



# **Empowerment and Responsibility: Legislative Powers to Strengthen Wales**

March 2014



**Commission on Devolution in Wales  
Comisiwn ar Ddatganoli yng Nghymru**

INQ000216882\_0001



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# Foreword

The Commission that I have the honour to chair has a fundamental belief that power brings responsibility, and that the only purpose of the exercise of power ought to be the benefit of the citizen. Our well-received First Report dealt with financial matters in that context. This Report is painted on a wider canvas, but is suffused with the same ideas of empowerment, responsibility and a stronger Wales.



Grounded on clear principles, we have articulated a vision of new powers for Wales so that appropriate legislative choices are exercised at the Welsh level, in the interests both of the people of Wales and of the wider United Kingdom. We have also recommended ways in which the governmental and parliamentary institutions in Cardiff and London ought to collaborate.

Necessarily this Report deals with processes. We realise that people are more interested in outcomes. Our intention has been to settle the process questions in the hope that our recommendations will excite all those who want to see what some might regard as a rather sterile debate about distribution of powers replaced by a debate about how those powers can best be exercised.

It has been a pleasure to work with my fellow Commissioners. Their experience, wisdom and open-mindedness have been crucial to our work. Equally crucial has been the input of our able and committed staff. Organisations and individuals up and down Wales and beyond have generously given us their advice. Commissioners have listened, read and discussed over many months. That process of deliberation has meant that we can again present a unanimous Report, and so assert that our recommendations will have a wide degree of support.

In the Foreword to our First Report, I said that it was a privilege and a responsibility to be commissioned by the United Kingdom Government to make recommendations that could affect the lives of every single fellow citizen of Wales. The privilege and the responsibility have become only greater in this second part of our work where we were specifically charged to make recommendations that will better serve the people of Wales. But we are confident that we have discharged our commission, and I am again proud to commend our Report to Her Majesty's Government for implementation.

Paul Silk  
March 2014



# Chapter 1 – Our remit and approach

## 1.1 OVERVIEW

1.1.1 This chapter outlines the Commission's remit, how we approached our work and our evidence-gathering process.

## 1.2 BACKGROUND AND ESTABLISHMENT OF THE COMMISSION

1.2.1 Since the creation of the National Assembly for Wales in 1999, devolution in Wales has evolved through a number of phases. Polling consistently suggests a settled acceptance of the National Assembly and the Welsh Government as parts of the political landscape in Wales. Changes in and reviews of the devolution arrangements across the United Kingdom have also taken place over the last fifteen years. These reviews and changes are discussed in further detail in Chapter 2.

1.2.2 Following the UK General Election in May 2010, the Conservative and Liberal Democrat parties formed a coalition government. The Coalition Agreement included a commitment that, depending on the result of the March 2011 referendum on primary legislative powers for the National Assembly, a process similar to the Calman Commission<sup>1</sup> would be established for Wales.

1.2.3 On 3 March 2011, the Welsh public voted in favour of the National Assembly having primary legislative powers. Our Commission was duly established by the UK Government a few months later, on 11 October 2011. The setting up of the Commission, and its terms of reference, were supported by the Welsh Government and by all four political parties represented in the National Assembly.

## 1.3 REMIT

1.3.1 The Commission's remit was divided into two parts. Our terms of reference are set out in Box 1.1 below.

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<sup>1</sup> The independent Commission on Scottish Devolution (the 'Calman Commission') was set up in 2008 to look at the provisions of the Scotland Act 1998 and to recommend changes to the devolution settlement in Scotland. It is discussed further in paragraph 2.3.6 of this report.



### **Box 1.1: Terms of Reference**

An independent Commission will be established to review the present financial and constitutional arrangements in Wales. It will carry out its work in two parts:

#### **Part I: Financial Accountability**

To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support.

#### **Part II: Powers of the National Assembly for Wales**

To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.<sup>2</sup>

### **Part I**

- 1.3.2 For Part I, we were asked to consider the financial powers of the National Assembly to increase its accountability. On 19 November 2012, we published our first report *Empowerment and Responsibility: Financial powers to strengthen Wales*. The report was unanimous. It made 33 recommendations on taxation and borrowing powers for the National Assembly and on related financial matters.
- 1.3.3 We were pleased that the report gained all-party support, and was endorsed unanimously in the National Assembly. It was also well-received more generally, with a warm response from business representatives and other interested groups. An initial response to the first report was given by the Prime Minister and the Deputy Prime Minister when they visited Cardiff on 1 November 2013,<sup>3</sup> and a formal response was published on 18 November 2013.<sup>4</sup> Of the Commission's thirty-three recommendations, thirty-one were for the UK Government to consider and thirty were accepted in full or in part. The Welsh Government has accepted the recommendation to establish a Welsh Treasury, and the National Assembly has begun work to increase Members' capacity for scrutiny of greater financial powers. We look forward to the consideration of the UK Government's draft Bill.<sup>5</sup>

<sup>2</sup> It goes on to state that "In undertaking Part II, the Commission should:

- examine the powers of the National Assembly for Wales, and in particular:
  - the boundary between what is devolved and non-devolved;
  - whether modifications to the boundary should be made at this stage; and
  - any cross-border implications of such modifications;
- consult widely on any proposed modifications to the current boundary;
- make recommendations on any modifications to the settlement likely to have a wide degree of support; and
- consider and make recommendations on how best to resolve the legal and practical implementation issues from those modifications.

The Commission will not consider... in part II, the structure of the National Assembly for Wales, including issues relating to the election of Assembly Members".

<sup>3</sup> GOV.UK website (2013) *Powers for Wales in biggest devolution in decades*

<sup>4</sup> HM Government (18 Nov 2013) *Empowerment and Responsibility: Devolving financial powers to Wales*

<sup>5</sup> The Draft Wales Bill was published on 18 December 2013.

## **Part II**

- 1.3.4 Following the publication of our first report, we began work on Part II of our remit to review the non-financial and wider powers of the National Assembly.
- 1.3.5 We approached our task with open minds. As a Commission we felt that it was our responsibility to take full account of the views presented to us and that this was a duty we owed to those who provided evidence to us. The ‘modifications to the present constitutional arrangements’ that we recommend under our terms of reference seek to reflect this.
- 1.3.6 Throughout our work in Part II, we have emphasised that our task was to consider the principle of where powers should rest, and not to assess policy delivery.

## **Membership**

- 1.3.7 Paul Silk was appointed by the Secretary of State for Wales to chair the Commission. He was joined by seven other Commissioners in Part II.<sup>6</sup> Four Commissioners were appointed independently of political parties (Trefor Jones CBE CVO, Professor Noel Lloyd CBE, Helen Molyneux and the Chair), and four were nominated by the political parties in the National Assembly (Nick Bourne, subsequently Lord Bourne of Aberystwyth, the Welsh Conservative nominee; Jane Davidson, the Welsh Labour nominee; Dr Eurfyl ap Gwilym, the Plaid Cymru nominee; and Rob Humphreys, the Welsh Liberal Democrat nominee). Biographies of the Commission members can be found in Annex A.
- 1.3.8 A small secretariat of officials, drawn from the Wales Office, the Welsh Government and HM Treasury, supported the Commission. The Commission had a budget of approximately £1 million to fund both parts of its work. The Commissioners are unpaid and have been conscious to avoid unnecessary expenditure.
- 1.3.9 We should like to thank publicly the members of the secretariat for their hard work and efforts in supporting the Commission. Our work would have been impossible without their commitment, good humour and intellectual contribution.

## **1.4 OUR APPROACH**

- 1.4.1 The Commission held one or two day formal meetings every three weeks in Cardiff and also held meetings across Wales and in London. Minutes of our meetings are available on our website.
- 1.4.2 We were as open and transparent as possible about our work and approached our task in a consensual manner. We were also determined to produce an evidence-based report likely to command a wide degree of support.
- 1.4.3 Our remit for Part II was very wide and we therefore felt it was important to hear as many views as possible to help inform our work and deliberations.

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<sup>6</sup> Former Welsh Assembly Government Finance Minister Sue Essex, nominated by Welsh Labour, and Dyfrig John CBE, an independent member and Chair of the Principality Building Society, stood down from the Commission at the end of Part I.



### *Awareness raising*

- 1.4.4 In order to raise awareness of our work and to give as many people as possible the opportunity to share their views with us, we agreed a wide-ranging communications and public engagement strategy. We used a variety of communication tools to implement this and to encourage debate on the important issues within our remit.
- 1.4.5 We engaged actively with the media. We issued regular press releases and a communiqué following every Commission meeting and we provided a number of articles for national and regional papers to promote our work. The Chair and other Commissioners undertook press, radio and television interviews and this helped us build a good profile and promote debate.
- 1.4.6 Our website (<http://commissionondevolutioninwales.independent.gov.uk> and <http://comisiwnarddatganoliynghymru.independent.gov.uk>) hosts a wide range of information about the Commission's work. This includes the publication of all evidence submitted to us, together with the agendas and minutes of all our meetings. The interactive section of our website also provided another method for people to engage with us.
- 1.4.7 Our Twitter account (@silkcommission) enabled us to provide short updates to our followers and signpost people to the different ways to become involved in the debate. We regularly tweeted throughout Part II and used twitter to provide links to key documents and related sites and articles relevant to our work.
- 1.4.8 In order to summarise the Commission's work and to highlight the ways to submit views, we produced a short information pamphlet setting out the Commission's remit and the current devolution arrangements. This was distributed at all our public events.
- 1.4.9 We placed advertisements in national and regional newspapers to promote our call for evidence and our public events. We also arranged all-Wales radio advertisements, through Real Radio, to promote our public events.
- 1.4.10 A questionnaire was developed to gather views and evidence. This was used to support our public events and was available in hard copy and online. Questionnaires could be submitted until 27 September 2013 and we received over 500 responses. An analysis paper summarising the responses is available on our website under the 'papers' tab.
- 1.4.11 Our website hosted a number of different forums inviting people to join the debate. We held six different debates during Part II and received seventy responses.

### *Evidence gathering*

- 1.4.12 In November 2012, we issued an initial Call for Evidence to nearly 800 interest groups and organisations, inviting contributions by 1 March 2013. We included our terms of reference in this and purposely kept the Call for Evidence general in order to encourage a wide range of views. Once we had identified the main issues presented in the evidence received, we wrote out again to any organisations or individuals with relevant knowledge from whom we had not yet heard.
- 1.4.13 We were pleased to receive over 200 submissions. A list of those who submitted evidence to us can be found in Annex B. The range and quality of the submissions have been very helpful to us, and we have been impressed with the number of thoughtful responses that we received.

- 1.4.14 Though a wide variety of views were presented, it was noteworthy that many pieces of evidence related to the same topic areas. This meant we could focus our task and begin thinking about the issues that merited particular consideration and further examination. The choice of topic areas for further consideration was thus based on the evidence presented to us.
- 1.4.15 We invited expert opinion on these topic areas. Oral evidence was given to us and we also arranged less formal specific expert sessions<sup>7</sup> with academics and stakeholders to assist with our deliberations. Notes of these sessions are available on our website. We also sought international evidence: for example, we engaged with the Forum of Federations, the international organisation focussed on comparative multi-level governance.
- 1.4.16 In this report, we have summarised in boxes some of the evidence that we received on specific topic areas. These summaries aim to provide a flavour of the views presented to us; they are not a comprehensive summary of the evidence that we received on each topic. However, we have taken full account of all the evidence we have received. As mentioned in paragraph 1.4.6, all evidence submitted to us is available on our website.
- 1.4.17 We also sought evidence from the UK and Welsh Governments on the costs associated with the proposals we were considering. We have referred to this evidence throughout the report, though we appreciate that any costings should be treated as indicative only. Further work by the two Governments will be necessary if they decide to take forward our recommendations.

### **Public Events**

- 1.4.18 We wanted to hear the views of the public across Wales and held a series of public events throughout the country. Our public events took place mainly during May and June 2013.
- 1.4.19 Events of different types were held at different times of the day in order to cater for the needs of as many people as possible. These included information drop-in sessions, a business breakfast and evening public meetings. We encouraged those who attended to debate, ask questions, share their views and speak directly with Commissioners. An extremely wide range of opinions was presented to us through these public events, often passionately and robustly.
- 1.4.20 Over 400 people attended our public events and a summary of the points raised is available on our website under the 'papers' tab.
- 1.4.21 Commissioners also made themselves available to attend public meetings that were arranged by a range of community and business organisations.

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<sup>7</sup> Expert sessions were held on broadcasting, transport, economy, policing, models of devolution, natural resources and criminal justice.



Box 1.2: Our public events

## Part II Public Events - May to June 2013



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## **Stakeholder Engagement**

- 1.4.22 We regarded engagement with elected representatives as being of high importance. Thus, throughout Part II, regular briefing sessions were held for Assembly Members and Members of both Houses of Parliament (including Members of Parliament representing constituencies in England close to the border). These were opportunities for us to hear and take account of their views, and for us to provide updates on our work.
- 1.4.23 Commissioners attended and gave key-note speeches at a number of conferences and events organised by various organisation, including the Legal Wales conference, UK's Changing Union,<sup>8</sup> the British Academy, National Eisteddfod and a debate on devolution within the United Kingdom at the Hay Festival. We participated in events aimed at gaining the views of young people - for example, the Urdd's youth forum with over 40 young people attending and a debate at the Funky Dragon's annual residential event. We also contributed articles to various journals and websites, including the London School of Economics and Political Science's politics blog and the 'Click on Wales' site run by the Institute of Welsh Affairs.

## **Opinion poll**

- 1.4.24 It was also important for us to gather statistical data on public opinion on Welsh devolution and we decided to commission a public opinion survey, as we had done for Part I. An open tender exercise was conducted through the Government Procurement Service and we appointed Beaufort Research Ltd to undertake the poll.
- 1.4.25 The researchers first held focus groups throughout the country to test and refine the questions to be used in the final opinion poll. Beaufort Research then interviewed a representative sample of 2,009 members of the Welsh population aged 16 and above by telephone between 21 May and 12 June 2013. The sample was statistically representative of the Welsh general public.
- 1.4.26 The results were broadly consistent with previous polls on attitudes to Welsh devolution and the powers of the National Assembly.<sup>9</sup> The poll showed that a majority of the Welsh public believed the National Assembly has provided a strong voice for Wales and 62 per cent would like to see further powers devolved over a period of time.
- 1.4.27 Some of the poll's key findings are reflected in the evidence boxes throughout this report. The full opinion poll report can be found on our website.

## **Developments elsewhere in the United Kingdom**

- 1.4.28 Our task was to consider devolution in Wales, but Welsh devolution has to be seen within the context of a United Kingdom that is in a continuing process of constitutional change. We needed to take account of what is happening in Scotland and Northern Ireland in particular, but also of concerns in England, at the levels both of cross-border issues and of wider constitutional reform.

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<sup>8</sup> The UK's Changing Union project is a joint initiative between the Wales Governance Centre at Cardiff University, the Institute of Welsh Affairs and Cymru Yfory/Tomorrow's Wales. In addition to their written evidence to us they have published a number of research papers relevant to our work.

<sup>9</sup> Professor Roger Scully (2013) *Elections in Wales blog*.

- 1.4.29 We visited Scotland and Northern Ireland to learn about their devolution experiences. These visits were invaluable in helping us with our deliberations, and we are most grateful to those who gave us the benefit of their experiences.
- 1.4.30 In Scotland, we met Scottish Ministers and officials; the Deputy Presiding Officer of the Scottish Parliament; the Leaders of the Scottish Conservatives and Scottish Liberal Democrats; members of the Scottish Labour Shadow Cabinet; Reform Scotland; broadcasters; and academics.
- 1.4.31 In Northern Ireland, we met the First Minister; the Justice Minister; the Permanent Secretary of the Justice Department, Northern Ireland Executive; the Speaker of the Northern Ireland Assembly; officials from the North-South Ministerial Committee; the Law Society of Northern Ireland; the Northern Ireland Law Commission; broadcasters; and academics.

### **Research and analysis**

- 1.4.32 Our report is firmly founded on the evidence that we received, in writing and orally, on what we heard at our public events, and on our opinion poll. We were able to draw on research by others and analysis presented in other reports such as those of the Calman<sup>10</sup> and Richard Commissions.<sup>11</sup> Our secretariat also prepared several analysis papers. A number of their research papers are available on our website.<sup>12</sup>
- 1.4.33 As a Commission, it was our task to assess all that we heard and read, and to apply our judgement, knowledge and experience in the preparation of our report and making of our recommendations. We have done this, and we are pleased that our report is unanimously agreed by us all.

## **1.5 SUMMARY**

- 1.5.1 We were as open and transparent as possible about our work and approached our task in a consensual manner. We were also determined to produce an evidence-based report likely to command a wide degree of support. We received over two hundred written submissions and over five hundred questionnaire responses; we met over four hundred people at public events; our opinion poll covered two thousand people across Wales; and we took oral evidence from a large number of interested organisations and experts.
- 1.5.2 We should like to thank most warmly all who engaged with us throughout both parts of our work. The views submitted to us have been extremely valuable in helping us reach recommendations that are evidence based, and that, we believe, are likely to command a wide degree of support.

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<sup>10</sup> The Commission on Scottish Devolution (2009) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*.

<sup>11</sup> The report of the Richard Commission (2004) *Commission on the powers and electoral arrangements of the National Assembly for Wales*.

<sup>12</sup> Papers include a summary of our questionnaire responses; history of devolution in Wales; current devolution settlements in the United Kingdom; and international evidence.



# Chapter 2 – Current devolution arrangements

## 2.1 OVERVIEW

2.1.1 In this chapter we describe the current devolution arrangements in Wales and their historical context. We also provide an overview of the devolution settlements in Scotland and Northern Ireland and developments in England. We also assess international evidence. Finally we consider the wider context in which devolution currently operates within the United Kingdom.

## 2.2 DEVOLUTION IN WALES

### *Background*

- 2.2.1 During the last century Wales developed greatly as an administrative unit within the United Kingdom. In 1907 a Welsh department was created within the Board of Education in London, the beginning of a process of decentralisation within the UK Government that would lead to the establishment of the Welsh Office in 1964.<sup>13</sup> This process included establishing a Welsh Insurance Committee, Welsh Board of Health, and Council of Agriculture for Wales. The establishment of the Council of Wales and Monmouthshire in 1948 provided a forum for a more general consideration of matters of importance to Wales and encouraged better coordination of the UK Government's activities in Wales.
- 2.2.2 The Welsh Office, headed by a Secretary of State for Wales, was established in 1964. It held responsibility for local government, planning, housing, water, forestry, parks, the Welsh language, regional economic planning and highways, with tourism, health, agriculture and education added later.
- 2.2.3 Responding to the increasing interest in self-government in Scotland and Wales, the UK Government established the Royal Commission on the Constitution in 1969. The Kilbrandon Commission, as it was known, recommended the establishment of an Assembly for Wales in its 1973 report. This was offered to the Welsh people in a referendum in 1979. The proposed Welsh Assembly was rejected by 79.7 per cent to 20.3 per cent.
- 2.2.4 In the final quarter of the last century, momentum increased towards establishing a democratically elected Assembly for Wales. A second referendum was held in 1997, and this voted in favour of devolution by 50.3 per cent to 49.7 per cent. This meant the Welsh Office's direct role in the governance of Wales (with the vast majority of its staff) was passed on to a form of devolved government for Wales. A small UK Government Department, the Wales Office, was created at the same time.<sup>14</sup>

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<sup>13</sup> See James Mitchell (2011) *Devolution in the UK*, page 42.

<sup>14</sup> The current role of the Wales Office is discussed in paragraph 14.2.5 of this report.

- 2.2.5 Devolution in Wales has seen three distinct phases.<sup>15</sup> The initial phase of devolution was that set out by the Government of Wales Act 1998, which provided for a National Assembly for Wales first elected in 1999. The Government of Wales Act 1998 is summarised in Box 2.1.

**Box 2.1: The Government of Wales Act 1998**

The Government of Wales Act 1998 created the National Assembly for Wales. The National Assembly was a body corporate that had no primary legislative powers. Instead it was given executive powers that allowed the National Assembly to make secondary legislation in eighteen areas. These areas were broadly based on the administrative powers of the Welsh Office. Powers were transferred to the National Assembly through Transfer of Functions Orders. Between 1999 and 2006, the National Assembly was dependent on the UK Parliament if it wanted primary legislation to be passed in relation to Wales.

- 2.2.6 The White Paper which set out the UK Government's proposal for a National Assembly in 1997 promised that *'a directly elected Assembly will assume responsibility for policies and public services currently exercised by the Secretary of State for Wales'*.<sup>16</sup> Therefore the powers of the National Assembly broadly corresponded with the previous responsibilities of the Secretary of State for Wales. These had been accumulated in an incremental fashion over time prior to devolution. This allocation of powers was summarised by a leading expert on devolution in 2005: *'Based originally for reasons of short-term political and administrative convenience on the informal distribution of functions to the Welsh Office happening over many years, the allocation of law making powers to the Assembly has been typically piecemeal and ad hoc in character, displaying little regard for the constitutional value of intelligibility'*.<sup>17</sup>
- 2.2.7 In 2002, the First Minister of the National Assembly for Wales, who headed a Labour-Liberal Democrat Partnership Government, appointed the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales. This was better known as the Richard Commission, after its Chair, Lord (Ivor) Richard. The Richard Commission reported in March 2004, less than five years after the first National Assembly was elected, and made a number of recommendations for an improved devolution settlement for Wales. Their proposals for a legislative Assembly for Wales, based on the reserved powers model and separate to the executive, were summarised in their report. This summary is replicated in Box 2.2.

<sup>15</sup> For more details see the research paper on the history of Welsh devolution on the Commission website.

<sup>16</sup> *A Voice for Wales: The Government's proposals for a Welsh Assembly (July 1997)* Cm 3718.

<sup>17</sup> 'The Welsh experience', Richard Rawlings (2005) *Devolution, Law Making and the Constitution*, ed. R Hazell and R Rawlings.



### Box 2.2: The Richard Commission's proposals for a legislative Assembly for Wales

- Wales Bill needed to amend Government of Wales Act and confer primary law-making powers on the Assembly;
- Bill specifies reserved matters (Westminster legislates); everything is devolved to the Assembly unless specifically reserved;
- reserved matters could include: the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice;
- devolved matters: the fields set out in Schedule 2 of Government of Wales Act [1998] i.e. health, education and training, social services, housing, local government, planning, culture, sport and recreation, the Welsh language, ancient monuments and historic buildings, economic development, industry, tourism, transport, highways, agriculture, fisheries, food, forestry, environment, water and flood defence;
- corporate body structure replaced with executive and legislature;
- Assembly can construct its own rules of procedure and Standing Orders, adopted by a majority of two thirds;
- executive powers in a particular field can be devolved even if the Assembly has no corresponding primary legislative powers;
- Cardiff legislative programme might contain around four to six government Bills a year;
- change in Membership and electoral system [increase to 80 members, elected by the Single Transferable Vote];
- option of tax-varying power.

2.2.8 The second phase of devolution followed after the Richard Commission had reported to the First Minister. The UK Government published a White Paper *Better Governance for Wales* in 2005. The White Paper responded to the call for a separation of the executive from the National Assembly, and to the call for the Assembly to have law-making powers. Legislation followed in the Government of Wales Act 2006, summarised in Box 2.3. This separated the legislature from the executive, creating the Welsh Assembly Government, and gave the National Assembly for Wales restricted powers to establish primary legislation in specified areas.

2.2.9 At this point, the powers devolved to the National Assembly were not reappraised to any substantial extent. As set out in *Better Governance for Wales*:

*'The Government is committed to ensuring that the Assembly has the tools to deliver change in the areas for which it has responsibility. We are therefore proposing to give the Assembly, gradually over a number of years, enhanced legislative powers in defined policy areas where it already has executive functions.'*

### **Box 2.3: The Government of Wales Act 2006**

The Government of Wales Act 2006 formally separated the National Assembly for Wales and the Welsh Assembly Government into legislature and an executive. It also repealed Section 1 of the Government of Wales Act 1998 which had established the National Assembly as a body corporate.

The Act also conferred on the National Assembly restricted primary law-making powers. This meant that, from the 2007 elections, the National Assembly had powers to make Assembly Measures on any "Matter" within the twenty devolved "Fields" in Schedule 5 of the Act. Before a Matter could be legislated on, it had to be specifically listed within the Field in Schedule 5 either through provisions in an Act of the UK Parliament or through a complicated procedure known as a "Legislative Competence Order".

The 2006 Act also contained provisions for a process leading to a referendum on the introduction of primary legislative powers in all devolved areas.

- 2.2.10 The separation of the National Assembly and Welsh Assembly Government meant that the executive powers that were first granted to the National Assembly between 1999 and 2006 were transferred to Welsh Ministers in the Welsh Assembly Government. Executive powers continued (and still continue) to be granted to Welsh Ministers either through Transfer of Functions Orders or Acts of the UK Parliament. This means that the legislative functions of the National Assembly do not necessarily coincide with the executive functions of the Welsh Ministers.
- 2.2.11 The first Welsh Assembly Government elected following the 2006 Act, a coalition between Labour and Plaid Cymru, established the All Wales Convention, chaired by Sir Emyr Jones Parry. The Convention was tasked with gauging public understanding of the devolution settlement and assessing whether a referendum on full law making powers, as provided for in the Act, would be successful. It concluded that the settlement was not well understood, and "that a 'yes' vote in a referendum was obtainable", though that was not a certainty.<sup>18</sup> Box 2.4 summarises how the referendum came about and what its results were.

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<sup>18</sup> *All Wales Convention Report* (2009), page 100.



#### **Box 2.4: The 2011 Referendum<sup>19</sup>**

On 9 February 2010, the National Assembly for Wales began the referendum process with 53 Assembly Members voting in favour and none against. The referendum was held on 3 March 2011, with 63.5 per cent of votes in favour of enhanced legislative powers for the National Assembly.

In practice, this meant that the National Assembly would have power to legislate over the “Subjects” listed in Schedule 7 of the Government of Wales Act. These Subjects would be the same as the Fields listed under Schedule 5 of the Act, but there would no longer be a need to request devolution of specific Matters within a Field. Instead, if a Subject was listed under Schedule 7, the National Assembly had competence to legislate on any issue relating to that Subject as long as it was not listed as an Exception under the Act.

A number of Assembly Acts have been passed since the changes in the legislative powers of the National Assembly were introduced. These have succeeded the Assembly Measures previously available.

- 2.2.12 The ‘yes’ vote in the 2011 referendum on enhanced law-making powers marked the beginning of the third, and current, phase of devolution. Coincidentally, this was the year by which the Richard Commission recommended the changes it proposed should be implemented.
- 2.2.13 While Wales is still governed by the Government of Wales Act 2006, the powers of the National Assembly are now those set out in Schedule 7 of the Act. This superseded Schedule 5, which set out the scope of the devolution settlement as it was amended incrementally. The National Assembly now has full law making powers in the twenty areas that have been devolved to Wales (subject to exceptions as set out below). As the then Secretary of State wrote in a November 2010 memorandum to the House of Commons Welsh Affairs Committee, prior to the referendum:

*‘In general, the Assembly’s legislative competence is described in broader terms in Schedule 7 than in Schedule 5. This is because Schedule 7 describes the full range of legislative competence which would be devolved to the Assembly in the event of a “yes” vote in next year’s referendum and the Assembly Act provisions coming into force. Those descriptions are necessarily broad brush given the breadth of the powers involved. Schedule 5 in contrast describes the specific areas of competence which the Assembly has currently, and usually provides a more detailed description of that competence given its much narrower scope.’<sup>20</sup>*

<sup>19</sup> A good outline of the referendum in a context of the development of devolved politics in Wales can be found in Richard Wyn Jones and Roger Scully (2012) *Wales Says Yes: Devolution and the 2011 Welsh Referendum*.

<sup>20</sup> Annex to the Welsh Affairs Committee’s 2010 report on *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*.

## The Current Settlement

2.2.14 The system of devolution in Wales is based on the conferred powers model, meaning the UK Parliament has specified subject areas in which it has granted the National Assembly law-making powers (discussed further in Chapter 4). Schedule 7 of the Government of Wales Act 2006 sets out the twenty areas in which the UK Parliament has transferred legislative power to the National Assembly. They are summarised in Box 2.5. Through these twenty areas the National Assembly has responsibility for a wide range of domestic policies.<sup>21</sup>

### Box 2.5: Devolved subjects in Schedule 7

The 20 devolved subjects are:

- |   |                                 |
|---|---------------------------------|
| 1. Agriculture, forestry, animals, plants and rural development | 11. Housing                     |
| 2. Ancient monuments and historic buildings                     | 12. Local government            |
| 3. Culture  | 13. National Assembly for Wales |
| 4. Economic development   | 14. Public administration       |
| 5. Education and training                                       | 15. Social welfare              |
| 6. Environment  | 16. Sport and recreation        |
| 7. Fire and rescue services and fire safety                     | 17. Tourism                     |
| 8. Food   | 18. Town and country planning   |
| 9. Health and health services                                   | 19. Water and flood defences    |
| 10. Highways and transport                                      | 20. Welsh language              |

2.2.15 If the Act simply listed the Subjects set out in Box 2.5 and gave the National Assembly legislative power on all issues that came within that Subject, the National Assembly's powers would be relatively straightforward to understand. However, it is not that simple. Each Subject has text that explains or illustrates what that subject is intended to mean. In the case of 14 out of the 20 subjects, the explanation is in turn followed by Exceptions that apply to that Subject and to all Subjects. There are also general Exceptions. Anything that is covered by an Exception is outside the National Assembly's legislative competence.

2.2.16 The full Schedule is set out in the Government of Wales Act and can be found in Annex C of this report. To give a flavour of the full complexity of the Schedule, Box 2.6 below sets out the exceptions in relation to the first subject in the Schedule.

<sup>21</sup> It is worth noting that the extent of devolved powers has increased incrementally since 1999 through transfers of powers from Westminster; two examples are in relation to rail franchises and fire services.



### **Box 2.6: An example of a conferred power**

This box reproduces the first Subject in Schedule 7 of the Government of Wales Act:

#### ***Agriculture, forestry, animals, plants and rural development***

*Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds. Rural development.*

*In this Part of this Schedule "animal" means--*

- (a) all mammals apart from humans, and*
  - (b) all animals other than mammals;*
- and related expressions are to be construed accordingly.*

*Exceptions--*

*Hunting with dogs.*

*Regulation of scientific or other experimental procedures on animals.*

*Import and export control, and regulation of movement, of animals, plants and other things, apart from (but subject to provision made by or by virtue of any Act of Parliament relating to the control of imports or exports)--*

- (a) the movement into and out of, and within, Wales of animals, animal products, plants, plant products and other things related to them for the purposes of protecting human, animal (or plant) health, animal welfare or the environment or observing or implementing obligations under the Common Agricultural Policy, and*
- (b) the movement into and out of, and within, Wales of animal feedstuff, fertilisers and pesticides (or things treated by virtue of any enactment as pesticides) for the purposes of protecting human, animal (or plant) health or the environment.*

*Authorisations of veterinary medicines and medicinal products.*

2.2.17 The National Assembly can therefore legislate to protect Welsh forests, but cannot legislate on hunting with dogs, which remains the UK Parliament's responsibility. There is a general power to legislate on rural development, but that has to be read against restrictions in other parts of the Schedule that would prevent, say, the creation of a rural business development association. The powers that the National Assembly has to regulate movement of 'animals, plants and other things' (whatever 'other things' is intended to mean) are opaque. Similar points could be made about most of the other Subjects.

2.2.18 There are a number of areas where the National Assembly cannot legislate at all. Any area that is not listed as a devolved power under Schedule 7 of the Government of Wales Act is outside the legislative competence of the National Assembly. There is no comprehensive list of these areas. The main areas that are non-devolved are foreign affairs, defence, policing, immigration and justice, macro-economic policy and the tax and welfare system. The absence of a comprehensive list of non-devolved powers means there can be uncertainty as to

whether a particular matter is devolved or not. In addition, even in areas that are conferred, there are often exceptions listed in the legislation and even sometimes exceptions to the exceptions (see for example sub-paragraphs (a) and (b) under the third Exception in Box 2.6).

- 2.2.19 The Welsh Government's evidence highlighted a further complexity in the Welsh devolution settlement. This is a general restriction on National Assembly legislation removing or modifying existing powers of UK Ministers (the restriction is set out in Part 2 of Schedule 7 of the 2006 Act). The 2009 Report of the All-Wales Convention concluded:

*'The problem with this General Restriction is that it seems to introduce an element of uncertainty into the scope of the National Assembly for Wales's law-making powers. There is no composite list of relevant Minister of the Crown functions, therefore how can there be clarity on the extent of the National Assembly for Wales's law-making powers...?'*

- 2.2.20 Despite these complexities, the scope of the Welsh devolution settlement is quite wide by international standards, with most public services being devolved. One way of measuring the scope of the Welsh devolution settlement is to consider how much public spending in Wales is devolved. In 2012-13, public spending in Wales was around £30 billion, of which £9.2 billion was spent by the Welsh Government, £8.6 billion by local government in Wales (a combination of council tax revenue and funding from the Welsh Government, not included in the figure of £9.2 billion), and £12.1 billion was spent by UK Government departments, including pensions and benefits payments.<sup>22</sup> Thus considerably more than half of public spending is devolved.
- 2.2.21 Within the United Kingdom, the UK Parliament is sovereign and because of this the National Assembly (like the Scottish Parliament and Northern Ireland Assembly) is a subordinate body. This means that the UK Parliament can legislate on any area it wishes, whether it is devolved or not. However, a convention has arisen whereby the UK Parliament seeks the consent of the National Assembly before legislating in a devolved area. The UK Parliament does not have to abide by any decision of the National Assembly not to give consent, but can legislate regardless.
- 2.2.22 The legislation that created the National Assembly and Welsh Government (and all other devolved administrations), like all other legislation, can be repealed or amended by the UK Parliament. However, while the United Kingdom does not have a formal written constitution, many consider the devolution Acts within the United Kingdom to be part of a wider set of 'constitutional legislation' in the same vein as legislation like the Parliament Acts of 1911 and 1949, the European Communities Act 1972 or Human Rights Act 1998.<sup>23</sup>
- 2.2.23 Further information on the Welsh devolution settlement is available in our research paper *Current devolution settlements in the United Kingdom*, published on our website.

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<sup>22</sup> HM Treasury (2013) *Public Expenditure Statistical Analyses*.

<sup>23</sup> As a practical example of this, the UK Government's Cabinet Manual, published in October 2011 as '*A guide to laws, conventions and rules on the operation of government*', includes the two Government of Wales Acts as being part of the statutes that underpin the UK constitution.



## 2.3 DEVOLUTION IN SCOTLAND

- 2.3.1 Unlike Wales, Scotland voted in favour of devolution in 1979. However, the vote in favour did not meet the legislative threshold of at least 40 per cent of the electorate voting in favour of a Scottish Assembly. Devolution was therefore not introduced in Scotland at that time.
- 2.3.2 In 1997, a second referendum was also held in Scotland. The people of Scotland voted in favour of the establishment of a Scottish Parliament (with 74.3 per cent of those voting in favour) and in favour of that Parliament having tax-varying powers (with 63.5 per cent of those voting in favour). This was legislated for in the Scotland Act 1998, which created the Scottish Parliament, with primary legislative powers, and the Scottish Executive (now the Scottish Government).
- 2.3.3 While Wales operates under the conferred powers model of devolution, Scotland operates under the reserved power model. This model of devolution means that the Scotland Act 1998 prescribes those areas where the Scottish Parliament cannot legislate – the reservations. These areas are listed under Schedule 5 of the Act. The Scottish Parliament has powers to make legislation in any area that is not reserved. Given that there is no list of devolved powers the principle of ‘if it is not reserved then it is devolved’ applies.
- 2.3.4 Scotland also has more areas of policy devolved to it than Wales, including justice and policing. This reflects the wider range of responsibilities held by the pre-devolution Scottish Office.
- 2.3.5 Additionally, executive powers were devolved differently in Scotland compared with Wales. Whereas in Wales specific functions were transferred by Transfer of Functions Orders, all executive powers that a Secretary of State would have held in a devolved area were transferred to the Scottish ministers in the Scotland Act 1998 (unless specifically reserved).
- 2.3.6 In 2008, a Commission was set up to review devolution in Scotland within the context of the United Kingdom by the Labour, Liberal Democrat and Conservative parties, which together formed a majority in the Scottish Parliament. The Commission on Scottish Devolution, or the Calman Commission as it is commonly known after its Chair, Sir Kenneth Calman, reported in June 2009 to the Scottish Parliament and the UK Government.<sup>24</sup> It made a number of recommendations seeking to strengthen Scottish devolution within the United Kingdom. These were mainly in the area of financial accountability,<sup>25</sup> though it also made some recommendations on the re-allocation of responsibilities between the Scottish and UK Parliaments, and on intergovernmental and inter-parliamentary relations.
- 2.3.7 The result of the Calman Commission’s recommendations was the Scotland Act 2012. This amended the Scotland Act 1998 by giving the Scottish Parliament further powers in relation to income tax; new borrowing powers; and the devolution of stamp duty and landfill tax. It also extended devolution in a number of other areas, including speed limits and drink/drive limits.

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<sup>24</sup> Commission on Scottish Devolution (2009) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*.

<sup>25</sup> With the exception of an ability to vary the basic rate of income tax by 3p, the Scottish settlement was like the Welsh settlement in having no taxation or borrowing powers.

- 2.3.8 In November 2013 the Scottish Parliament unanimously passed the Scottish Independence Referendum Bill, providing for a referendum to be held on 18 September 2014 on whether Scotland should leave the United Kingdom. This followed the Scottish Parliament election of 2011, when the Scottish National Party was elected as the majority party in the Scottish Parliament on a manifesto which undertook to hold such a referendum. While it does not support independence, the UK Government agreed in October 2012 to extend the competence of the Scottish Parliament to legislate for this referendum.
- 2.3.9 Further details on the devolution arrangements in Scotland can be found in our research paper *Current devolution settlements in the United Kingdom* published on our website.

