The Draft Wales Bill

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Note: This briefing examines the background to the draft Wales Bill, its principal features, and the provisions concerning ministerial powers. It was first published by the UK Constitutional Law Association on its blog.

On 20 October 2015, the UK Government published the draft Wales Bill. The overall purpose of the Bill is to implement the UK Government's St David's Day "Agreement" of February 2015 in order to establish a clear and lasting devolution settlement for Wales. That agreement followed the publication of the Silk II report in 2014. The Silk report concluded that the Welsh devolution scheme was unstable and unclear and that there was often uncertainty over which government – the UK or Welsh Governments – was responsible for which policy area. The report recommended the move from a conferred powers model to a reserved powers model in order to provide greater clarity and certainty regarding the division of powers between the UK and the Welsh Assembly. (For an excellent overview, see Ann Sherlock, "The Continuing Development of Devolution in Wales" (2015) 21 *European Public Law* 429).

The draft Bill is currently undergoing pre-legislative scrutiny by both the Commons Welsh Affairs Committee and the Constitutional and Legislative Affairs Committee of the Welsh Assembly. The importance of the Bill cannot be overstated: it proposes to establish a clear and lasting devolution settlement for Wales by moving from a conferred-powers model to a reserved-powers model. In his forward to the draft Bill, Stephen Crabb MP, Secretary of State for Wales, stated that the Bill would "create a stronger, clearer and fairer devolution settlement for Wales that will stand the test of time."

However, since its publication, there has been intense debate and disagreement as to whether or not the Bill will in fact deliver a stable, clear and lasting devolution settlement for Wales. Immediately following the publication of the Bill, the Presiding Officer of the Welsh Assembly stated that her support for the Bill was conditional on it meeting three key criteria: clarity, workability, and no roll-back of the Assembly's existing powers. Assessing the Bill against these criteria, the Presiding Officer concluded that the Bill "would amount to a backwards step for the National Assembly and would not deliver a lasting constitutional settlement for Wales and the UK as a whole". If the Bill was enacted, there would be almost immediate calls for another Wales Bill. The First Minister of Wales, Carwyn Jones AM, has also raised concerns that the new Bill would not, if enacted, introduce the desired stable devolution settlement. Instead, the Bill would lead to additional complexity, increase the UK Government's veto over the legislative powers of the Welsh Assembly, and roll-back some of the Welsh Assembly's current competences. The purpose of this contribution is to examine some of these concerns – in particular the issues concerning the legislative competence of the Assembly.

The Bill arrives against the following background. There have, of course, been previous constitutional statutes for Wales in 1999 and 2006 and the flaws and shortcomings of those statutes have been much discussed. The devolution scheme for Wales has been seen as unstable, complex and marked by silences and uncertainties as to which areas have and have not been devolved. Further, the devolution scheme for Wales has differed in various respects from those in Scotland and Northern Ireland for two reasons. There is the shared legal system between England and Wales, which creates additional complexity. Also, fewer matters have been devolved to Wales when compared with Scotland and Northern Ireland. A referendum in 2011 produced a majority in favour of the Welsh Assembly exercising primary legislative powers. There have also, over recent years, been three references to the Supreme Court concerning the legislative competence of the Welsh Assembly (see previous blogs by Adam Tomkins, Ann Sherlock, and Alan Trench). It is generally recognised that it would be preferable to reduce the possibility of future litigation to ensure that there is certainty and clarity concerning the powers and competence of the Welsh Assembly.

At a political level then, there is a need to introduce a stable and clear devolution settlement for Wales. The current Bill will be the only opportunity to do this during the current Parliament. The perception is that there has been an ongoing debate in Wales for some years now over constitutional issues. However, there are real concerns whether the model provided by the draft Bill is adequate.

Some key features of the draft Bill

To start with, there are some important and relatively uncontentious aspects of the Bill that are welcome. Mirroring the current Scotland Bill, the draft Wales Bill recognises that both an "Assembly for Wales" and the Welsh Government would be permanent parts of the UK's constitutional arrangements. It also formally recognises that the UK Parliament cannot normally legislate with regard to devolved matters without the Assembly's consent. The Bill would also require a super-majority in the Assembly for certain electoral legislation. A two-thirds majority would be required in the Assembly to legislate on the following matters: whether to change its name from Assembly to Parliament; the franchise for elections (for instance, whether to lower the voting age to 16); the voting system; the number of constituencies and regions or other electoral areas; and the number of members to be returned for each constituency, region or area.

