functions on reserved bodies just as Assembly consent is sought when Parliament legislates in devolved areas.

There was a suggestion in the evidence that devolving functions of Ministers of the Crown on devolved matters to Welsh Ministers (as in Scotland under sections 53-56 and 58 of the *Scotland Act 1998*) would be a better approach.

Single jurisdiction in England and Wales

Evidence suggested that the complexity of the model in the draft Bill reflects in part a desire to preserve the single England and Wales jurisdiction; it was considered that the legislative powers of the Assembly should not be limited in pursuit of that aim. Although the Secretary of State does not support the creation of a separate Welsh jurisdiction, some evidence proposes a *distinct* rather than a *separate* jurisdiction to address the divergence in English and Welsh law. That would mean distinct laws being applied by an undivided legal system.

Powers over the functions of the Assembly and elections

Provisions in the draft Bill relating to elections include powers for Welsh Ministers over the administration of Assembly elections (clauses 4, 5, and 6) and Assembly competence to amend certain provisions in GOWA 2006, including those relating to Assembly constituencies and electoral regions, timing of Assembly elections, voting, candidates, calculation and allocation of regional members, casual vacancies and the franchise (Schedule 7B, paragraph 7). A two-thirds majority of all Assembly seats would be required for changes to the franchise, electoral system and the number of members, constituencies etc. The draft Bill also provides the Assembly with extensive powers over local elections since in most respects they are not listed as reserved matters.

These provisions in the draft Bill have generally been welcomed, including the requirement for a two-thirds Assembly majority.

The provisions in the draft Bill for the Assembly to have control over its internal operations (clauses 19, 23 and 24) have also been welcomed. Some evidence, e.g. from the Presiding Officer, has suggested areas in which these powers should be further extended.

General and specific reservations

Response to the transfer of powers in areas such as energy, transport and planning has been generally favourable although concerns have been expressed about the details. Some evidence has proposed the addition of other new areas of competence.

Draft Wales Bill

Introduction

This document provides a glossary of the Welsh language technical and legislative terms associated with the Draft Wales Bill (the draft Bill)

ancillary – ategol	permanence – parhauster
codify – codeiddio	private law - cyfraith breifat
combination rule(s) – rheol(au) cyfuno	property law – cyfraith eiddo
common law power(s) - pŵer (pwerau) cyfraith gyffredin	proposed reserved powers model – model cadw pwerau'n ôl arfaethedig
conferred powers model – model rhoi pwerau	protected subject-matter – pwnc a warchodir
consolidate – cydgrynhoi	Representation of the People Act - Deddf Cynrychiolaeth y Bobl
consolidation Bill – Bil cydgrynhoi	reservation(s) – cymal(au) cadw
contract law – cyfraith contractau	reserved authority – awdurdod a gedwir yn ôl
criminal law – cyfraith trosedd	reserved matter(s) – mater(ion) a gedwir yn ôl
devolved purpose – pwrrpas datganoledig	reserved powers model – model cadw pwerau'n ôl
enabling Bill – Bil galluogi	restate the law – aiddatgan y gyfraith
enforcement provision(s) – darpariaeth(au) gorfodi	serious adverse impact – effaith niweidiol difrifol
exception(s) – eithriad(au)	single legal jurisdiction – awdurdodaeth gyfreithiol sengl
executive power – pŵer (pwerau) gweithrediaeth	sovereignty – sofraniaeth
franchise – etholfraint	St David's Day process – proses Dydd Gŵyl Dewi
intellectual property right(s) – hawl(iau) eiddo deallusol	super-majority – uwch-fwyafrif
intervention power – pŵer ymyrryd	Supreme Court – Goruchaf Lys
legislative competence – cymhwysedd deddfwriaethol	tenancy law – cyfraith tenantiaeth
necessary – angenrheidiol	Welsh offshore region – rhanbarth môr mawr Cymru
necessity test(s) – prawf (profion) angenrheidrwydd	Welsh onshore area – ardal glannau Cymru

Useful phrases

Presiding Officer's tests of clarity, workability and no roll-back of competence - **Meini prawf y Llywydd sef setliad eglur, ymarferol a dim camu'n ôl o ran cymhwysedd y Cynulliad**