## 2.4 DEVOLUTION IN NORTHERN IRELAND

- 2.4.1 Devolution in Northern Ireland has a long history following the partition of Ireland in 1921, with Northern Ireland having devolved government from its creation until the introduction of direct rule in 1972. The current devolution settlement is a consequence of the Belfast Agreement in 1998, and the St Andrews Agreement of 2006. The Northern Ireland Act 1998 created the Northern Ireland Assembly and the Northern Ireland Executive as a cross-party executive based on power-sharing between the communities of Northern Ireland. The Northern Ireland Assembly has had intermittent periods of suspension, the longest being from 2002 to 2007.
- 2.4.2 Devolution in Northern Ireland also operates under a reserved powers model, though a different one from Scotland. There are two lists of powers retained by Westminster: 'excepted powers', on which the Northern Ireland Assembly cannot legislate; and 'reserved powers', which are currently reserved to the UK Parliament but may be considered for devolution in the future, and can be legislated for by the Assembly with the agreement of the Secretary of State. Until 2010, powers over justice and policing were 'reserved' but they have now been transferred to the Northern Ireland Assembly.
- 2.4.3 Northern Ireland has more devolved powers than Wales, including in areas such as energy, policing, justice and social security. This reflects the wide range of powers transferred to Northern Ireland prior to the suspension of devolved government in 1972. As Northern Ireland has the broadest devolution settlement of the three in the United Kingdom, this report refers often to Great Britain, as opposed to the United Kingdom, when discussing matters such as social security or energy.<sup>26</sup>
- 2.4.4 The Northern Ireland Act 1998 also required Northern Ireland Ministers' participation in the North-South Ministerial Council, for cooperation with the Government of the Republic of Ireland, and in the British-Irish Council, which also includes the UK, Irish, Scottish and Welsh Governments, as well as the Crown Dependencies of the Channel Islands and Isle of Man.
- 2.4.5 Further details on the devolution arrangements in Northern Ireland can be found in our research paper *Current devolution settlements in the United Kingdom* published on our website.

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<sup>26</sup> Great Britain excludes Northern Ireland.



## 2.5 DEVOLUTION IN ENGLAND

- 2.5.1 There is no England-level government, and England itself does not have a devolution settlement. However, in effect several UK Government departments, such as the Department of Health, have become mainly England-only departments.
- 2.5.2 There is a form of devolved government in London. The post of Mayor of London was created in 2000. The Mayor has executive responsibility over certain local domestic policies such as policing, transport, some aspects of housing, and some financial powers. The Mayor is scrutinised by the 25-member Greater London Assembly which does not have legislative powers.
- 2.5.3 There were some proposals at the time of the second elections to the Scottish Parliament and National Assembly for regional devolution in England. A referendum was held in the North East of England in 2004 on a regional Assembly, as proposed by the then UK Government. The referendum rejected the proposal by 77.9 per cent to 22.1 per cent; no further referendums have been held in English regions.
- 2.5.4 The main context currently for devolution of power within England has been to sub-regional and local communities. The Prime Minister pledged in November 2010: *'We will be the first government in a generation to leave office with much less power in Whitehall than we started with'*.<sup>27</sup> Illustrations of this policy include the Localism Act 2011, which sought to devolve decision-making powers from the UK Government to English councils; the development of sub-regional entities including city regions and local enterprise partnerships;<sup>28</sup> and the introduction of directly elected mayors, subject to local voters' agreement. As these reforms are principally in the realm of devolved areas such as economic development and local government, the Welsh Government could act similarly in Wales if it wished (for example, city regions are being established in Swansea Bay and south east Wales).
- 2.5.5 In addition to our Commission, the UK Government's Coalition Agreement provided for a second Commission. This Commission would look at the consequences of devolution for the House of Commons. It was launched in February 2012, and is known as the McKay Commission after its Chair, Sir William McKay. The essential remit of the McKay Commission was to examine what is known as the West Lothian question,<sup>29</sup> which asks why MPs from Scotland, Wales and Northern Ireland can vote on legislation which only applies to England, while MPs from England have no comparable rights on devolved matters. Its report was published in 2013 and proposed a mechanism for MPs from England (or England and Wales) whose constituencies alone would be affected by legislation to express their views separately from the House as a whole – a kind of parallel to the legislative consent procedure in the devolved legislatures. They also proposed that a Devolution Committee should be established in the House of Commons to consider devolved implications of UK legislation. At the time we agreed our report, the UK Government had not yet responded.

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<sup>27</sup> GOV.UK website news story (Nov 2010) *Business Plans Published*.

<sup>28</sup> This includes the implementation of Lord Helseltine's report (2013) *No Stone Unturned*.

<sup>29</sup> So called first by Enoch Powell MP after the then constituency of Tam Dalyell MP – the person who first posed the question.

2.5.6 When considering possible future developments in Welsh devolution, it is important that English views are taken into account. Box 2.7 refers to some recent research.

**Box 2.7: English attitudes towards devolution**

Our first report discussed the Institute of Public Policy Research's (IPPR) 2012 report<sup>30</sup> on English attitudes towards devolution, *The dog that finally barked*. The evidence presented suggested the emergence of what might be called an 'English political community' and concerns within England about the apparent privileges of Scotland. The IPPR followed this in 2013 with IPPR's *England and its two Unions*,<sup>31</sup> which looked further at the demand within England for political expression and analysed any sense of grievance at England's treatment, particularly compared with Scotland. It found that 42 per cent of respondents chose 'How England is governed now that Scotland has a parliament and Wales has an assembly' as a key priority for action or change.

## 2.6 INTERNATIONAL COMPARISONS

2.6.1 There are examples all over the world of devolution in federal and non-federal states and countries, and there is a very wide variety of models of decentralisation and devolution. We have looked at a number of international examples to learn from their constitutional structure.<sup>32</sup>

2.6.2 However, we have been acutely aware that, although it has 'quasi-federal' aspects,<sup>33</sup> the United Kingdom is not a federal country, even if as distinguished a commentator as the current Deputy President of the Supreme Court has argued that '*the United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts*'.<sup>34</sup> So there is limited usefulness in comparisons with federations abroad.

2.6.3 Drawing on this international evidence, we concluded that:

- there is no 'one size fits all' model;
- while the evidence does not provide a conclusive comparison of the merits of a 'reserved powers' model over a 'conferred powers' model, there are examples of federations based on 'conferred powers' (such as Belgium and Spain) and on 'reserved powers' (such as the USA, Switzerland and Australia); some also have shared or concurrent powers;
- while there is a complex spectrum of forms of federal government, the reserved powers model appears to be somewhat more common;

<sup>30</sup> Richard Wyn Jones, Guy Lodge, Ailsa Henderson and Daniel Wincott (2012) *The dog that finally barked: England as an emerging political community*.

<sup>31</sup> Richard Wyn Jones, Guy Lodge, Charlie Jeffery, Glenn Gottfried, Roger Scully, Ailsa Henderson and Daniel Wincott (2013) *England and its two Unions: The anatomy of a nation and its discontents*.

<sup>32</sup> A useful summary is Majeed, Watts and Brown (2006) *Distribution of Powers and Responsibilities in Federal Countries*.

<sup>33</sup> See, for example, Vernon Bogdanor (2009) *The New British Constitution*: "[Devolution] has transformed Britain from a unitary state to a quasi-federal state" (page 89).

<sup>34</sup> Speech by Baroness Hale to Legal Wales conference, Llandudno, 2012.



- the scope of powers devolved in the Welsh settlement is quite wide by international standards, covering most public services and many economic development functions. However, the non-devolution of policing and justice appears somewhat anomalous. Some aspects of social welfare tend to be more devolved elsewhere, although the complete devolution of health in Wales is striking;
- the degree of autonomy in devolved policy areas is unusual by international standards, as shown by the fact that the provision of devolved funding (the block grant) from the UK Parliament to the National Assembly is for the most part without conditions. In many federal countries the federal government uses its funding to influence the way in which the states spend the money by attaching conditions;
- in the main, other settlements internationally are more institutionally complex than Wales's, with a greater propensity for overlapping responsibilities and disputes;
- formal mechanisms for intergovernmental cooperation appear to be somewhat undeveloped in the United Kingdom by international standards, although informal mechanisms are also important in the United Kingdom; and
- centralisation and decentralisation tend to ebb and flow over time in federal systems and there are forces pulling in both directions.

2.6.4 We note that Wales appears to be internationally anomalous in three respects:

- it has legislative but not (at present) tax and borrowing powers (though the implementation of our first report will remove this anomaly);
- it has a legislature but not its own devolved courts and judiciary; and
- it is part of a Union where both the conferred and reserved powers models apply in different parts of the Union.

2.6.5 Further details can be found in our research paper *International evidence* published on our website.

## 2.7 CURRENT AND FUTURE CONSTITUTIONAL DEVELOPMENTS ACROSS THE UNITED KINGDOM

2.7.1 Our report is one of a number of recent and future events that will shape the future of the United Kingdom, including the referendum on Scottish independence due in September 2014 and the UK Government's response to the McKay Commission. We have undertaken our work and developed recommendations mindful of this context.

2.7.2 The outcome of the referendum in Scotland on the issue of independence will, no doubt, not just shape the future of devolution in Scotland but have a major impact across the whole of the United Kingdom.

2.7.3 In developing our recommendations, we have been fully aware we are making recommendations within this report against a context of wider constitutional discussions. Irrespective of developments in the wider context, implementation of our recommendations will bring greater stability to Welsh devolution, to Wales's benefit and the benefit of the rest of the United Kingdom.

## **2.8 SUMMARY**

- 2.8.1 Wales has been subject to more changes in its devolution settlement since 1998 than have Scotland or Northern Ireland. There have been three phases in Welsh devolution: the first two National Assemblies operated under the Government of Wales Act 1998; the 2007 National Assembly operated under the first devolution model contained in the Government of Wales Act 2006; and the National Assembly elected in May 2011 operates under the second devolution model in the 2006 Act.
- 2.8.2 Wales has fewer powers than Scotland and Northern Ireland and is also the only country in the Union to have a conferred powers model. Wales's settlement is also more complex than those that in Scotland or Northern Ireland.
- 2.8.3 While international comparisons are useful, we recognise the unique nature of the United Kingdom's system of devolution. Wales appears to be anomalous in three respects: it has legislative powers but no taxation or borrowing powers at present; it has a legislature but not its own courts system; and it is part of a Union where different models of devolution are being used.
- 2.8.4 Future constitutional developments across the United Kingdom, including the referendum on independence in Scotland, will impact on devolution in Wales. We have been mindful of these developments and have recommended changes that will allow both Wales and the United Kingdom to benefit whatever the wider constitutional future.



# Chapter 3 – Principles for Welsh devolution

## 3.1 OVERVIEW

3.1.1 This chapter sets out the Commission’s vision of how devolution could better serve the people of Wales in line with our remit, and the principles we established to guide our work.

## 3.2 OUR VISION

3.2.1 As set out in Chapter 1, our terms of reference asked us to consider the devolution settlement and to produce recommendations that would allow the National Assembly for Wales and the UK Parliament to better serve the people of Wales. We began our work by considering what our vision for ‘better serving Wales’ should be.

3.2.2 We agreed at an early stage that our recommendations should seek to provide a stable basis for devolved government for the future, in the hope that further modification of the settlement would not be necessary for several years. At the same time we recognised the possibility of a political impetus for constitutional change in the future. We also wanted to ensure that any modifications that we recommend will enable the Welsh public to feel more confident in understanding which of their elected representatives would make decisions on any specific issue.

3.2.3 We reflected on some of the criticisms made of devolution, and our views on what constituted good governance. The weight of the evidence we heard was that Wales’s devolution settlement is unstable and unclear, and that there is often uncertainty over which Government is responsible for which policy area. This is not helpful for government in Wales or in Westminster. Additionally, we heard a concern that political debate in Wales too often focussed on constitutional issues, rather than the performance of the Welsh economy or public services – on process, not delivery.

3.2.4 We were aware from evidence received that some people were not satisfied with the performance of devolved government to date. However we were clear that our remit was not to provide a review of how the powers and responsibilities currently held by either Westminster or Cardiff had been used. It was not for us to review how the two Governments had deployed their powers, but rather where the powers were best held.<sup>35</sup>

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<sup>35</sup> The Official Opposition in the National Assembly put it in their written evidence to us: ‘We therefore do not feel any review into the Assembly’s existing powers should be prejudiced by the failings of successive Welsh administrations or of any political party to correctly utilise the tools at its disposal to deliver improvements for the people of Wales.’

- 3.2.5 That said, we wanted to avoid making recommendations that would make the devolution settlement an inherent obstacle to the delivery of good outcomes for Wales. On the contrary, we believed our work should seek to ensure a devolution settlement that maximised the potential for good outcomes for the people of Wales. Our goal was that the governance of Wales should be done efficiently and collaboratively, regardless of how responsibilities might be distributed.
- 3.2.6 Our draft vision was discussed during our public meetings. These meetings provided opportunities for us to explain our task and to ensure that the public broadly agreed with our interpretation of it. People who attended these meetings were generally content with our proposed vision, though they also suggested modifications. For example, they encouraged us to make the principle of efficiency more clear, something with which we readily agreed.
- 3.2.7 An additional matter raised in public meetings in different parts of Wales was a feeling that their local area had not seen the advantages of devolution as much as other areas of Wales. This view was held strongly by a number of attendees, and was also raised in responses to our questionnaire and in the focus groups held in advance of the opinion poll. We therefore included in our vision a clear statement that devolution should benefit the whole of Wales as well as the United Kingdom.
- 3.2.8 The vision we agreed is set out in Box 3.1 below.

**Box 3.1: The Commission's vision**

*We believe that the people of Wales will be best served by:*

- *a clear, well founded devolution settlement that allows coherent political decisions to be made in a democratic and accountable manner, and*
- *political institutions that operate effectively and efficiently and work together in the interests of the people they serve.*

*Devolution of power to Wales should benefit the whole of Wales and the United Kingdom.*

- 3.2.9 Our vision, refined as it was by the comments made to us, guided our work. We hope that this vision also has a wider applicability and might be the basis for the approach of Governments in London and Cardiff, and others, to devolution in Wales.
- 3.2.10 In addition to our vision, we were keen to establish some key principles – something that had proved very helpful in the first part of our work.

**3.3 PRINCIPLES FOR DEVOLUTION**

- 3.3.1 As set out in Chapter 2, the fourteen years of devolution in Wales have seen broadly three stages of development. This evolutionary process reflected political considerations at the time, or perceived flaws in the settlement. We were keen to ensure that our recommendations, as in Part I, were based on a clear set of principles. As we wanted our vision to have a wider applicability, so we wanted the principles we used in our work to be a framework that could be applied to the consideration of any proposed future adjustments in the settlement. This would be in contrast to the reactive and piecemeal nature of the development of devolution in the past.



### **Box 3.2: Evidence on principles**

The UK Government said: *'We believe firmly that there are benefits in taking decisions at local level within a strong United Kingdom'*.

The Welsh Government based its evidence on the principle of *'Powers for a purpose'*.

The UK's Changing Union project suggested six core principles: *'Respect for the settled will of the Welsh electorate; Democratic accountability; Stability and sustainability; Clarity and predictability; Effectiveness; and Consistency across the UK'*.

Cardiff Law School suggested *'two key principles should underpin the legal framework... The first is that they should be as clear as possible to avoid doubt and conflict as between Cardiff and Westminster. The second is that they should be based on a coherent test which would enable understanding of why particular matters may, or may not, be allocated to one legislature or the other at the outset, and how matters may be allocated as they arise for determination in the future'*.

SNAP Cymru told us that *'the principles of transparency, clarity and accessibility should underpin the devolution settlement'*.

Community Housing Cymru believed *'transparency and consistency'* were the key principles that should underpin devolution and any modifications to the settlement.

The Parliament for Wales campaign outlined principles arising from international and European law, including self-determination, subsidiarity, equality in the devolved settlements and good governance.

True Wales stated that *'democratic principles should underpin any modification to the settlement'*.

The Law Society suggested that *'the principle of subsidiarity may result in a more logical and accessible settlement'*.

The Wales Council for Voluntary Action believed that the principles of *'clarity, transparency and accessibility'* it submitted to the All Wales Convention, when it had argued for a move to full-law making powers, were still valid.

Wales TUC expressed a firm view that *'any consideration of changes to the settlement should be based upon the principle of fairness for the people of Wales'*.

Unite Wales supported *'a clearer constitutional settlement, one that clarifies accountability for responsibility for areas of public concern and by doing so makes devolved government more accessible to the people of Wales'*.

Undeb Cenedlaethol Athrawon Cymru, the teaching union, set out the following principles: *'An improvement to the welfare of the people of Wales; An improvement in accountability; Better clarity as regards responsibilities and legislative powers; Appropriate and adequate funding arrangements; and Creation of a more transparent and organized system that is appropriate to the purposes of the people of Wales'*.

The Bevan Foundation argued for a fundamental principle that *'government should be accountable to the people for its decisions. Accountability requires clarity over who is responsible for what'*.

Professor Thomas Watkin argued that identifying principles would *'in itself improve the settlement'*.

The RSPB suggested that the principles of *'transparency, clarity and accessibility (based on reasonable cost) should underpin the devolution settlement'*.

The Chartered Institute of Taxation suggested principles applied in the development of tax laws more widely. These principles were *'Consultation; Stability; Certainty; and Simplicity'*.

Citizens Advice Cymru suggested the general principles to inform consideration of the devolution settlement: *'the structures and processes must be as clear, transparent and easy to engage with as possible; it must be possible for individuals to have ready access to justice and to be able to find out what law applies in their circumstances; [and] it must be easy to identify easily which elected representatives have the power to change that law'*.

Gofal suggested the following principles as a basis for further devolution: *'Providing a clear benefit to the people of Wales; Increasing transparency, accessibility and public understanding; Improving accountability and the quality of decision making; Supporting a holistic, whole person approach to policy and law making; Ensuring full and fair funding for devolved areas; [and] Preparing and equipping Wales for longer term devolution'*.

3.3.2 Using the suggestions put forward in evidence, and taking account of the principles we agreed in our first report and of our vision for devolution in Wales, we agreed a set of principles for the second part of our remit.

3.3.3 These principles are:

- *Accountability* – voters should be able to hold the responsible institutions to account for delivering policies in a transparent way;
- *Clarity* – voters should understand where decisions are made and the settlement should be straightforward to operate;
- *Coherence* – the National Assembly should have freedom and autonomy to use devolved policy and legislative levers within a coherent framework of powers;
- *Collaboration* – the Welsh and UK Governments should work constructively together;
- *Efficiency* – the arrangements should be affordable and provide value-for-money to the taxpayer, and should not place undue burdens on individuals or business;
- *Equity* – fundamental standards and rights should be enjoyed by citizens across the United Kingdom;
- *Stability* – the settlement should be well founded, sustainable and predictable in its operation, and meet the needs of current and future generations; and
- *Subsidiarity and localism* – decisions should be made as close as possible to the people they affect, consistent with addressing the relevant matter effectively, thus promoting empowerment.



- 3.3.4 In considering the evidence submitted to us, we used these principles to evaluate the case for any change to the constitutional arrangements. The remainder of the report reflects the outcome of these considerations.
- 3.3.5 It is appropriate at this stage to make one general observation on the principle of efficiency. It could be argued that any change to the devolution settlement would involve additional cost to the Welsh Government, and that retaining the status quo would therefore always be more efficient. However that is not the case. First, where a responsibility is transferred between governments, it is accompanied by a transfer of financial resources for the administration and delivery of that responsibility. Transfers therefore do not mean net additional cost to the public purse. Secondly, while it is true that there may be some additional cost from diseconomies of scale in the short term, there are also opportunities for efficiency savings to be made in the longer term, for example by aligning previously disparate responsibilities.
- 3.3.6 There is also a more general argument that devolution improves the efficiency of the economy by decentralising decision making, fostering innovation and enterprise, and aligning the allocation of resources with local preferences.
- 3.3.7 But we were very conscious of cost issues. We consider the costs of our recommendations in Chapter 16 and the report also deals with relevant costs whenever specific transfers of powers are recommended.

## **3.4 SUMMARY**

- 3.4.1 We believe that the people of Wales will be best served by a clear, well-founded devolution settlement; and by political institutions that operate effectively and efficiently and work together in the interests of the people they serve. Devolution of power to Wales should benefit the whole of Wales and the United Kingdom.
- 3.4.2 Any proposed changes to the devolution settlement should be tested according to the principles of accountability, clarity, coherence, collaboration, efficiency, equity, stability and subsidiarity.

# Chapter 4 – Model of devolution

## 4.1 OVERVIEW

- 4.1.1 This chapter explains the legislative framework within which the Welsh devolution settlement currently operates, and the arguments received for change. We compare the different models and set out how we see the future of the devolution settlement in broad terms.
- 4.1.2 The model of devolution was one of the topics most frequently raised in evidence submitted to us. Where this topic was raised, the views expressed were almost wholly in favour of the reserved powers model. Advantages of the conferred powers model were put forward by a limited number of respondents. The UK Government's evidence did not discuss the model itself, though stated that the current settlement was satisfactory. The Secretary of State for Wales has argued subsequently in favour of the conferred powers model.<sup>36</sup>

### Box 4.1: Evidence on the model of devolution

The UK Government said: *'The Welsh settlement is satisfactory and works well in practice'*.

The Welsh Government told us that they were clear *'that the reservation model is a technically superior method of devolving legislative competence on a devolved legislature. In our view, the conferral model is incapable of prescribing with any degree of certainty exactly what the Assembly can legislate about... The Welsh model... lacks clarity and certainty and much time is spent addressing potential arguments about whether provisions of a Bill relate to... [an] undefined subject-matter'*.

The UK's Changing Union project's submission argued that *'a conferred powers model creates confusion, complexity and uncertainty for the Welsh and UK Governments, Assembly Members, MPs and Peers, and the Welsh public... A reserved powers model would do away with most limbo areas. It would mean much more certainty about the basic subject-matter competence of the Assembly. It would save much work for Welsh Ministers, their staff and the Assembly Commission. It would begin to put the relationship between Cardiff Bay and Westminster on a more adult footing. It would provide clarity for the public and civil society. It is the right solution and the right moment to adopt it'*. Its 'Our Future' project also supported a move to a reserved powers model.

The submission from the Hywel Dda Institute of Swansea University's School of Law concluded that *'the reserved powers model is, in principle, superior in terms of accessibility, clarity, stability, sustainability, effectiveness and consistency with the principle of subsidiarity'*. They also addressed the issue of how to reserve the legal system under a reserved powers model:

<sup>36</sup> In his June 2013 speech at the Wales Governance Centre. Additionally in the House of Lords on 4 November 2013 Baroness Randerson, the Parliamentary Under Secretary of State, said: *'I am aware of the noble Lord's continued interest in this issue. I am aware, too, that this point [a proposal that the situation in Wales should equate to that of Scotland and Northern Ireland, thereby bringing cohesion and simplicity] has been raised by a number of people. But I remind noble Lords that this is an issue for part two of the Silk commission, and something on which it is already working'*.



*'So the challenge of identifying and treating separately those kinds of provision which relate to matters of general private or public law would not be a totally new one [referring to the 1978 Scotland Act]. Whilst the view that it would be "complex" and "uncertain" is to be respected, this does not mean that it should not be undertaken if the benefits of doing so are great enough'.*

Cardiff Law School believed that, under the principles of clarity, coherence and subsidiarity, the conferred powers model was inadequate, and that moving to the reserved powers model *'represents the next logical step in the process of devolution'*.

Constitutional trainers and consultants Your Legal Eyes suggested that the Northern Ireland model of devolution was the *'best model which could be adapted to fit Wales' needs'*.

Aberystwyth University's Institute of Welsh Politics set out that the *'merits of the "reserved powers" model akin to Scotland are well developed and include establishing clearer, simpler, more effective and accountable arrangements for Wales'*.

The Equality and Human Rights Commission Wales's submission gave support for the reserved powers model, but noted an advantage the present conferred powers model had afforded Wales: *'In general terms the Scottish model gives greater powers and provides clarity in relation to what is devolved and what is reserved. However, some constitutional and equalities experts... have noted that the devolved model in Wales has enabled the Welsh Government to take steps not available to the Scottish Government. For example, equality standards have been built into regulatory frameworks in Wales... As the regulation of equality and human rights is reserved to the UK Government, the Scottish Government was unable to include equality in its regulatory regimes'*.

Professor Alan Trench, University of Ulster, said: *'Moving to a 'reserved powers' model of conferring functions on the National Assembly would have a number of significant benefits. It would provide for greater legal certainty, and reduce the possibility of functions widely understood by the general public to be devolved being held to be beyond devolved law-making competence on grounds of what may be seen as "technicalities". The reserved powers model provides for greater certainty about devolved competence at the margin, as it means those claiming devolved legislation is beyond competence have to identify the reservation that limits it, rather than forcing those claiming it is within competence to point to the power or powers making it lawful'*.

Professor Thomas Watkin, former First Welsh Legislative Counsel, said: *'The first choice, therefore, that needs to be made is between these two approaches [conferred and reserved powers]. Logically, neither is different from the other in its result. The basis on which the choice is to be made must therefore rest on other factors. The breadth of the legislative competence being devolved may well loom large and be thought to be an important, possibly decisive, factor in making the choice. If very broad powers are to be devolved, it will be simpler to set out {not x} [ie what is not devolved]; if fairly narrow powers are to be devolved, setting out x [ie what is devolved] will be simpler'*.

Submissions in favour of the reserved powers model were also received from SNAP Cymru, Community Housing Cymru, the Parliament for Wales Campaign, the Wales Council for Voluntary Action, UCAC Teaching Union, the Bevan Foundation, the Children's and Older Group of the Study of Parliament Group, the Electoral Reform Society Wales, Cymdeithas yr Iaith Gymraeg, Federation of Small Business Wales, Federation of Master Builders, BMA Cymru Wales, and RSPB Cymru. The Institute of Directors also supported the reserved powers model in their oral evidence to the Commission.

Lord Morris of Aberavon was also in favour of the reserved powers model<sup>37</sup>, as was the Presiding Officer in her oral evidence to the Commission.

## 4.2 CURRENT ARRANGEMENTS

- 4.2.1 Following the referendum in March 2011, the National Assembly for Wales was empowered to make primary legislation in the 20 broad policy areas set out in Schedule 7 (see Box 2.5). Thus the areas where the National Assembly can legislate are conferred upon it, and listed in the statute. This is known as the conferred powers model.
- 4.2.2 The corresponding legislation for Scotland and Northern Ireland sets out the areas where the devolved legislature cannot legislate – areas that are reserved to the UK Parliament. This is known as the reserved powers model. This model was also in place in Northern Ireland between 1921 and 1972.
- 4.2.3 The Richard Commission recommended the reserved powers model for Wales, but the then Secretary of State for Wales and the then First Minister provided a memorandum to the Welsh Affairs Committee in 2005<sup>38</sup> explaining why this model was not that used in what became the 2006 Act.
- 4.2.4 In many of the twenty Subjects under Schedule 7, there are also exceptions, which specify particular aspects of that Subject that are non-devolved. These exceptions apply across the settlement. For example, 'Broadcasting' appears as an exception under the Subject of 'Culture' and is not specifically mentioned under the Subject of 'Welsh Language'. The exception applies across all Subjects, so that the National Assembly cannot legislate for the use of Welsh language in broadcasting.
- 4.2.5 A Member in charge of any Assembly Bill has a statutory obligation to state that the Bill he or she is introducing is within the National Assembly's legislative competence. For Government Bills, this is a Welsh Government Minister, so it falls to the Welsh Government to attempt to ensure that any Bill it introduces in the National Assembly is within the National Assembly's competence. Determining whether a proposed Bill is within the competence of the National Assembly is also a key responsibility of the Presiding Officer, who must provide Assembly Members with a memorandum setting out his or her judgement on an Assembly Bill when it is introduced. The Presiding Officer's memorandum does not prevent consideration of a Bill that he or she has judged to be outside the National Assembly's competence.

<sup>37</sup> Lord Morris set out his views further in his speech *The Welsh Nation and the United Kingdom* (delivered as the Welsh Political Archive Annual Lecture, National Library of Wales, Nov 2013).

<sup>38</sup> Welsh Affairs Committee (2005) *Government White Paper: Better Governance for Wales*, Ev62



4.2.6 Once a Bill has been passed by the National Assembly, and before it is submitted for Royal Assent, the UK Government's Attorney General and the Welsh Government's Counsel General have 28 days to consider whether the Bill as a whole, or any provision of the Bill, is within competence. If the Attorney General or the Counsel General believes it may not be, either may refer the question to the Supreme Court to determine. At the time we agreed this report, this had happened on three occasions since the National Assembly received its full law-making powers in May 2011. The first was the reference by the Attorney General of the Local Government Byelaws (Wales) Act, which was passed by the National Assembly in July 2012. The Supreme Court delivered a judgement in November 2012 that it was within competence.<sup>39</sup> The second was the Agricultural Sector (Wales) Bill, passed in July 2013 and again referred by the Attorney General. The Supreme Court is expected to hand down a judgement on that Bill after the publication of this report. The third referral was of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill by the Counsel General. This Bill was introduced by a backbench Assembly Member and passed by the National Assembly in November 2013.

### 4.3 ARGUMENTS IN FAVOUR OF THE CONFERRED POWERS MODEL

- 4.3.1 The evidence we received was overwhelmingly in favour of a reserved powers model, but we fully explored the arguments in favour of a conferred powers model.
- 4.3.2 The first argument in favour of conferred powers is what might be described as 'the incremental argument'. Legislative competence was devolved to Wales incrementally between 2007 and 2011, and it could be argued that it is logical to do this by conferring specific powers, rather than listing all possible powers in a list of reservations and deleting them individually.<sup>40</sup>
- 4.3.3 The second argument is that the conferred powers model has a presumption against powers in new or non-identified areas being held by the National Assembly. A reserved powers model would change the presumption of where a non-identified power would lie. Currently the UK Parliament would be responsible for any issue not specifically devolved to the National Assembly. Under a reserved powers model, the presumption would be that the National Assembly would be responsible for anything not specified as being reserved. This would mean any issues that were not considered at the time the legislation setting out the settlement was passed would be devolved by default. While this 'residual authority' issue is seen by some as an argument in favour of a conferred powers model, others see it as an argument in favour of a reserved powers model. However, it is an important consideration to bear in mind.
- 4.3.4 The third argument is that there may be a pragmatic case for a conferred powers model where the range of devolved powers is narrow. If most powers are retained by the UK Government, a list of conferred powers would be shorter and more straightforward than a list of reserved powers. Given that the devolution settlement in Wales is relatively narrow, compared to that of Scotland or Northern Ireland, legislation setting out the powers reserved to the UK Parliament would be long and complicated. This argument was cited

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<sup>39</sup> UK Supreme Court (2012) *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* UKSC 53.

<sup>40</sup> The international evidence that we reviewed suggests that where there is a process of devolution from a formerly unitary state, there is often a conferred powers model with the residual authority remaining with the federal government, as in Belgium and Spain.

by the then First Minister for Wales and the Secretary of State for Wales in 2005. As more powers are devolved, this argument becomes weaker.

- 4.3.5 There is also an argument based on the single England and Wales legal jurisdiction. The 2005 memorandum of the First Minister and Secretary of State suggested that primary law-making powers could inadvertently result in Wales becoming a distinct legal jurisdiction by default. To prevent this fundamental change, they argued that the extent of law-making powers would therefore need to be circumscribed. This could be achieved under a reserved powers model only by specifically reserving fundamental legal principles and basic legal rules to the UK Parliament. The 2005 memorandum claimed this would be very complex, and might not even be possible.
- 4.3.6 The current Secretary of State for Wales offered an argument of appropriateness in his June 2013 speech at the Wales Governance Centre. His view was that the conferred powers model allowed the flexibility and surety appropriate to Wales's historical and geographic circumstances.<sup>41</sup>
- 4.3.7 A final point made to us in evidence was that the conferred powers model could allow a more generous interpretation of the devolved powers than a reserved powers model. For example, legislation could be more far-reaching within a conferred subject area than it might be with stricter limits set in a reserved powers model. The onus of proof that a matter is not within competence rests with those arguing the matter goes beyond the conferred subject area, or relates to an area listed as an exception, or to a non-devolved area (areas that are not listed). This would only be an argument in favour of the conferred powers model if one were to favour a more expansive settlement.

#### 4.4 ARGUMENTS IN FAVOUR OF THE RESERVED POWERS MODEL

- 4.4.1 As we said earlier, the evidence we received was overwhelmingly in favour of a reserved powers model. We have attempted to summarise the arguments heard in its favour.
- 4.4.2 The first argument in favour of a reserved powers model is that of certainty. With a clear set of reservations, the limit of the devolution settlement should be more apparent and so allow the National Assembly to legislate with confidence. As the Law Society told us, *'It could be argued that the combining of express references to subjects in Schedule 7 with exceptions leads to doubt as to whether a legislative provision came within a subject or an exception, thus possibly leading to legal challenge'*. This was an argument advanced by several others. Essentially, the conferred powers model includes a list of what is devolved, and a second list of exceptions – leaving aside the exceptions to exceptions. Comparing these lists creates uncertainty, and issues not addressed by either list could be contested. A reserved powers model would provide an opportunity to remove what might be called 'grey areas' that characterise the present settlement. In short, there would be only one list.
- 4.4.3 We were also told that Wales's current Schedule 7 is unclear. The Hywel Dda Institute's evidence pointed to the fact that exceptions in one Subject area apply across the settlement (see 4.2.4 above). This can cause confusion because of the apparently rather arbitrary choice

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<sup>41</sup> Wales Office website (June 2013) *Welsh Secretary delivers 'Wales in the Continuing Union' speech*.



of the Subject under which they appear. The Institute gave the example of subsidence caused by coal mining, which appears as an exception under the Subject of Economic Development, but could appear in a range of other Subjects or have the extent to which it applies more clearly enunciated. The whole Schedule needs to be consulted and considered before determining competence. This was contrasted with the more straightforward reservation in the Scottish settlement, which has more specific reservations that would apply to a subject area rather than cross-cutting exceptions. This provides greater clarity.

- 4.4.4 We were told very firmly in both Scotland and Northern Ireland by the parliamentary authorities, by Ministers and their officials, and by representatives of the legal profession that the reserved powers model was inherently preferable to the conferred powers model in terms of certainty and clarity. In the case of Scotland, we were told that the then Secretary of State immediately prior to devolution, Donald Dewar, had been most insistent that the conferred powers model contained in the Scotland Act 1978 should not be adopted. Speaking in the House of Commons in July 1997, he said:

*'A... crucial difference from 1978—I shall telescope this—is that we have moved to define the reserved rather than the devolved powers, to ensure maximum clarity and stability. Anyone looking at the 1978 Act would see a somewhat grudging document, which would have required frequent updating. There would have been a greater danger—I put it no higher than that—of arguments over vires. We wished to minimise the difficulties of interpretation and to allow for maximum flexibility in future. We have done so.'*<sup>42</sup>

- 4.4.5 This provides the third argument in favour of a reserved powers model: that it would be more stable over time. As foreseen by Donald Dewar, the reserved powers model appears to provide greater structural stability than the conferred powers model. The uncertainty over vires encountered in the first two years of full primary law-making powers in Wales has been striking, with three Bills being referred to the Supreme Court by the UK Government, and a number of other Bills where there has been uncertainty over the National Assembly's competence.<sup>43</sup> In Scotland and Northern Ireland, there have been no such challenges by the UK Government, nor any hearing based on a referral by the Counsel General's counterparts.<sup>44</sup>
- 4.4.6 A fourth argument in favour of a reserved powers model for Wales is that it would bring greater consistency and coherence across the United Kingdom. It is argued that it is illogical to have both conferred and reserved devolution models in one state and that there are advantages in structural symmetry between the three devolution settlements, even if the detail of what is devolved is different in the three countries. The United Kingdom appears to be unique in the world in operating two different models of devolution. Westminster and Whitehall could more clearly see the responsibilities for which it maintains day-to-day responsibility if they are expressed through three sets of reservations, many of which will be common to all the devolution settlements. It will also be beneficial in the development of common jurisprudence, particularly at the Supreme Court, for cases involving the operation of the devolution settlements.

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<sup>42</sup> House of Commons (31 Jul 1997) *Official Report* Column 462.

<sup>43</sup> For example, the BBC reported doubts being raised over the National Assembly for Wales (Official Languages) Act 2012 in October 2012.

<sup>44</sup> In April 2011 the Attorney General for Northern Ireland referred the Damages (Asbestos-Related Conditions) Bill to the Supreme Court, but withdrew his reference the following month.



- 4.4.7 A fifth argument in favour of a reserved powers model is that it would enable the settlement to be re-drawn, but this time based on clearer and more logical principles. Schedule 7 of the Government of Wales Act 2006 was drafted quickly, by force of circumstance. It appears that there was an expectation that it could be amended in due course as required. In the event the referendum that brought it into force was triggered earlier than had been expected.<sup>45</sup> Much evidence that we received, including from the UK Government, focused on the problems caused by the specific wording of the exceptions within the current settlement. That could perhaps be remedied by redrafting the current Schedule 7, but this would be unlikely to command wide support or to provide as satisfactory an outcome as a reserved powers model. For example, if it were to be redrafted to make exceptions appear within every Subject, rather than having cross-cutting exceptions, this would make a long and complex schedule. Moving to a reserved powers model would be an opportunity to legislate for well-argued and rational reservations, drafted in a robust, considered and coherent way – reservations that the UK Government would have to defend publicly and before the UK Parliament.
- 4.4.8 The sixth argument is that a reserved powers model would be simpler. It was frequently pointed out to us that the present conferred powers model is particularly complex, with extensive executive Ministerial powers often not aligned with legislative powers and the need to acquire consent if legislation would affect the pre-commencement powers of the Secretary of State. The consequence is that it is difficult to know just how extensive the settlement is, creating uncertainty for legislators, business, individual citizens and lawyers.<sup>46</sup>
- 4.4.9 A final and practical argument in favour of the reserved powers model would be that it reduces the risk of litigation. Whereas three Bills of the National Assembly have been referred to the Supreme Court since 2011, there have been no such challenges to legislation passed by the Northern Ireland Assembly or the Scottish Parliament.<sup>47</sup> Between them, they have passed over 200 Acts. It was argued in evidence that this suggests an inherent problem in the conferred powers model, and that a clearer legislative model would avoid the costs, confusion and delay associated with Supreme Court referrals.
- 4.4.10 As far as the connection between reserved powers and a separate jurisdiction is concerned, we understand from our discussions, including some with former Parliamentary Counsel, that reserving the fundamental principles of law and basic legal rules would be possible under a reserved powers model. Hence a separate jurisdiction would not necessarily be a consequence of such a model. We consider this issue further later in this chapter.

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<sup>45</sup> The 2005 Memorandum by the Secretary of State and First Minister referred to above stated ‘Such a referendum [on law-making powers] ought only be triggered on the basis of a broad political consensus in Wales in favour of primary powers. There is no suggestion that there is such a consensus at this time, nor is there likely to be one for many years to come’. In fact, it was triggered by the first Assembly operating under the Government of Wales Act 2006.

<sup>46</sup> An example of a current exception in Schedule 7 was “Provision of advice and assistance overseas by local authorities in connection with carrying on there of local government activities”, within the Subject of Local Government. As this was raised in evidence, we sought to better understand the type of activities to which it refers and why it was excepted. We have not been fully successful in reaching such an understanding, and therefore have been reluctant to make an assessment of whether this proscription should remain.

<sup>47</sup> Nor were there any to the Judicial Committee of the Privy Council prior to the establishment of the Supreme Court. There have been cases where challenges by businesses and others to Acts of the Scottish Parliament have been heard in the Supreme Court.