A central aspect of the Bill concerns the move from a conferred-powers model to a reserved-powers model. Since the inception of Welsh devolution, a conferred-powers model has been used. Under the Government of Wales Act 2006, the Assembly only possesses legislative competence on those subjects that have been specifically attributed to it. By contrast, Scotland and Northern Ireland both have a reserved-powers model: the Scottish Parliament and Northern Ireland Assembly can legislate in all areas other than those explicitly reserved to the UK Parliament.

Given the anomalous position of Wales – the only devolved nation with a conferred-powers model – the Bill seeks to move to a reserved powers model. It does so by introducing general reservations (the Constitution, the Civil Service, political parties, the single legal jurisdiction of England and Wales, foreign affairs, and defence). There is also a long list of over 200 specific policy reservations. New powers would be devolved over areas such as energy, transport and local government and Assembly elections. However, there are some areas – in particular policing – that remain with Westminster despite a recommendation from the Silk Commission that it be devolved.

Minister of the Crown powers

One controversial aspect of the Bill concerns Minister of the Crown powers. These are the many and various powers conferred upon Ministers of the Crown prior to devolution. When Welsh devolution was first introduced, the powers of the Secretary of State for Wales were transferred to the Assembly. However, many powers exercised by other UK Ministers were not transferred – even though they concerned areas that were devolved. The result is a haphazard arrangement whereby UK Ministers retain powers on areas devolved to Wales. The upshot is that executive and legislative responsibilities do not neatly map onto each other. This state of affairs continues to present a real problem.

Under the Government of Wales Act 2006 the Assembly cannot remove or modify any pre-commencement (ie pre-2011 – when the Assembly acquired legislative powers) function of a Minister of the Crown unless the Secretary of State consents or if the removal or modification is incidental to, or consequential on, any other provision contained in the Act of the Assembly (Government of Wales Act 2006, Schedule 7, part 2, para 1 and part 3, para 6). For instance, in the Local Government Byelaws (Wales) case, the Assembly was able to remove the Secretary of State's right to confirm the making of byelaws in Wales because this was incidental and consequential. This provided a possible way for the Assembly to legislate on ministerial powers.

In 2014, the Silk II report recommended that, in order to reduce complexity and increase clarity, there should be a general transfer of Minister of the Crown functions to Welsh Ministers in non-reserved areas (subject to any necessary restrictions). This would promote alignment between legislative and executive competence. It would also bring Wales into line with the position in Scotland. Under section 53 of the Scotland Act 1998, UK ministerial powers within the devolved competence of the Scottish Parliament were transferred from UK to Scottish ministers (apart from some exceptions under section 56).

It might therefore be thought that the draft Bill would implement this Silk recommendation, but no. On the contrary, the Bill introduces new restrictions upon the Assembly's current legislative competence under the 2006 Act. Under the draft Bill, the Assembly could not legislate to remove, modify or confer a function of a "reserved authority" (which includes a Minister of the Crown and any other non-Welsh public authority) – unless the appropriate UK Minister consents. This would be the case even if the ministerial power or function concerned is within the Assembly's devolved competence.

The draft Bill restricts the Assembly's powers with regard to Minister of the Crown functions in at least three ways. First, the draft Bill does not – unlike the 2006 Act – include provision to remove or modify a function of a UK Minister where to do so would be incidental or consequential. This means that the UK Government would recover the ground lost following the Supreme Court's judgment in the Local Government Byelaws (Wales) case by reversing the effect of that judgment. Reducing the scope of the Assembly's powers in this respect means that it has less room for manoeuvre – which clearly generates causes for concern. Second, the new provisions would apply to all functions – not just pre-commencement (ie pre-2011) functions. For instance, in 2013, the Assembly enacted the Human Transplantation (Wales) Act 2013 which imposed functions upon the Human Tissue Authority: consent from the UK government was not required under the 2006 Act. However, under the draft Bill, consent from a UK minister would

now be required. Third, the draft Bill extends the range of bodies that would have to consent to any change: this would include not just UK Ministers, but also public authorities.

Furthermore, the Bill makes the Assembly's legislative competence dependent not upon a clear rule written into statute, but upon a decision by a UK Minister to grant or withhold consent. In other words, the Assembly's competence to modify such powers would be dependent upon the discretion of a Minister of the Crown. Such Ministers will, of course, vary over time. Different Ministers will reach different decisions concerning the modification of their powers. This further undermines the claim that the Bill will provide a clear and certain devolution settlement.