## **4.5 ASSESSMENT AGAINST THE COMMISSION'S PRINCIPLES**

- 4.5.1 Given the interest in the model of devolution shown in the evidence submitted to us and our wish to satisfy the principles which we established, it became clear to us that we needed to take a view on the preferred model of devolution independently of our consideration of the powers that should be devolved. After careful assessment of the evidence we formed the firm view that a reserved powers model would be superior to the current arrangements, and that it would better satisfy our principles of clarity, coherence, collaboration, accountability, subsidiarity, stability, effectiveness and efficiency.
- 4.5.2 The reservations legislated for by the UK Parliament would be drafted in a way that was clear for the UK Parliament and defensible by the UK Government. The reserved powers would therefore be as coherent and understandable as functions of the UK Parliament. The consequence of that would be that the powers available to the National Assembly would also be clearer and more coherent.
- 4.5.3 In a reserved powers model, the settlement would set out clearly the limits of devolved competence. We would expect law-makers to legislate with greater confidence and with greater regard to the purpose of the legislation, rather than being constrained by uncertainty about whether their intended purpose satisfies the set of conferred powers. This should allow legislation to better meet the needs and concerns of the Welsh electorate.
- 4.5.4 With a more clearly understood settlement, and a reduced possibility of doubt as to whether the subject of legislation is conferred or non-devolved, law-makers ought to have a clearer grasp of what is and is not possible. The removal of uncertainty would enable legislation to be passed that is less ambiguous or prone to referral to the Supreme Court. This should remove some of the cost of the settlement, making it more efficient.
- 4.5.5 A clear reserved powers model would improve accountability by allowing businesses, civil society and the public at large to understand what Westminster is responsible for, and that the National Assembly is responsible for everything else. This would enable the public to feel more engaged in the political process, and to hold the responsible elected representatives better to account.
- 4.5.6 Under a reserved powers model, Westminster would have to articulate the responsibilities for which it believes it ought to take day-to-day responsibility. This would mean exercising a judgement as to responsibilities that ought not to be held at a lower level. Areas that Westminster does not consider necessary to retain would be devolved. Approaching devolution in this way, rather than attempting exhaustively to identify the responsibilities that could be delivered closer to the citizens, is in keeping with our principles of localism and subsidiarity.
- 4.5.7 The process of moving, after proper discussion, to a reserved powers model would also have the advantage of allowing the settlement to be re-written in a way that would remedy the defects of haste and inconsistency that are apparent in the current model. This would provide greater stability for the future.

## 4.6 HOW A RESERVED POWERS MODEL WOULD OPERATE

- 4.6.1 Under a reserved powers model, all powers that are not reserved are devolved. This means that, instead of listing the powers devolved, the powers not to be devolved need to be set out. Changing models is therefore likely to require a good deal of discussion and to be a substantial drafting exercise – though, as we have explained, this process would in itself be helpful. It would require a clear political commitment in order to ensure the necessary cross-Whitehall process of determining what should be reserved. That process should not involve Whitehall alone, but should be undertaken jointly with the Welsh Government. Goodwill and a willingness to collaborate will be necessary on both sides. The National Assembly and the UK Parliament will also need to be consulted at the pre-legislative stage. Chapter 15 sets out a possible timetable for this work.
- 4.6.2 As a Commission, we did not feel it was our role to draft a proposed Schedule of reserved powers, nor to present drafting proposals. We did, however, receive useful evidence from the Presiding Officer with sound suggestions for principles to be followed in preparing a new Schedule and for the way the legislation might provide a guide for future interpretation of the settlement. We reproduce the main points in Box 4.2.

### **Box 4.2: Presiding Officer's suggested drafting principles for a reserved Schedule**

*'We would submit that any legislation expressing the [National] Assembly's competence in the form of a reserved powers model should adopt the following principles.*

*(a) Each reserved topic should, so far as possible, be drafted in one consistent style.*

*(b) If this is not possible, consideration should be given to grouping reservations by style as well as by subject. In other words, in each subject, any broad reservations would be listed first, followed by any detailed ones.*

*(c) Reservations should not be drafted in terms of "the subject-matter" of UK Acts. (However, this is not to be read as an objection to the new legislation containing a prohibition on Assembly Acts modifying particular UK Acts, or provisions of those Acts).*

*'The intention behind the reservation should be explained, either in a "purpose" provision within the legislation, or in the Explanatory Notes to the legislation (which should accompany the legislation in its passage through Parliament, unlike the Explanatory Notes to the Scotland Act 1998). This explanation could either be an explanation of the common purpose behind all the reservations, if that is possible. Alternatively – and, we would submit, more usefully – there could be an overall explanation of this common purpose and then an explanation, in relation to each reservation, of its purpose, showing how that related to the overall common purpose. We would suggest that the discipline of producing such an explanation would be likely to result in a more consistent settlement, as well as one that is easier for the courts to interpret.'*

- 4.6.3 The reserved powers model would reserve powers of two broad types: those that could not be devolved without undermining the integrity of the United Kingdom as a Union, and those that are regarded for one reason or another as better exercised on an England and Wales or Great Britain or United Kingdom basis. Matters like defence, international affairs and macro-economic policy fall into the first category, and are discussed later in this chapter. Matters that we believe (following our assessment of the evidence against our principles) should fall into the second category are discussed in other chapters.



- 4.6.4 Two very important matters fall within the second category: fundamental principles of civil law, and the criminal law in its broadest sense. We have already dealt with the argument that moving to a reserved powers model would necessarily mean the creation of a separate jurisdiction by suggesting that this could be resolved by careful drafting of the legislation. In this context, the Hywel Dda Institute helpfully referred us to the Scotland Act 1978. This Act conferred on the Scottish Assembly the power to make criminal and civil law. It expressed this by listing two groups of powers: “civil law matters” and “crime”. It is worth setting out in full these two groups. This is done in Box 4.3.

**Box 4.3: How to define legal principles — a legislative example**

In the Scotland Act 1978, repealed following the unsuccessful 1979 referendum, legal matters were conferred or devolved to the Scottish Assembly reflecting the separate legal system in Scotland. If a reserved powers model is adopted in Wales in which such matters continue not to be devolved, this definition might provide an example of how legal matters could be reserved to the UK Parliament.

*Civil law matters were expressed as: ‘Natural and juristic persons and unincorporated bodies. Obligations including voluntary and conventional obligations, obligations of restitution and obligations of reparation. Heritable and moveable property. Conveyancing. Trusts. Bankruptcy. Succession. Remedies. Evidence. Diligence. Recognition and enforcement of court orders. Arbitration. Prescription and limitation of actions. Private international law’.*

*Criminal law matters were expressed as: ‘Principles of criminal liability. Offences against the person. Sexual offences. Offences against public order, decency and religion. Offences against the administration of justice. Offences related to matters included in other Groups in this part of this Schedule. Criminal penalties. Treatment of offenders (including children and young persons and mental health patients involved in crime). Compensation out of public funds for victims of crime. Criminal evidence. Criminal procedure including arrest, search, custody and time limits for prosecutions. Recognition and enforcement of court orders. Criminal research’.*

- 4.6.5 The Scotland Act 1978 demonstrates that it is possible to produce a legal text that defines basic legal concepts, either for conferral or for reservation.<sup>48</sup> In the case of the new reserved powers model we recommend for Wales, it will be necessary to decide which of these fundamental principles of civil and criminal law need to be reserved to Westminster.
- 4.6.6 We did not receive evidence calling for either criminal or civil law in their widest senses to be devolved. Full devolution of each would be a fundamental change: the law on offences against the person could differ between Wales and England, as could the penalties for the same offences. In the civil field, there could be different property, matrimonial, commercial or inheritance law. The necessary wide public debate on the desirability of this degree of potential difference between Wales and England has not yet taken place.

<sup>48</sup> Some of the terminology reflects ideas in Scots law and is not therefore directly transferable.

- 4.6.7 On the other hand, it is worth noting that both criminal and civil law are devolved in Scotland and Northern Ireland without any apparent adverse consequences. Moreover, devolution of criminal and civil law powers would not mean that the UK Parliament would no longer legislate for the United Kingdom as a whole: it has frequently done so since devolution in criminal law areas in Scotland with the consent of the Scottish Parliament. Nor would it mean that there would necessarily be great divergence in the law: it is noticeable that civil law is very similar in Northern Ireland to England and Wales despite the powers that have existed since Northern Ireland came into existence for laws to differ.
- 4.6.8 Moving to a reserved powers model will be an opportunity for a careful consideration to be given to the justification for reserving fundamental civil and criminal legal concepts, based on the principles set out in the last Chapter. It is very likely that most will be reserved at least at first, though we will later be proposing that aspects of the treatment of offenders (for example) should not be reserved.
- 4.6.9 It will also be important to ensure that the reserved powers model does nothing to restrict the existing and future ability of the National Assembly to create criminal sanctions where it is necessary to support its wider devolved law making powers, or to exercise legislative powers in public law.
- 4.6.10 Although major change could happen as a result of moving to the reserved powers model, it is important to emphasise that the change of model of devolution does not in itself change the scope of the settlement – it does not necessarily mean further devolution. It is also the case that extensive new powers could be given under the conferred powers model.
- 4.6.11 Even with the changes that we recommend later in this report, the Welsh settlement would remain the narrowest of the three in the United Kingdom, and Wales and England will remain the most intertwined nations of the Union. There would be a continuing need to engage politically and administratively to ensure that the settlement works for the people of Wales, who are strongly supportive of some form of devolution and expect elected representatives to work and use public money efficiently, maturely and effectively. In recommending a reserved powers model, we stress that this is not the panacea that some seem to believe it to be.
- 4.6.12 Under the conferred powers model, residual powers (that is, powers not clearly devolved) currently rest with the UK Government. Under the reserved powers model, unless they were specifically reserved, they would be devolved. This is a significant transfer of risk from the UK Parliament to the National Assembly. The Scottish experience has shown that occasions can arise where the list of reservations ought to be amended to reflect developments. Constructive relations to ensure that the settlement operates as originally intended are crucial. While it would be entirely possible for the UK Parliament to legislate unilaterally to amend the settlement, it would be a departure from the convention of only amending the settlement with consent.
- 4.6.13 In a reserved powers model, we would expect that the roles played by the Presiding Officer, Counsel General and Attorney General in monitoring the settlement and individual pieces of legislation made under it would continue, but that these roles would be somewhat simpler.
- 4.6.14 While Scotland has only reservations in its statute, the Northern Ireland Act 1998 has both ‘reservations’, which may be devolved in the future or can be legislated on with the consent of the Secretary of State, and ‘exceptions’, which are broadly equivalent to Scottish



reservations. Some evidence suggested that the Northern Ireland model might be followed in Wales. The Northern Ireland model reflects the special circumstances of Northern Ireland and the need to proceed only with cross-community consent. We, therefore, do not believe that the Northern Ireland model would provide additional benefits to Wales.

- 4.6.15 In this Report, where we believe a matter should be within the competence of the National Assembly, we have normally expressed this by recommending that the matter should be devolved. What we mean by this is that the matter should not be reserved to the UK Parliament in the reserved powers model we favour. But as we explain in Chapter 15, it will also be possible for some of these powers to pass to Wales even before the reserved powers model is brought in.

## **4.7 MINISTER OF THE CROWN FUNCTIONS**

- 4.7.1 Discussion of the model of devolution relates to the legislative powers of the National Assembly rather than the executive powers of the Welsh Ministers, but the two issues are linked. An issue that arose in evidence, perhaps particularly in light of the Supreme Court consideration of the Local Government Byelaws Bill, was that of Minister of Crown functions. These are the executive functions of UK Ministers.
- 4.7.2 Whereas Minister of the Crown functions in devolved areas were transferred in general terms to Scottish Ministers in the Scotland Act 1998, they have been transferred to Welsh Ministers on a case-by-case basis. The Government of Wales Act 2006 includes a requirement for the consent of the Secretary of State before amending or removing these powers in a piece of National Assembly legislation, unless it is incidental to the legislation or consequential to it. This requires close reading of relevant statutes before introducing Assembly Bills in order to identify any Minister of the Crown functions that might be affected. These are sometimes obscure or anomalous, as was apparent from the Supreme Court's consideration of the Byelaws Bill.
- 4.7.3 In order to reduce complexity and increase clarity, we believe that a future Government of Wales Act should include a general transfer to the Welsh Ministers of Minister of Crown functions in devolved (that is, non-reserved) areas. This would promote alignment between legislative and executive competence. We appreciate that there may be reasons to retain specific functions in devolved areas that UK Ministers would continue to require, and these should be set out clearly as exceptions to the general presumption that Welsh Ministers should have sole executive powers in devolved areas. The Scotland Act 1998 provides a mechanism for Scottish Ministers' functions to be transferred to a UK Government Minister (for example, in order to procure common equipment for emergency services in Great Britain), and it would be sensible for a similar provision to be included in the new Government of Wales Act.
- 4.7.4 As stated above, there are a number of areas where executive responsibility but not legislative responsibility was transferred to the National Assembly and then to Welsh Ministers. These transfers were done on a case-by-case basis and presumably for good reason. We were made aware of areas where it would be appropriate for the Welsh Government to continue to have certain executive functions that go beyond the National Assembly's legislative competence. These areas should be set out in a format that could be easily consulted and understood.

- 4.7.5 Meanwhile, until a new Government of Wales Act is passed, we recommend prompt consideration of proposed National Assembly legislation by the UK Government to ascertain whether Minister of Crown powers are affected. There should be a presumption in favour of permitting any change proposed provided it is within competence.

#### 4.8 POWERS WHERE NO CHANGES ARE PROPOSED.

##### **Box 4.4: Evidence on unchanged powers**

Our opinion poll showed that a majority of people in Wales wanted no change to the existing allocation of powers between the two Governments on tourism (93 per cent in favour of the status quo), housing (88 per cent), agriculture (86 per cent), roads (84 per cent), defence and foreign affairs (82 per cent), education (78 per cent) and health (70 per cent).

The UK Government said: *'The Welsh devolution settlement has evolved greatly over the last sixteen years, and is now wide-ranging. The Assembly and the Welsh Government are responsible for a broad range of domestic policy subjects, ranging from housing, planning and local government to health, education and the Welsh language. At the same time Wales benefits from being part of a strong United Kingdom, and Parliament and the UK Government are responsible for matters which benefit from a UK-wide, GB-wide or England and Wales approach, or where a common approach benefits everyone in the country collectively, such as economic policy, defence, security and foreign affairs.'*

The Welsh Government said: *'The UK's constitutional fundamentals; Foreign Affairs and Defence; Home Affairs matters such as National Security, Immigration and Emergency Powers; most macro-economic and UK internal market matters; and Social Security, should all be within Westminster's exclusive remit. This should also be the case for Energy, Employment rights and Health and Safety matters. Charities and Charity law should continue to be matters dealt with on an England and Wales basis, as should Land Registration.'*

The UK's Changing Union project said: *'We emphasise that in this paper we are adopting a broad brush approach, looking at "large" areas of competence. Detailed work will be needed to delineate precisely the extent of reserved powers. In this respect, we follow the lead of another useful starting point, the Richard Commission, which proposed the following high-level list of reserved matters:*

*"the constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice".*

*'Even within this list there are by now several areas in which the further devolution of legislative competence to Wales would be beneficial. In particular, we consider that a case can be made for devolution of legislative competence to the Welsh Assembly in broadcasting and policing.'*



- 4.8.1 Having considered the model of devolution, we now turn to the question of the allocation of powers between the UK Government and the Welsh Government. We first consider powers currently held by the UK Government.
- 4.8.2 Within a decentralised state, certain responsibilities must in our view rest with the central authority, that is the UK Parliament. We have therefore concluded that there should be no changes in powers in the following areas:
- the constitution;
  - macroeconomic policy;
  - foreign affairs;
  - immigration; and
  - defence.
- 4.8.3 In relation to social security, our opinion poll showed that there was some interest in devolving benefits and the welfare system. We will return to this subject in Chapter 11.
- 4.8.4 Our terms of reference also invited us to consider whether currently devolved powers ought to be returned from the National Assembly for Wales to Westminster. During our public events, we met individuals who felt strongly that particular public services had deteriorated since devolution. Our opinion poll also showed evidence of a wish among a minority of the people of Wales to return responsibility in areas like health. As health was a subject on which we received a fair amount of evidence, and given its significance within the devolution settlement, we consider it in more depth in Chapter 11. However, we received no widespread evidence that suggested that devolution should be rolled back.<sup>49</sup> We therefore recommend no general return of powers to Westminster.
- 4.8.5 In line with our principle of subsidiarity, and given the lack of evidence to the contrary, the existing devolved areas such as health, agriculture, housing, education, culture, economic development, roads, environmental protection, local government and planning should remain devolved.

### **Recommendations**

- R.1 The existing conferred powers model should be replaced by a reserved powers model. The two Governments should agree a process and timetable for developing and agreeing the new legislation setting out the powers reserved to Westminster.
- R.2 There should be a general transfer of pre-devolution Minister of the Crown powers to Welsh Ministers, subject to any necessary exceptions. In the meantime, consideration of potential Minister of the Crown powers in National Assembly Bills should be done promptly by the UK Government and with a presumption of consent.

<sup>49</sup> In our opinion poll, 3 per cent favoured fewer powers and 10 per cent favoured abolition of the National Assembly.

## 4.9 SUMMARY

4.9.1 The reserved powers model would allow a better system of devolution in Wales. It would be clearer and allow law-makers to undertake their role more confidently. This would be in the interest of the people of Wales.

4.9.2 The key arguments in favour of a reserved powers model are:

- a model which sets out what is not devolved is more certain, stable and coherent than a model which sets out what is;
- it is inconsistent, illogical and inequitable for two parts of the United Kingdom to have a reserved powers model and one a conferred powers model;
- a reserved powers model is clearer and would increase accountability by empowering people in Wales to understand their settlement better; and
- the introduction of a reserved powers model would be an opportunity to simplify the settlement, producing greater certainty about the scope of the powers of the National Assembly and of Welsh Ministers and promoting subsidiarity and localism.

4.9.3 The choice of model does not of itself affect which powers are devolved and which are not.

4.9.4 We considered whether any powers currently held by the National Assembly would be better held by the UK Parliament. We received very little evidence in favour of returning powers to Westminster and therefore conclude that there should be no reduction in the powers currently devolved.

4.9.5 The UK Parliament should continue to exercise its existing powers in the following areas:

- the constitution;
- macroeconomic policy;
- foreign affairs;
- immigration; and
- defence.



# Chapter 5 – Intergovernmental relations

## 5.1 OVERVIEW

- 5.1.1 This chapter examines the current arrangements for intergovernmental relations between the Welsh Government and the UK Government, and considers the possible scope for improving the current mechanisms governing relations between the two Governments.

### Box 5.1: Evidence on intergovernmental relations

Our opinion poll showed that 53 per cent believed that the Governments of the United Kingdom and Wales worked together fairly well to do what is best for Wales.

Responses to our questionnaire showed that 68 per cent thought that the Welsh Government and the UK Government should work together more closely.

The UK Government stated that *'we believe that the formal structures for relations between the UK and the Devolved Administrations are working well, and support constructive communications between the four administrations'*. In its additional evidence, the UK Government highlighted the mechanisms it used to engage with the Welsh Government including bilateral meetings. These are considered *'vital in enabling the devolution settlement to function effectively'*. It also emphasised the important role played by the Wales Office in *'ensuring these mechanisms work well and in facilitating bilateral communication between departments and the Welsh Government'*.

In its additional evidence on intergovernmental relations, the Welsh Government noted that *'the extent of bilateral engagement between Welsh Government and UK Government Ministers...is business-driven and very extensive on some issues. In other areas, where matters are largely devolved, the need to engage is considerably less'*. It stated that *'UK Government communications can be a major issue for Ministers here. There are occasions when the UK Government makes announcements relating primarily to England, but having significant implications for Wales, in respect of which there has been no prior consultation...Our bilateral Concordats with UK Government departments commit both parties to good prior communication, but it is a constant challenge to make sure this is respected in practice'*. The evidence also included four annexes that outlined in more detail *'the positive collaboration as well as some of the frustrations'*.

SNAP Cymru and the Citizens Advice Cymru stated separately that *'regardless of the specifics of the devolution settlement intergovernmental relations are in need of serious improvement, and that individuals and communities should not suffer as a result of poor communication between governments'*.

Community Housing Cymru and the Wales Council for Voluntary Action noted separately in their evidence that *'regardless of potential changes to the devolution settlement in relation to powers we believe that there is a need to improve and strengthen*



*intergovernmental relations. This is in relation to both policy and legislation and the operation of the devolution settlement as a whole.*

The UK's Changing Union project focused on the consideration of Wales in negotiations on EU matters arguing that it is *'the UK Government that speaks for the devolved administrations in the Council of Ministers. This raises particular concerns when Welsh interests diverge from those of the UK as a whole. This difficulty can often be exacerbated when Welsh and UK Governments are 'incongruent', i.e. controlled, as at present, by different political groupings. In these circumstances the informal means of coordinating policy positions that apply when the two levels of government are congruent are not usually available. This points to the need for clearer and more robust mechanisms for intergovernmental relations within the UK.'*

Higher Education Wales noted that in relation to the Higher Education sector in Wales *'maintaining productive and efficient intergovernmental relations is critical. The memorandum of understanding between the UK Government and the devolved administrations sets out these principles... There is little evidence relating to this formal machinery and its effectiveness in coordinating HE policy.'*

The Bevan Foundation noted that *'Irrespective of changes to the devolution settlement in relation to powers, there is a need to improve and strengthen intergovernmental relations in respect of policy and legislation. This is particularly the case when UK decisions have very substantial consequences for people and communities in Wales, which in turn have consequences for the Welsh Government and other public bodies in Wales.'*

The Children's Commissioner for Wales and the Older People's Commissioner for Wales identified *'barriers to effective joint working between Westminster and Cardiff Bay including effective management of newly devolved policy areas, timely decisions on funding outcomes when new major policy initiatives are undertaken in England but which have a bearing on taxpayers in Wales, and areas of reserved policy but which have a disproportionate impact on devolved public services in Wales.'*

In its evidence, Gofal highlighted the decision by the UK Government to abolish the Council Tax benefit and aspects of the Social Fund as examples of *'some very real problems with intergovernmental relations and accountability. Handing over responsibilities with very little dialogue, failing to provide financial information in a timely manner and cutting the amount of funding to deliver the service is not acceptable, especially in cases that affect some of the most vulnerable people in our society.'*

The Welsh Committee of the Administrative Justice and Tribunals Council noted that in relation to administrative justice issues *'regardless of whether there is to be a devolved judicial system, there are various means by which cohesion within current arrangements can be encouraged, in that there is greater scope for collaboration and coordination between arms of the UK and Welsh Governments.'*

Play Wales said: *'We note that the better collaboration across these non-devolved policy areas would make stronger contributions to supporting children's Right to Play in Wales.'*

In his evidence, Lord Morris of Aberavon highlighted the need to consider *'the maintenance and improvement of relations between the Government and Assembly in Cardiff and the*



*Government and Parliamentarians at Westminster*, adding that he had *'noted over the years a growing divergence between the two institutions'*. Lord Morris suggested that *'there should be machinery in place so that when action is being taken regarding Wales, Parliamentarians and Assembly Members should know what the other is doing'*.

## 5.2 CURRENT MECHANISMS FOR ENGAGEMENT

### *Current position*

- 5.2.1 The way in which the UK Government and all three Devolved Administrations work together is set out in a Memorandum of Understanding (MoU). The MoU, and supplementary agreements, define the principles that underpin relations between the four administrations. It is a statement of political intent rather than a binding agreement and is not a statutory document. The MoU is scheduled for review on an annual basis, with the most recent version dating from October 2013.
- 5.2.2 In the MoU, the four governments commit themselves to the principles of good communication, consultation and cooperation. They also commit to the open and full exchange of information, statistics and research with one another, especially where one administration's work may have a bearing on the responsibilities of another, with confidentiality being observed as appropriate. The primary aim is not to constrain the discretion of any administration, but to allow administrations to make representations to each other in sufficient time for those representations to be fully considered.
- 5.2.3 The MoU includes three separate overarching Concordats which apply broadly uniform arrangements across the Governments. These relate to the handling of the coordination of European Union policy and its implementation; financial assistance to industry; and international relations touching on the responsibilities of the Devolved Administrations. The MoU also provides for a Joint Ministerial Committee (JMC), which is described further in Box 5.2.

#### **Box 5.2: Joint Ministerial Committee**

The Joint Ministerial Committee (JMC) consists of Ministers from the UK Government, Welsh Government, Scottish Government and Northern Ireland Executive. The JMC provides central coordination to the relationship between the four administrations, underpinning the regular, day-to-day contact which the four administrations have with each other.

Its terms of reference are:

- to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities;
- where the UK Government and the Devolved Administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;
- to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and
- to consider disputes between the administrations.

The JMC meets in a range of formats, with plenary meetings chaired by the Prime Minister (or his representative) at least once a year. There is also a sub-committee (JMC(D)), to discuss domestic matters, and an European sub-committee (JMC(E)) to discuss matters relating to the European Union. UK Government Ministers chair both these forums. Officials from the four administrations support the Committee, acting as a joint secretariat.

- 5.2.4 The working arrangements between the UK Government and the Devolved Administrations are set out in a series of 17 devolution guidance notes (DGNs). The notes are published by the UK Government with the agreement of the Devolved Administrations. They are an introduction to the main principles involved in the managing of the devolution settlements in Wales, Scotland and Northern Ireland, as well as dealing with bilateral relations, correspondence, parliamentary business, legislation, concordats and the role of the Secretary of State for each of the Devolved Administrations. Box 5.3 outlines the DGNs.

**Box 5.3: Devolution Guidance Notes**

The current Devolution Guidance Notes are:

- DGN 1 - Common Working Arrangements
- DGN 2 - Handling correspondence under devolution
- DGN 3 - Role of the Secretary of State for Scotland
- DGN 4 - Role of the Secretary of State for Wales
- DGN 5 - Role of the Secretary of State for Northern Ireland
- DGN 6 - Circulation of inter-Ministerial and inter-departmental correspondence
- DGN 7 - Court Proceedings regarding devolution issues (Not yet published)
- DGN 8 - Post-Devolution Primary Legislation affecting Northern Ireland
- DGN 9 - Parliamentary and Assembly primary legislation affecting Wales
- DGN 10 - Post-Devolution primary legislation affecting Scotland
- DGN 11 - Ministerial accountability after devolution
- DGN 12 - Attendance of UK ministers and officials at committees of the devolved legislatures
- DGN 13 - Handling of parliamentary business in the House of Lords
- DGN 14 - Use of Scotland Act Section 30(2) Orders
- DGN 15 - Scottish legislative proposals giving devolved powers and functions to UK bodies
- DGN 16 - Modifying the legislative competence of the National Assembly for Wales (superseded by DGN 17)
- DGN 17 - Modifying the Legislative Competence of the National Assembly for Wales (succeeded DGN 16)



5.2.5 Individual Welsh Government departments and their counterparts in the UK Government have also agreed and published bilateral concordats. Like the MoU and concordats, these are not legally binding. They are informal and flexible agreements to which both parties commit themselves and set out existing administrative best practice. Concordats generally specify when they will be reviewed, either on a yearly or 'regular' basis and any changes have to be agreed by both parties. Similar arrangements are in place between the UK Government and the other devolved administrations.

### Assessment

5.2.6 In assessing the current mechanisms for engagement between the two Governments, we believe that it is fundamental that the relations between them should be based on the principles of mutual respect and equality of esteem.

5.2.7 We heard of many examples of good engagement between the two Governments. These included, for example, engagement between the Welsh Government and the Ministry of Defence through their inter-governmental concordat, including the development of a Wales-specific care pathway for injured or ill service personnel discharged into Wales. Another example was the consultation between the Welsh Government and the Department for Transport around the Trans-European Transport Network.

5.2.8 However, we have received evidence highlighting instances where there has been a lack of consideration for Wales in relation to UK legislation or policy development. There was some striking exemplification of this in evidence from the Welsh Government, and while Sir Bob Kerslake, Head of the Home Civil Service, told us that the arrangements mostly worked well, he acknowledged that this was not always the case.

5.2.9 The MoU, DGNs and concordats provide clear explanations on how the two Governments should communicate with each other on various matters, including the legislative process. However, it is clear from the evidence we have received that a number of Whitehall departments are either not always aware of these basic documents or do not always apply them when developing and implementing policy or during the legislation process itself. In previous reports both the Welsh Affairs Committee<sup>50</sup> and the National Assembly for Wales's Constitutional and Legislative Affairs Committee<sup>51</sup> have recommended that the status of DGNs should be strengthened and reviewed on a regular basis to ensure that the knowledge of Whitehall departments on the Welsh devolution settlement is refreshed.

5.2.10 The Wales Office has indicated in its Annual Report<sup>52</sup> that it continues to raise with other UK Government departments the importance of engaging with the Welsh Government on policy and legislation. However, there seems to be no consultation with the Welsh Government to pinpoint areas in which the engagement is unsatisfactory.

5.2.11 We believe that it is important that the MoU, DGNs and concordats are adhered to by both Governments to ensure that engagement on policy development, legislation and other matters takes place at an early stage.

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<sup>50</sup> Welsh Affairs Committee (2010) *Eleventh Report - Wales and Whitehall*.

<sup>51</sup> National Assembly for Wales Constitutional and Legislative Affairs Committee (2012) *Inquiry into the Granting of Powers to Welsh Ministers in UK Laws*.

<sup>52</sup> Wales Office (2013) *Annual Report and Accounts 2012-13*.

- 5.2.12 We therefore suggest that the two Governments should work together to improve awareness of guidance across their respective departments and identify best practice. This should be aided by a formal arrangement for regular meetings between Directors General/Permanent Secretaries of Welsh and UK Government departments to discuss concerns and forthcoming issues.
- 5.2.13 Whilst we acknowledge that informal engagement between the two Governments is valuable, there is also a need to ensure that adherence to the current mechanisms is strengthened. We believe that, with a move to a reserved powers model, a new Government of Wales Act should provide for a statutory Code of Practice in relation to intergovernmental relations. This would embed intergovernmental relations within the devolution settlement and leave both Governments open to judicial review if either were thought to have failed to uphold the Code. The Code should be reviewed, and renegotiated if necessary, within twelve months of an incoming Welsh or UK Government.
- 5.2.14 In the meantime, we suggest that there should be a regular independent audit of intergovernmental relations between the two Governments, jointly conducted by the Wales Audit Office and the National Audit Office. This would ensure standards are first improved and then maintained in both Wales and Whitehall. When the new Government of Wales Act is enacted, the audit would be used to ensure that the Code of Practice is being upheld.

### **5.3 MONITORING THE DEVOLUTION SETTLEMENT**

#### *Current position*

- 5.3.1 The MoU is agreed, and the JMC process is conducted, on a quadrilateral basis. While there are bilateral concordats, there are no formal arrangements for meetings for bilateral engagement between the Welsh Government and the UK Government. There are, of course, private bilateral meetings between the First Minister and the Secretary of State for Wales in which devolved and non-devolved issues are discussed, and there are many other meetings and discussions between the two Governments at ministerial and official levels.

#### *Assessment*

- 5.3.2 We believe that there is a need for a formal mechanism for bilateral engagement between the Welsh Government and the UK Government. This mechanism would enable the two Governments to enhance the level of consultation, cooperation and action on matters of mutual interest, including the Welsh devolution settlement. A transparent forum would allow greater accountability and reassurance that the concerns of the people of Wales were being discussed by the two Governments.
- 5.3.3 Elsewhere, a similar mechanism exists in the form of the North-South Ministerial Council, which brings together the Northern Ireland Executive and Irish Government Ministers. During our visit to Northern Ireland, we visited the Council. We were impressed with its focus on the needs of the citizen and on using intergovernmental processes to produce outcomes benefitting people on both sides of the border by encouraging cross-border cooperation in areas such as health, transport and civil contingencies.
- 5.3.4 We propose that a Welsh Intergovernmental Committee should be established to oversee the operation of the Welsh devolution settlement. Box 5.4 outlines a proposed format of the Committee.



#### **Box 5.4: Suggested format of the Welsh Intergovernmental Committee**

The Committee should be jointly chaired by the First Minister and the Prime Minister or their nominated representatives.

There would be two Ministers on the Committee from each Government as permanent members. A Minister from HM Treasury and the Welsh Government Finance Minister would attend if finance issues were discussed.

For each meeting, the matters listed for discussion would determine whether additional Ministers from both Governments were required to attend. The Committee would also be able to invite experts, academics or other organisations to attend meetings and give evidence if appropriate.

We expect that a small secretariat of civil servants jointly provided by the Welsh and UK Governments would be required to prepare for meetings in advance and to follow up agreements with respective departments in the two Governments.

The Committee's agenda and minutes would be published. The Committee would be able to establish sub-committees. There would be regular meetings throughout the year.

- 5.3.5 We acknowledged in Chapter 4 that moving to a reserved powers model would be a substantial drafting exercise. We propose that one of the early tasks of the Committee would be to consider how to simplify as much as possible the existing devolution model as part of the process for moving to a reserved powers model.
- 5.3.6 The Committee would also provide a mechanism to consider any proposals to amend the devolution boundary on a continuing basis. This is important work of on-going bilateral cooperation, and there should be no future need for the establishment of an independent Commission like ours to consider minor modifications of the devolution boundary. Following the move to a reserved powers model, we would envisage that the emphasis of this work would be on subjects to be included or removed from the reservation list.
- 5.3.7 In Chapter 12 we mention a number of technical areas where we received evidence in favour of devolution that we were not able to assess fully. There will be still further areas that have not been mentioned to us, or that will arise in the future. Another part of the remit of the Committee we propose would be to consider, using the principles we have articulated, where responsibility should lie for such issues.
- 5.3.8 Proposals for amendments to the devolution boundary could be tabled by both Governments for discussion at the Committee. Interested parties outside government should also have the opportunity to put forward proposals for the Committee to consider, perhaps through an online forum hosted by the Wales Office. Normally a short period of public consultation on a possible amendment should be conducted in advance of consideration in the Committee.
- 5.3.9 The expectation would be that Committee discussions are held and recorded in a transparent way. Both the National Assembly's Constitutional and Legislative Affairs Committee and the Welsh Affairs Committee would have a role in scrutinising the Welsh Intergovernmental Committee's work.

## 5.4 DISPUTE AVOIDANCE AND RESOLUTION

### *Current position*

- 5.4.1 The MoU states that all efforts should be made to resolve differences between the UK Government and the Devolved Administrations informally and at working level, if possible. Bilateral concordats between the Devolved Administrations and UK Government departments also outline how disputes should be resolved, generally committing to resolve differences at official level whenever possible.
- 5.4.2 If no agreement is possible at official level, then the matter is raised at Ministerial level. The MoU recognises the responsibility of the relevant territorial Secretary of State for resolving disputes by convening further talks between the parties at ministerial or official level.
- 5.4.3 For resolving financial issues, the Statement of Funding Policy sets out the UK Government's rules. It states that issues, including the interpretation of the Statement of Funding Policy, should generally be first discussed bilaterally between the Treasury and the relevant Devolved Administrations or, if appropriate, at a timely Finance Quadrilateral meeting, which brings together HM Treasury Ministers and Finance Ministers of the Devolved Administrations.
- 5.4.4 If disputes cannot be resolved through the steps outlined above, the JMC offers a mechanism for resolving differences between the UK Government and one or more of the Devolved Administrations. This is set out in the MoU and summarised in Box 5.5 below.

#### **Box 5.5: JMC dispute resolution process**

The JMC dispute resolution process is not intended to deal with differences over possible changes to the overall statutory framework governing devolution such as a redrawing of the devolution settlements. As the JMC is not a decision-making body, the basis on which the mechanism operates is to facilitate agreement between the parties in dispute, not to impose a solution.

The dispute resolution mechanism starts with an initial meeting of the JMC secretariat and officials from the administrations involved (including representatives of the relevant territorial Secretaries of State) to seek agreement on the facts, allow the parties to set out their positions and facilitate discussion of shared interests, options for resolving the disagreement and criteria for an agreed outcome.

If no agreement can be obtained then the dispute can be referred for discussion at a JMC meeting of ministers from the UK Departments and the Devolved Administrations involved in the dispute, along with the relevant territorial Secretaries of State or their representatives. This meeting would be chaired by a senior UK Minister, who would as far as possible be someone without a direct departmental interest in the issue in dispute.

At either stage, an independent third party can be commissioned to conduct analysis of the issues relating to the dispute and provide advice or recommendations. The parties must decide, with facilitation from either the JMC secretariat or Chair, whether to follow the advice or recommendations. Such advice or recommendation is not binding on the parties to the dispute.



If the dispute cannot be resolved in this way, then any party can request that the dispute be considered by a JMC Plenary meeting. The consideration of a dispute by a JMC Plenary meeting is final, and there are no further stages within the dispute resolution process, unless a Plenary meeting decides to remit consideration of the dispute to a further round of the Ministerial-level discussions. If agreement is not reached, the matter will rest as one on which the Governments are not in agreement.

The Joint Ministerial Committee Annual Report 2011-12<sup>53</sup> stated that two inter-administration disagreements/disputes had been considered under the dispute avoidance and resolution protocol. These were a dispute concerning whether funding for regeneration as part of the London Olympics ought to generate Barnett consequential, which involved the four administrations; and a disagreement between the Northern Ireland Executive and the UK Government on a £18 billion capital expenditure commitment to Northern Ireland. The first dispute was resolved in December 2011 and the second in June 2013.<sup>54</sup>

### Assessment

- 5.4.5 The evidence we have received has highlighted that, while the number of formal disputes since devolution has been small, there is a need to improve mechanisms for the resolution of disagreements between the Welsh Government and the UK Government. We have heard during a number of oral evidence sessions that intergovernmental negotiations are often reliant on good personal relationships between officials and Ministers. If there is a disagreement between the Welsh Government and UK Government that cannot be resolved, there seems to be a reluctance to use the JMC to resolve the matter.
- 5.4.6 We believe that there needs to be a mechanism at a level between informal resolution and the JMC process. The Welsh Intergovernmental Committee should include within its remit responsibility for resolution of disagreements. Where there are disagreements between the Welsh Government and UK Government departments, it would be a forum for resolving these quickly while not invoking the full dispute resolution machinery. The expectation would be that any disagreement brought to the attention of the Committee would be recorded and included in an annual report to the National Assembly and the UK Parliament.
- 5.4.7 As discussed in Chapter 4, if a Bill (or provision in a Bill) passed by the National Assembly is considered to be not within the scope of the National Assembly's legislative competence, it can be referred by the Counsel General or the Attorney General to the Supreme Court for a decision. We believe that the clarity obtained by moving to a reserved powers model should reduce the possibility of Supreme Court referrals. However we acknowledge that there will be situations where an issue of competence might need to be determined.
- 5.4.8 Whilst we agree that the Supreme Court should remain the final resort in relation to determining these questions, consideration should be given to exploring a form of arbitration between the two Governments before a referral is contemplated. The international community regularly utilises arbitration as a mechanism for resolving disputes between States on, for example, territorial, treaty, and human rights matters. A similar mechanism

<sup>53</sup> Joint Ministerial Committee (2012) *Annual Report 2011-12*.

<sup>54</sup> Joint Ministerial Committee (2013) *Annual Report 2012-13*.

could be used by the Welsh and UK Governments. We envisage that the arbitrator would be appointed jointly by the two Governments and be someone who has held high judicial office, such as a retired Supreme Court judge, or a retired member of the Court of Appeal.

- 5.4.9 To ensure that the process is not merely a gateway point before referral to the Supreme Court, it would be helpful to discourage referrals without good reason. If either Government wished to continue to refer the matter to the Supreme Court following a decision in arbitration, we would expect the costs of the Supreme Court case to be paid by the referring party.

## 5.5 EUROPEAN UNION MATTERS

### *Current position*

- 5.5.1 The formal relationship between the UK Government and the Devolved Administrations on European Union (EU) matters is set out in the Memorandum of Understanding and the Concordat on Coordination of EU Policy.
- 5.5.2 This process is overseen by the JMC(E) which meets every quarter to discuss the UK Government's and Devolved Administrations' priorities in Europe, and the cooperation between them. A Welsh Minister attends the JMC(E) and it is chaired by a Foreign and Commonwealth Office Minister. The Welsh Minister is also responsible for ensuring that all developments concerning Europe are communicated to the National Assembly as appropriate.
- 5.5.3 The MoU between the UK Government and the Devolved Administrations contains provisions for attendance by Ministers from Devolved Administrations at European Council of Ministers meetings. Decisions on Ministerial attendance are taken on a case-by-case basis by the lead UK Government Minister. Ministers from the Devolved Administrations may also request to speak at Council meetings, with the expectation they will follow the agreed United Kingdom line. In reaching decisions on the composition of the United Kingdom team, and who will represent the UK Government, the lead Minister will take into account that the Devolved Administrations should have a role to play in meetings of the Council of Ministers at which substantive discussion is expected on matters likely to have a significant impact on their devolved responsibilities.

### *Assessment*

- 5.5.4 We have received evidence that the needs of Wales needed to be better considered and represented by the UK Government during EU negotiations, in particular in negotiations on the EU budget and the Common Agricultural Policy.
- 5.5.5 We note that the MoU on EU policy negotiation was agreed by the UK Government and the Devolved Administrations in October 2013. We also acknowledge that there are significant benefits in establishing an agreed position for the United Kingdom when entering negotiations. However, given the impact that these decisions can have on Wales, we feel that more could be done to consider Welsh interests and for them to influence more clearly the negotiation process.
- 5.5.6 We therefore believe that a sub-committee should be established under the Welsh Intergovernmental Committee we propose. This would have responsibility for monitoring and influencing EU impacts on Wales. We would expect the discussions of the sub-committee also to be published, so ensuring a greater transparency on EU policy decisions and aiding Welsh citizens' understanding of the decision process.



## 5.6 DATA SHARING AND COMPARATIVE ANALYSIS

### *Current position*

- 5.6.1 The formal relationship between the UK Government and the Devolved Administrations on the exchange of information, statistics and research is set out in the MoU.
- 5.6.2 It emphasises that the UK Government and the Devolved Administrations will aim to provide each other with as full and open as possible access to scientific, technical and policy information, including statistics and relevant research. It also states that there is a common interest in the provision of statistical advice and information in relation to both devolved and non-devolved matters that is coherent across the United Kingdom and that adheres to high professional standards.
- 5.6.3 Specific arrangements for cooperation between the Devolved Administrations and the UK Government on official statistics are contained within an inter-administration agreement between the National Statistician and the Chief Statisticians of the Devolved Administrations. The agreement was last reviewed in June 2012. Bilateral concordats between Welsh and UK Government departments can also specify arrangements on the sharing of data.

### *Assessment*

- 5.6.4 We received evidence that there should be greater consultation and more discussion between the UK and Welsh Governments as policy is developed. We also heard that there is a need for better comparative information and analysis of the economy and public services across the countries and regions of the United Kingdom, with this information shared between governments.
- 5.6.5 It is in the interests of all that the UK and Welsh Governments should work together to share best policy and delivery practice, especially as devolution has encouraged policy divergence in a number of areas. Better comparative data and analysis would enable comparisons of different approaches taken by the different administrations and should develop the potential for devolution to be used as a 'policy laboratory'. In this context, we would encourage both administrations to be open to considering and adopting policies from other administrations in the United Kingdom and further afield.
- 5.6.6 Any data sharing would be aided by developing and publishing more comprehensive and consistent comparative data across the countries and regions of the United Kingdom. Efforts should be made to ensure that data is collected on a consistent basis, so that comparison on a like-for-like basis is possible. An example might be data in relation to the economic impact of UK Government spending in non-devolved areas such as Defence. Data sharing and learning from each other should be encouraged and monitored by the Welsh Intergovernmental Committee.
- 5.6.7 There may be a particular role here for the National Audit Office and the Wales Audit Office. While recognising that the Audit Offices are responsible for setting their own priorities, in consultation with the Public Accounts Committees of the National Assembly and the House of Commons, we believe that both could play a significant role in reporting on comparative policy approaches and performance outcomes. An example of good practice was the June 2012 National Audit Office report on *Healthcare across the United Kingdom*.<sup>55</sup>

<sup>55</sup> National Audit Office (2012) *Healthcare across the UK: a comparison of the NHS in England, Scotland, Wales and Northern Ireland*.

## 5.7 CROSS-BORDER ISSUES

- 5.7.1 Parts of the border region between Wales and England are densely populated and all along the border people work and obtain services in Wales or in England with little concern for the administrative boundary. This has been taken into account in framing our recommendations.
- 5.7.2 The Welsh and UK Governments must work closely together to ensure that the needs of people and business on both sides of the border are taken into account in the development and delivery of policies. We have touched on these issues throughout the report - for example, in relation to health.
- 5.7.3 A number of cross-border matters such as healthcare, public services and road and rail links between Wales and England have been the subject of debate in the House of Commons<sup>56</sup> and of consideration by the Welsh Affairs Committee.<sup>57</sup>
- 5.7.4 While we are aware that intergovernmental protocols exist in particular areas such as health, it has been suggested to us that there is a need to ensure that complaints are swiftly and effectively dealt with. This will become even more important as more powers are devolved. We agree and believe that a sub-committee should be established under the new Welsh Intergovernmental Committee proposed in paragraph 5.3.4 to consider and resolve cross-border issues when they are not resolved through normal channels.

### Recommendations

- R.3 The two Governments should identify and circulate guidance on good practice on intergovernmental relations and areas for development by drawing on examples provided to us. They should also review existing guidance notes and adherence to them regularly.
- R.4 A statutory Code of Practice on intergovernmental relations should be provided for in a new Government of Wales Act.
- R.5 It would be helpful for the National Audit Office and the Wales Audit Office jointly to audit intergovernmental relations. This audit could be reported to the Welsh Affairs Committee and the corresponding National Assembly committee which could then, from time to time, jointly review intergovernmental communication and engagement.
- R.6 The Welsh and UK Governments should establish a Welsh Intergovernmental Committee, supported by separate sub-committees if needed. It should oversee the operation of the Welsh devolution settlement by:
- seeking to simplify the existing devolution model, and taking forward the process of moving to a reserved powers model;
  - considering detailed proposals for changes to devolved responsibilities raised in the future;
  - resolving disagreements without invoking the full dispute resolution process;

<sup>56</sup> For example, on cross-border healthcare, House of Commons (25 June 2013) *Official Report* Column 274.

<sup>57</sup> For example, Welsh Affairs Committee (2010) *Tenth Report - Cross-border provision of public services for Wales: follow-up and Welsh Affairs Committee (2013) Third Report - Crossing the border: road and rail links between England and Wales.*



- d. monitoring EU developments impacting on Wales; and
  - e. resolving cross-border issues.
- R.7 There should be an arbitration mechanism for resolving disagreements between the Welsh and UK Governments in relation to legislative competence of Bills passed by the National Assembly before a referral to the Supreme Court is contemplated.
- R.8 To improve evidence-based outcomes, the two Governments should:
- a. collaborate with the Scottish Government and the Northern Ireland Executive to publish more comprehensive and consistent comparative data and analysis on public service and economic outcomes across the countries and regions of the United Kingdom. This should be built on existing data sources as far as possible; and
  - b. identify and learn from each other what works well in policy and delivery to improve public services and the economy, especially building on the work of the Wales Audit Office and National Audit Office.

## 5.8 SUMMARY

- 5.8.1 The evidence suggests that people in Wales want the two Governments to work more closely together for the benefit of Wales. While there are many examples of good practice, there is scope for improvement. In addition, people want to know how Wales is performing compared to other parts of the United Kingdom and the scope for learning from each other what works best.
- 5.8.2 We make a number of recommendations to enhance the existing mechanisms for improving relations between the two Governments, based on mutual respect and parity of esteem. These include identifying and disseminating good practice and areas for development. We hope that the National Audit Office and the Wales Audit Office will wish to conduct a joint audit of intergovernmental relations. To strengthen the current mechanisms, a statutory Code of Practice for intergovernmental relations should be provided for in a new Government of Wales Act.
- 5.8.3 We also recommend the establishment of a formal mechanism to oversee the Welsh devolution settlement in the form of a Welsh Intergovernmental Committee, comprised of United Kingdom and Welsh Ministers. The Committee should have responsibility for simplifying the existing Welsh devolution settlement including the process of moving to a reserved powers model; considering detailed proposals to change the devolved boundary; monitoring and influencing EU impacts on Wales; dealing with cross-border issues; and resolving disputes.
- 5.8.4 The two Governments should engage in a process of arbitration conducted by a person who has held high judicial office prior to a Bill being referred to the Supreme Court.
- 5.8.5 There should be joint working between the two Governments to share best policy and delivery practice. Administrations should be open to adopting good practices and policies from one another. This should be complemented by developing more comprehensive comparative performance data across the countries and regions of the United Kingdom.

# Chapter 6 – Economic powers

## 6.1 OVERVIEW

- 6.1.1 In this chapter we set out the current devolution arrangements in relation to the economy, outline the evidence presented to us and use our principles to assess whether there should be any changes in this area.
- 6.1.2 In our Part I report we made a number of recommendations for strengthening the Welsh economy through devolution of certain tax and borrowing powers and other changes, with a view to incentivising economic growth. The UK Government has accepted in full or in part all except one of our recommendations. This chapter considers whether there is scope for changes in other economic powers.

## 6.2 ECONOMIC POWERS

### *Current position*

- 6.2.1 The National Assembly for Wales's legislative competence includes economic regeneration and development, the social development of communities and the promotion of competitiveness. A number of executive functions are also devolved to Welsh Ministers, including grant-awarding powers. These are used principally to set up business and employment support schemes and to invest in infrastructure. Welsh Ministers also have power under section 60 of the Government of Wales Act 2006 to do anything they consider appropriate to achieve the promotion or improvement of the economic, environmental and social well-being of Wales.
- 6.2.2 Certain aspects of economic policy are not devolved. These include macro-economic policy, anti-competitive practices, insolvency, product standards, consumer protection and trade, and some aspects of business regulation.
- 6.2.3 Employment and welfare benefits are non-devolved policy areas and are the responsibility of the UK Government. However, responsibility for policy in relation to training and skills in Wales is devolved to the Welsh Government.
- 6.2.4 Both Governments have powers in relation to export development and inward investment. The UK Government retains powers that enable UK Trade and Investment (UKTI) to promote the United Kingdom as a whole overseas, and to provide a coordinated approach to Foreign Direct Investment.

### **Box 6.1: Evidence on the economy**

The UK Government told us that *'two areas where the devolution boundary is not clear cut are responsibility for consumer law enforcement and representation of consumer interests in Wales. The whole question may be of interest to the Silk Commission, in terms of the balance between local authority prioritisation of funding and wider consumer protection'*. In relation to regulation, it proposed that *'through the BRDO-coordinated Welsh Regulators Forum, which comprises national and local regulators in Wales, there is opportunity and ambition to develop a coordinated and consistent*



*approach to regulation'. On the issue of inward investment, the UK Government stated that 'the Welsh Government, through its trade and investment team provides its own support and programmes (and also access to UKTI national support) to meet the needs of exporters in Wales and for promoting Wales to foreign investors'.*

*The Welsh Government proposed in its evidence that 'the taxation Reservation should be made subject to an Exception, to enable the Assembly to legislate on devolved taxes (including in relation to their collection and management) in light of the Commission's First Report on fiscal powers for the Assembly. The Exception should also permit the Assembly to legislate on the Community Infrastructure Levy (CIL)'. On consumer protection, it stated that 'this should be a matter Reserved to Westminster, although the Assembly's existing competence should be maintained in relation to food, agriculture and horticultural products, fish and fish products, seeds, fertilisers and pesticides, and the representation of consumers of water, as should Welsh Ministers' executive functions in respect of Consumer Focus (Wales) and the consumer councils for water and public transport'.*

*The Bevan Foundation stated that 'there is scope to devolve powers over employment programmes e.g. the Work Programme as argued as long ago as 2007 in our report Setting the Agenda, so that they can be more closely aligned to local labour market conditions, local economic development initiatives and education and training provision'.*

*Unite Wales considered 'that any decisions on changes to the devolution settlement or extension of devolved powers must be in the economic as well as constitutional interest of Wales and the people of Wales'.*

*The Federation of Small Businesses Wales stated that 'in conclusion FSB Wales believes the status quo is in many instances providing sub-optimal outcomes for businesses in Wales. As an organisation, FSB Wales prioritises building a business environment that's conducive to growth. Clearly the present devolution settlement makes this objective difficult to achieve'.*

*Consumer Focus (Wales) said: 'In December 2011, the Welsh Affairs Committee published their report into the representation of consumer interests in Wales. The recommendations of this report include: We further recommend that the Government conduct a review of the new arrangements for consumer representation two years after their implementation. This review should examine whether or not it is appropriate to devolve responsibility for consumer affairs to the National Assembly for Wales. We call on the Commission on Devolution in Wales to consider this matter when it reviews the powers of the National Assembly for Wales'.*

*Dr Andrew Crawley, University of Illinois Urbana-Champaign and Professor Max Munday, Cardiff Business School, argued that 'for Wales there is a paucity of economic modelling. The issue is three-fold, there needs to be a greater dissemination of data from government and Office for National Statistics, there needs to be detailed regional models constructed to use this data, and finally there needs to be a greater degree of work between those in government and those in academia to develop the best intelligence possible'.*

*Professor James Foreman-Peck, Cardiff University, maintained 'that there should be no further extension of powers to the Welsh government at least until performance has improved markedly'.*

6.2.5 By way of background Box 6.2 sets out some key statistics on the Welsh economy.

**Box 6.2: Key facts on the economy**

- Wales contributed 3.4 per cent of the United Kingdom's gross value added (GVA) in 2012. Wales has a lower GVA per head than Scotland, Northern Ireland or any English region. GVA per head grew faster than England, Scotland and Northern Ireland between 2011 and 2012.<sup>58</sup>
- Labour productivity (gross value added per hour worked) was 16.1 per cent below the United Kingdom average.
- Gross disposable household income<sup>59</sup> of the residents of Wales at £14,129 per head was the fourth lowest among Scotland, Northern Ireland, Wales and the English regions.
- The employment rate stood at 70.7 per cent in the third quarter of 2013, compared with the United Kingdom rate of 72.0 per cent.<sup>60</sup>
- In April 2011,<sup>61</sup> the median gross weekly earnings for full-time employees on adult rates who were resident in Wales was £452, which compares with £485 in Scotland and £446 in Northern Ireland and the United Kingdom average of £498.
- Public spending per head in Wales on economic affairs was 41 per cent higher than the UK average in 2011-12.<sup>62</sup>

**Assessment**

6.2.6 Improving the performance of the economy is a high priority for both the Welsh and UK Governments. There have been no calls for fundamental changes to the allocation of economic powers between the UK and Welsh Governments.

6.2.7 Based on the evidence we have received and taking into account the crucial importance of the fiscal and economic union for Wales and the United Kingdom single economic market, our view is that for the most part the allocation of powers should not be changed, with key macroeconomic and microeconomic powers being retained by the UK Government.

6.2.8 On the other hand concerns have been expressed about the poor performance of the Welsh economy and the apparent lack of a positive economic dividend from devolution, and we discuss these issues in Chapter 16.

<sup>58</sup> Office for National Statistics (Dec 2013) *Regional Gross Value Added (Income Approach)*.

<sup>59</sup> Office for National Statistics (Apr 2013) *Regional Gross Disposable Household Income (GDHI) 2011*.

<sup>60</sup> Office for National Statistics (2013) *Labour Force Survey*.

<sup>61</sup> Office for National Statistics (Mar 2012) *2011 Annual Survey of Hours and Earnings (based on SOC 2010)*.

<sup>62</sup> HM Treasury (2013) *Public Expenditure Statistical Analyses*.



## *Employment programmes*

- 6.2.9 The biggest suggested change in economic powers in the evidence to us was the argument for the devolution of Department for Work and Pensions (DWP) employment programmes, which are devolved in Northern Ireland. Spending in Wales on employment policies is around £130 million a year. The argument we have heard is that devolution would enable the Welsh Government to create a more unified approach to employment and training. We have also heard opposing views that devolution would tend to weaken the Great Britain-wide approach to a single labour market and associated tax credits and benefits. We note that devolution of the employment programmes would go beyond the current devolution arrangements in Scotland.
- 6.2.10 It is not clear whether Wales would gain or lose financially if employment programmes were to be devolved. If they were devolved, changes would no longer be funded according to the provision required by Wales, but by a proportion corresponding to Wales's population. Wales currently has a higher proportion of employment programme participants than its population share. This would be reflected in the amount transferred from the UK Government to the Welsh Government. Then, looking forward, if Welsh unemployment rates move up or down more or less in line with United Kingdom trends, the impact either way is unlikely to be significant.
- 6.2.11 On balance, we do not recommend the devolution of the UK Government's employment programmes, bearing in mind the importance of maintaining a coherent approach that aligns employment programmes with benefits, although this should be kept under review.
- 6.2.12 The evidence also highlighted the current split in relation to powers associated with training and employment programmes and the need for better coordination. This has led to the two Governments creating a number of different employment programmes and schemes designed to provide access to work. This may lead to a perception of a lack of cooperation between the two Governments and ultimately cause confusion to both jobseekers and employers in Wales.
- 6.2.13 We note that this concern was raised by the Welsh Affairs Committee in its report on The Work Programme in Wales.<sup>63</sup> That report highlights a number of issues in relation to the incompatibility between separate UK Government and Welsh Government employment programmes and the confusion for employers and jobseekers caused by different schemes operated by the two Governments.
- 6.2.14 We believe that there should be better coordination between the two Governments on employment programmes to ensure that Welsh jobseekers and employers are not misinformed or hindered. The two Governments should consider how this coordination could be achieved, and in doing so they should consider whether the Welsh Government could have a bigger role in the administration of DWP policies in the interests of jobseekers and employers in Wales.

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<sup>63</sup> Welsh Affairs Committee (2013) *Third Report - The Work Programme in Wales*.

### *Consumer protection*

- 6.2.15 We believe that Welsh consumers should continue to benefit from comprehensive and specialist consumer advice provided by United Kingdom or Great Britain-wide bodies. Much of the legislative framework on consumer protection is determined by European legislation.
- 6.2.16 We have not received evidence arguing for the existing competence of the National Assembly in relation to consumer protection to be transferred back to the UK Government. This is also the case in respect of Welsh Ministers' executive functions in respect of consumer representation and the consumer councils for water and public transport.
- 6.2.17 However, we believe that this is an area that is not transparent and that would benefit from the two Governments and interested bodies examining the scope for simplifying the existing division of responsibilities. We note the current reform of Consumer Focus (Wales); it will be important to ensure Welsh interests are fully reflected in this reform. The two Governments and interested bodies may wish to examine the scope for simplifying the existing division of responsibilities in relation to consumer protection.

### *Regulation and inward investment*

- 6.2.18 We have heard the view that, through the Welsh Regulators Forum, which is coordinated by the Better Regulation Delivery Office and which comprises national and local regulators in Wales, there is opportunity and ambition to develop a coordinated and consistent approach to regulation. Both Governments have regulatory responsibilities which impact on Welsh business. We have heard from business about the need to avoid unnecessary burdens to ensure Wales becomes more competitive; this is especially pertinent for small businesses. It is an area where there should be a strengthened joint approach by the UK and Welsh Governments.
- 6.2.19 Some concerns about the decline in inward investment were also mentioned to us. Responsibility in this area is split between UKTI and the Welsh Government. While it is potentially beneficial for Wales that it is promoted abroad by both the UK Government and the Welsh Government, there is scope for better coordination to ensure that inward investment and export opportunities are maximised.
- 6.2.20 More generally we have heard the argument that improving the Welsh economy requires a more proactive cross-border approach. At the governmental level, the two Governments both have key economic powers; they need to employ those in a coordinated way for maximum effect including through increased inter-agency cooperation. This is discussed further in Box 6.3.

#### **Box 6.3: A cross-border approach to economic strategy**

We heard evidence about the importance of Wales and England working together to improve their economies, especially at our expert session on the economy, held in Wrexham when cross-border representatives were present.

At the sub-regional level, it is important to build on the fact that the two economies are heavily integrated. For example, the Mersey Dee Alliance (MDA) is a partnership that supports strategic economic activity spanning the North Wales/North West England border. Its geographical area of focus is North East Wales, West Cheshire and Wirral, one of the most important centres for manufacturing in the United Kingdom.



In addition, the North Wales Economic Ambition Board is working to improve inward investment and accelerate economic growth in North Wales.

The Great Western Partnership includes an alliance of business groups, local authorities and transport experts along the Great Western Line. The Partnership has successfully lobbied for the electrification of the Great Western Main Line to Swansea and has set out a case for further upgrades to deliver journey times between Cardiff and London/Heathrow of eighty minutes or less.

### *Policy analysis*

- 6.2.21 Further to the general discussion of data preparation in Chapter 5, we have also heard specific concerns about the lack of economic and public finance data, and the capacity for economic modelling. These are both areas in which Scottish experience is more advanced. There is scope for the two Governments to work with the Office for National Statistics and the academic and business communities to gather more robust and timely data, and to develop better models of how the Welsh economy works. This should lead to better-informed policy decisions on what interventions in the economy are likely to be most effective.

#### **Recommendations**

- R.9 The UK and Welsh Governments should provide a clearer and better-coordinated approach to employment and training policies. This should include consideration of the role of the Welsh Government in the administration of Department for Work and Pensions employment programmes.
- R.10 Given that the border is administrative and not economic, and given their shared ambition for economic growth, the UK and Welsh Governments should take account of each other's policies in a coherent way when developing their economic strategies for Wales. This would include a better-coordinated approach to business regulation and inward investment.
- R.11 The two Governments should improve the collection of Welsh economic data and economic modelling capacity.

## **6.3 SUMMARY**

- 6.3.1 In our Part I report we made a number of recommendations for strengthening the Welsh economy through devolution of certain tax and borrowing powers and other changes, with a view to incentivising economic growth.
- 6.3.2 Beyond this we propose no major change to the existing allocation of economic powers. We believe there is scope for making the existing devolution settlement work more effectively to improve the performance of the Welsh economy. Both Governments should provide a better coordinated approach to the development of economic policy in Wales, including employment and training policies, business regulation and inward investment.
- 6.3.3 The two Governments should improve the production and collection of economic data and modelling capacity.

# Chapter 7 – Transport

## 7.1 OVERVIEW

7.1.1 In this chapter we set out the current devolution arrangements in relation to transport, outline the evidence presented to us and use our principles to assess whether there should be any changes in this area.

## 7.2 CURRENT POSITION

7.2.1 Highways and transport are devolved subjects under Schedule 7 of the Government of Wales Act. This includes responsibility for bridges and tunnels, street works, traffic management and regulation, and transport facilities and services.

7.2.2 There are however a number of exceptions within the Highways and Transport subjects specified in Schedule 7 where the power remains with the UK Government. These cover:

- aviation;
- most aspects of rail;
- shipping;
- ports and harbours;
- transport security;
- driver licensing;
- driving instruction;
- speed limits; and
- regulation of the construction and equipment of motor vehicles and trailers and their use on roads.

### *Rail*

7.2.3 Rail is not devolved apart from financial assistance in specific circumstances.<sup>64</sup> However, in terms of executive competence, the Secretary of State for Transport and the Welsh Ministers are joint signatories to the Wales and Borders rail franchise, currently operated by Arriva Trains Wales (ATW). The division of responsibilities between the two Governments is governed by the Joint Parties Agreement.

7.2.4 Capital investment in the railway network in Wales is provided by Network Rail and specified and funded by the UK Government's Department for Transport on an England and Wales basis through the High Level Output Specification process. The rail network in Wales, defined as the Wales Route,<sup>65</sup> covers Wales and parts of England including Hereford, Ludlow and Shrewsbury. The Welsh Government also has powers to purchase additional services for Wales via franchises let by the Department for Transport, and to invest in infrastructure in Wales or England for 'Welsh purposes'.

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<sup>64</sup> As well as transport security and railway heritage.

<sup>65</sup> Network Rail (2012) *Network Specifications 2012 Wales*.



## Ports

- 7.2.5 Ports policy is non-devolved in Wales, except for small fishing and leisure harbours. Ports in Wales are included in the scope of the UK Government's National Policy Statement for Ports, which is applicable both to Nationally Significant port infrastructure projects and to smaller applications that are dealt with by the Marine Management Organisation.
- 7.2.6 There are thirty-two port locations in Wales with a mixture of trust, municipal and privatised ports. Trust ports in Wales include Milford Haven, Neath, Newport (River Usk), Caernarfon and smaller trusts such as Saundersfoot. Privatised ports include Barry, Cardiff, Newport, Port Talbot and Swansea (Associated British Ports); Holyhead and Fishguard (Stena Line); and the port of Mostyn (independent). Municipal ports, such as Conwy, are run by local authorities.
- 7.2.7 Cardiff and Newport are designated as 'core' ports under the European Commission's proposals for a revised Trans-European Transport Network, because each handles more than 1% of the total volume of traffic that passes through all EU maritime ports. The European Commission has also agreed to include Milford Haven following joint proposals by the UK Government and Welsh Government. The ports of Swansea, Fishguard and Holyhead are part of the broader 'comprehensive' TEN-T network, because each handles more than 0.1% of the total EU maritime ports traffic.

## Traffic

- 7.2.8 The following matters in relation to vehicle standards and traffic management are non-devolved:
- provisions on car tax, car standards and safety;
  - regulation of motorways and roads standards;
  - driver, learner driver and driving instructor licensing;
  - insurance;
  - licensing of public service vehicles and heavy goods vehicles drivers;
  - safety issues; and
  - road traffic offences.
- 7.2.9 The overall speed limit framework, including the setting of national limits for different types of roads, is also non-devolved. The Welsh Government is responsible for determining local speed limits on the motorway and trunk road network in Wales. Local highway authorities are responsible for determining speed limits on the local road network in Wales but must have regard for the guidance issued by the Welsh Government.
- 7.2.10 The Traffic Commissioner for Wales and West Midlands is appointed by the Secretary of State for Transport. Commissioners are statutorily independent in their licensing functions. In relation to traffic and private road usage, the Traffic Commissioner has responsibility for the licensing of the operators of Heavy Goods Vehicles and of buses and coaches (Public Service Vehicles) and taking action against drivers of Heavy Goods Vehicles and Public Service Vehicles in certain circumstances.
- 7.2.11 Under the Concordat between the UK Government's Department for Transport and the Welsh Government, the Welsh Government has a formal role in the appointment of the Traffic Commissioner for Wales and the West Midlands. The Traffic Commissioner for Wales and the West Midlands is required to liaise regularly with the Welsh Government.

### **Roads**

- 7.2.12 The Welsh Government is responsible for the provision and maintenance of roads in Wales, and the Highways Agency fulfils the equivalent functions in England for the strategic road network. The Highways Agency has an agreement with the Welsh Government to provide services to the whole of the Severn Crossing, including the part of it in Wales.
- 7.2.13 Funding of the road network is a devolved matter, and there is no history of providing cross-border subsidies for transport purposes. Only where a scheme has physically involved both sides of the border have funds been directly transferred from one national authority to another.
- 7.2.14 The Severn Crossings are the responsibility of the UK Department for Transport and are currently run by a private concessionaire, Severn River Crossings plc. The current concession with Severn River Crossings is expected to end in 2018.

### **Bus Transport**

- 7.2.15 The Transport Act 1985 provided the framework for Wales's deregulated and mostly privatised bus transport system. Beyond set standards for safety and competency, bus operators are free to provide services as they chose.
- 7.2.16 The UK Government is largely responsible for what regulation there is of bus services, with the "Registration of local bus services" a specific Exception to the devolved responsibilities in the Government of Wales Act 2006. Traffic Commissioners grant operator licences, register local bus services, set punctuality standards and investigate bus companies not meeting their obligations.

### **Taxi and Private Hire Vehicles**

- 7.2.17 The power to legislate on the regulation of taxi and private hire vehicles is non-devolved. The responsibility for administering the regulation of taxi and private hire vehicles resides with the local authorities in Wales using best practice guidance issued by the UK Government's Department for Transport.

### **Aviation**

- 7.2.18 Aviation, air transport, airports and aerodromes are listed as an Exception to the devolved responsibilities in the Government of Wales Act 2006. However, there are exceptions to this Exception, relating to the provision of financial assistance to providers or proposed providers of air transport services, airport facilities or services; the publication of strategies about the provision of air services; and the regulation of the use of aircraft carrying animals for welfare or environmental reasons.
- 7.2.19 Under Section 11 of the Transport (Wales) Act 2006, the Welsh Government has executive powers to provide financial assistance in relation to air transport services (for passengers or cargo), where it does not believe the service or facilities would be delivered without that assistance. The Welsh Government has recently acquired Cardiff airport. This is Wales's only major airport.



## Transport spending

7.2.20 In 2012-2013 (the latest available year), transport public spending per head in Wales was 23 per cent higher than in England, only exceeded by London and Scotland. The bulk was spent on roads and rail. £446 million was by spent the Welsh Government, £478 million by local government and £195 million by the UK Government.<sup>66</sup>

### Box 7.1: Evidence on transport

Our opinion poll found that 88 per cent supported the (continued) devolution of roads. In our questionnaires, only 5 per cent wanted bus transport in Wales to be controlled by the UK Government and only 23 per cent wanted rail transport to be controlled by the UK Government.

The UK Government said: *'The Commission may wish to examine the devolution boundary in respect of ports, noting that the UK Government should remain responsible for supranational matters. The Government would welcome the Commission's consideration of the current devolution boundary for railways, and the potential for changes to those arrangements. Two routes through Wales form part of the trans-European road network: the M4 and feeder roads (A48 and A40) to Fishguard in the south, which form part of the route from Felixstowe to Ireland, and the A55 in the north, which forms part of the route from Holyhead to Immingham. The Commission may wish to consider whether current arrangements for the maintenance and upgrade of these routes in Wales could be improved, particularly in the context of responsibilities for large-scale projects to upgrade and improve these routes. The Commission may wish to investigate the devolution, or further devolution, of the regulation of local bus services and operators in Wales.'*

The Welsh Government said: *'The Welsh Government is seeking further powers for the Assembly in order to promote road safety, and to improve public transport services, in Wales. The Assembly's existing powers, set out in Schedule 7, should be extended (if necessary by appropriate Exceptions to Reservations) in order to give the Assembly competence in relation to speed limits, bus regulation, taxi regulation and ports. We also see scope for change in relation to rail.'*

The UK's Changing Union project told us that: *'New responsibilities that would facilitate an integrated transport policy would include: public transport policy; rail and bus industry regulation; rail investment (with the operational and financial interface between the Welsh Government and Network Rail set out in statute and mirroring the current DfT - Network Rail position); contractual arrangements for the operations in Wales of train operating companies; powers currently held by the Traffic Commissioners; ports; airport development and air passenger duty.'*

Professor Stuart Cole, Emeritus Professor of Transport, Wales Transport Research Centre, University of South Wales, argued: *'The order of priority for Wales is as follows: an efficient and effective transport network to make us internationally competitive; urban congestion solutions; easy and affordable access to jobs and services by car, bus and rail services particularly from low-income communities and rural areas. Achieving this requires a revolutionary change in public transport provision.'*

<sup>66</sup> HM Treasury (2013) *Public Expenditure Statistical Analyses*.

According to Bristol Airport: *'Aviation policy should remain reserved to the UK Parliament. However in practice most, if not all, decisions relating to Welsh airports and air services are taken within currently devolved powers relating to the planning system, surface access and the provision of air services'*.

In the view of Sustrans and the Bevan Foundation: *'The Welsh Government should gain powers to decide bus subsidy/contract payment levels; decide bus routes and frequency for both commercially and publicly-run routes; and have devolved bus user groups'*.

The Welsh Ports Group said: *'The key, and overriding, observation is that there is no clear and consistently built up documentation setting out what might be the Welsh Government policy on ports, should responsibility for ports be devolved. Equally there are modes of devolution that could be highly beneficial, particularly if operators, customers, users and stakeholders can see that their chosen port has the rights of self determination and funding necessary to be able to deliver on the promises they make; that the port is well and constructively supported by the political establishment; that the value of ports is recognised and that (Welsh) Government strategies are focussed on supporting port activities through improved road and rail connections; that necessary consents can be delivered rapidly and with high levels of certainty, as well being as viewed in the wider economic context'*.

Taith told us: *'The Welsh Government in its evidence to the Commission, indicated that it is seeking further powers for the Assembly in order to promote road safety, improve public transport services, Ports and taxi regulation. These aspirations are broadly supported by Taith'*.

Passenger Focus said: *'The latest figures from the Office of Rail Regulation (ORR) highlight the importance of cross-border journeys to Welsh rail users with just under one third (31.5%) of the 27 million annual journeys that start and/or finish in Wales crossing the Wales-England border'*.

The South-East Wales Transport Alliance (Sewta) said: *'In its evidence to the Commission, the Welsh Government has indicated that it is seeking further powers for the Assembly in order to promote road safety and to improve public transport services. These aspirations are broadly supported by Sewta'*.

According to the Public Transport Users Committee (PTUC): *'It does not matter how ambitious or well developed the transport policies of Welsh Government are this eclectic mixture of responsibilities for public transport delivery within Wales does not facilitate effective public transport integration'*.

The National Assembly for Wales's Enterprise and Business Committee asked the Commission to consider the *'devolution of powers to Wales to facilitate transport integration'* in a number of areas including:

- *A statutory relationship between the Welsh Government and Network Rail. This might include devolution of powers to specify high level outputs for Welsh rail infrastructure, similar to the powers of the Scottish Government;*



- *An enhanced role in the rail franchising process as it affects Wales, particularly powers to specify franchise agreements that comprise predominantly Wales-only services (passenger services that start and end in Wales), such as the current Wales and Borders Franchise;*
- *Bus regulation and registration, including making the Traffic Commissioner for Wales accountable to the Welsh Ministers.*

The Committee also noted that *'should powers in these areas be devolved to Wales they should be accompanied by appropriate levels of funding in accordance with the relevant statement of funding policy'*.

The Community Transport Association Wales noted that there is *'currently a limited amount of integration in public transport in Wales, which needs to be addressed. We firmly believe that an accessible, integrated and sustainable transport system...will support economic, social and environmental sustainability. It will also underpin social inclusion and equality for the most vulnerable in our communities'*.

The Federation of Small Business Wales recommended that *'powers over transport should be rationalised to provide greater coherence over what the Welsh Government can do. This should include transferring powers (for example over bus regulation and rail infrastructure investment) from Westminster to Wales where appropriate to ensure transport policy in Wales can be appropriately implemented'*.

## 7.3 ASSESSMENT

7.3.1 We have assessed each part of the transport system in terms of its potential for devolution.

### *Unchanged powers*

7.3.2 The Welsh Government, the UK Government and most other evidence submitted to us have argued that shipping and maritime safety, road and vehicle standards, driver licensing, and aviation policy should remain at a United Kingdom level. We agree. Maintaining these functions at United Kingdom level would meet our principles of coherence and effectiveness.

7.3.3 The two Governments indicated that the management and direction of transport policies would benefit from a continued close working relationship between them. We agree.

### *Rail*

7.3.4 The majority of evidence received has argued for the Welsh Government to take on responsibility for the rail network in Wales. This includes the High Level Output Specification process with Network Rail for rail infrastructure. In Scotland, *'the promotion and construction of railways which start, end and remain in Scotland'* were devolved in 2002,<sup>67</sup> and therefore the railway network within Scotland is devolved, but not the routes that cross the border. While the Welsh network is more integrated with that of England than is the Scottish network, we think that devolving the rail network in Wales would be possible and desirable, although it would require close cross-border cooperation.

<sup>67</sup> The phrase was inserted as an exception to the reservations set out in Schedule 5 of the Scotland Act 1998 by the Scotland Act 1998 (Modifications of Schedule 5) Order 2002.

- 7.3.5 In addition, the case for transferring the UK Government's residual rail responsibilities in respect of the Wales and Border franchise is persuasive. This would still mean that cooperation would be required for any decisions affecting Wales and Borders services in England. Some redrawing of the franchise boundary and the services it contains may be appropriate if the Wales and Border franchise is fully devolved.
- 7.3.6 We have also concluded that the Welsh Government should be fully consulted on the appointment of non-devolved rail franchises which come into Wales, including the First Great Western services in south Wales, the Virgin Trains services in north Wales and the CrossCountry Trains services from the Midlands to Cardiff.
- 7.3.7 Although the Welsh rail network is closely linked to that in England, there is a strong case for a more closely integrated Welsh transport system. In addition, devolution would improve the lines of accountability and responsibility both in financial and policy terms, which are currently complex and unclear. There would be some transfer of risk to the Welsh Government, for example if the franchise failed. This would need to be carefully managed, but it is an inevitable consequence of devolution.
- 7.3.8 A report was published in December 2013 benchmarking rail services across Great Britain. Performance was measured on the basis of investment, growth and passenger satisfaction. The report specifically compared Scotland and Wales, and concluded that, with management of the Scotrail franchise devolved, Scottish rail services were growing and had high levels of passenger satisfaction whereas Welsh rail services performed much less well in terms of usage, accessibility and satisfaction. The Chief Executive of the Campaign for Better Transport commented that *'By devolving more decision making we can make full use of local knowledge and target investment where it will bring the biggest benefits'*.<sup>68</sup>
- 7.3.9 We also note that the National Assembly for Wales's Enterprise and Business Committee in their report on *'The Future of the Wales and Borders Rail Franchise (December 2013)'* said: *'In our report on Integrated Public Transport in Wales we recommended further devolution of rail powers in relation to both rail franchising and infrastructure. We therefore wholeheartedly agree with the Minister for Economy, Science and Transport's comment that "we want to take control of our own destiny" on the next franchise'*.<sup>69</sup>

## Ports

- 7.3.10 The Welsh Government and the UK Government agree that the devolution boundary for port development should be considered by the Commission. The evidence received on this matter mostly calls for devolution of port development to ensure that a distinct Welsh policy can be created for the economic development of this sector and the creation of an integrated transport infrastructure for freight. It would however be important to maintain and enhance the competitiveness of Welsh ports. We believe that devolution would improve the coherence between local transport, planning and port development.