While the Welsh Government can ask UK government departments for their consent to modify Minister of the Crown powers, such requests often take months to resolve. According to the First Minister, to enact the Social Services and Well-being (Wales) Bill, it was necessary to get consent from seven different Whitehall departments. Discussions were started in February 2012, but 16 months later, some of the consents still had not been received. There has been a delay of over one year for the Welsh Government to receive consents concerning the Environment (Wales) Bill 2015. Overall, the effect is to delay the Assembly's legislative process and its ability to make and implement policy effectively.
It is difficult to understand the rationale for the provisions in the draft Bill – other than a desire by UK Ministers to hold on to and claw-back ministerial powers. It would be reasonable to assume that the position in the 2006 Act would provide a floor against which a future devolution settlement would build upon. As noted above, the Silk report recommended the general transfer of Minister of the Crown functions. The only rationale advanced so far for the provisions in the draft Bill has been the following statement by the Secretary of State for Wales to the Commons Welsh Affairs Committee on 26 October 2015:

> "This idea that somehow you can have a devolution settlement where Welsh Government can make legislation for Wales that also affects England, but by the way, they do not have to have any regard for the views of UK Government Ministers as to how it affects England, if you follow the logic of some of the statements being made in Cardiff Bay last week in response to the draft Bill, that is the position you get to. That is lawless. You need devolution with rules; you need a rules-based approach to this to get clarity…"

There are three obvious difficulties here. First, the need to obtain Minister of the Crown consents applies when the Assembly is legislating on devolved (non-reserved) matters – areas in which the UK Government has no interest or responsibility. Second, the notion that the draft Bill introduces a rules-based approach is immediately contradicted by the exercise of ministerial discretion whether or not to give consent. Third, there is the issue of accountability. When making such decisions UK ministers are accountable to the UK Parliament – yet the whole purpose of establishing the Welsh Assembly was to remedy the democratic deficit that existed in Wales.

A preferable approach would be to have a general transfer of powers with specific exceptions. This is the position in Scotland. Alternatively, at the very least, the draft Bill could apply to pre-commencement functions only and include provision for incidental or consequential changes. Looking forward, it is likely

that the new provisions would, if enacted, create another avenue for litigation: any refusal by a UK Minister to consent to Assembly legislation changing a Minister of the Crown function could be challenged through judicial review by the Welsh Assembly and Government.

Legislative competence

The draft Wales Bill seeks to introduce a clear and lasting devolution settlement for Wales by moving to a reserved-powers model. One of the most controversial aspects of the Bill concerns the new tests to determine the Welsh Assembly's legislative competence and whether these tests provide certainty and clarity or whether they introduce more complexity and uncertainty.

Consider the following. The Welsh Government has published an analysis of 14 previously enacted Assembly Acts and concluded that they would have been outside competence under the draft Wales Bill. By comparison, the Wales Office has published its analysis and concluded that 20 of the 25 Assembly Acts could have been made in exactly the same way under the draft Bill. When the Welsh Government and the Wales Office arrive at such directly contradictory views and in the midst of tables accompanied by reasons why certain Assembly Acts either could or could not have been enacted under the draft Bill, it can be legitimately asked whether anyone knows for certain what the implications of the draft Bill will actually be. If not, then the Bill could be said to fall at the first hurdle in seeking to provide a clear and certain devolution scheme.

The uncertainty arises from how the new tests of legislative competence would apply in practice. These tests are buried away in schedules in the draft Bill. Their implications are neither satisfactorily explained by the Bill nor are they self-evident. The devil, as always, is in the detail.

There are, of course, existing tests of legislative competence in the Government of Wales Act 2006. Under this statute, the Welsh Assembly acts within its legislative competence if it legislates on one or more of the conferred subjects listed in that Act and if its legislation does not fall within any of the specified exceptions. Part of the problem with this scheme has been that silent areas in the 2006 Act generated uncertainty as to the legislative competence of the Assembly. For instance, the Assembly introduced the Agricultural Sector (Wales) Bill in 2013 to regulate agricultural wages on the ground that it had the competence to do so – agriculture is a conferred matter. However, the UK Government contended that the Bill was not within the Assembly's competence because it related to employment and industrial relations – areas that were not devolved.