<sup>68</sup> Credo Business Consulting LLP in association with the Campaign for Better Transport (2013) *The Effectiveness of the Rail Network Across Great Britain: A Comparative Analysis*.

<sup>69</sup> National Assembly for Wales (2013) *The Future of the Wales and Borders Rail Franchise*.



## **Roads**

- 7.3.11 A number of respondents drew attention to the current arrangements for infrastructure improvements of major transport routes across Wales (including the M4, A48 and A55), to cross-border roads and to responsibility for the Severn Crossings.
- 7.3.12 We are aware that discussions continue between the UK Government and the Welsh Government in relation to the concession arrangements for the Severn Crossings post-2018. This decision should remain for resolution by the two Governments.
- 7.3.13 In relation to the Trans-European Transport Network (which incorporates the M4 and A55 corridors), coordination between the Welsh Government and the UK Government's Department for Transport appears to be working well, as highlighted in the additional evidence provided by the Welsh Government. We see no reason to change devolved responsibility in this area.
- 7.3.14 There is a perception that improving north-south and east-west routes that cross the border tends to be a more important issue for Wales than England. In particular, we heard concerns about roads that weave in and out of Wales going north-south. UK Department for Transport officials told us that, due to relatively low traffic volumes, improvements to routes such as the A483 or A458 tend not to achieve the required cost benefits that more heavily-used route improvement schemes in England would provide. However, the Department indicated that it was considering new strategies for routes on the strategic road network, and that these would set out future maintenance, operational and enhancement needs. We welcome this approach, and believe that the Department for Transport must consider the strategic economic value of cross-border routes to Wales and not just to England. It would be for the Welsh Government to consider whether it wished to provide funding above that available from the UK Government's Department for Transport as part of a strategic improvement plan for cross-border road schemes.

## **Bus and taxi regulation**

- 7.3.15 We have received a number of calls for the devolution of bus and taxi regulation. We also note that the Law Commission for England and Wales in its consultation document in relation to its review of the law relating to the regulation of taxis and private hire vehicles proposed that powers for any system of regulation should be devolved to Welsh Ministers.
- 7.3.16 Devolution would allow the Welsh Government to introduce local control and improvements to service standards for public transport, taxi and private hire vehicles. It would also facilitate an integrated approach to transport initiatives across Wales. These changes would bring benefits to bus users in Wales as a result of the regulation of services closer to the point of use.
- 7.3.17 It would be logical for the functions of the Traffic Commissioner in relation to bus regulation to be devolved also. It would then be for the Welsh Government to decide whether Wales should have its own Traffic Commissioner, who would be accountable to Welsh Ministers in relation to bus regulation and other existing devolved powers, and to UK Ministers in relation to reserved responsibilities, such as Heavy Goods Vehicle licensing. This would be in line with arrangements in Scotland.

### **Drink drive and speed limits**

7.3.18 A number of respondents, including the Welsh Government, have called for the responsibility for speed limits and drink drive limits to be devolved. This would bring Wales in line with Scotland and Northern Ireland. The UK Government's argument in favour of devolving limits in Scotland was alignment with devolved health and road safety responsibilities.<sup>70</sup> This argument applies equally to Wales, and we see no good reason why drink drive and speed limits should not be devolved to Wales. If different limits were established on the two sides of the border, it would be essential for there to be effective awareness campaigns to ensure people crossing the border were aware of the differences.

### **Integrated transport planning**

7.3.19 Giving Wales more powers as we recommend would benefit the people of Wales by providing the Welsh Government with an opportunity to develop a more strategic and effective approach to transport in Wales. Such an integrated transport policy, along the lines of that in Scotland,<sup>71</sup> would fit our principles well, in particular simplicity, coherence and accountability.

## **7.4 COSTS**

### **Rail**

- 7.4.1 Funding in relation to the Wales and Border franchise forms part of the existing Welsh Block Grant. The Welsh Government told us that for 2013-14 the cost of the Wales and Border franchise for Welsh services will be in the region of £178 million. This includes the necessary service enhancements that have been required during the current franchise period. By 2018-19, the Welsh Government expects the cost of the franchise, allowing for inflation, to increase to £206.8 million. It believes that if Welsh Ministers assume responsibility as the Franchising Authority in respect of the Wales and the Borders franchise area then the current franchise cost provides a reasonable sense of the order of magnitude of funding that it would anticipate being required. The Welsh Government also expects that some additional expertise and capacity would be required to discharge the additional functions appropriately.
- 7.4.2 In relation to rail infrastructure, the Welsh Government told us that it had not quantified the costs of taking responsibility for oversight of the Wales Route, including responsibility for specifying and funding network outputs via the Office of Rail Regulation. The Welsh Government believes that a detailed assessment of the level of funding required would need to be undertaken prior to a final and formal agreement being reached.
- 7.4.3 According to the UK Government, it would be very difficult to provide detailed cost estimates of any transfer of rail responsibilities without a detailed proposal from the Welsh Government. It told us that the need for additional funding transfer in the event of further devolution in relation to the Wales and Border franchise would depend on the scope of the franchise in the future and the role of the UK Government in it. The UK Government also notes that there would be the need for a significant increase in staff resource during the competition to re-let the franchise, together with external resource requirements such as legal and commercial assistance.

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<sup>70</sup> HM Government (Nov 2010) *Strengthening Scotland's Future*.

<sup>71</sup> Transport Scotland's remit incorporates: rail and trunk road networks; major public transport projects; national concessionary travel schemes; impartial travel services; coordinating the National Transport Strategy for Scotland; liaising with regional transport partnerships, including monitoring of funding; sustainable transport, road safety and accessibility; local roads policy; aviation, bus, freight and taxi policy; ferries, ports and harbours; the Blue Badge Scheme.



### **Bus and taxi regulation**

- 7.4.4 The Welsh Government anticipates that the key funding implications would be in terms of staff resources and capacity and could be of the order of at least £100,000. It expects that the cost of bus registrations would be met from registration fees, but further work is required to establish the detailed costs of a separate regulatory regime and Traffic Commissioner in Wales.
- 7.4.5 The UK Government states that the income received from the Welsh element of bus registrations in 2012-13 was £46,500. It estimates that the proportion of expenditure to maintain the bus registration scheme relating to Wales would be £71,000.
- 7.4.6 In relation to taxi licensing, the Welsh Government estimates a requirement of around £60,000 for dedicated staff resources based on the arrangements in Scotland.

### **Ports**

- 7.4.7 The Welsh Government anticipates that the key funding implications would be in terms of staff resources and capacity. It suggests that the cost of administration would be around £150,000, based on Scotland's position. It went on to outline that the additional costs associated administering ports policy, including data collection and analysis, assessment of applications and wider policy support, which would mean a minimum requirement of around £500,000 to support a ports policy function in Wales. Some of these administrative costs would be offset by transfers from the UK Government.
- 7.4.8 To conclude on overall transport costs, there would need to be a fair transfer of existing resources from the UK Government's Department for Transport. Inevitably there would also be some transfer of risk which would need to be carefully managed, but no insuperable problems are expected.

#### **Recommendations**

- R.12 On transport, the following should be devolved:
- a. port development, including harbour orders and oversight of Trust ports;
  - b. the Wales and Border rail franchise;
  - c. funding of Network Rail in relation to the Wales network;
  - d. speed limits and drink drive limits;
  - e. bus regulation, including the relevant functions of the Traffic Commissioner; and
  - f. taxi regulation.
- R.13 While responsibility for inter-city cross-border rail franchises (Great Western, CrossCountry and Virgin Trains) should remain non-devolved, the Welsh Government should have a greater role in the consultation process for appointing a new franchise operator for these routes.
- R.14 There should be close coordination between the two Governments to ensure good quality cross-border routes. Matters to be considered should include:
- a. improvements to the Trans-European Network along the M4 and the A55 corridors;

- b. the future of the Severn Crossings tolls; and
- c. roads that straddle the border, including a formal process for decisions on proposed route improvements on either side of the border that takes full account of the strategic importance of the route for Wales.

## 7.5 SUMMARY

- 7.5.1 On transport, we recommend further devolution of powers on rail, ports, bus and taxi regulation, and speed and drink drive limits, to create simpler and more coherent arrangements and facilitate the development of a more integrated transport strategy for Wales. The functions of the Traffic Commissioner in relation to buses should also be devolved.
- 7.5.2 Whilst inter-city cross-border rail franchises should remain non-devolved, the Welsh Government should have a greater role in the appointment of a new franchise operator.
- 7.5.3 On roads, we do not recommend any changes in powers but there should be closer coordination between the two Governments to ensure a more strategic approach and good quality cross-border routes, both east-west and north-south.



# Chapter 8 – Natural resources

## 8.1 OVERVIEW

- 8.1.1 In this chapter we set out the current devolution arrangements in relation to natural resources, outline the evidence presented to us and use our principles to assess whether there should be any changes in this area. In particular, we cover water, energy, the Crown Estate, and marine conservation.
- 8.1.2 Environmental matters are for the most part devolved and we have had little evidence suggesting changes in powers, other than the areas covered in this chapter.

## 8.2 ENERGY

### *Current position*

- 8.2.1 Wales is part of the overall Great Britain energy market. Around 13 per cent of the electricity generated in Wales is used outside Wales. Of the electricity generated in Wales, 7.9 per cent is from renewable sources (oil and gas power stations provide the majority of electricity in Wales). This compares with 26.8 per cent for Scotland, 6.2 per cent for England, and 12.6 per cent for Northern Ireland. Overall, 9.4 per cent of energy generated in the United Kingdom is from renewable sources.<sup>72</sup> Wales has an important role in the overall energy supply of Great Britain, not least through the port of Milford Haven, which handles 29 per cent of Great Britain's seaborne trade in oil and gas.
- 8.2.2 The majority of energy and climate change policy is non-devolved, with the UK Government retaining responsibility for:
- overall strategic approach and associated policies;
  - regulation of the energy industry;
  - international negotiations on energy and climate change, including engagement with the European Union (though this is done in consultation, as appropriate, with the Devolved Administrations);
  - policy on the generation, transmission, distribution and supply of electricity, oil and gas, nuclear energy and nuclear installations;
  - all development consents relating to 'nationally significant' projects. These are defined as electricity generating installations above 50MW onshore (meaning on land) and 100MW offshore (at sea), certain pipeline and harbour facility projects, and overhead electricity lines;
  - licensing of oil and gas exploration and production activities and related consenting decisions;

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<sup>72</sup> UK Government Department of Energy and Climate Change (Dec 2012) *Electricity generation and supply figures*

- coal, including mining and subsidence, overseeing the current coal industry in the United Kingdom, managing the environmental impacts of current and previously active coal mines, and managing the UK Government’s responsibilities and liabilities arising from the previously nationalised coal industry, such as the rights of retired miners; and
- energy conservation, except for the encouragement of energy efficiency otherwise than by prohibition or regulation.

8.2.3 There are some devolved responsibilities in the area of energy. Environmental protection, economic development and some aspects of planning are devolved. Welsh Ministers also have executive powers in some non-devolved areas, such as powers under the Climate Change Act 2008.

8.2.4 Consents for onshore power generating infrastructure below the threshold of 50MW are devolved, and are currently dealt with by local planning authorities in Wales. Offshore, the Welsh Government has responsibility for consents for developments of less than 1MW. Offshore developments between 1MW and 100MW are the responsibility of the Marine Management Organisation, a non-departmental public body sponsored by the UK Government. Welsh Ministers would, however, have the right of decision in respect of any offshore development if the applicants proceeded through the rather cumbersome procedures of the Transport and Works Act 1992.

8.2.5 The responsibility for the consents to larger energy generating infrastructure is not devolved. However the Department of Energy and Climate Change (DECC) normally takes account of the Welsh Government’s planning priorities, expressed in the Planning Policy Wales document and Technical Advice Notes (TAN) – such as TAN 8 on renewable energy. Although Welsh Ministers have limited responsibility for energy consents, consents for ‘associated developments’ in respect of large generation projects (for example, sub-stations) are fully devolved. In December 2013 the Welsh Government published a draft Planning Bill and consultation document.<sup>73</sup> Consultation was underway at the time we agreed our report.

#### **Box 8.1: Evidence on Energy**

In our opinion poll, 70 per cent were in favour of the National Assembly having control of renewable energy, including large windfarms. In our questionnaires, 16 per cent thought that windfarms should be dealt with by the UK Government, with 55 in favour of the National Assembly (21 per cent preferred local authorities and 2 per cent the European Union, which were not options in our opinion poll).

The UK Government said: *‘The Government believes that a single market and regulatory regime across Great Britain is an effective way of ensuring competition and provides a consistent regulatory framework which is important for investors.*

<sup>73</sup> Welsh Government (Dec 2013) *Positive Planning: Proposals to reform the planning system in Wales*. It noted that their research project *Evaluation of Consenting Performance of Renewable Energy Schemes in Wales* (January 2013) raised a number of concerns about the ability of the current planning system to support the delivery of renewable energy developments within an acceptable time scale. The research suggested that due to the complexity, and often contentious nature of such projects, they comprise some of the most challenging and high profile aspects of the planning system. In the light of this, the Welsh Government proposes that in future applications for the category of devolved development defined as Developments of National Significance (in the case of electricity generation, this would mean generation capacity above 25MW) should be determined by the Welsh Ministers or person(s) appointed by them. Any decision of the Welsh Ministers would be final.



*'The UK Government has found the 50MW threshold for onshore development to be appropriate because many schemes above 50MW are of sufficient importance and scale to be considered nationally significant. Changing the threshold from 50MW to 100MW could have a negative impact on energy and planning policy for major infrastructure and result in increased complexity in the planning system and less efficient, more piecemeal and more expensive development.*

*'Welsh Ministers have no licensing functions in the Welsh offshore zone and no functions in relation to offshore generating stations under either the Electricity Act or the Planning Act.... However, relatively little development subject to licensing takes place in the offshore area.*

*'Energy networks across the Welsh / English border are substantially integrated (North Wales and South Wales in particular, with proposals being developed for mid-Wales), and maintaining a unified planning regime would facilitate further development of this important infrastructure.*

*'The UK Government believes there is a strong case to realign consenting powers in the area of "associated development" under the Planning Act 2008'.*

The Welsh Government said: *'The Welsh Ministers should have executive responsibilities in relation to the consenting of large scale energy generation (other than nuclear power) and related energy infrastructure, including consenting in the Welsh inshore and offshore marine areas.*

*'Ministers have corresponded with their UK counterparts on numerous occasions to point out that we are being disadvantaged by the Renewable Obligation regime compared to the other Devolved Administrations. The UK Government has noted its intention to move to a unified ROC regime but differences remain despite the recent review of RO banding in Scotland, Northern Ireland and England and Wales'.*

The energy company SSE said: *'SSE is equally comfortable with the UK Government making decisions or with devolved administrations doing so, as has been the case in Scotland where SSE has numerous generation assets. The key driver of the development of energy infrastructure projects is a long-term and stable regulatory environment.*

*'SSE would wish to see decisions relating to large-scale generation projects and auxiliary developments (for example, a wind farm and a sub-station) to be made by a single body in order to ensure consistency of approach and clarity in the decision-making process. Any proposals to devolve powers relating to energy generation would also need to be compliant with National Policy Statements at the UK level.*

*'If executive powers over large-scale energy development were transferred to the Welsh Government, SSE would also wish to see an accompanying step-change in resources to enable the optimum delivery of Wales' significant and ambitious targets regarding renewable electricity. The Welsh Government is already falling behind on its own targets for delivery of onshore wind, much of which (i.e. under 50MW) lies within their current executive competence'.*



Valero Energy Ltd, owners of Pembroke Refinery, stated that it found, in general, ‘the current division of responsibilities in Wales to be adequate, yet not without its particular challenges and unique characteristics’. It believed that ‘any transfer of energy policy competencies, as it relates to Valero’s core business, would not be beneficial’ and added that the ‘hydrocarbon energy industry is a globally connected one, which benefits from having a unified UK-wide approach to policymaking’. It also believed that ‘it would be inadvisable to further exacerbate the issue of divided responsibility for energy policy by devolving further aspects of energy policy’, and that ‘the potential devolution of consent for large scale energy infrastructure developments (above 50MW onshore and 100MW offshore), as well as aspects of renewable energy policy more generally, should similarly remain an excepted competence on Schedule 7 of the Government of Wales Act 2006’.

Natural Resources Wales said: ‘Further devolution of energy powers may allow some simplification of consenting arrangements but more importantly may help to drive better integration of strategic planning for energy that more effectively coordinates delivery of energy policy and related infrastructure in Wales. The success of this would depend strongly on the adequacy of resources. Energy development can also have significant cross-border implications, especially in the marine environment. Decisions about individual projects and planning for energy at a strategic level will often require extensive interaction with planners and regulators in other parts of the UK, irrespective of the further devolution of energy powers’.

Friends of the Earth Cymru said: ‘The retention of powers of consent and planning over electricity-generating infrastructure and fossil fuel developments by Westminster has meant that Wales has already missed out on first-mover advantage in most renewables industries.

‘The complexity of the energy planning and consenting arrangements puts in place a barrier that is additional to all other factors and is absent from the planning and consenting regime in Northern Ireland and Scotland – ostensibly our competitors in renewables development. There appears to be no logical reason for Wales being treated so differently to the other devolved nations.

‘For these reasons Friends of the Earth Cymru believes that all powers to consent, licence and permit energy developments in Wales should be devolved to the National Assembly for Wales’.

The Royal Society for the Protection of Birds (RSPB) Cymru said: ‘The RSPB has called for amendments to be made such that decisions on large-scale energy projects in Wales are made in line with Welsh planning policy. Indeed, during the last Assembly term the National Assembly for Wales’ Sustainability Committee recommended that this outcome should be sought through amendments to the Planning Act 2008, but such changes did not come about’.

The UK’s Changing Union project said: ‘The existing division of powers on energy, which has been identified by the First Minister as strategically crucial for Wales, is effectively an arbitrary one, specifically in the areas of planning and consent. Some of the disadvantages of this include: uncertainty over policy direction and inconsistency of process for developers, a temptation to indulge in a cross-border blame-game, and the potential for UK and Welsh Government policy aspirations to be at odds.



*'Respondents [to our research] have, however, expressed concern about a lack of clear policy direction and leadership by the WG as well as about civil service capacity. We regard these as issues to be tackled rather than obstacles to the acquisition of more comprehensive powers'.*

Unite Wales told us: *'Unite Wales supports the Welsh Government's evidence to the Commission that calls for the devolution of responsibilities for consenting to large scale energy generation and the related infrastructure. Devolving competency for consent would enable a more integrated approach which would be good for investment and good for generating decent, skilled employment opportunities in Wales'.*

Wales Trades Union Congress (TUC) Cymru said: *'The Wales TUC supports the Welsh Government's consistent calls for the transfer of the executive responsibilities to Welsh Ministers in relation to the consenting of large scale energy generation and related energy infrastructure. We believe that doing so would help reach targets for increasing the amount of energy generated from renewable sources and allow for a more consistent approach to energy policy across Wales. This would allow for a more stable and predictable environment for investors and help safeguard and develop employment'.*

The Federation of Master Builders argued that: *'The Welsh Government needs to ensure it makes the most of the "huge potential" renewable and non-renewable energy has for Wales. The Welsh Government needs further devolution of energy consenting, to ensure incentives for marine wave and tidal projects in Wales are on a par with that which already exists in Scotland'.*

NFU Cymru said: *'Wales does of course have an abundance of certain types of natural resource, including water, solar and wind. We do believe that there are potential benefits which could stem from making the best use of these resources, but we would add that this needs to be done sensitively, with the views of local communities taken in to account when decisions are made, especially with wind and solar developments'.*

The Institute of Civil Engineers Wales Cymru said: *'It is considered that the Welsh Government should have powers to grant planning permission for all energy schemes in Wales'.*

Dr Richard Cowell, School of Planning and Geography, Cardiff University noted that there was *'no innate logic to the current boundaries to energy-related powers between Westminster and Cardiff, reflecting as it does divisions inherited from pre-devolution days'.* Dr Cowell stated that there are *'undeniably some anomalies and complexities to the allocation of consenting and licensing roles between Westminster and Cardiff, between national and local government, and across different size categories of electricity-generating infrastructure. Devolution of powers to the Welsh Government may offer some scope for administrative integration, and this may be especially advantageous to smaller, off-shore renewable energy projects facing more difficult up-front financial risks. Much is made of the way in which Marine Scotland offers a cohesive approach to managing offshore licensing and consenting in Scotland for small-scale infrastructure, and devolution of powers to the Welsh Government may facilitate a similarly cohesive approach'.*

## Assessment

- 8.2.6 The profile of energy issues is high, both from the perspective of the interests of local communities and from the perspective of meeting supply needs and environmental challenges.
- 8.2.7 The evidence we received generally supports the view taken by the Calman Commission in Scotland that the single Great Britain energy market requires a Great Britain-wide approach to regulation and overall energy strategy.
- 8.2.8 Similarly, little evidence was received on the current United Kingdom-wide approach to international negotiations on energy and climate change, on nuclear policy, on the transmission of electricity, on the extraction of fuels, on the regulation of the energy market or on energy conservation. However we note in this context the heightened debate in parts of Wales about shale gas extraction through fracking where the same arguments about the balance between protecting the local environment and the United Kingdom's energy needs arise as they do in relation to on-shore wind development.
- 8.2.9 The bulk of evidence received on energy related to the consents regime for the generation of electricity within Wales. Most evidence called for the responsibility for development consents for renewable energy projects greater than 50MW (onshore) and offshore (above 1MW) to be devolved to Welsh Ministers. There was less evidence relating to non-renewable sources.
- 8.2.10 The context for our considering this evidence is that Wales has great scope to develop further its energy resources, within a framework of local accountability. Wales is already an exporter of energy. In addition to the reforms that the Welsh Government is proposing to planning arrangements there is scope for Wales to develop its energy resources further and to become an attractive destination for energy investment, particularly in the renewable sector. We would be supportive of any efforts to strengthen Wales's energy economy, and we have considered the issue with that in mind.
- 8.2.11 Current arrangements on energy consents appear to have no rational or principled basis, and there are a number of possible ways they could be modified. All have their adherents, and there are plausible arguments in favour of each. Options range from devolving all energy consenting powers to restoring them entirely to Westminster, with changing the threshold of devolved consents or fully devolving renewable energy consents falling in between.
- 8.2.12 Full devolution of all energy consenting responsibilities is one way to modify the current arrangements. Full devolution would give the Welsh Government greater accountability for developments in Wales and provide greater clarity for citizens. It is sometimes unclear to people in affected communities whether they should make representations to the Welsh Government in relation to their planning priorities, or to the UK Government for their decision-making powers over energy. Full devolution would also allow decisions on nationally significant infrastructure projects to be made in line with Welsh planning policy, and resolve the uncertainty arising from the current hierarchy of decision-making, where the UK Government's National Policy Statement takes precedence over the Welsh Government's planning policies.



- 8.2.13 However, full devolution would not satisfy our principle of effectiveness. It would present security of supply issues: Wales is currently a net exporter of electricity, and a Wales-focussed energy strategy may not meet the needs of the wider United Kingdom. In practical terms, there would also be substantial inefficiencies in the Welsh Government establishing capacity to make very complex, but very rare, consenting decisions – particularly on nuclear consents.
- 8.2.14 It could be argued that efficiency would be best achieved if there were only one consenting regime for England and Wales, and that, in the context of United Kingdom-wide energy security of supply – an increasingly important duty of the UK Government – responsibility should be returned to Westminster. However, this would neither meet our principle of equity, given that consents are devolved in Scotland and Northern Ireland, nor subsidiarity.
- 8.2.15 We considered two ways of achieving a better balance between our principles of subsidiarity, clarity, coherence, accountability and effectiveness. One – for which there appeared to be support in our public opinion research – would be to devolve renewable energy consents entirely. The other would be to change the threshold of the size of developments classified as ‘strategic’ and therefore a responsibility of the UK Government.
- 8.2.16 Devolving consenting powers over renewable energy developments would provide the Welsh Government with the powers to better meet its renewable targets, to pursue carbon-reduction targets and to specialise in renewable energy consenting. As the United Kingdom has European Union obligations to generate an agreed proportion of its electricity from renewable sources, devolution would enable the Welsh Government to play its full part in ensuring that the UK Government is able to meet those obligations. In practical terms, the issues surrounding the consenting requirements of renewable projects are qualitatively similar whatever the size of the project.
- 8.2.17 On the other hand, some renewable projects, particularly offshore, have a greater generation capacity than some non-renewable projects. It is also difficult to change the balance of generation to achieve a more carbon-neutral energy system by controlling only one type of energy generation. From a security of supply and overall energy mix perspective, there is therefore arguably no logical case for distinguishing renewables from non-renewables.
- 8.2.18 In changing the threshold, we appreciate that the larger the generation capacity, the greater its contribution to United Kingdom security of supply. Deciding where the cut-off threshold ought to be is not simple, and risks appearing arbitrary – a criticism of the current arrangements that we would want to remedy. The National Assembly has a long-standing cross-party consensus in favour of increasing the threshold to 100MW for offshore and onshore generation. However Box 8.2 below, which provides more information on the scale of energy projects in Wales, indicates that if the threshold were set as high as 350MW, this would still leave major generation projects in Wales with Great Britain-wide significance in UK Government control.

**Box 8.2: The size of existing and planned energy projects in Wales**

There are 42 power stations in Wales, 10 of which are over 350 MW and which account for most of the output.

Station Name	Fuel	Installed Capacity (MW)
Baglan Bay	Gas turbine	510
Bryn Titli	Wind	10
Carno	Wind	34
Llyn Alaw	Wind	20
Mynydd Gorddu	Wind	10
Taff Ely	Wind	9
Trysglwyn	Wind	6
Ffynnon Oer	Wind	32
North Hoyle	Wind (offshore)	60
Cemmaes	Wind	15
Barry	Combined Cycle Gas Turbine (CCGT)	140
Severn	CCGT	848
Aberdare District Energy	Gas	10
Solutia District Energy	Gas	10
Connahs Quay	CCGT	1380
Rhyd-y-Groes	Wind	7
Cefn Croes	Wind	59
Tyr Mostyn & Foel Goch	Wind	21
Solutia	Wind	5
Rheidol	Wind	2
Mynydd Clogau	Wind	14
Dinorwig	Pumped storage	1728
Ffestiniog	Pumped storage	360
Deeside	CCGT	515
Llangwryfon	Wind	9
Wylfa	Nuclear	490
Maentwrog	Hydro	28
Dyffryn Brodyn	Wind	5
Aberthaw B	Coal	1586
Aberthaw GT	Gas oil	51
Pembroke	CCGT	2180
Cwm Dyli	Hydro	10
Dolgarrog High Head	Hydro	17
Dolgarrog Low Head	Hydro	15
Rhyl Flats	Wind (offshore)	90
Uskmouth	Coal/biomass	363
Penryddian & Llidiartywaun	Wind	31



Station Name	Fuel	Installed Capacity (MW)
Rheidol	Hydro	49
Alltwalis	Wind	23
Dow Corning	Combined Heat and Power (CHP)	27 MWe
Milford Haven Refinery	CHP	29 MWe
Upm, Shotton	CHP	22 MWe

There are also a number of National Infrastructure Planning Projects anticipated in Wales. The majority of these are from renewable sources.

Project	Developer	Stage	Proposed Installed Capacity
Mynydd Mynyllod Wind Farm	Scottish Power Renewables	Pre Application	Up to 75 MW
Dyfnant Forest Wind Farm	Scottish Power Renewables	Pre Application	80 - 120 MW output
Wylfa New Nuclear Power Station	Horizon Nuclear Power	Pre Application	Minimum of 2,600 MW
Rhiannon Wind Farm (Round 3 Irish Sea Zone)	Celtic Array Ltd	Pre Application	Up to 2.2 Gigawatts
Tidal Lagoon Swansea Bay	Tidal Lagoon (Swansea Bay) PLC	Pre Application	250-350 MW
Brechfa Forest West Wind Farm	RWE npower renewables	Decided	56 - 84 MW
Mynydd y Gwynt Wind Farm	Mynydd y Gwynt Ltd and Renewable Energy Holdings	Pre Application	Up to 81 MW
Clocaenog Forest Wind Farm	RWE npower renewables	Examination	64 – 96 MW
Nant y Moch Wind Farm	SSE Renewables	Pre Application	140 – 176 MW
South Hook Combined Heat & Power Station	QPI Global Ventures Ltd	Examination	Up to 500 MWe
Wrexham Energy Centre	Wrexham Power Limited	Pre Application	Up to 1,200 MW
Hirwaun Power Station	Hirwaun Power Limited	Pre Application	Up to 299 MW
Internal Power Generation Enhancement for Port Talbot Steelworks	Tata Steel UK limited	Pre Application	Electrical generation capacity will be increased to between 170 MWe and 225 MWe

Sources: Gov.UK website – Department of Energy and Climate Change (July 2013) - *Electricity: chapter 5, Digest of United Kingdom energy statistics (DUKES) – 5.11 and 5.12* and National Infrastructure Planning Portal – Wales Projects (as of November 2013).

- 8.2.19 We have concluded that the balance between accountability, clarity, coherence, subsidiarity and effectiveness would be best achieved by increases to the current threshold of 50MW onshore and 1MW offshore. We have also concluded that consenting responsibility for all energy generation projects below 350MW should be devolved to Wales. This would deliver improved accountability while enabling Wales to better develop its important energy resources.
- 8.2.20 The threshold which we suggest has been informed by the size of existing and proposed developments for Wales. The figure of 350 MW would include the majority of renewable energy schemes currently proposed for Wales, with the larger schemes of strategic importance to the United Kingdom remaining with the UK Government. Bringing most renewable power stations within a Welsh system was the preference of the people of Wales, as identified in our public research. A limit of 350MW would also mean that a scheme like the Swansea Bay Tidal Lagoon project would be decided in Wales. It would not, however, include the very large renewable or non-renewable developments that are of broader importance to the United Kingdom. It would provide opportunities for Wales to be at the forefront of development of new renewable technology, particularly offshore. It would provide greater certainty to the public and developers as to who is responsible for developments, so promoting accountability and a stable framework to encourage investment.
- 8.2.21 There will also need to be arrangements made for circumstances such as generation proposals that cross the border between Wales and England (particularly at sea), or where capacity is estimated to be close to the threshold on either side of 350MW.
- 8.2.22 In the case of major projects in Wales that remain a responsibility of the UK Government, there also should be a statutory obligation to consult the Welsh Government and to take into account the policies of the Welsh Government and of the local planning authority in respect of the development.
- 8.2.23 If development consents for energy projects in Welsh offshore waters are to be devolved then the corresponding consents for marine licensing in that area should also be devolved.
- 8.2.24 We now turn to the issue of ‘associated consents’. Currently, in England only, the relevant legislation makes provision for ‘associated consents’ (for example, roads and substations) that are part of a Nationally Significant Infrastructure Project (for example, a power station or a major overhead line) to be consented to at a national level. In Wales, any ‘associated development’ is determined at local planning authority level. We were told that this can result in additional complexity, cost and uncertainty.
- 8.2.25 In the context of giving wider consenting powers to the Welsh Government and of requiring the UK Government to take account of Welsh planning policies in considering any generating capacity above 350MW, we recommend that consenting to associated developments should be the responsibility of the body responsible for the main project (the Welsh Government or local planning authority below 350MW and the UK Government above 350MW). This will mean that the associated consents are decided at the same time as the consent for the main project, so avoiding delay and uncertainty.



- 8.2.26 The Welsh Government and a number of organisations have called for responsibility for Renewables Obligation Certificates (ROC) to be devolved. Discussions are continuing between the UK Government and the Devolved Administrations on the Electricity Market Reform and the proposed Contracts for Difference (CfD) that will replace ROCs from 2017. The UK Government has stated that the Welsh Government will be statutory consultees on the design and delivery of CfDs alongside Scotland and Northern Ireland.
- 8.2.27 We recommend that the new CfD system should be agreed with the Devolved Administrations and should ensure parity for Wales with the other Devolved Administrations.

### Costs

- 8.2.28 The Welsh Government has told us that a number of factors affect the level of funding which would need to be transferred to cover the administrative costs of consenting to large scale energy generation projects, excluding nuclear. These include the exact nature of the functions and consenting regime being transferred, the number of estimated energy projects which would be considered in Wales on an annual basis, the existing costs for administering these functions and the degree of cost recovery (through applicant fees) within any existing consenting regime. (The existing consenting regimes recover around 60 per cent of their administrative costs, with the difference being covered by central government funding.)
- 8.2.29 Making some assumptions about the number of large scale onshore and offshore projects in Wales, the Welsh Government estimates that the current administrative costs of consenting to large scale energy generation (excluding nuclear) projects in Wales is of the order of £400,000-£500,000 (these are further costs to those recovered from applicant fees). As we are not recommending powers to the extent that the Welsh Government proposed and on which it therefore based its estimate, the cost to the Welsh Government would be somewhat less than this figure, and would be met in part at least by transfers from the UK Government.
- 8.2.30 The UK Government estimated an annual cost of around £63,000 for Wales taking responsibility for renewable planning consents over 50MW. This figure was based on an assumption of two applications per annum, suggested by the pipeline of major projects, and was based on the demands on officials who have wider roles, rather than working full-time on consenting (it was also a separate figure from those covered by applicant fees). The UK Government emphasised that *‘Planning Act casework places substantial demands on the Department owing to the often controversial nature of the proposals, the need for detailed environmental assessments, the complex nature of the permissions sought and the tight timescale for completion. The current DECC team manage all major energy proposals for England and Wales (currently circa 12 Planning Act recommendations per annum, likely to increase in future years), and has a great deal of expertise to ensure timely and robust decision-making’*.
- 8.2.31 The UK Government also estimated administrative costs of up to £10,000 for operation of the Renewables Obligation scheme, based on an estimate of the proportion of the current time of the England and Wales team spent on Wales’s share of projects. Again, these would not be full-time roles.
- 8.2.32 Taking all these factors into account, we do not think that our proposals involve material additional costs.

### **Recommendation**

R.15 To encourage the development of energy projects in Wales, we recommend:

- a. the responsibility for all energy planning development consents for projects up to 350MW onshore and in Welsh territorial waters should be devolved to the Welsh Government;
- b. there should be a statutory obligation for the UK Government to consult the Welsh Government and take account of Welsh planning policies when granting consents for projects over 350MW;
- c. associated development consents should be aligned with responsibility for the main project;
- d. responsibility for issuing marine licences in Welsh offshore waters should be devolved; and
- e. Wales should have parity with Scotland and Northern Ireland for the proposed Contracts for Difference (CfD) that will replace Renewables Obligation Certificates from 2017 as part of the wider Electricity Market Reform.

## **8.3 WATER**

### ***Current position***

- 8.3.1 Water and flood defence are devolved to the National Assembly under Schedule 7 of the Government of Wales Act 2006. This means that water supply and water resources management are devolved. However, water industry regulation is not devolved. Schedule 7 contains two Exceptions to the devolved competence of the National Assembly relating to water. These Exceptions are the appointment and regulation of water undertakers whose area is not wholly or mainly in Wales and the licensing and regulation of water suppliers within the meaning of the Water Industry Act 1991. Sewerage is also not devolved.
- 8.3.2 Under the terms of the European Union Water Framework Directive there are two cross-border river basin districts in Wales and England - the Severn (incorporating the river catchments of the Severn and the Wye) and the Dee. There is a further river basin district entirely in Wales, covering Western Wales. The Western Wales river basin district is exclusively within the executive competence of the Welsh Ministers. Under the Directive, the United Kingdom is required to manage the Severn and the Dee river basin districts in a holistic fashion. All aspects of European Union and domestic water environment law and policy sit within the context of the Directive. Objectives must be set for water bodies within those river basin districts, irrespective of administrative boundaries, for the good of the water environment in its broadest sense. Therefore, although water environment policy is largely devolved, the Secretary of State and the Welsh Ministers and their respective delivery bodies are obliged under the Directive to produce joint plans in order to implement all aspects of water environment law.



- 8.3.3 The National Assembly's legislative competence is currently limited to the appointment and operation of the two water undertakers – Dŵr Cymru/Welsh Water and Dee Valley Water – whose areas are wholly or mainly in Wales. Those wholly or mainly in England, such as Severn Trent, part of whose operations are in Wales, are a matter for the UK Government.
- 8.3.4 These arrangements have been revisited by the two Governments in the context of the UK Government's Water Bill, introduced in June 2013. The provisions of this Bill to increase competition between water suppliers by allowing more users to choose their supplier will not take effect in Wales, and the competition requirements for water companies operating wholly or mainly in Wales will remain a matter for the National Assembly. Therefore, if the Bill is enacted, the option to change suppliers would be available to businesses in the Severn Trent area of Wales, but not to those in England served by Dee Valley or Dŵr Cymru/Welsh Water.
- 8.3.5 Under section 114 of the Government of Wales Act 2006, the Secretary of State has the power to make an order preventing an Assembly Bill being submitted for Royal Assent if he or she has reasonable grounds to believe that the Bill may contain provisions which might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England.
- 8.3.6 Section 152 of the 2006 Act gives a second power of intervention to the Secretary of State in relation to the executive powers of Welsh Ministers. The Secretary of State may intervene if it appears to him or her that the exercise of an executive function (or failure to exercise that function) might have a serious adverse impact on water resources, water supply or quality in England.