In the Agricultural Sector (Wales) Bill case in 2014, the Supreme Court held that, provided an Assembly Bill or provision fairly and realistically concerned a devolved matter (eg agriculture), it did not matter whether it might also be capable of being classified as relating to a subject which has not been devolved (eg employment). The 2006 Act did not require that an Act of the Assembly should relate solely to a devolved subject. This means that the Assembly has been able to legislate on silent subjects, such as employment. The ruling then clarified the devolution settlement in an expansive way which gave the Assembly the maximum possible scope to legislate.

However, the draft Bill would reverse the effect of this ruling. This is because many of the currently silent areas, such as employment, would be now explicitly reserved. Under the draft Bill, any provision of the Assembly will be outside competence if it relates to reserved matters. If therefore the Assembly sought to introduce a similar Bill to the Agricultural Sector (Wales) Act 2014 in a different area, such as the social care sector, then it would be outside the Assembly's competence. This view is reinforced by the fact that the draft Bill provides that the subject-matter of the Agricultural Sector (Wales) Act 2014 is a specific exception to the general reservation of employment. The effect is to reverse the Supreme Court's expansive interpretation of the 2006 Act in relation to the Agricultural Sector (Wales) Bill case and to reduce the Assembly's legislative competence.

The necessity test

The Bill also subjects Assembly legislation to a new necessity test. This would apply whenever the Assembly legislates to change the law on reserved matters and private and criminal law. The Assembly would be unable to modify these areas of law unless: (i) the modification is ancillary to a provision made which has a devolved purpose; and (ii) the modification has no greater effect on the general application of the law than is necessary to give effect to that devolved purpose. In general terms, any Assembly Act modifying private and criminal law could not go any further than is necessary to achieve its (devolved) purpose. Further, Assembly legislation could not have a greater effect on the general application of private or criminal law than is necessary.

Why would the Assembly need to modify these areas of law? Part of the purpose of both criminal and private law is to enforce legal rules and regulations. If a legislature is to make effective laws, then it must also be able to provide for civil and criminal means of enforcement through its primary legislation. In other words, these legal tools are essential instruments if a legislature is to be able to make effective and enforceable laws.

On the other hand, Wales shares a legal system with England. As the Bill's explanatory notes state, the purpose of the necessity test is "to provide a general level of protection for the unified legal system of England and Wales, whilst allowing the Assembly some latitude to modify those areas of law within the confines of the exceptions" laid out (para 32). The test is there to prevent the Welsh Assembly from changing areas of law such as tort, contract law, and criminal law any further than is necessary as these areas are law in both England and Wales.

However, it only takes a moment's reflection to recognise that real difficulties are likely to arise in practice. If the purpose is to protect the unified legal system of England and Wales while allowing the Assembly "some latitude" to modify these areas of law, then precisely how much latitude is to be allowed to the Welsh Assembly? The applicable test is one of necessity, but what does this mean in practice? What would happen when the Welsh Assembly and UK Government arrive at different conclusions as to what is necessary? Which view would prevail? The Bill does not, indeed cannot, answer these questions; it merely poses them. But these questions go right to the centre of the Assembly's legislative competence and whether the Bill will in fact provide a clear and stable devolution settlement.

Suppose, for instance, that the Assembly legislated to regulate landlords through a licensing scheme (housing is a devolved matter). The Assembly might legislate to make it a criminal offence for a landlord to

operate without a licence. This would be permissible as it would be ancillary to the devolved purpose. The issue would then arise as to whether the creation of such an offence would have no greater effect on the general application of the criminal law than is necessary to achieve the devolved purpose. So, if the Assembly sought to modify the sentencing of all licensing offences, then this would go further than is necessary.

More legal challenges?

However, things are rarely so clear-cut in practice. There is often scope to argue that a particular law goes further than is necessary. The necessity test seems to set a high bar for the Assembly to satisfy. It also runs against the grain of conferring legislative power on the Assembly that it is able to exercise in its own right as a democratically elected institution. In the event of a dispute, it is highly likely that many Assembly Acts would be challenged before the Supreme Court – an outcome that contradicts the Bill's purpose of providing a clear, robust, and stable devolution settlement and the recognised need to reduce references to the Supreme Court.

It is also uncertain how the Supreme Court would interpret and apply the necessity test. The court could adopt a strict approach: the Assembly could only go as far as is strictly necessary or required in the circumstances. This would provide clarity, but pose a high threshold for the Assembly to satisfy. Alternatively, the Supreme Court could adopt a flexible context-dependent approach in which the necessity of a measure would depend upon the weight to be attached to the Assembly's legislative judgment as balanced against the nature of the provision and its consequences.