#### **Box 8.3: Evidence on water**

The UK Government said: *'The technical features of the water and sewerage industries are complex. Separating cross-border systems may not always be technically feasible at reasonable cost and may create significant regulatory difficulties. Any proposal to align the legislative competence of the Assembly and executive competence of the Welsh Ministers in relation to the water and sewerage industries with the geographic boundary of Wales, would have significant implications – including for the management of water resources; the potential impact on the stability of the regulatory regime for the statutory water and sewerage undertakers; investment and asset management; and the inter-dependence of the cross-border water and sewerage industries'.*

The Welsh Government said: *'We want .....this competence[on water] extended to the geographical boundary with England in line with the legislative competence for other Acts of the Assembly. In addition to removing these Exceptions, we seek to secure new legislative competence for the Assembly in relation to sewerage. This would complement the Assembly's broad competence in relation to water and other environmental matters. We wish to ensure that legislative competence for sewerage extends up to the geographical boundary with England. We also propose removal of the existing Secretary of State unilateral intervention power in the case of functions relating to water. There is an important interdependency between Wales and England in terms of water resource management, water supply and water quality. We consider that any concerns about potential adverse impact in England in relation to these matters would be more appropriately addressed through inter-governmental mechanisms that set out the basis for cooperation and joint working between the respective Governments'.*



Dŵr Cymru/Welsh Water said: *'The view of Dŵr Cymru is that there is a need to rationalise those powers devolved to the Welsh Government. At present, Schedule 7 of the Government of Wales Act 2006 does not provide legislative competence to the Assembly in all areas of the water industry - for example, there is no competence in respect of sewerage issues. This creates needless complexity and in practice severely limits the practical scope of those powers granted in respect of clearly connected areas of competence (for example, water supply, water resource management (including reservoirs), water quality and representation of consumers of water and sewerage services). There is no obvious logic in the way in which power in some of these areas have been devolved, and in others they have not. The need to resolve this issue is urgent, since as matters stand, the Assembly will pass a legislative competence order in respect of some significant sections of the draft Water Bill, where others will automatically apply in Wales if passed by the UK Parliament'*.

Dee Valley Water (DVW) said: *'There are also potential cross-border issues that could adversely affect DVW in particular; having such high proportions of its customers on each side of the border (60% Wales and 40% England). There is also the prospect that, for policies based on national rather than the company boundary, DVW will be subject to the increased complexity of applying different policies and rules to its customers depending on which side of the border they are'*.

We also often heard in our public meetings that Wales should exploit its water resources more effectively.

### Assessment

- 8.3.7 The water industry is privatised in England and Wales. Water and sewerage issues in England and Wales are complex, particularly in relation to cross-border issues, reflecting the fact that river basins cross geographic boundaries. As in all matters, we are conscious that our task was to consider how the constitutional arrangements could be modified to allow the interests of the people of Wales to be better served. Wales is an exporter of water. We believe that the importance of water policy will grow and that, as the evidence suggests, it will be important that Wales exploits its water resources.<sup>74</sup> We make recommendations that we believe will be in the interest of consumers and will lead to effective arrangements in the future.
- 8.3.8 Based on our principles of subsidiarity, accountability and coherence, we believe the presumption should be in favour of aligning respective competences with the geographic border. The legislative authority of UK Ministers over water undertakers in parts of Wales is anomalous, and there is a particular problem that some citizens in England (customers of Dŵr Cymru/Welsh Water and Dee Valley Water) are subject to Welsh legislation, something on which they have no representative voice – a concern mentioned to us by a number of English Members of Parliament.<sup>75</sup>

<sup>74</sup> The Holtham Commission argued against introducing a Welsh water tax. But with increasing water shortages in the south-east of England, the scope for developing the export industry further may increase over time.

<sup>75</sup> Welsh customers of English companies are represented by their MPs. Welsh customers of Welsh companies are represented by their AMs.



- 8.3.9 At the same time there is clear evidence that water issues also need to be considered on an inter-governmental and river basin basis. Appointing different water undertakers on the two sides of the border where infrastructure is shared might be difficult, and there is also a potential downside if the administrative border cut across the operations of a single water undertaker. The undertakers told us that it would be possible for them to operate under different regulatory arrangements on the two sides of the border, but that there would be a degree of complexity.
- 8.3.10 There is clearly a balance of considerations here. In order to inform our assessment we asked Ofwat for information on costs arising from aligning the boundary of responsibility with the national border. In their response, they told us that there would be some administrative costs for companies in isolating costs incurred in serving Welsh customers and those for English customers. They suggested that these administrative costs could be between about £700,000 and £1.6 million over ten years.
- 8.3.11 On the costs to customers arising from different policies or regulations set by Governments either side of the border, they said:
- 'Customer charges in the water sector generally have a regional character in that they are largely 'averaged' across all customers in each company's area. This means that if costs and price controls are separated across different groups of customers (in this scenario retail costs that had been averaged across customers would need to be split between customers in Wales and customers in England) then this can lead to changes in the charges customers face because different amounts of that company's total retail costs would be averaged across different groups of customers.'*
- 'The extent of any subsequent increase or fall in customers' bills would depend upon the scale of any change and given that retail costs generally make up a small proportion of customer bills we would envisage that any such incidence effects are likely to be very minor.'*
- 8.3.12 Ofwat also noted that there could be some benefits from companies better understanding their costs and customers through alignment of the boundary, though these were not likely to be material. However, Ofwat also stressed that their response was based on indicative estimates and that more robust estimates would require extensive further work in conjunction with the relevant companies.
- 8.3.13 In the light of the evidence we have received, we conclude that the administrative boundary should define the limit of Welsh Government competence. However the interests of both English and Welsh consumers and suppliers are also important. We would like to see more work done cooperatively between the two Governments (including examining the two statutory Exceptions) so that the National Assembly and Welsh Government can make decisions on water inside Wales, and the UK Parliament and UK Government makes those decisions in respect of England, but that the interests of consumers are protected. A formal intergovernmental protocol on water would also be necessary to deal with any cross-border issues.
- 8.3.14 In relation to sewerage, no strong arguments have been put forward for maintaining the status quo. It is unclear why legislative competence in relation to sewerage was not devolved as in Scotland and Northern Ireland and made subject to the same restrictions as water. The evidence clearly points towards devolution in order to promote coherence and reduce complexity. We therefore believe that there is a strong case for powers relating to sewerage to be devolved.

8.3.15 The powers of intervention of the Secretary of State are also anomalous. In principle, it seems unjust for any Minister to be able to overrule the wishes of an elected body or Minister of a different administration without means of redress or challenge. The formal intergovernmental protocol in relation to water we recommend should include protection of the rights of English consumers of water from Wales and vice versa. The Secretary of State's powers of intervention should be replaced by a mechanism for dispute resolution within the protocol.

### Costs

8.3.16 The Welsh Government does not envisage any significant public sector cost implications associated with the devolution of sewerage policy and of licensing for water and sewerage. The majority of costs associated with sewerage management are met through the water industry and it is unlikely that this would change as a result of devolving this policy area fully to the National Assembly.

8.3.17 There would be some administrative costs, for both the Welsh and UK Governments and for the industry, as a result of changes to devolved responsibilities. The Welsh Government told us that it intended to progress work with the water industry and regulatory bodies to understand the practical issues that would need to be addressed were the devolution boundary to be changed. Ahead of this it is not possible to be precise, but the Welsh Government does not expect a significant permanent increase in the number of officials in its existing water team.

8.3.18 To conclude, subject to the outcome of the further work on the boundary issue that we have proposed, our proposals should not involve material costs.

### Recommendation

R.16 On water, we recommend:

- a. powers over sewerage should be devolved to the National Assembly for Wales;
- b. the boundary for legislative competence for water should be aligned with the national border. We recognise the need for further consideration of the practical implications of alignment, with particular regard for the interests of consumers, and involving the regulator, consumer representatives, water companies and both Governments;
- c. a formal intergovernmental protocol should be established in relation to cross-border issues; and
- d. the Secretary of State's existing legislative and executive powers of intervention in relation to water should be removed in favour of mechanisms under the intergovernmental protocol.



## 8.4 CROWN ESTATE

### *Current position*

- 8.4.1 The Crown Estate is land and property that belongs to the reigning Monarch 'in right of the Crown' but is not the private property of the Monarch. The term is also used for the body that administers the Estate. This administrative body was established under the Crown Estate Act 1961 and is a trust estate, independent of the government and the Monarch. It has a public function to 'invest in and manage certain property assets belonging to the Monarch' and remit its revenue surplus each year to the United Kingdom Consolidated Fund. For management purposes the estate is divided into four business groups: urban, marine, rural and Windsor.
- 8.4.2 HM Treasury is the Crown Estate's sponsor department with the Economic Secretary as its sponsoring Minister. The Crown Estate is led and directed by its board of eight Commissioners. The board includes a member who represents Scotland, but no other part of the United Kingdom is specifically represented. The Scottish Government is consulted on the appointment of the member representing Scotland.
- 8.4.3 Wales accounts for a relatively small percentage of the value of the Crown Estates portfolio – about 1.8 per cent. It also accounts for a relatively small percentage of its revenue – only 2.6 per cent in 2012-13, or £8.6m. This was an increase of about a quarter from 2011-12. The level of investment of the Crown Estate in Wales varies greatly from year to year – in 2012-13 it was £1.6million, while in 2011-12 it was £84.3million.<sup>76</sup>
- 8.4.4 Wales benefits from the Coastal Communities Fund, which re-invests half of the revenue from Welsh marine activities, around £1.15 million a year, in Wales.
- 8.4.5 There is a Memorandum of Understanding (MOU) between the Welsh Government and the Crown Estate governing the relationship between them and the role of the Crown Estate in Wales.

#### **Box 8.4: Evidence on the Crown Estate**

The Welsh Government said: *'Welsh Ministers should have a right of consultation in respect of a Crown Estates Commissioner with special responsibility for Wales'*.

Dr Richard Cowell, Cardiff University suggested *'bringing ownership of the Crown Estate in Wales to the Welsh Government might enable a better quality of debate about the kind of off-shore renewable energy development pathway that is appropriate for Wales, and open up discussion on how the royalties from resource exploitation should be best invested'*.

The Parliament for Wales Campaign said: *'The devolution of the Crown Estates has previously been mentioned by Assembly Members and we suggest that this is examined as a future potential income source'*.

Abergele Town Council raised the Crown Estate, and the question of escheat as it related to a derelict property: *'The present position is most unsatisfactory. There may be a case for devolving this "complex and arcane area of our property and constitutional law" to the Welsh Government. This present position is not an option'*.

<sup>76</sup> The Crown Estate (2013) *Wales Highlights*.

Sovereign Wales suggested 'The Welsh Government and authorities should work constructively with the Crown Estate in order to facilitate a smooth transition of [the Crown Estate's] rights back to Wales. This will mean that Wales will have better prosperity through owning the rights to fishing, mining, gas and oil exploration, tidal and offshore wave and wind farms, gold and silver, and all other renewable and non-renewable energies and resources found within the designated territorial waters and borders of Wales. These are normal, basic internationally recognised laws and civic rights of any nation, as defined by the 1982 United Nations Convention on the law of the sea and within International Law and UN charter'.

### Assessment

- 8.4.6 We did not receive widespread evidence calling for the transfer of ownership of the Crown Estate in Wales to the Welsh Government. The Calman Commission noted the benefits derived by Scotland from being part of a much wider and more profitable Estate and this argument also applies to Wales.
- 8.4.7 The Crown Estate already benefits Wales - the Coastal Community Fund is an example. It could, however, do more, for example, by encouraging investment in the Welsh supply chain, particularly when it is developing offshore energy.
- 8.4.8 This strengthens the argument that the arrangement for Scotland's representation on the Crown Estate Commissioner's board should be replicated for Wales.
- 8.4.9 As with the Scottish member on the Crown Estate board, it is appropriate that the Welsh Government should be formally consulted on the appointment of the Welsh Commissioner.
- 8.4.10 There is a case for a Crown Estate office being established in Wales, subject to normal value-for-money criteria, in order to promote and develop the role of the Crown Estate for the benefit of Wales. Additionally, the existing memorandum between the Crown Estate and Welsh Government should be published and updated regularly.

### Recommendation

R.17 On the Crown Estate, we recommend:

- a. there should be a Welsh Crown Estate Commissioner appointed in consultation with the Welsh Government;
- b. a Crown Estate office should be established in Wales, subject to normal value-for-money criteria, to promote the development of the Crown Estate for the benefit of Wales;
- c. the existing memorandum between the Crown Estate and Welsh Government should be published and regularly updated; and
- d. emphasis should be given by the Crown Estate to the Welsh supply chain, especially in developing offshore energy in Wales.



## 8.5 MARINE CONSERVATION

### Current position

- 8.5.1 The Welsh Government suggested that the existing executive responsibilities of Welsh Ministers for marine conservation and licensing in the Welsh inshore area should be extended to the Welsh offshore area.

#### Box 8.5: Evidence on marine conservation

The Welsh Government said: *'The Welsh Ministers already have executive responsibilities for marine conservation, including marine protected sites, and marine licensing in the Welsh inshore area. These responsibilities should be extended to the Welsh offshore area. This would allow the Welsh Ministers, who are the marine planning authority under the Marine and Coastal Act 2009 for both the Welsh inshore and offshore areas, to plan for and manage the whole of Welsh seas more coherently, including fisheries in the offshore for which the Welsh Ministers are already responsible'*.

### Assessment

- 8.5.2 We agree that the existing executive responsibilities of Welsh Ministers for marine conservation and licensing in the Welsh inshore area should be extended to the Welsh offshore area. This would fit well with our principles of coherence and accountability.

#### Recommendation

- R.18 The existing executive responsibilities of Welsh Ministers for marine conservation and licensing in the Welsh inshore area should be extended to the Welsh offshore area.

## 8.6 SUMMARY

- 8.6.1 On energy, all energy planning consents (non-renewable and renewable) below 350MW should be devolved. The UK Government should have a statutory obligation to take account of Welsh planning policies when exercising its retained responsibilities for larger projects. The system of associated development consents should be aligned with consenting powers to avoid unnecessary complexity in the context of greater devolution of the consenting regime. Responsibility for issuing marine licences in Welsh offshore waters should be devolved. The Welsh Government should receive parity with Scotland and Northern Ireland for the proposed Contracts for Difference from 2017.
- 8.6.2 On water, the boundary for legislative competence should be aligned with the national border, with further work to assess costs and benefits for consumers and the industry. The Secretary of State's intervention powers in relation to water should be removed in favour of a formal intergovernmental protocol. Powers over sewerage should be devolved to the National Assembly.

- 8.6.3 On the Crown Estate, a Welsh Crown Estate Commissioner for Wales should be appointed, in consultation with the Welsh Government. To maximise the potential for investment in Wales, the Commissioner should be supported by a Crown Estate office in Wales, subject to meeting value-for-money criteria.
- 8.6.4 The existing executive responsibilities of Welsh Ministers for marine conservation and licensing in the Welsh inshore area should be extended to the Welsh offshore area.



# Chapter 9 – Broadcasting

## 9.1 OVERVIEW

- 9.1.1 In this chapter we set out the current arrangements in relation to broadcasting, outline the evidence presented to us, and use our principles to assess whether there should be any changes in this area.

## 9.2 CURRENT POSITION

- 9.2.1 Broadcasting is not devolved to the National Assembly for Wales and Welsh Ministers do not have any executive powers in the area of broadcasting. The Welsh Government does, however, use its economic development powers to fund local radio. Funding and oversight of the BBC and the funding of S4C are all non-devolved subjects. There is no requirement for broadcasters to report on performance to the Welsh Government or National Assembly.

### **BBC**

- 9.2.2 The BBC is funded through the UK-wide licence fee and governed by the BBC Trust. The Trust is responsible for setting the BBC's strategy, reviewing its performance, protecting the BBC's independence and monitoring its spending of the licence fee. It is comprised of twelve Trustees, including four National Trustees who represent England, Scotland, Wales and Northern Ireland. All Trustees are appointed by the Queen on advice from UK Government Ministers.
- 9.2.3 The BBC in Wales is responsive to its audience through the Audience Council for Wales. The Council's task is to gauge the views of the Welsh public on the BBC, and it reports to the BBC Trust on the concerns and opinions of audiences in Wales on the BBC's services. There are thirteen members of the Council, and it is chaired by the BBC's National Trustee for Wales.

### **S4C**

- 9.2.4 S4C (Sianel Pedwar Cymru - Channel Four Wales) was launched in 1982 to provide a dedicated channel for Welsh language broadcasting and it now broadcasts entirely in Welsh. Its strategic policy is the responsibility of the S4C Authority. The Secretary of State for Culture, Media and Sport is responsible for appointing S4C Authority members, in consultation with Welsh Government Ministers and following open competition.
- 9.2.5 Since 2010, the primary source of funding for S4C is from the BBC licence fee (£76.3 million in 2013-14). It is also supported by a grant from the UK Government's Department for Culture, Media and Sport (DCMS) (£6.56 million in 2013-14) and by advertising revenue. Under section 31 of the Public Bodies Act 2011, the UK Government has a responsibility to 'secure that' S4C receives sufficient funding for its public service obligation. That can be done either by direct funding or through arrangements with another party (the BBC at present).

## Ofcom

- 9.2.6 Ofcom is an independent body responsible for the regulation of communications across the United Kingdom, including the television and radio sectors as well as telecommunications. It operates under the Communications Act 2003 and is accountable to the UK Parliament. Ofcom is funded by fees from the communications industry and by a grant-in-aid from the UK Government.
- 9.2.7 Ofcom has an office in each nation of the United Kingdom, headed by a Director, who is a member of Ofcom's Senior Management Group. The offices are responsible for managing communications with the public and stakeholders, dealing with aspects of Ofcom's remit and providing input and advice on national issues to Ofcom policy and project teams.
- 9.2.8 As well as a national office, Wales also has representation on Ofcom's Content Board and has its own Advisory Committee. The Committee advises Ofcom about the interests and opinions of Welsh citizens in relation to communications matters.

### Box 9.1: Evidence on broadcasting

In our opinion poll 58 per cent said that broadcasting and media regulation should be devolved. In our questionnaires, 60 per cent thought broadcasting should be devolved.

In its evidence, the UK Government stated that *'there are good reasons why broadcasting was not devolved in the devolution settlements and there is no evidence to suggest that devolution of broadcasting policy or a different approach to funding the BBC would benefit licence fee payers'*. It noted that *'the Public Bodies Act 2011 makes clear that the Secretary of State must ensure S4C has sufficient funding to carry out its public remit. The UK Government considers therefore that S4C's interests are appropriately safeguarded'*.

The Welsh Government stated that it *'does not agree with those who argue that, within this field, Broadcasting should now be devolved'*. However, it argued that *'the appointment of the Welsh member of the BBC Trust, and also the Chair and members of the S4C Authority, should be made only with the agreement of the Welsh Ministers'*. In relation to Ofcom, the Welsh Government recognised *'the important role to be played by Ofcom in the regulation of broadcasting, we also believe that it is essential that the Ofcom Board should feature one member specifically charged with representing the views of Welsh citizens, and that this member should also be appointed with the agreement of Welsh Ministers'*. On the issue of devolution of broadcasting, it noted that *'a number of complex issues would need to be considered and addressed were the policy area to be devolved from a pan-UK basis. The assurance and guarantee of sufficient funding, operational and editorial independence, and a strong foundation from which to be able to operate competitively, ought therefore to be central questions in the consideration of where and by whom broadcasting in Wales is regulated'*.

Elan Closs Stephens (Trustee for Wales, BBC Trust) noted *'that it is essential that we keep members of Parliaments and Assemblies in the UK well informed about the Trust's work and will continue to meet Assembly Members regularly to do so. The BBC has a strong relationship with the Assembly, the Government of Wales and individual Members. In July 2008 the Trust approved a supply strategy for network television outside London, which included specific references to the devolved nations, in order to*



*ensure: Cultural representation of the whole UK; Appropriate economic investment in the Nations and Regions of the UK; Sustainability of supply across the whole of the UK. It is important to mention that the Trust monitors the implementation of the strategy regularly and it publishes figures on progress each year in the BBC Annual Report'.<sup>77</sup>*

*S4C stated that the 'devolution of broadcasting – regulation, accountability, governance and funding – is not a decision for S4C'. It did, however, note that 'assurance and guarantee of sufficient funding, operational and editorial independence, and a strong foundation from which to be able to operate competitively, ought therefore to be central questions in the consideration of where and by whom broadcasting in Wales is regulated'.*

*The Centre for the Study of Media and Culture in Small Nations, University of South Wales stated that 'it would be in the nation's best interest if Wales' voice was strengthened within the existing regulatory framework for broadcasting'. It put forward a number of recommendations including that the 'BBC National Trustee for Wales should be appointed with the approval of the Welsh Government as is the case in Scotland', 'the Welsh Government should be responsible for setting S4C's future remit and appointing the Chair and members of the S4C Authority' and that 'the additional funding which the DCMS currently spends on S4C (about £7m) should be transferred to the Welsh Government to allocate to the channel'. It also added that 'the Ofcom Advisory Committee for Wales should have greater powers, including the responsibility to create a separate Channel 3 licence for Wales and local radio licences', 'the Committee should be appointed by the Welsh Government and the appointment process should include public hearings held by the National Assembly for Wales', and 'the Committee's Chair should also serve as the representative for Wales on the main Ofcom board'.*

*The UK's Changing Union project argued that 'full responsibility for S4C should be transferred to the National Assembly for Wales and the Welsh Government, with the relevant Welsh minister responsible for appointing the Chair and members of the S4C Authority; the Welsh member of the BBC Trust should be a joint appointment by the Welsh minister and DCMS; National Broadcasting Trusts should replace the BBC's Audience Councils in the devolved nations and should have responsibility for policy, content and allocation of resources for all services delivered solely for audiences in their respective countries; Welsh ministers should appoint representatives to the main board of Ofcom; and responsibility for local and community radio policy and licensing should be handed to a renamed Ofcom Advisory Committee for Wales'.*

*The UK's Changing Union: Our Future submission states that 'we would recommend that the Commission explores the practicality of a devolved S4C having a separate royal charter (along the BBC's lines)'.*

*Cymdeithas yr Iaith Gymraeg's view was 'To devolve power over broadcasting and telecommunications to the National Assembly to ensure that the expertise and ability to make the right decisions over the future of broadcasting in Wales'. It also called for 'the federalisation of the BBC' and stated that 'the BBC Wales trust should be appointed by the National Assembly for Wales'. Cymdeithas yr Iaith Gymraeg also supported 'the transfer of the right to license radio and television services to the National Assembly for*

<sup>77</sup> The management of the BBC declined to give evidence.

*Wales which would include local radio and television and a new licence on a Welsh level to the third commercial radio station'. It also stated that 'the National Assembly for Wales should be given power to impose Welsh language conditions upon local radio and television licences and that the powers of the National Assembly for Wales should be broadened to impose a duty to provide Welsh language service on all media'. Cymdeithas yr Iaith Gymraeg also argued for 'the devolution of the S4C budget to the National Assembly for Wales along with the legislative powers that would allow a funding formula to be established'. Additionally it wished to see 'the National Assembly with the power to broaden the remit of S4C to include provisions of Welsh language services to all media'.*

*Lord Morris of Aberavon told us that he did 'not see how the Assembly can carry out its existing legislative competence for the Welsh language properly without a significant involvement in broadcasting'.*

*The National Union of Journalists noted that the 'current system of scrutiny of S4C - and the Welsh media in general - has proven woefully ineffective' and called upon the Welsh Government to 'hold its own public review into the future of Welsh language broadcasting and the impact the UK Government's proposals regarding S4C will have upon the Welsh language, our society and our culture'. It also submitted a number of recommendations including calling for 'Welsh representation on the Ofcom board', 'increased independence, openness and accountability of broadcasting authorities at the BBC and S4C' and arranging for 'accurate statistical data to be assembled on the current state of the Welsh media'.*

*The Writers Guild of Great Britain argued that 'the devolved administration in Wales should not be prevented from exercising responsibility for broadcasting and the media. The DCMS should relinquish responsibility for S4C to the Welsh Government along with the £7 million budget, ring-fenced into the future'.*

*Equity Wales stated that it did not 'believe that Broadcasting should be devolved but there needs to be input and monitoring from the Welsh Government into how the broadcast industry serves Wales'.*

*The Broadcasting Entertainment Cinematograph and Theatre Union believed 'that S4C should be an autonomous, Welsh-run, organisation, accountable to audiences and institutions within Wales'.*

*In his evidence, Professor Thomas O'Malley stated that 'to strengthen the media in Wales it is necessary to bolster the powers and role of public authorities in this area. They should be held democratically accountable to the electorate and have no remit to interfere in programming, but they should have powers to intervene in the market in the interests of sustaining a plural and diverse communications environment in Wales'.*



### 9.3 ASSESSMENT

- 9.3.1 Neither the Welsh Government nor the UK Government wants to see broadcasting as a whole devolved. They cite the importance of broadcasting to a common cultural citizenship across the United Kingdom.
- 9.3.2 In terms of performance, outputs and outcomes, broadcasting plays an important role in Welsh life and culture in both languages – providing news, sport and entertainment for its various audiences that reflect and explore the communities of Wales and the wider United Kingdom. It can also set Wales and the United Kingdom within wider global contexts and in turn bring international news, analysis and perspectives to Wales. Welsh language broadcasting has a key role in sustaining the Welsh language. Broadcasting is also important to the Welsh economy. For example, the recent expansion of BBC production capacity in Cardiff Bay has been economically significant.
- 9.3.3 Most of our evidence suggests that the National Assembly and the Welsh Government should take an enhanced role in broadcasting. In this, the evidence is broadly in accord with the analysis of the Richard Commission, with the Calman Commission making similar points in respect of Scotland.
- 9.3.4 In terms of our devolution principles, we do not believe that there is a case to devolve the regulation of broadcasting. A fragmented approach to regulation would neither be more efficient nor fair; and it would not improve accountability given the UK-wide nature of the broadcasting market.
- 9.3.5 Some evidence advocated the federalisation of Ofcom. We acknowledge that Ofcom through its office in Wales and the Advisory Committee for Wales does take account of the views and comments of the Welsh public and representative organisations in the development of Ofcom policies at a United Kingdom level. However, we believe that Welsh input could be strengthened further by ensuring that Wales is represented on the Ofcom board. This should be through either a specific Board member for Wales or by designating responsibility for Wales to an existing Board member's portfolio.
- 9.3.6 There has been an on-going discussion since the Richard Commission about how the National Assembly is able to influence and hold to account public bodies working in non-devolved areas that impact on the responsibilities of the National Assembly. In the case of public service broadcasters, we believe that this can best be addressed by improving governance and intergovernmental cooperation.
- 9.3.7 Some evidence advocated a federalisation of the BBC. While this does not appear to be the majority view in Wales, the Welsh element of BBC governance should be strengthened. The Welsh Government, amongst others, argued for the UK Government to seek formal agreement of Welsh Ministers in the appointment of the Trustee for Wales. This would bring Wales in line with Scotland.
- 9.3.8 Given the unique importance of the BBC outputs in Wales, we also believe that the UK Government should make provision for a devolved Trust (replacing the Wales Audience Council) within the United Kingdom Trust framework, with responsibility for oversight and scrutiny of the policy, content and allocation of resources in Wales. A similar arrangement should be made if the BBC Trust is replaced in the future by a different model of governance.

- 9.3.9 There is also an argument that the Welsh Government should have more of a role to play in appointments to the S4C Authority. We believe that the appointments to the Authority should only be made with Welsh Government agreement.
- 9.3.10 In terms of our devolution principles, it is anomalous that the power to fund S4C public service broadcasting lies with the UK Government rather than the Welsh Government. We do not believe that this can be justified against our principles of accountability, subsidiarity and efficiency. For the present, the funding issue has been in effect resolved by the removal of responsibility for most of the funding from the DCMS to the BBC. However, it is not clear what will happen to funding after March 2017. Assuming the current arrangements will be rolled forward in 2017, responsibility for S4C could then be devolved with a transfer of the residual DCMS budget and associated administration costs to the Welsh Government. There would be little financial risk in so doing. We recognise that it would be important to retain the current regulatory arrangements, including the arm's length independence of S4C: editorial independence must not be imperilled.
- 9.3.11 More generally, we believe that public service broadcasters of specific content to Wales should be accountable to the National Assembly in the same way as they are at a United Kingdom level to the UK Parliament. For example, they should provide an annual report on performance to the National Assembly, including more transparent data on trends in Welsh broadcasting output. However, editorial independence must not be endangered in any way, and broadcasters should not be accountable to the National Assembly on matters of content.
- 9.3.12 The BBC and S4C are not the only public service broadcasters. The commercially-run ITV and Channels 4 and 5 also have public service obligations. In the case of ITV, the recent decision to award a Wales franchise is welcome, as is ITV's existing Welsh coverage. Channels 4 and 5 have little or no discernible Welsh output.
- 9.3.13 There are also a wide range of wholly commercial undertakings that broadcast in Wales on radio or television. Whether or not they respond to Welsh needs is a matter of their commercial judgment, and we heard from witnesses there is intense pressure in radio, especially with the switchover to digital, which can have the effect of minimising local content. Across the whole sector there was concern from our witnesses that, in a multi-channel world and where television is under pressure from the internet, there is an increasing risk of a decline in the Welsh content of broadcasting in both languages. It is important that the regulatory framework around broadcasting seeks to mitigate this risk, and our recommendations about strengthening the Welsh representation on Ofcom and strengthening accountability within the BBC Trust framework are aimed in part at addressing that issue. In addition, we hope the National Assembly and Welsh Government will actively and publicly monitor developments in this field and will consider what interventions might be appropriate.



## 9.4 COSTS

- 9.4.1 In its evidence, the Welsh Government told us that, if devolution were to be proposed, then a detailed analysis would need to be undertaken of every element of the DCMS's role in relation to S4C. This includes the likely administrative costs for appointing Members to the S4C Authority as well as receiving S4C's Annual Report and the obligations involved with this. The Welsh Government also told us that the statutory duty of the Secretary of State for Culture, Media and Sport under the Public Bodies Act 2011 to ensure that S4C receives a "sufficient" amount to enable it to fulfil its remit and provide its public services would need to be taken into account if any transfer of grant were to be proposed in future.
- 9.4.2 The UK Government told us that the DCMS will maintain S4C's £6.787million funding into 2015/16. It notes that there are currently no plans or estimates in place for what will happen to S4C's exchequer funding should the decision be taken to devolve this responsibility to the Welsh Government.
- 9.4.3 While we recognise the need for further work on the details of costs, we do not think that our recommendations involve material additional costs, provided there is a fair transfer of the public expenditure element of S4C funding (with clarity on the future non-public expenditure funding framework) and associated DCMS administration costs.

### Recommendations

- R.19 The regulation of broadcasting should remain the responsibility of the UK Government.
- R.20 On the BBC, we recommend:
- a. the creation of a devolved governance body within the UK Trust framework with powers to provide oversight and scrutiny of BBC outputs in Wales; and
  - b. the appointment of the representative of Wales to the overall BBC governance body (currently the BBC Trust) should be by formal agreement between the Welsh and UK Governments.
- R.21 On S4C, we recommend:
- a. within the framework that the bulk of funding should continue to be met from the licence fee, responsibility for funding the public expenditure element of S4C should be devolved to the National Assembly for Wales; and
  - b. in the meantime the appointment of the S4C Authority members by the UK Government should require Welsh Government agreement.
- R.22 The interests of Wales should be represented on the Ofcom board through a board member with specific responsibility for representing Wales.
- R.23 Public service broadcasters of specific content to Wales should provide an annual report on performance to the National Assembly for Wales, including more transparent data on trends in Welsh broadcasting output.

## **9.5 SUMMARY**

- 9.5.1 Regulation of broadcasting should remain the responsibility of the UK Government.
- 9.5.2 On the BBC, we recommend the creation of a devolved governance body within the UK Trust framework. This body should provide oversight and scrutiny of BBC outputs in Wales. The appointment of a Wales representative to the overall BBC governance body should be made through agreement between the Welsh and UK Governments.
- 9.5.3 Whilst the bulk of funding for S4C should continue to be met through the licence fee, responsibility for the public expenditure element that comes direct from government should be devolved to the National Assembly.
- 9.5.4 We also make recommendations on the representation of Welsh interests on the Ofcom board and suggest ways of more effective monitoring of progress in public service broadcasting in Wales.



# Chapter 10 – Policing and justice

## 10.1 OVERVIEW

10.1.1 In this chapter we set out the current arrangements in relation to policing and justice, outline the evidence presented to us and use our principles to assess whether there should be any changes in this area.

## 10.2 POLICING

### *Current position*

- 10.2.1 Policing is non-devolved. There are four police force areas in Wales: North Wales, Dyfed-Powys, Gwent and South Wales. Following the Police Reform and Social Responsibility Act 2011, each police force area now has a directly-elected Police and Crime Commissioner (PCC), who holds the police to account on behalf of the population of the area which they serve. The PCCs replaced Police Authorities, and they represent a substantial decentralisation from the Home Office, reversing a previous trend towards centralisation.<sup>78</sup> The Home Secretary nevertheless retains wide powers and is responsible for the legislative framework, for overall funding and for setting the strategic policing requirement.
- 10.2.2 Police forces interact with a number of devolved services. Health, housing, education and highways policy all have a direct bearing on police work, and what the police does has implications for these areas of devolved public policy. As an emergency service, the police forces also work closely with the devolved fire and ambulance services. Partnership working in Wales has meant that the police participate in Welsh Government-led initiatives, such as Local Service Boards, which exist for each of the 22 local authority areas. The Commission on Public Service Governance and Delivery, chaired by Sir Paul Williams,<sup>79</sup> has considered the role the police play in public services leadership in Wales.
- 10.2.3 In addition to service-level engagement, the police forces engage directly with the Welsh Government, despite the absence of formal accountability arrangements. For example, the four Chief Constables attended a meeting of the Welsh Government Cabinet in 2012. We understand that there are regular meetings between the PCCs and Welsh Ministers, as there are between senior police officers and officials of the Welsh Government.

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<sup>78</sup> See, for example Chris A Williams (2003) *Britain's police forces: forever removed from democratic control?* at [Historyandpolicy.org](http://Historyandpolicy.org)

<sup>79</sup> This Commission is entirely separate from ours, although there are some common themes such as the need to improve scrutiny and comparative performance data. We have held two very useful meetings with members of Sir Paul's Commission. It has been of great value that Lord Bourne is a member of both Commissions.

### **Box 10.1: Evidence on policing**

Our opinion poll showed that 63 per cent were in favour of the National Assembly and Welsh Government having responsibility for policing in Wales. A plurality of respondents (48 per cent) believed that policing was already devolved in Wales. In our questionnaires, around 58 per cent were in favour of devolution.

The UK Government said: *'Overall, the current arrangements work well. There are four key points to bear in mind in considering the devolution boundary for policing:*

*...Policing is inextricably linked with the criminal justice system*

*...Existing governance and partnership arrangements provide a significant level of integration and autonomy*

*...There are cost and complexity issues with separating out national structures and arrangements*

*...The Strategic Policing Requirement and the management of national threats'.<sup>80</sup>*

The Welsh Government said: *'We propose that the Assembly should have legislative responsibility for policing, by which we mean the governance and administration of the police service in Wales. We are also seeking legislative powers in relation to community safety and crime prevention, where there is extensive overlap with the functions of devolved services - notably local government, the NHS and the fire and rescue service.... we regard the Police as essentially a service working principally within the criminal justice system alongside other services devolved and non-devolved, and already organised very much on a territorial basis within Wales'.*

Winston Roddick QC, PCC for North Wales said: *'For the people of Wales, who should be the central consideration for the commission on devolution, the benefits of devolving the police service would be overwhelmingly positive'.*

Ian Johnson, PCC for Gwent said that *'any proposals to change the current arrangements must evidence what the benefits for the people of Wales would be under any revised governance arrangements. Only if any new arrangements can be shown to add value to the current position should they be considered'.*

Christopher Salmon, PCC for Dyfed-Powys said: *'creating divisions in this system would do nothing for justice and a great deal for criminals. If the decision was taken to devolve policing and criminal justice to Cardiff, all that would happen is that money would need to be re-routed via Cardiff, adding expense, confusion and complication in layers of bureaucracy'.*

Alun Michael, PCC for South Wales, said: *'I agree that it makes sense to devolve responsibility for policing. It will bring together the responsibilities that fit together and enable a joined up approach to be taken to crime reduction and the building of healthy communities – two key purposes of democratic government which ought to sit together'.*

<sup>80</sup> The Home Office declined to give oral evidence and were unable to provide further written evidence, beyond costs information, in time.



The Police Federation of England and Wales said they *'maintain that... devolving policing to Wales could be achieved. Should Government in Westminster and Cardiff agree to devolve policing powers to Wales, the Police Federation of England and Wales would fully support them to achieve this transition of governance to uphold the best traditions of British policing'*.

The Association of Chief Police Officers (ACPO) Wales said: *'there is a need to maintain cross-border services relations and interoperability if devolution were to occur'*. Giving oral evidence on their behalf, Chief Constable Peter Vaughan confirmed that they supported devolution of policing.

The former Chief Constable of Gwent Police said: *'The transfer of policing from Parliament to the National Assembly for Wales should be supported subject to a full and robust option appraisal. The devolution of policing must result in added value and an improved service to the people of Wales'*.

The Superintendents Association said: *'The key issue for us is whether the proposed devolution of power and control will provide an improved service and would it be fully funded?...For effective improvements, process re-engineering should examine the criminal justice system process from initial police involvement through to Courts proceedings and beyond...The short term devolution of policing would increase costs significantly – re-organisation of any kind is never without cost and in the current austerity climate this would be a challenging case to prove. In the medium to long term, the effective alignment of processes could potentially release efficiencies and save longer term policing costs'*.

The Welsh Local Government Association said: *'It is believed that at some point in the future, the devolution of policing may be required to ensure that policing in Wales can develop in line with priorities set by the Welsh Government for police forces and other key public sector partners, the majority of which are already devolved, and with the overall aim of creating safer communities... Devolution of policing should not lead to increased costs however a full financial impact assessment would need to be carried out in identifying any financial implications and potential risks'*.

Dr Timothy Brain, Senior Honorary Research Fellow, Universities' Police Science Institute Cardiff, said: *'While acknowledging the risks, the close alignment of policing and community safety under the Welsh Government would be a major advantage, while increased accountability and transparency would enhance public confidence in policing... Devolution is not a panacea, but the principal advantage of devolving policing will be the closeness of political decision-makers to the issues, communities and service providers...There are risks associated with devolving policing, but there are with retaining the status quo. On balance, the benefits outweigh the risks'*.

The UK's Changing Union project said: *'In general there was support for devolution of police powers to the Welsh Government from the majority of agencies and individuals interviewed as part of this research'*.

In its evidence submission, True Wales opposed *'the devolution of crime and policing on the grounds that it will make tackling organised crime and terrorism more difficult to coordinate'*.