However, as we know, Supreme Court judges sometimes disagree amongst themselves when it comes to judicial review of policy. One needs only to think about the disagreements in recent Supreme Court cases such as R (SG & Ors) v Secretary of State for Work and Pensions and R (Tigere) v Secretary of State for the Home Department to recognise how the Supreme Court can arrive at different conclusions when reviewing the proportionality and necessity of policy measures.
To this can be added the significant incoherence in the Supreme Court's case-law concerning the weight the court should attach to legislation made by the Welsh Assembly when called upon to determine the Assembly's legislative competence and the legislation's compliance with Convention rights. In the Asbestos Diseases (Wales) Billcase, the Supreme Court was split 3-2 on this issue. Lord Mance in the majority took the view that while weight should be attached to the view of the Welsh Assembly, it was for the court to form its own judgment on the issues of legislative competence and compliance with Convention rights. By contrast, in the minority, Lord Thomas took the view that "great weight" should be attached to the judgment of the Welsh Assembly as a democratically elected body with primary legislative competence. There was, Lord Thomas stated, no reason for treating the Welsh Assembly in any way different to the UK Parliament.

Once we get to this stage, it is very difficult to see how the draft Bill will be able to promote the constitutional values of clarity, certainty and intelligibility. On the contrary, the Bill seems to open up a wide area for further litigation and uncertainty concerning the Assembly's legislative competence. The various tests – "ancillary to a provision which has a devolved purpose" and "no greater effect on the general application of the private or criminal law than is necessary to give effect to that purpose" – are

ambiguous and likely to inhibit the Assembly's policy and law making. The consequence may be for Welsh policy-makers to adopt a timid approach to avoid legal challenge.

It might be asked why this issue does not arise in relation to Scotland. The Scotland Act 1998 (Schedule 4, para 3) has a similar necessity test. Indeed, this test was lifted by the Wales Office as the basis for the provisions in the draft Wales Bill. However, in Scotland, private and criminal law are, of course, not reserved matters. The Scottish Parliament is able to modify its own private and criminal law. By contrast, England and Wales share a legal system. The choice seems to be between retaining the shared legal system and having a necessity test that will add additional complexity and potentially reduce the legislative ability of the Welsh Assembly or establishing a separate – or distinct – Welsh jurisdiction. The likelihood is that the discussion concerning the new necessity test will fuel the debate within Wales in favour of establishing a Welsh jurisdiction.

Another point raised by Professor Thomas Glyn Watkin concerns parity of treatment between the Welsh Assembly and the UK Parliament. If the purpose of the necessity test is to provide protection for the unified legal system of England and Wales, then should these tests apply only in relation to the Welsh Assembly? Should not they also apply to the UK Parliament when it legislates on England-only matters? The Bill is silent on this question, but the point has force. Why is the Welsh Assembly to be singled out for additional statutory controls when legislating while the UK Parliament when operating as an England-only legislator proceeds under the protective cover of parliamentary sovereignty?

Conclusion

It is unsurprising that the draft Wales Bill has provoked controversy. Its provisions are intricate and complex. In many important respects, the Bill reduces the Welsh Assembly's legislative competence. It reverses the effect of two decisions of the Supreme Court. There is much force behind the view that the Bill does little to improve the current situation, but instead increases the uncertainty and instability of the Welsh devolution settlement. It also opens up wider scope for judicial challenge. Although the Bill does move toward a reserved-powers model, it reflects a conferred-powers approach. In short, the Bill is unlikely to deliver the clear and lasting devolution settlement that it promises. This is because of the way that the Bill is drafted. But it is also because the Bill reflects a top-down approach to what sort of devolution settlement and structure Whitehall is prepared to grant to Wales. Needless to say, this is an inadequate way to go about the task of constitution-building.

Things could be different. The UK Government could have worked in a more collaborative way with the Welsh Assembly and Government. It could have, as recommended by the Assembly's Constitutional and Legislative Affairs Committee, used the principle of subsidiarity as the starting point. Fortunately, the Bill has a long way to go before it could be enacted. This should provide the opportunity to sort out some of the issues identified here. The Assembly's Presiding Officer has proposed amendments to the Bill to resolve the issues discussed here. Further, the Bill will require a Legislative Consent Motion from the Assembly (see a recent blog on this by Alan Trench). As matters currently stand, the draft Bill stands little chance of being granted such consent.

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