## Police Funding

- 10.2.4 Funding arrangements for the police in England and Wales were set out in the Police Act 1996. The police in Wales now get their funding from three main sources – the UK Government (the Home Office); the Welsh Government; and the police precept component of council tax.
- 10.2.5 The distribution of Home Office funding is based on a formula that takes into account local population size and indicators that reflect the likelihood of crime.<sup>81</sup> Additional funding is provided by the Home Office specifically for counter-terrorism policing. In 2012-13, the Home Office's funding for police forces in Wales was £229 million.
- 10.2.6 Funding from the Welsh Government also derives from a statutory requirement.<sup>82</sup> The Welsh Government, with the approval by resolution of the National Assembly, has some discretion over the allocation of funding between the four forces in Wales. In 2012-13, the Welsh Government provided £151 million to the Welsh Police forces, corresponding to funding made by the UK Government's Department for Communities and Local Government for forces in England.<sup>83</sup> The Welsh Government has also provided additional support: for example, it has funded 500 additional community support officers for Wales.
- 10.2.7 In addition there is the local police precept element of council tax. The Welsh Local Government Minister has control over council tax policy in Wales, including whether to cap the precept, which means the Welsh Ministers can influence the level of funding to some extent. The precept provided £221 million in 2012-13.
- 10.2.8 The funding from the two Governments is provided to the Police and Crime Commissioners (and on to police forces) almost entirely without hypothecation: they can use it according to the priorities they have identified for the populations they serve.

## Assessment

- 10.2.9 Some of the evidence we have received supports the view that the present system works well. The statistics on performance<sup>84</sup> and cost per head<sup>85</sup> seem to support this view (although it should be borne in mind that Wales is more rural than much of England):
- in 2011-12 recorded offences per 1,000 population were 63 compared to 71 for England;
  - the detection rate was 35 per cent compared to 28 per cent for England, and was up from 28 per cent in 2002-03; and
  - in terms of fairness, 62 per cent think the criminal justice system in England is fair compared to 65 per cent in Wales; for effectiveness, the figures are 44 per cent and 45 per cent respectively.

<sup>81</sup> The application of the formula to the 2013-14 financial year is set out in *The Police Grant Report (England and Wales) 2013/14*, HC876.

<sup>82</sup> Local Government Finance Act 1988.

<sup>83</sup> Since transferred to the Home Office.

<sup>84</sup> Office for National Statistics (2012) *2011/12 Crime Survey for England and Wales*.

<sup>85</sup> HM Treasury (2013) *Public Expenditure Statistical Analyses*.



- 10.2.10 In terms of spending per head, the England/Scotland/Wales/Northern Ireland figures for 2012-13 are: £248/£241/£237/£493. So Wales has the least costly system, though the costs are similar to the devolved system in Scotland.
- 10.2.11 In addition, many acknowledged the good cooperation between the police and the devolved authorities. We did not hear that the current arrangements are failing.
- 10.2.12 On the other hand, many have argued that devolution of policing would be an improvement on current arrangements. Arguments in favour of devolution came from the Welsh Government, key professional police bodies, and the Chief Constables; only one of the four Police and Crime Commissioners was definitely opposed to devolution, and two were definitely in favour (the fourth gave a neutral view). In addition, in our opinion poll a clear majority of people supported the devolution of policing. The Police Federation of England and Wales agreed with the Welsh Government that policing could be devolved without devolving other parts of the criminal justice system.
- 10.2.13 The argument in favour of devolution was expressed succinctly by the Counsel General in a speech to the Society of Legal Scholars in November 2012:
- ‘There are great advantages in having devolved responsibility for these services. Each part of the UK has its own unique challenges to face in relation to crime, and these are dictated by a number of factors; such as population density, terrain, cultural trends, the structure and organisation of police forces, and many others. By maintaining powers over policing and criminal justice at a more local level, it can be easier for devolved administrations to promote and encourage efficiencies through a restructuring of administrative services within their territorial boundaries while focusing on tackling the crimes which most greatly affect their communities.’*
- 10.2.14 Policing is a public service that is of particular concern to citizens in their daily lives. In that way, it is like health, education and the fire service, all of which are devolved. Policing is in fact one of the few public services that is not devolved in Wales. It is devolved in Scotland and Northern Ireland and is either wholly or partly devolved in most federal systems. Devolution is thus in accordance with our principle of subsidiarity. It is also consistent with our principle of coherence, allowing crime and its causes to be tackled holistically under the overall policy framework of the Welsh Government and National Assembly.
- 10.2.15 Accountability would also be improved by aligning funding and policy responsibility. As suggested by our opinion poll findings, the present arrangements are complex and not transparent. It is also unsatisfactory in accountability terms that much of policing is funded from devolved sources yet strategic police policy is determined in Westminster.
- 10.2.16 We also heard that strategic policing policy tends to be dominated by English metropolitan concerns and that a devolved policy would better reflect Welsh policing circumstances. Devolution would also bring together responsibility for the three emergency services in Wales and allow the development of synergies that might suit Welsh circumstances.
- 10.2.17 We note that the Welsh Government call was for the devolution of the governance and administration of the police. They did not suggest the devolution of legislative competence in respect of police powers such as those of arrest, stop and search, and detention. We consider in Chapter 4 the issue of devolution of the criminal law. But unless and until the criminal law is devolved, devolution of legislative responsibility for policing should sensibly

come with reservations to ensure that the basic principles on which police officers work in Wales and England would remain the same. For example, the subject matter of the Police and Criminal Evidence Act 1984 (PACE) might be reserved.<sup>86</sup> This would ensure that cases being brought before the England and Wales courts would be based on evidence obtained in the same way.

- 10.2.18 The need to ensure on-going cooperation between police forces, and the fact that crime does not observe borders, were often raised with us. We are aware that a large amount of current inter-force cooperation is essentially bilateral, without central government coordination. During our visit to Northern Ireland, we discussed the support available from forces in Great Britain for the security requirements of hosting the G8 summit. We were also told in Scotland of the excellent cross-border cooperation between Scottish and English police forces. We believe that devolution would do nothing to inhibit inter-force cooperation. It would patently be in the interests of both Governments and the communities they serve to ensure excellent cooperation and inter-operability.
- 10.2.19 We do not recommend devolution of matters dealt with at United Kingdom level by the National Crime Agency (NCA), which is responsible for tackling serious and organised crime, fraud, cyber crime, border protection and child exploitation. Cooperation between the police in Wales and the NCA should continue under devolution of policing.
- 10.2.20 While the responsibility for police training, inspections and complaints would be devolved, the Welsh Government may wish to continue to benefit from the expertise held by the National College of Policing, HM Inspectorate of Constabulary, and the Independent Police Complaints Commission rather than duplicate provision. Funding and service-level arrangements would need to be agreed. In this context we understand that the UK Government has already indicated an intention that the National College should become self-funding by charging directly for services provided to police officers and forces.
- 10.2.21 In 2011, the UK Government published a Policing Protocol as a Statutory Instrument<sup>87</sup> under the Police Reform and Social Responsibility Act 2011. This Protocol sets out the relationship between the Police and Crime Commissioners, Chief Constables and the Home Secretary. The Home Secretary retains powers to direct PCCs and Chief Constables as a last resort. If policing were devolved, we envisage that Welsh Ministers would have these powers. The Strategic Policing Requirement in devolved areas would be set by the Welsh Ministers. The Home Secretary would retain the power to deal with matters of national security.<sup>88</sup>
- 10.2.22 We set out in Box 10.2 what devolution of policing might mean in practice for Wales.

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<sup>86</sup> The Police and Criminal Evidence Act 1984 (PACE) sets out the legislative framework for the powers of police officers to combat crime, and their code of practice. This mainly deals with powers of entry and search and the handling of evidence and witnesses or suspects of crime. Equivalent provision is made for Northern Ireland by the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341). The equivalent in Scottish law is the Criminal Procedure (Scotland) Act 2010.

<sup>87</sup> UK Government Home Office (2011) *Policing Protocol Order 2011*.

<sup>88</sup> Areas in Scotland for which legislative responsibility remains with the UK Government include national security, terrorism, and drugs. These would not be devolved in Wales either. The British Transport Police is Great Britain-wide.



### Box 10.2: What devolution of policing would mean for Wales

The National Assembly would have legislative responsibility for the governance and administration of the police service in Wales and in relation to community safety and crime prevention.

The National Assembly would in the future be able to take decisions on issues such as whether there should be Police and Crime Commissioners or a single Welsh police force.<sup>89</sup>

The Welsh police forces would continue to have independent day to day operational responsibility; and inter-operability with other police forces and emergency services would be maintained.

The police service's relationship with the criminal justice system, particularly the courts and Crown Prosecution Service, would also be maintained.

The Welsh Government would need to establish a policing team. The Welsh Government would fund Wales's police forces and determine both the overall amount and the allocation to police forces from within their budget. The block grant would be adjusted, with a transfer of existing resources from the Home Office.

The Welsh Government would also need to ensure there were satisfactory oversight arrangements, both in terms of professional standards and conduct. It would be sensible for Her Majesty's Inspectorate of Constabulary and the Independent Police Complaints Commission to continue to undertake their roles, given their expertise and reputations, and arrangements for this should be agreed between the two Governments. We acknowledge that a Welsh Government could decide to handle these matters differently in the future.

10.2.23 We have considered the four concerns raised by the UK Government very carefully:

- *Is policing inextricably linked with the Criminal Justice System (CJS)?* While we agree that the links between the police and the remainder of the criminal justice system are strong, it is noteworthy that policing and justice responsibilities are held by separate UK Government departments. We will argue later in this chapter that other parts of the criminal justice system might be devolved in the future. But we believe that police devolution does not necessarily need, or imply, wider devolution of criminal justice. We would, of course, expect efforts to achieve efficiency and effectiveness through greater interaction across the criminal justice system to continue (for example, coordinated IT systems).
- *Do the present arrangements provide a significant level of integration and autonomy?* These are desirable characteristics of the present system and should be sustained. Mutual aid and inter-operability arrangements between forces are certainly vital. However, devolution would enable the Welsh Government to maintain existing levels of integration and to develop them further, especially with existing devolved services. Devolution would bring greater autonomy and the opportunity to adapt even better to local needs.

<sup>89</sup> We note the report of the Independent Police Commission (2013), chaired by Lord Stevens, *Policing for a Better Britain*, which explored issues of police structures and governance.

- *Are there cost and complexity issues?* The four police services are contained entirely within Wales. At its simplest, this means that devolution does not necessarily mean organisational change. However, there is currently, and will need to be in future, excellent cooperation across the Wales/England border. We would not advocate breaking up the United Kingdom-wide arrangements, for example, on organised crime. Where there are cross-border economies of scale, such as on procurement, these arrangements could be maintained post devolution. There would be additional Welsh Government civil service costs but there may also be scope for savings, considered further below. Police pensions, the Police College and other areas such as police complaints and independent inspection of policing could continue on an England and Wales basis, and we envisage that an agreement would be reached between the two Governments which ensured continued access to these services on a charging basis, with no net additional cost.
- *Would devolution weaken the existing management of national threats such as organised crime, terrorism and cyber threats?* We see no reason why this should happen. Clearly the management of national threats would remain a high priority for both Governments and we are confident that both would wish to devise suitable cooperation, drawing on experience in Scotland and Northern Ireland. As we have already mentioned, we would want the existing functions of the National Crime Agency to continue.

## Costs

- 10.2.24 If policing were devolved, there would be a full transfer of the existing Home Office Police Grant and associated revenue and capital provision to the Welsh Government. A policing team would be needed within the Welsh Government to support Ministers in exercising their powers. The Welsh Government estimates that this would cost £2-3 million a year, a figure that broadly accords with the UK Government's estimates of equivalent existing Home Office administrative resources relating to policing and crime policy and analytical support that would be transferred to the Welsh Government.
- 10.2.25 We would not envisage any change to the non-devolved status of the National Crime Agency. However, there are other costs for specialist and centralised services that the Home Office also meets centrally (such as the Airwave digital communications system, national databases and the Police National Computer). It is unlikely to be desirable or practical to try to set up separate arrangements for Wales. Where these and other services are provided on an England and Wales basis (including the Police College, HM Inspectorate of Constabulary and the Independent Police Complaints Commission) Welsh costs could be apportioned on a fair basis and there is no reason to suppose that extra costs of any substance would arise as a result of devolution.
- 10.2.26 The responsibility for police pay would be devolved, but the Welsh Government could decide to continue to participate in the mechanism for determining pay on an England and Wales basis. We do not, however, recommend the devolution of pension arrangements. There is no necessary material extra cost as a result of the devolution of responsibility for pay.
- 10.2.27 In subsequent spending reviews the Welsh Government would receive Barnett consequential of changes in police spending in England. The Welsh Government would be responsible for allocating grant to its police forces. It might, of course, wish to develop a different formula from that currently used by the Home Office.



- 10.2.28 Given the pragmatic model of devolution that we propose, we do not expect there to be substantial additional costs. Existing annual Home Office policing costs in Wales would be transferred. At the margin, there may be some replication of Home Office costs and some costs of calculating the Welsh element of joint services, but these are likely to be minor. Of course, the Welsh Government could choose to spend more or less on policing after devolution.
- 10.2.29 Devolution of operational policing would fit well with our principles of coherence, subsidiarity and accountability. Provided the effectiveness of policing at the United Kingdom level is maintained, and provided devolution is carried out in a way that minimises additional costs, as we propose, we see police devolution as being in the interests of Wales and the United Kingdom. If there is a fair transfer of resources from the Home Office, we think that devolution would not just be affordable, but also provide opportunities to make savings.

### **Recommendation**

R.24 On policing, we recommend:

- a. policing and related areas of community safety and crime prevention should be devolved;
- b. existing levels of cross-border police cooperation should be maintained;
- c. powers in respect of arrest, interrogation and charging of suspects, and the general powers of constables, should not be devolved unless and until criminal law is devolved;
- d. the National Crime Agency should not be devolved;
- e. police pay should be devolved, but police pensions should not be devolved; and
- f. the two Governments should agree charging systems and terms of service provision for the Police College, Independent Police Complaints Commission, HM Inspectorate of Constabulary and common services such as the Police National Computer system.

## **10.3 JUSTICE**

### ***Current position***

- 10.3.1 In this section we discuss the justice system in Wales. This is a shorthand term for something rather complex that includes the judiciary, courts, criminal prosecution, prisons, probation services, youth justice, sentencing guidelines, and legal aid as well as the criminal and civil law.
- 10.3.2 Justice is currently mainly non-devolved, with the exception of devolved tribunals. The judiciary is independent from government, while the Ministry of Justice is responsible for the administration and operation of most aspects of the justice system, though the Crown Prosecution Service (CPS) is answerable to the Attorney General.

- 10.3.3 The National Assembly exercises no legislative competence in terms of justice, and the Welsh Ministers have no executive powers directly in relation to the justice system. However, Acts of the National Assembly for Wales can create offences or otherwise make the law in Wales different from that in England. Welsh Ministers also have executive powers in relation to devolved tribunals.

**Box 10.3: Evidence on the justice system**

Our opinion poll showed that 35 per cent were in favour of the National Assembly and Welsh Government having responsibility for the courts and criminal justice system in Wales. In our questionnaires, 51 per cent were in favour of devolving the courts and prisons.

The UK Government said: *'England and Wales share a single legal jurisdiction, which has continued to evolve over hundreds of years to meet the changing needs of British society. We support the continuation of the current unified system, which in our view works well whilst offering scope for close working between devolved and non-devolved partners in delivering justice services in Wales. We believe that a separate Welsh legal jurisdiction would offer questionable tangible practical benefits to people living in Wales and could complicate the system unnecessarily for those who need to use it'*.

The Welsh Government said: *'We believe that Policing and Justice (including criminal justice) should in principle be matters of devolved competence. But the potential costs and risks are such that we do not feel able to argue for transfer of criminal justice and administration of justice responsibilities at the present time; these should be matters to be devolved in longer time, without the need for new primary legislation. Devolution to the Assembly of responsibility for policing in Wales can and should be undertaken, however; and the Welsh Ministers should have executive responsibilities in relation to youth justice'*.

Sir Roderick Evans, former High Court Judge, said: *'The creation of a Welsh jurisdiction would enable the development of a justice system tailor made to meet the needs of Wales, bring the administration of justice closer to the people of Wales and create jobs and career structures not presently available in Wales'*.

Professor John Williams, Department of Law and Criminology, Aberystwyth University, said: *'There is a strong case for fully devolving responsibility for the probation service. Again, the link with social services and housing (particularly when addressing the needs of former prisoners) are central to effective probation work. The future of probation under the Ministry of Justice is uncertain with the move towards privatisation. This could lead to a policy mismatch between, for example, probation and social services within Wales. Disjointed provision does not serve the needs of those using the probation service, or reduce the risk of reoffending. Reference should be made to three other areas of the criminal justice system. i. The criminal courts: the devolution of responsibility for the criminal courts is part of the broader debate on a Welsh jurisdiction discussed below. At present, the time is not right. ii. The prison service: the crisis within prisons, particularly overcrowding, makes devolving the Welsh prison service too complex. Given the need for a variety of prison accommodation, the existing prison estate in Wales may not yet be flexible enough to meet the needs of the Wales prison population. iii. Crown*



*Prosecution Service: Logically if policing powers are devolved, there is a case for greater devolution of the CPS Wales functions, although the England and Wales CPS, and/or the Director of Public Prosecutions, should retain responsibility for areas such as terrorism and politically sensitive cases. Devolution of the CPS would follow the model of the Crown Office and Procurator Fiscal Service in Scotland, and the Public Prosecution Service in Northern Ireland’.*

Professor Thomas Glyn Watkin, academic and former Senior Civil Servant with the Welsh Assembly Government, said: *‘Against this background, it is arguably time to recognize formally that cases involving the application of the law which relates only to Wales should as a general rule be heard in Wales, both at first instance and at appeal, with only final review to the Supreme Court requiring the litigation to leave the country’.*

The Welsh Committee of the Administrative Justice and Tribunals Council (WCAJTC) said: *‘Regardless of whether there is to be a devolved judicial system, there are various means by which cohesion within current arrangements can be encouraged, in that there is greater scope for collaboration and coordination between arms of the UK and Welsh Governments responsible for administrative justice issues’.*

The Law Society said: *‘The debate on a separate jurisdiction for Wales is progressing. The inquiry by the Constitutional and Legislative Affairs Committee of the Assembly (“the Constitution Committee”) and the Welsh Government’s own call for evidence last year attracted much interest and reflected informed opinion. The Law Society’s response to the Constitution Committee inquiry addressed the impact on solicitors and legal services’.*

The UK’s Changing Union project said: *‘It seems to be common ground, even among those not previously disposed to devolution, that a distinct Welsh jurisdiction, or something very much like it, will emerge. That being so, we consider it necessary to plan ahead for that constitutional change, rather than let it emerge in a gradual, ad hoc and unmanaged manner. Our view is that any Act of Parliament establishing a reserved powers model should also make provision for establishing a Welsh legal jurisdiction’.*

Lord Morris of Aberavon said: *‘I am a late convert to the transfer of policing, although I would not be happy with one police force for Wales. Criminal Justice, depending on how it is defined, is more problematic and there are obvious difficulties here’.*

Sir Stephen Laws, former First Parliamentary Counsel, said: *‘The existence of separate rules of recognition would tend to suggest a need for separate courts systems. On the other hand, as things stand, there may be some areas of jurisdiction that would need to be exercised so infrequently that it would be organisationally and financially inefficient to have two wholly separate courts systems for England and Wales. Where that is the case, one court with one jurisdiction would need to be replaced by one court with two jurisdictions and the need to decide both which to exercise and how interactions between them are to be resolved. That would produce its own added complexity and inefficiencies’.*

Professor Alan Trench, School of Criminology, Politics and Social Policy, University of Ulster, said: *‘There is no good reason, in my view, why a “minimal” legal jurisdiction for Wales could not be established at least in the first instance. The key characteristics of a legal jurisdiction are a defined geographical area, and a defined (or identifiable) body of*



*law that applies in that area. There is no reason why the body of law should be unique to that area, and there are plenty of reasons, in a Welsh context, for maintaining close connections with “English” law’.*

On the subject of a separate legal jurisdiction for Wales, the National Assembly’s Constitutional and Legislative Affairs Committee Inquiry into a Separate Welsh Jurisdiction (December 2012) said the following:

*‘We note that many witnesses agreed that any future jurisdiction should be based on the following features:*

- a defined territorial extent – for our purposes, Wales;*
- a body of law, which would include laws made by the National Assembly as well as inherited laws at the time any jurisdiction is introduced; and*
- a range of distinct legal institutions and a court system.*

*‘From the evidence received, we believe that a Welsh legal identity is getting stronger, regardless of whether a separate jurisdiction is required or not. As a result, we believe that changes should be made within the current unified Wales and England model to ensure that it reflects and recognises this emerging legal identity.... We accept that the case for a separate Welsh jurisdiction will be strengthened as divergence between laws in Wales and England increases’.*

In its evidence to this inquiry, the Welsh Committee of the Judges’ Council said the following about the possibility of a separate legal system for Wales: *‘Undoubtedly the law in Wales is becoming different from that in England in some areas, particularly public law. That is not however the case with important parts of the body of the law such as criminal law (save in minor respects), consumer protection and employment law. Increased difference in laws increases the rationale for separately appointed judges and separately organised courts.*

*‘The devolution of criminal justice would clearly be a major step. If the power to make criminal law remained with the UK Parliament, but its administration was devolved, tensions could develop. Commercial law could remain common between England and Wales. Consideration would need to be given to the administration of other specialist areas of law, for example, charities law. We would see no difficulty, if a separate jurisdiction were established, for Wales to remain a common law jurisdiction, as has Northern Ireland’.*

Reverend Professor Noel Cox, Department of Law and Criminology, Aberystwyth University argued that the development of a separate legal jurisdiction in Wales was *‘not so much an event as a process. It could come into full life with the creation of separate and distinct courts in Wales, or the application of separate laws within United Kingdom courts based in Wales. Either could occur, but if a direction were not mapped out there would be a danger that developments could be mutually inconsistent. There has been a tendency to focus on the development of statute law and statutory regulations, but the possible development of a distinct common law within Wales is also worth considering. In this regard in particular the development of the common law outside the United Kingdom might be worth exploring’.*



## Assessment

- 10.3.4 The overriding principle of our consideration is that access to justice is paramount and that therefore the justice system should be brought as close as possible to the community it serves (subsidiarity) while maintaining the quality of justice dispensed (effectiveness).<sup>90</sup>
- 10.3.5 Both criminal and civil justice should be considered. In criminal justice, there are a number of stages: the determination by the legislature of what is a crime; the deterrence and prevention of crime; the detection of offences; the prosecution of offenders; the determination of guilt; the imposition of penalties (ranging from on-the-spot fines to life imprisonment); the treatment of offenders; the system of appeals; and the treatment and rehabilitation of offenders.
- 10.3.6 Civil justice is the system under which disputes between people, businesses and other organisations are determined. It is governed by common law and statute, by legal concepts such as tort and by the rules of court. Examples are family law and commercial law. There is also public law and administrative justice, governing the operation of public bodies.
- 10.3.7 Separate arrangements for Wales should not be established ‘just to be different’: giving responsibility for strategic direction to Welsh institutions does not preclude using mechanisms which operate on an England and Wales basis in order to take advantage of existing experience and benefit from economies of scale, provided this is consistent with the principle of local access to justice.
- 10.3.8 In relation to criminal justice, our starting principle is that the National Assembly should have responsibility in those areas that have the greatest impact on the community and the day-to-day lives of the citizens of Wales – reflecting the principles enunciated in Chapter 3.<sup>91</sup>

## Youth justice

- 10.3.9 Currently, youth justice for England and Wales is overseen by the Youth Justice Board, a non-departmental public body, accountable to the Ministry of Justice. Board members are appointed by the Secretary of State for Justice. Offenders between 10 and 17 years old go through the youth justice system. The great majority are dealt with in the community, though if found guilty of a serious crime, there is an option of secure custody. In 2011-12, fewer than 100 young people from Wales were in custody.<sup>92</sup>
- 10.3.10 In his report of December 2009<sup>93</sup> commissioned by the Welsh Government, Professor Rod Morgan found that the factors linked to youth offending were often related to devolved services, such as education and training, social services, and health, while youth offenders were dealt with through non-devolved services, such as the police, Youth Offending Teams and youth courts. He concluded that the Welsh Government should also have

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<sup>90</sup> The justice system in Wales is perceived to be similar to England in terms of fairness and effectiveness. In terms of fairness 62 per cent thought the criminal justice system in England was fair compared to 65 per cent in Wales, for effectiveness the figures were 44 per cent and 45 per cent. Office for National Statistics (2012) *2011/12 Crime Survey for England and Wales*.

<sup>91</sup> In terms of spending per head, the England/Scotland/Wales/Northern Ireland figures for 2012-13 for law courts are: £93/£87/£89/£137; and for prisons £67/£65/£74/£89. So there is no evidence that the devolved Scottish system is more expensive. HM Treasury (2013) *Public Expenditure Statistical Analyses*.

<sup>92</sup> UK Government Ministry of Justice (2013) *Youth Justice Statistics 2011/12 England and Wales*, Page 39.

<sup>93</sup> Professor Rod Morgan (2009) *Report to the Welsh Assembly Government on the question of Devolution of Youth Justice Responsibilities*.

administrative responsibility for youth justice, given the related responsibilities it already held. Policy might then be better integrated.

- 10.3.11 We agree with this conclusion and therefore believe that the administrative responsibility for the treatment and rehabilitation of youth offenders should be devolved, particularly bearing in mind the close links that exist with services provided by local authorities. The small number of young offenders who are sent to secure custody cannot currently be accommodated in Wales, and there will need to be cross-border management of these offenders between England and Wales with an appropriate charging system.
- 10.3.12 There would be a small cost implication as a result of establishing a separate youth justice system in Wales of around £0.3million, according to the UK Government. These costs include the administrative costs of placing young people in custody, costs relating to Board activity in Wales and executive management oversight of the Youth Justice Board Cymru.

### **Prisons and Probation**

- 10.3.13 Adult offenders who receive community or custodial sentences are the responsibility of the National Offender Management Service (NOMS). From April 2014, NOMS will have a Director for Wales in order to acknowledge its relationship with the Welsh Government. The Director for Wales will have responsibility for probation services in Wales (including direct responsibility for the probation of serious offenders) and for the four existing prisons in Wales. Probation services for less serious offenders will be provided by the private sector.
- 10.3.14 The provision of probation services in Wales is currently contracted to the Wales Probation Trust by the NOMS on behalf of the Secretary of State for Justice. The cost of probation services in Wales is around £56 million, according to UK Government evidence. No additional costs of devolution have been identified, although if contracts were separated out upon devolution, there might be costs associated with diseconomies of scale.
- 10.3.15 Based on our principles, we believe that the treatment and rehabilitation of adult offenders in the community through the probation service should be devolved to the National Assembly.<sup>94</sup> This would allow better integration with areas already devolved that are crucial for offender rehabilitation, including help to overcome substance misuse, housing, education and training. However we note the strong links between the prison and probation services.
- 10.3.16 There are arguments for and against devolution of prisons. Devolution of prisons would enable the Welsh Government to implement distinctively Welsh policies in areas such as tackling reoffending and reducing recidivism, by, for example, providing adult education and training in prisons. Community prisons could be established close to where offenders live, so making their re-integration into the community easier, as well as making visits easier for their families. There could be provision for female prisoners in Wales (there is none at present) and there could be greater sensitivity to the needs of Welsh-speaking prisoners. Scotland and Northern Ireland and many states in federal systems manage their own prison systems effectively. Devolution of probation services would strengthen the case in favour of devolution of the prison service.

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<sup>94</sup> The Wales reoffending rate is 51.6 per cent compared to the England and Wales average of 46.4 per cent, as quoted in Western Mail (12 Nov 2013) *Welsh re-offending rate 'appalling'*.



- 10.3.17 On the other hand, the prison service is integrated between England and Wales in terms of planning and management. Furthermore, a self-contained Welsh prison estate could lack flexibility, with less ability to move prisoners between institutions and a greater need to predict the numbers and types of prison places required in the future. If self-contained, it would also be expensive, given that it would require the building of new accommodation for women and high security prisoners.
- 10.3.18 The UK Government suggested to us that, in a self sufficient devolution model, the additional costs of providing Category A and women's accommodation, plus additional overhead costs of operating a devolved prison system, would be a one-off cost of around £101.5 million, with additional annual running costs of around £22.5 million. In the current financial climate we think additional costs of this order would be difficult to justify. However, these figures assume that a devolved Welsh prison service would house all Welsh prisoners, and that no English prisoners would be housed in Wales. A cross-border charging system is also possible and would result in much lower incremental costs.
- 10.3.19 There is certainly a mismatch between the number of prison places in Wales and the number of Welsh prisoners. We understand that at present there are more Welsh prisoners in England than English prisoners in Wales. However this position will be reversed when the new prison in Wrexham enters service.
- 10.3.20 As we argue throughout this report, we do not believe devolution necessarily entails self-sufficiency. We recognise that there will need to be cross-border cooperation, and that even under a devolved system there would be a case for some Welsh prisoners to be detained in England and vice versa. As in the case of the health service, it should be possible to establish a suitable charging system agreed between the two Governments. While such a system would be cheaper and more practical than a fully self-contained system, it would mean that a Welsh Government's policies to rehabilitate Welsh prisoners would apply only to those Welsh prisoners held in Welsh prisons. The UK Government would similarly find its policies to rehabilitate English prisoners only applied to those held in England.
- 10.3.21 Based on our principles, we believe that there is a persuasive case for the devolution of the prison service, as well as the probation service. But we also recognise the difficulties of implementation in this area. The two Governments should jointly carry out and publish a study of the feasibility of implementation.<sup>95</sup>
- 10.3.22 Irrespective of this, we believe that a formal mechanism should be established for Welsh Ministers to contribute to policy development on adult offender management. We welcome the commitment of the new Director of the NOMS, Wales to work with the Welsh Government on education, training and health care provided for prisoners in Wales.

### ***The Crown Prosecution Service (CPS)***

- 10.3.23 CPS Cymru Wales is one of 13 regional divisions of the CPS, and the CPS recognises Wales's 'unique identity'. Administratively CPS Cymru Wales is largely self-contained. However, there is no difference in prosecution policy between Wales and England, and we accept that, so long as the criminal law is not devolved, there is little case for the devolution of prosecution policy. If criminal law is in future devolved, then the case for a separate prosecution service in Wales, as in Scotland and Northern Ireland, is a strong one.

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<sup>95</sup> This study should take account of the planned new prison in Wrexham and the opportunities which this increased capacity in Wales might bring for reconfiguring Welsh prison services.

## The Courts

- 10.3.24 There is already a great deal of administrative devolution in the courts system. The administration of the courts and cross-border (that is non-devolved) tribunals in Wales is the responsibility of Her Majesty's Courts and Tribunals Service (HMCTS) Wales. The administration of the devolved tribunals is the responsibility of the Welsh Government.
- 10.3.25 Below the High Court, justice is administered in Wales by Welsh courts with magistrates (who are appointed from people living locally) and judges who are appointed to the Wales circuit.<sup>96</sup> At the High Court level, several welcome initiatives have already been implemented, a good example of which is described in Box 10.4. A Mercantile Court, a Chancery Court and an Administrative Court have been established in Wales. Both the Civil and Criminal Divisions of the Appeal Court sit on occasion in Wales, as does the Upper Tribunal.

### Box 10.4: Administrative devolution of courts in Wales

The operation of the Administrative Court in Wales is a good example of how the courts can be increasingly devolved in an administrative sense.<sup>97</sup>

Until 1999, Administrative Court cases could only be issued and heard in London. In the last 10 years, steps have been taken to ensure that Administrative Court claims can be issued, managed and heard out of London; and, in particular, that decisions affecting people in Wales are administered and heard in Wales.

In April 2009, a discrete Administrative Court office was established in Cardiff. This has the facility for issuing and managing Administrative Court claims. The office is designed to enable all Administrative Court proceedings to be started, administered and heard in Wales, except for very narrow excepted classes of claim (e.g. terrorist, extradition and Proceeds of Crime Act proceedings).

In 2012 the then President of the Queen's Bench Division issued a protocol for transfer to ensure that, as a matter of mechanics, Welsh claims would be transferred to the Administrative Court in Wales in all but exceptional circumstances.

The practice direction and protocol are also complemented by policy guidance issued by the Administrative Court in Wales which provides that, in the absence of exceptional circumstances, claims with a connection with North Wales will be heard in North Wales. Unlike the English regions, although most Welsh cases are heard in Cardiff Civil Justice Centre, the Administrative Court in Wales is generally willing to sit away from its main centre, and hears cases at venues throughout Wales.

- 10.3.26 We believe that cases at all levels arising in Wales or involving Welsh parties should be heard in Wales unless the parties choose otherwise. There is a particular issue in cases involving laws that apply only in Wales.<sup>98</sup>

<sup>96</sup> Magistrates are appointed by the Lord Chancellor on the advice of local advisory committees, Judges are appointed by the Queen, on the recommendation of the Lord Chancellor and following a fair and open application process conducted by the Judicial Appointments Commission (an executive non-departmental public body, sponsored by the Ministry of Justice.)

<sup>97</sup> Note from the judiciary October 2013.

<sup>98</sup> Technically laws passed by the National Assembly for Wales are part of the law of England and Wales, although generally speaking they only apply in Wales and so are known as Welsh laws.



- 10.3.27 Thus we believe that the various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales. A High Court office might with benefit be established in Wales to coordinate High Court sittings in Wales.<sup>99</sup> We also believe that High Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales and Welsh law. Similarly, the divisions of the Appeal Court should continue to sit in Wales, and do so on a regular basis, to hear cases that arise in Wales.<sup>100</sup> Appeal Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales and Welsh law. While the Supreme Court will normally sit in London, we understand that the Court is also willing to sit in Cardiff when appropriate, and we very much welcome this.
- 10.3.28 The Welsh Language Act 1993 provides that the Welsh language is treated on the basis of equality in the administration of justice in Wales, and practice directions and other guidance developed by the judiciary in Wales ensure that Civil, Family and Criminal Courts apply the principles of the Act in practice. The Judicial College is working with HM Courts and Tribunal Service's Welsh Language Unit to provide training in Welsh so as to broaden the availability of appropriately trained Welsh-speaking judiciary. We believe that there should be further mechanisms to ensure that there are judges at all levels who are competent to hear cases in the Welsh language.
- 10.3.29 In principle we also believe that Welsh-domiciled defendants, appellants or plaintiffs who wish to use the Welsh language in court proceedings transferred to England should be able to do so, as they already can for cases heard in Wales. We acknowledge that further consideration needs to be given to the details, including where the parties do not all agree, as well as the issue of cost effectiveness and availability of resources.
- 10.3.30 Beyond administrative devolution we have also considered whether responsibility for some or all of the court system and judiciary should be devolved to the Welsh Government, which would create what some people refer to as a separate Welsh jurisdiction.<sup>101</sup> We recognise that it is unusual for a devolved state or region that has legislative powers not to have a court system of its own where cases involving those laws are heard, though devolved courts do not have to deal exclusively with devolved laws: in the case of Scotland and Northern Ireland, there are devolved court systems that deal comfortably with both devolved law and non-devolved law.
- 10.3.31 There are two separate issues here. The first is whether the administration of the courts in Wales should be transferred to the Welsh Government. Though there would be clear advantages in devolution of courts administration, with the opportunity for court provision for example to reflect Welsh needs, there would be substantial costs. According to the UK Government, a devolved court service would cost approximately an additional £10 million, largely consisting of the IT system and support costs, on top of the existing cost of about £70 million for HMCTS Wales.

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<sup>99</sup> As suggested by the Welsh Committee of the Judges' Council to the Constitutional and Legislative Affairs Committee of the National Assembly for Wales in 2012.

<sup>100</sup> The Welsh Committee of the Judges' Council also suggested establishing a Court of Appeal office in Cardiff to coordinate further sittings of the Court of Appeal in Wales.

<sup>101</sup> The issue of a separate Welsh jurisdiction was considered in more detail in a report by the National Assembly for Wales Constitutional and Legislative Affairs Committee (December 2012) *Inquiry into a Separate Welsh Jurisdiction*.

- 10.3.32 The second issue is whether Wales should have a separate judiciary and a separate legal profession. In terms of a devolved judiciary, the costs would be limited. According to the UK Government, the total additional cost of operating a separate Judicial Office would be around £1.5 million and that of separate judicial appointments and complaints functions would be around £0.5 million.
- 10.3.33 The principal argument here is that there should be a devolved Welsh judiciary and legal profession because of the existence of separate Welsh laws. Divergence between the law in Wales and England is at present small. However as more Welsh laws are introduced and Westminster passes further laws that apply to England only, and as there is more administrative devolution of the courts, the case for a Welsh judiciary becomes stronger.
- 10.3.34 Although Scotland and Northern Ireland have their own judiciaries, it is also possible to share a judiciary: the Supreme Court is retained by some Commonwealth countries as their final court of appeal, and judges from the United Kingdom sit in the higher courts of the Channel Islands, for example. The advantages of a wider pool of expertise are clear. If our recommendations on administrative devolution of the courts are implemented, we see little immediate advantage in creating a separate Welsh judiciary.
- 10.3.35 As far as the legal profession is concerned, people will use lawyers who are experienced in the relevant area of law and are therefore likely to use lawyers with experience of Welsh law for relevant cases in Wales, although the evidence which we have received suggests that there is further scope to develop further a strong indigenous legal profession in Wales. There is no need to create a separate legal profession to achieve this. There would also be potential disadvantages for lawyers in Wales who represent clients in England if there were separate legal professions, even if many lawyers were qualified in both jurisdictions.
- 10.3.36 We are not therefore convinced of the case for devolving the court system or creating a Welsh judiciary and legal profession at present. We also recognise that there seems from our opinion poll to be limited public appetite for devolution in this area. However, given the emergence of a distinct body of Welsh law that will need to be adequately administered, a separate Welsh courts system and a separate Welsh judiciary is something that must be contemplated in the future. We recommend that the two Governments review the case for this within the next ten years.

### *Sentencing policy*

- 10.3.37 We do not recommend that there should be different sentencing policies or guidelines in Wales for the same offences as England until or unless the criminal law is fully devolved to Wales.

### *Supreme Court*

- 10.3.38 Scotland and Northern Ireland are each represented on the Supreme Court bench. We heard the argument that there should similarly be at least one judge on the Supreme Court with particular knowledge and understanding of the distinct requirements of Wales and Welsh law. We note that the President of the Supreme Court has already announced that in any hearing involving Welsh devolution issues, the Supreme Court panel will, if possible, include a judge who has specifically Welsh experience and knowledge. We would like to go further, and therefore recommend that there should be a requirement



that one member of the Supreme Court should have experience and knowledge of the requirements of Wales. We have earlier welcomed the willingness of the Supreme Court to sit in Wales.

### ***Tribunals***

- 10.3.39 Tribunals provide an important means of redress for citizens and affect a significant proportion of the population directly or indirectly. There are Welsh tribunals, operating in devolved policy areas, and others which operate on an England and Wales or Great Britain basis. Welsh Ministers should continue to be the 'authority responsible' for the administration and management of the Welsh tribunals. Consideration should be given to the best form of administrative support, which in line with recommendations in other areas of our report could be on a 'bought in' basis while maintaining lines of responsibility. We note that the Welsh Government is currently conducting a review of the operation of the devolved tribunals.
- 10.3.40 There should be clarity and coherence in the relationship between Welsh tribunals and those operating on an England and Wales or Great Britain basis, and there should be coordination on such matters as training and on the effect of decisions taken in Westminster on the organisation of devolved tribunals. There should also be consistent appointment, remuneration and disciplinary processes, clearly independent from government: independence of the judiciary is as essential in the tribunals service as in other courts.

### ***Legal aid***

- 10.3.41 Some suggested in evidence that responsibility for legal aid should be devolved, as it is in Scotland and Northern Ireland. If legal aid were devolved, there would be a transfer of around £110 million plus additional costs of around £5 million per annum from loss of economies of scale.
- 10.3.42 We believe it is important that people in Wales should have the same access to the law as in England, and therefore legal aid should not be devolved until such time as there may be wider devolution of the legal system. We have heard concerns that Wales's circumstances, in particular rurality and the Welsh language, have not been properly considered in relation to legal aid reform. We believe that the UK Government should fully consult the Welsh Government and other key stakeholders to ensure that the operation of the legal aid system reflects Welsh circumstances.

### ***Law reform and accessibility of the law***

- 10.3.43 The effect of the bringing into force of Part 4 of the Government of Wales Act 2006 is that a greater divergence will develop between the law applicable in England and that in Wales. This has important implications for the implementation of law reform. The demands of law reform will undoubtedly have particular characteristics in a devolved Wales with its own legislative powers. We welcome the close working between the Law Commission, UK Government and Welsh Government on these matters.

- 10.3.44 Currently the Welsh Ministers are unable to propose law reform projects to the Law Commission with the aim of improving the effectiveness and coherence of the laws that apply in Wales. We understand that, with the support of the Counsel General, the Law Commission has proposed to the Secretary of State for Wales that there should be a transfer of functions order under section 58 of the Government of Wales Act 2006 so that the Welsh Government is able to propose law reform projects to the Law Commission on a similar basis to UK Government Ministers. We agree.<sup>102</sup>
- 10.3.45 According to several submissions we received, it is sometimes difficult to establish what the law is that applies in Wales. Laws for Wales have been made by the UK Parliament and the National Assembly, and laws made by each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens. We recommend that a mechanism be sought to ensure the expeditious publication of up-to-date law applying in Wales, and that a programme of consolidation of law should be undertaken. The Law Commission would have an important role in this process.
- 10.3.46 Another aspect of accessibility is that law should be as clear and simple as possible. The existence of primary powers in Wales is an opportunity for law to be drafted in a form that is readily understood. We hope that the Welsh Government will seize this opportunity.

### *Cooperation*

- 10.3.47 As an example of the liaison we are suggesting elsewhere between UK Ministers and the National Assembly, there should be a periodic report by the UK Government, in consultation with the Welsh Government, to the UK Parliament and the National Assembly on how access to justice is improving in Wales.
- 10.3.48 There should be regular dialogue between the Lord Chief Justice of England and Wales and Welsh Ministers on the administration of justice in Wales.

### *Timetable*

- 10.3.49 Box 10.5 sets out a timetable for taking forward the devolution of policing and justice in Wales.

#### **Box 10.5: Timetable for devolving the police and justice system**

A suggested timetable for devolving policing and justice is:

2017: devolution of youth justice system

2017: devolution of the police

By 2018: completion of the review of devolution of prisons and probation

On-going: administrative devolution of the court system

By 2025: completion and implementation of the review of legislative devolution of other aspects of the justice system.

<sup>102</sup> The Law Commission's evidence drew our attention to four matters: their concordat being updated with the Welsh Government; the deficiency which we have addressed in paragraph 10.3.44; consultation with the Welsh Government on the Law Reform programme; and the creation of a Welsh Advisory Committee. We welcome these developments. Clause 21 of the draft Wales Bill published in December 2013 refers to the relationship between the Welsh Ministers and the Law Commission and would enable proposals of law reform projects to be made by them as we recommend.



### *The economic importance of the Welsh legal sector*

10.3.50 The evidence presented to us emphasised the economic importance of developing a strong Welsh legal sector, including the opportunity which devolution brings to Welsh law schools; the need for a growing indigenous legal profession so that the courts become less dependent on advocates from outside Wales; the wider role which a strong Welsh legal profession plays in the development of the Welsh economic and civil polity; and the importance of an outward facing Welsh legal sector playing its full part in the United Kingdom and internationally. We agree with all these points, and our recommendations take account of them. The two Governments, the professions and universities should work together to develop a strong and competitive Welsh legal sector, identifying and building on Wales's comparative advantages.

### *A Welsh criminal justice board*

10.3.51 In order to derive maximum benefit from the devolution of the police and other areas of the justice system, we recommend that a Welsh Criminal Justice Board be established, bringing together both Governments and their relevant agencies so that all involved in the criminal justice sector in Wales collaborate effectively. The Board we propose would draw upon best practice from the current England and Wales Criminal Justice Board and the equivalent bodies in Scotland and Northern Ireland, and would need to consider how its deliberations could most effectively lead to a criminal justice system which serves the citizens of Wales.

#### **Recommendations**

R.25 The treatment and rehabilitation of youth offenders should be devolved.

R.26 On probation and prison services:

- a. there is a persuasive case for the devolution of the prison service, as well as the probation service, though we also recognise the difficulties of implementation in this area. The two Governments should jointly carry out and publish a study of the feasibility of implementation; and
- b. in the meantime, we propose that a formal mechanism be established for Welsh Ministers to contribute to policy development on adult offender management.

R.27 There should be further administrative devolution in the court system, including by the following means:

- a. the various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales, other than highly specialist cases;
- b. a High Court office should be established in Wales to coordinate High Court sittings in Wales;
- c. the divisions of the Appeal Court should continue to sit in Wales on a regular basis to hear cases that arise in Wales; and
- d. High Court and Appeal Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales.

- R.28 There should be a review within ten years of the case for devolving legislative responsibility for the court service, sentencing, legal aid, the CPS and the judiciary to the National Assembly.
- R.29 There should be at least one judge on the United Kingdom Supreme Court with particular knowledge and understanding of the distinct requirements of Wales.
- R.30 Welsh Ministers should continue to have competence on tribunals in devolved areas of policy; there should be clarity and coherence in the relationship between devolved and non-devolved tribunals; the process of appointment, training and terms and conditions of employment should be consistent; and tribunals should be seen to be independent of government.
- R.31 Until and unless legal aid is devolved, the UK Government should fully consult the Welsh Government and other key stakeholders to ensure that the operation of the legal aid system reflects Welsh circumstances.
- R.32 Welsh Ministers should be able to propose law reform projects to the Law Commission on a similar basis to UK Government Ministers.
- R.33 There should be improved access to all legislation in areas of devolved powers through publication of a consolidated body of Welsh primary and secondary legislation.
- R.34 There should be a periodic report by the UK Government in consultation with the Welsh Government to the UK Parliament and to the National Assembly on how access to justice is improving in Wales; and there should be regular dialogue between the Lord Chief Justice of England and Wales and Welsh Ministers on the administration of justice in Wales.
- R.35 A Welsh Criminal Justice Board, bringing together both Governments and their relevant agencies, should be created.

## 10.4 SUMMARY

- 10.4.1 Most of the evidence we received supported the devolution of policing in line with other public services in Wales. Devolution would create a better alignment between policies for tackling crime and its causes; would bring accountability for policy and funding into alignment; and would facilitate policing policies better attuned to the circumstances of Wales.
- 10.4.2 We conclude that policing should be devolved. However responsibilities in relation to the National Crime Agency should remain non-devolved, as should powers in respect of arrest, interrogation and charging of suspects, until and unless criminal law is devolved.
- 10.4.3 We believe that there is not a broad consensus in favour of wholesale devolution of the justice system at the present time. However the youth justice system should be devolved, given its close links with local government and other devolved functions. Following the devolution of policing, there should be an implementation review for devolving probation and prisons.



- 10.4.4 There is also a case for further administrative devolution in the courts system and judiciary, particularly as the volume of Welsh law develops; and the case for legislative devolution should be reviewed within ten years.
- 10.4.5 We focus on the accessibility of justice in Wales. In this context, it is important that the law in Wales, from both the UK Parliament and the National Assembly, is better understood. We recommend easier reference of law reform projects to the Law Commission, and the publication and consolidation of the law in Wales, to help this understanding.
- 10.4.6 We make a number of other recommendations for improving the justice system, including the creation of a Welsh Criminal Justice Board.

# Chapter 11 – Health and social security

## 11.1 OVERVIEW

11.1.1 In this chapter we set out the current arrangements in relation to health and social security, outline the evidence presented to us and use our principles to assess whether there should be any changes in this area.

## 11.2 HEALTH

### *Current position*

11.2.1 Legislative competence has been devolved to the National Assembly for most aspects of health. These include the promotion of health, the prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder and the control of disease, family planning, provision of health services (including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities), clinical governance and standards of health care, and the organisation and funding of National Health Service.

11.2.2 The UK Parliament retains responsibility in a number of areas, including abortion, human genetics, human fertilisation, human embryology, and surrogacy arrangements, regulation of health professionals, human medicines and medicinal products, including authorisations for use and regulation of prices, standards for, and testing of, biological substances, and welfare foods. Welsh Ministers have some executive functions in these areas, for example in relation to abortion, medicines and mental capacity.

11.2.3 A protocol between the Welsh Government and the UK Government's Department of Health for cross-border healthcare commissioning was established in 2005. This has been renewed annually or biennially. An updated protocol has recently been published.

### **Box 11.1: Evidence on health**

In our opinion poll 70 per cent said health should be controlled by the National Assembly, with 27 per cent in favour of returning responsibility to Westminster, the highest level of support for this option across all devolved areas. In our questionnaires, 63 per cent favoured control by the National Assembly.

The UK Government stated that *'health is, essentially, a devolved subject, with certain aspects being non-devolved where it has made sense to take an UK-wide or GB-wide approach. For historical reasons, the Welsh devolution boundary in regard to health differs from those that apply in relation to Scotland (where some aspects of health professional regulation are devolved) and Northern Ireland (where different legislation applies, for example on abortion).*



*'The UK Government wants strong cooperation between the NHS in England and the NHS in Wales. A Protocol for Cross-Border Healthcare has been in place for several years. It clarifies arrangements for a patient who lives on one side of the border and is registered with a GP on the other or who receives elective treatment in a hospital'.*

*In its evidence the Welsh Government proposed that 'Health and Health Services should continue to be matters for the Assembly's legislative competence, save that the Exceptions listed under the Health field in Schedule 7 to GoWA 2006 (for example, Abortion, Human Genetics and related matters, and Xenotransplantation) should generally become matters Reserved to the UK Parliament'.*

*True Wales believed that 'the very best medical expertise and equitable movement of medical staff between England and Wales must be ensured; to achieve this, a means should be found by which all hospital treatment is overseen at a UK level. What is currently a collection of disparate regional services should be restored as a truly National Health Service overseen as a whole by the United Kingdom Parliament'.*

*Gofal noted that 'The Mental Health (Wales) Measure, the Welsh Government's new mental health and wellbeing strategy Together for Mental Health, and the decision to ring-fence Supporting People funding are all examples of Welsh-specific legislation and policies that benefit the people we support. As a result, we strongly believe that health and social care should remain the responsibility of the National Assembly for Wales'.*

*The Royal College of Surgeons stated that 'The devolution of healthcare has enabled the Welsh Government to provide a substantially different policy direction in the development of the NHS compared to England. This has presented a number of challenges to healthcare provision given the demographics of Wales, which need to be addressed to improve standards. A number of powers related to health also currently retained by the UK Government including to medical regulation, medical education, abortion, human genetics, fertility, and xenotransplantation. We believe that these areas should remain the responsibility of the UK Government, who are best placed to address these issues'.*

*The British Medical Association Cymru recommended that the 'subject of medical regulation should become a "reserved power" to facilitate the free movement and proper regulation of the medical profession working in all constituent parts of the United Kingdom'.*

*The Consortium of Wye Valley Councils said 'What is of great concern to us now and to many of our English residents is the unintended consequences that devolution is having on the provision of health care. There now exists a ludicrous situation where English patients of a Welsh GP surgery no longer have a choice on where they receive their nonemergency care. If their GP calls for an ambulance they will be transported in the vast majority of cases to a Welsh hospital which in some cases is further away from the nearest English hospital'.*

*Professor Malcolm Prowle argued 'that the evidence suggests that the Welsh Government has not performed well with regard to the two key public services of schools education and health and a similar situation may exist in relation to other public services. It would be best to concentrate on improving core public services and return to the issue of further devolution of responsibilities towards the end of this decade provided the situation has improved'.*

## **Assessment**

- 11.2.4 The evidence we have received suggests that the majority do not favour changes to the current devolved boundaries on health. We note that a number of concerns have been raised about the performance of the Welsh Government on health matters, but it is not our function to assess the performance of the Welsh Government in this or any other field. As explained earlier in the report, our task is to consider where power should be held rather than the policy decisions of a particular government.
- 11.2.5 Elsewhere in our report we recommend that there should be improved comparative data across the United Kingdom. This should include health data.
- 11.2.6 We have received evidence on where the responsibility should lie for the regulation of health professionals. We believe that the regulation of health professionals should be maintained at a United Kingdom-wide level to ensure that regulation is applied consistently across the four nations.
- 11.2.7 Our principal concern in the area of health is access to treatment for patients near the border between Wales and England. We believe in principle that such patients should receive treatment where it is most clinically appropriate.
- 11.2.8 We welcome the overarching protocol that has been established by the two Governments on cross-border healthcare. However, we believe that the current arrangements should be strengthened by developing individual protocols between each border Local Health Board in Wales and neighbouring NHS Trusts in England.
- 11.2.9 We have also heard evidence that there is scope for the Welsh and English health services to work more closely together to develop better joint strategies in relation to, for instance, highly specialist services and maximising joint efficiency savings. This is something clearly in the interest of patients.

## **11.3 SOCIAL SECURITY**

- 11.3.1 Social security, including the welfare state and benefits system, is the largest non-devolved function. We therefore considered this area carefully.

### **Current position**

- 11.3.2 Legislative competence for social welfare is devolved to the National Assembly. This includes the protection and well-being of children and young people; care of children, young adults, vulnerable and older persons; and badges for display on motor vehicles used by disabled persons. Some benefits, such as council tax benefit and the social fund, have already been devolved to the National Assembly.
- 11.3.3 The more wide-ranging subjects relating to social welfare are not devolved. These include employment law and industrial relations, social security, child support and occupational and state pensions. Functions relating to these subjects are exercised by the UK Government on a Great Britain-wide basis, and the UK Parliament exercises legislative competence at the Great Britain-level.
- 11.3.4 The social security system is not devolved in Scotland. Whilst the social security system is devolved in Northern Ireland, in practice Northern Ireland operates in parallel with Great



Britain under the parity principle. The parity principle argues that because people across the United Kingdom pay the same rates of National Insurance and non-devolved taxation, they should be entitled to the same rights and benefits.

#### **Box 11.2: Evidence on social security**

Our opinion poll found that 51 per cent thought that the National Assembly should control the welfare and benefit system. In our questionnaires, 46 per cent favoured control of welfare benefits and pensions by the National Assembly.

The UK Government argued that *'there are also good practical and administrative reasons why welfare benefits are, and should continue to be, broadly aligned throughout the UK, and are best operated on a common basis throughout GB:*

- *Entitlement to many benefits is transferable throughout the UK. For all practical purposes, actions, evidence and decisions made in one part of the UK are accepted in another part of the UK;*
- *The UK Government has negotiated a series of reciprocal arrangements with other countries which allows each other's citizens to have access to the host state's benefit systems based on entitlement earned in the other state. In addition, certain benefits can be "exported" within the European Union under EC Regulation 1408/71. This would be greatly complicated without parity; and*
- *services are delivered more efficiently and effectively at the national level, and there are economies of scale in sharing the IT infrastructure used to calculate and pay NI benefits.*

*For these reasons, we believe that responsibility for State Pensions and most welfare benefits should continue to be non-devolved'.*

The Welsh Government stated that *'while it would in theory be possible to devolve responsibility for Social Security (including Child Support and Pensions) to the Assembly and Welsh Government (as is the case in Northern Ireland), the Welsh Government would not support such a proposition, for two reasons. First, any such move could expose the Welsh Government to unmanageable budgetary risks, and as we said earlier, our approach to the issues requires that we do not lightly enter into new commitments having such potentially damaging financial consequences. Secondly, we believe that the pooling of risks and responsibilities across the countries of the United Kingdom, so securing a common level of social protection for all our citizens, is fundamental to that continuation of the UK to which we are committed. The Welsh Government is clear, therefore, that Social Security is a matter that should be Reserved to Westminster'.*

The Bevan Foundation highlighted the risks of devolving social security, stating *'financial constraints and the current process of reform of social security benefits make devolution of almost all aspects of the benefit system virtually impossible in the short to medium term'.*

SNAP Cymru raised concerns over changes to welfare currently being implemented by the Department for Work and Pensions.

Community Housing Cymru also raised similar issues about current welfare reform and believed that the Welsh Government should be given the same powers over welfare as

are currently held by the Northern Ireland Executive. It stated that *'the Welfare Reform Act 2012, which introduces huge changes to the welfare system, will have a disproportionate effect on people in Wales, and in Northern Ireland we have seen a divergence in policy, which will serve the people of Northern Ireland more effectively than the proposals as set out in the Act'*. Highlighting that housing policy is devolved and welfare policy is non-devolved, they argued that *'welfare policy and a reform agenda are placing huge strains on housing associations, local authorities, and their tenants'*.

The Church in Wales called for greater devolved control, with resources accompanying. It argued that *'it is an ongoing problem that benefit levels are set by UK, but services are provided locally. Tackling poverty etc is thus made more difficult. Local Authorities are under strain due to central government policies – for example, having the duty to house people made homeless by government policies (such as how Housing Benefit/rent is paid). The Assembly finds it difficult to plan spending, house building, etc because Westminster is in charge. WG must administer UK policies it has no influence over'*.

The UK's Changing Union project drew attention to the recent transfer to the Welsh Government of certain social welfare functions that they felt showed the danger of devolving functions without consultation or accompanying resources. They supported non-devolution of social security.

The Parliament for Wales Campaign called for the devolution of the social security system at least on the basis of subsidiarity with flexibility and innovation for minor payments including dental and optical policy and payments, winter fuel payments, furniture and other minor allowances. It recommended that Job creation policy and funding, including grants for disabled employment be devolved. It proposed that employment transfer could mitigate austerity effects if social security to clients in Wales were made in Wales.

The Wales Council for Voluntary Action noted that *'the way in which the devolution of both council tax benefit and the social fund has been approached recently has led to serious concerns from many organisations about inter-governmental relations and the decisions about how and when policy areas are devolved. These decisions seem to have been made on very short timescales, with limited dialogue between governments and without full consideration of the impact on vulnerable people. Whilst we are not making a comment on the devolution of the policy areas themselves, we strongly feel that more consideration should have been given to the financing, timing and implementation of any new systems in Wales. The absence of timely communication and, possibly, respect between governments in this area has the potential to have a detrimental effect on some of Wales' most vulnerable people'*.

## Assessment

11.3.5 Spending per head on social protection in Wales is 13 per cent higher than the UK average.<sup>103</sup> The social security system plays a very important role in Wales. So who controls it is significant. Whilst the Welsh Government points to the financial risks involved in the devolution of social security, the fact that it is devolved in Northern Ireland shows it is

<sup>103</sup> HM Treasury (2013) *Public Expenditure Statistical Analyses*.



possible to devolve without undue risk. Nevertheless, it was apparent from the discussions we had when we visited Northern Ireland that the parity principle meant there was little benefit in practice to Northern Ireland from devolution.

- 11.3.6 Wales forms part of a social as well as economic union with the rest of the United Kingdom. The Calman Commission emphasised that the social security system, and the pooling of risk and redistribution which goes with it, form a vital part of the social union, and that the social union underpins and complements the United Kingdom's economic and monetary union. Their analysis here is helpful: *'there are many social ties that bind the UK together: family, professional, cultural. But there are also some common expectations about social welfare. Social security payments are available and are paid on the same basis to people across the country, according to their needs. This principle of fairness should not be undermined, though some benefits may be administered locally where they intersect with devolved policies like housing'*.
- 11.3.7 We do not recommend devolution of the social security system. It is an important part of the United Kingdom social and economic union and this brings substantial advantages to the people of Wales. We agree with the evidence received that the transfer of costs and risks to Wales from devolution would not be justified. In keeping with our principle of equity, we do not believe that the welfare and benefits a citizen receives should be dependent on the local community's ability to pay for them.
- 11.3.8 We heard when we visited Scotland that there is a growing debate, such as that conducted by Reform Scotland, around devolving part of the social security system to achieve a more joined up approach to tackling poverty. We believe that if parts of the social security system were to be devolved to Scotland at some future date, any implications for Wales should be considered further then.
- 11.3.9 Some individual benefits have already been devolved: in particular, council tax benefit and the Social Fund.<sup>104</sup> We have considered whether there is scope for further devolution, such as in respect of housing benefit. While there could potentially be a case for going further at some point in the future where there is a good fit with devolved policies, the complications of devolution may outweigh any benefits. The UK Government should in the meantime always take into account Welsh circumstances.
- 11.3.10 If major reforms such as universal credit (non-devolved) and care for the elderly (part devolved) are to be successful in Wales, there should be close and early consultation between the two Governments and key stakeholders to ensure Welsh interests are taken into account.
- 11.3.11 We acknowledge that the Department for Work and Pensions works closely with the Welsh Government and its agencies across a range of issues. For example, the Department for Work and Pensions is represented on some Local Service Boards in Wales. However we have also heard evidence that there is scope to go further and our recommendations in Chapter 5 about improving intergovernmental relations are relevant in this context.

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<sup>104</sup> The discretionary Social Fund, comprising the Community Care Grant and Crisis Loan schemes, was abolished as a Jobcentre Plus responsibility as of 1 April 2013 by the Welfare Reform Act 2012. Funding was passed to Local Authorities in England and to the Welsh Government to make alternative arrangements as they wished.

### Recommendations

- R.36 There should be no change to the devolution settlement in relation to health.
- R.37 There should be equitable cross-border access for patients and a strategic approach to joint delivery of health services. This should be delivered through:
- a. regular and frequent review by the Welsh Intergovernmental Committee of the UK Government and Welsh Government protocol on cross-border healthcare;
  - b. individual protocols developed between each border Local Health Board in Wales and neighbouring NHS Trusts in England; and
  - c. a cooperative and coherent approach to joint delivery of health services, particularly highly specialist facilities, and joint efficiency savings.
- R.38 The social security system in Wales should remain non-devolved.

## 11.4 SUMMARY

- 11.4.1 Health is the largest devolved function in Wales. We believe there should be no change to the devolution settlement on health, but make recommendations to improve cross-border health delivery. These include equitable cross-border access for patients, a strategic approach to joint delivery of health services, and regular reviews of the UK and Welsh Government protocol healthcare. Individual protocols should be developed between each border Local Health Board in Wales and neighbouring NHS Trusts in England.
- 11.4.2 The social security system, including the welfare state and benefits system, should remain non-devolved. Developments in this area across the United Kingdom and their possible implications for Wales should continue to be monitored.



# Chapter 12 – Further matters

## 12.1 OVERVIEW

- 12.1.1 In this chapter we set out the current arrangements in relation to the Welsh language, building regulations, civil contingencies, elections, equal opportunities, family welfare, Higher Education and science, teachers' pay and Lords Lieutenant. We outline the evidence presented to us and use our principles in Chapter 3 to assess whether there should be any changes in these areas.
- 12.1.2 We also outline a number of matters on which we have received insufficient evidence to enable us to formulate firm recommendations. We suggest that these should be considered further by the Welsh Intergovernmental Committee proposed in Chapter 5.

## 12.2 WELSH LANGUAGE

### *Current position*

- 12.2.1 Legislative competence over the use of the Welsh language is devolved to the National Assembly. This means that the National Assembly can legislate in relation to the Welsh language, other than in the specific case of the use of the Welsh language in courts and areas such as broadcasting that are exemptions from the National Assembly's competence under the 2006 Act.
- 12.2.2 Several examples of the way in which the Welsh language does not have full parity in Wales were drawn to our attention by the Welsh Language Commissioner. Under the Juries Act 1974, jurors who are not proficient in English are disqualified from jury service. Under the Births and Deaths Registration Act 1953, registration may be in English only or bilingual, but may not be in Welsh only. The prescribed forms under the Cremation Regulations 2008 are only in English. Marriages may only be registered in Welsh if the Registrar speaks Welsh. These particular restrictions apply to important life-events and civic duties. It is understandable that the Whitehall departments responsible for legislation in these areas may not fully understand that bilingualism is now part of the life of all Welsh citizens.

### **Box 12.1: Evidence on the Welsh language**

The Welsh Language Commissioner said: *'The Welsh Language Commissioner is of the opinion that any further amendments to the Welsh constitution should contain a clear statement on the face of the legislation, confirming that Welsh is one of the official languages in Wales, and that it has official status. We request that the Commission on Devolution in Wales reviews the British Legislation which currently treats the Welsh language less favourably than the English language, and considers how the situation could be rectified to ensure justice for Welsh speakers.'*

## Assessment

- 12.2.3 We believe that all the areas mentioned by the Commissioner should be reviewed by the UK and Welsh Governments with a view to amending the law to give equal status to the Welsh language. More generally, we believe that the UK Government and Welsh Government should systematically assess and then keep under review the way in which the Welsh language is used across government.

## 12.3 BUILDING REGULATIONS

### Current position

- 12.3.1 At present, under the Building Act 1984, most executive functions including the power to make building regulations, are devolved to Welsh Ministers. Functions related to excepted energy buildings<sup>105</sup> or exercisable by the Secretary of State as a Crown authority under the Building Act are not devolved. Legislative competence in respect of provisions in the Building Act is also not devolved.

#### Box 12.2: Evidence on building regulations

The UK Government stated that *'in respect of excepted energy buildings and the transposition of EU Directives, the boundary of the settlement is complex and difficult to work in practice. The current boundary means that excepted energy buildings in Wales must comply with the building regulations which apply to England. This means that building control bodies (local authorities and approved inspectors) in Wales need to use the building regulations applying in England in relation to excepted energy buildings (which is likely to impact on a small amount of their work).*

*'At present Welsh Ministers are not designated to use the European Communities Act (ECA) 1972 to transpose Directives concerning matters that relate to building regulations. The European Communities (Designation) Order 2008 (S.I. 2008/301) designated the Secretary of State (and any Northern Ireland department) with powers to legislate in relation to measures relating to the environment, which covers energy performance of building matters. The designation does not extend to Welsh Ministers. This means that for environment or energy performance matters where we rely on the ECA 1972, the Secretary of State legislates for Wales. For example, when recently transposing the Energy Performance of Buildings Directive (recast) 2010/31/EU, the UK Government had to include within the building regulations applying in England provisions which would also apply to the buildings of statutory undertakers and Crown buildings in Wales, as Welsh Ministers do not have powers to legislate for these. This is confusing for the Crown and statutory undertakers and also for building control bodies operating in Wales.*

*'The Commission may wish to consider whether there is a need for categories of buildings to be excepted from the competence of Welsh Ministers, and whether Welsh Ministers should be able to make building regulations in respect of all buildings in Wales'.*

<sup>105</sup> As defined in the Welsh Ministers (Transfer of Functions) (No. 2) Order 2009.



## Assessment

- 12.3.2 We have heard that the current position is complex and operationally difficult in practice.
- 12.3.3 There appears to be no reason for the current exception and there would be simplification benefits from removing it. We therefore believe that the exception should be removed and Welsh Ministers should be able to make building regulations in respect of all buildings in Wales.

## 12.4 CIVIL CONTINGENCIES

### Current position

- 12.4.1 Although civil protection and emergency powers are not explicitly devolved, the role of the Welsh Government in coordinating civil protection activity in Wales has evolved. For example, it now coordinates cross-cutting activities as well as the work undertaken by Local Resilience Forums.

#### Box 12.3: Evidence on civil contingencies

The UK Government said: *'The respective roles of devolved and non-devolved bodies in the response phase of an emergency may not always be clear in advance. Clarity of roles and responsibilities is important, as is the ability to work together in planning for emergencies and to build, as far as possible, on day-to-day arrangements in the response phase. While the Government believes that no major change is necessary, understanding of how these arrangements might work better in practice would be helpful'.*

The Welsh Government said: *'The Welsh Government has very limited formal powers in respect of civil contingencies, although it exercises a de facto role of leadership and coordination. A recent Wales Audit Office report on 'Civil Emergencies in Wales' concluded that "the Welsh Government's remit for routine leadership and coordination of civil contingencies is particularly unclear. In addition, the expectation that the Welsh Government will routinely provide some leadership to the organisations that are accountable for civil contingencies is also potentially confusing, because the Civil Contingencies Act 2004 does not appear to empower the Welsh Government in this way". We believe that transfer of the Ministerial functions in Part 1 of the Civil Contingencies Act 2004, with full transfer of the necessary resources, would recognise the Welsh Ministers' de facto role and clarify accountability'.*

## Assessment

- 12.4.2 In the light of the evidence of the two Governments we suggest both Governments should ensure that there is a clear understanding of their respective roles, with any agreed transfer of executive powers if that is necessary to ensure resilience. This understanding should be made available to all parties who might be involved in dealing with civil contingencies arising in Wales.

## 12.5 ELECTIONS

### *Current position*

- 12.5.1 General elections to the National Assembly are a reserved matter. Local authority elections are devolved, with two exceptions, namely the local government franchise, and electoral registration and administration.
- 12.5.2 In May 2012, the UK Government published a Green Paper on the future electoral arrangements of the National Assembly, following the Parliamentary Voting Systems and Constituencies Act. The paper put forward proposals in relation to National Assembly constituencies, length of term of the National Assembly, standing as both a constituency candidate and a regional candidate, and multiple mandates (sitting as an MP and AM). These were included in the UK Government's Draft Wales Bill published in December 2013.
- 12.5.3 These issues are specifically outside the Commission's terms of reference and have therefore not been considered in this report.

#### **Box 12.4: Evidence on elections**

The UK Government said: *'National Assembly elections are regulated by secondary legislation which the Secretary of State makes under the GoWA. These provisions are framed so as to ensure that the law relating to Assembly elections is broadly similar to that which applies at Parliamentary and local elections.'*

*'The conduct of local government elections in Scotland has been devolved since the Scotland Act 1998. Scottish Ministers are responsible for making the rules on the conduct of Scottish local elections, but not for the franchise or electoral registration in relation to those elections. The Commission may wish to consider whether electoral administration in regard to local government elections in Wales, which would cover setting the rules for the conduct of the elections, should similarly be devolved to Welsh Ministers. We would expect the franchise and electoral registration to remain non-devolved.'*

The Welsh Government said: *'there should be no Reservation to the UK Parliament of powers in respect of elections to the Assembly, or to Welsh local authorities (save that the Exceptions to the Assembly's existing legislative powers, in respect of the local government franchise and electoral registration, should be confirmed as matters Reserved).'*

The Presiding Officer for the National Assembly for Wales said that the *'Secretary of State currently has the power to vary the day of an ordinary general election by a month and the power to propose a day for the holding of a poll at an extraordinary general election if the Assembly resolves that it should be dissolved. This is a power which is more appropriately held by the Presiding Officer, as is the case for the Scottish Parliament'*.

On the powers of the Secretary of State to control National Assembly electoral arrangements, the Presiding Officer considered that the *'Assembly should have competence over its own electoral arrangements, subject to appropriate safeguards. However, if the SoS were to retain the power to control these arrangements...the Statutory Instruments should at least be subject to Assembly procedure as well as Parliamentary'*. The Presiding officer noted that *'in the Scottish settlement, the power to make arrangements about Scottish Parliament elections is now divided between Scottish Ministers and the Secretary of State (since the Scotland Act 1998 was amended by the Scotland Act 2012).'*



The Parliament for Wales Campaign requested that election issues in Wales be placed in the hand of the Assembly Commission.

The Electoral Commission view was that *'any decision relating to responsibility for legislative competence for Assembly and/or local elections in Wales should in the first instance consider what potential benefits this change would have on voters in Wales'*. It stated that *'it would be sensible and consistent with arrangements in Scotland that secondary legislation for the conduct of Assembly and local elections be made by the Assembly rather than by the Secretary of State for Wales, which is the current position. Similarly, it would be consistent for the power to vary the date of Assembly elections by up to one month and call an extraordinary election to be with the Assembly Presiding Officer, as it is in the Scottish Parliament, rather than the Secretary of State for Wales.'*

The Electoral Reform Society Wales said that the voting system for Assembly should be devolved, with a two-thirds threshold. It should remain unicameral and the dual candidacy ban should be ended.

The view of Wales Study Group of the Study of Parliament Group was the Presiding Officer ought to set the date of extraordinary elections (rather than the SoS), and there ought to be a longer post-election period before the Assembly must meet to appoint a Presiding Officer.

### **Assessment**

12.5.4 Changes to the election process for the National Assembly, such as those discussed in the Wales Office's Green Paper, are beyond our terms of reference. However we believe that the administration of local government elections, including rules for their conduct, should be devolved in accordance with our principles of accountability, equity and subsidiarity.

## **12.6 EQUAL OPPORTUNITIES**

### **Current position**

- 12.6.1 The subject of equal opportunities is largely non-devolved. However, the Equality Act 2010 provides the power for Welsh Ministers to prescribe specific equality duties for public bodies in Wales in devolved public services. These include the Welsh Government itself, local authorities, local health boards, schools and Further Education/Higher Education Institutions.
- 12.6.2 The Act includes a provision for a new Public Sector Equality Duty (PSED). This duty requires public bodies to pay due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity, and foster good relations. Welsh Ministers have the power to introduce specific Welsh Duties to help public bodies operating in devolved fields of responsibility comply with the PSED. The specific Welsh duties have been in force since April 2011.
- 12.6.3 The Equality Act 2010 also includes provisions for a socio-economic duty that would require public bodies to consider the impact of decisions in order to reduce socio-economic disadvantage. The UK Government has decided not to commence this part of the Act and has announced its intention to repeal this duty.

### **Box 12.5: Evidence on equal opportunities**

On the duty in relation to socio-economic disadvantage the UK Government said: *'We have announced our intention to repeal this duty (which has never been commenced) in respect of GB-wide and English authorities. We are working with the Welsh Government to agree an approach which allows Wales to commence the duty for Welsh bodies (as specified in the Equality Act 2010).'*

The Welsh Government said: *'For purely pragmatic reasons, it is not possible for the Welsh Government to argue that the Assembly should have full legislative powers in relation to equalities issues. If equality were not reserved, it would require the Welsh Government and the National Assembly to take over the full range of responsibilities currently carried out at the UK level, including implementing all developments in EU equality legislation into law in Wales. This is impractical in resourcing terms. Devolved competence should however be strengthened or clarified, by way of appropriately drafted Exceptions to the Equality reservation. Devolved competence should however be strengthened or clarified, by way of appropriately drafted Exceptions to the Equality reservation, in the four ways set out below.*

*'The National Assembly should be given primary legislative competence in relation to the three aims of the Public Sector Equality Duty in the 2010 Equality Act in relation to the devolved public sector.*

*'The National Assembly should have full competence over the socio-economic duty in section 1 of the 2010 Act and its objective of reducing inequality of outcome resulting from socio-economic disadvantage, in respect of the devolved public sector.*

*'The National Assembly should have competence to give functions to the Equality and Human Rights Commission and change its accountability structure, to ensure they match the devolved competence on equality which is being sought for the Assembly.*

*'The National Assembly should have full competence over whether, and the extent to which, positive discrimination on the grounds of the protected characteristics in the Equality Act 2010 is permitted in public appointments to the boards or governing bodies of devolved public sector organisations in Wales'.*

The view of the Equal and Human Rights Commission was: *'Three recommendations are made for consideration by the Commission on Devolution. These are: The National Assembly should be given powers to build on equality and human rights legislation including the Equality Act 2010 and the Human Rights Act 1998. The National Assembly should be given full primary legislative competence in relation to the Public Sector Equality Duty. The National Assembly should be given competence to strengthen its relationship with the EHRC'.*

In their joint submission, the Children's Commissioner for Wales and the Older People's Commissioner for Wales said that in relation to the Equality Act *'whilst this should remain a reserved responsibility, the Welsh Government should be granted the power to go beyond minimalist provision. Responsibility for the three general duties to promote equality should be devolved to Wales and the Equality and Human Rights Commission should be made additionally answerable to Welsh Ministers for devolved policy areas'.* On human rights, the Commissioners said that the *'enhanced responsibilities for the Welsh Government should be sustained especially in the light of potential changes to the Human Rights Act'.*



## Assessment

- 12.6.4 In our evidence session with the Welsh Equality Commissioners, we heard that the approaches of the Welsh and UK Governments towards equality and human rights were diverging.
- 12.6.5 This was highlighted in the report on a United Kingdom Bill of Rights published by the UK Government's Commission on a Bill of Rights.<sup>106</sup> It noted the distinctive approach towards human rights taken by the National Assembly and Welsh Government, including the development of a system of rights protection in Wales. The Commission on a Bill of Rights commented: *'We would want strongly to support the right of the devolved administrations and legislatures, in their areas of competence, to introduce additional rights if, but only if, they thought it right to do so'*.
- 12.6.6 The Commission on a Bill of Rights also noted general levels of satisfaction with the Human Rights Act in Wales *'In general, there was satisfaction with the Human Rights Act and the current system of rights protection developed by the Welsh Government and Assembly within its devolved competence under the Government of Wales Act 2006. This included legislation such as the Welsh Language (Wales) Measure 2011 and the Rights of Children and Young Persons (Wales) Measure 2011. As a result, it was suggested that these and other policy areas were now a matter for the devolved institutions in Wales and not issues which should figure in any discussion on a UK Bill of Rights. Concern was also expressed that if a UK Bill of Rights contained justiciable provisions that touched on devolved areas of competence, such as language, they could disturb the delicate balancing which had been achieved in Wales through instruments such as the Welsh Language Measure'*.
- 12.6.7 We understand that PSED is part of the Welsh Government's strategy for equality. However, the current legal position is that, if the UK Parliament were to repeal the PSED, the Specific Duties made under it would also fall.
- 12.6.8 We believe that legislative clarity would be improved if the National Assembly were given competence in respect of the devolved public sector specifically of the socio-economic duty provided for under section 1 of the 2010 Equality Act. This has the objective of reducing inequality of outcome resulting from socio-economic disadvantage.
- 12.6.9 The Equality and Human Rights Commission (EHRC) is an organisation with responsibilities throughout Great Britain. However, the EHRC is solely accountable to Ministers of the UK Government. This is despite the fact that Welsh Ministers have responsibilities on equality. We agree with the Welsh Government that EHRC needs to develop into a body that is jointly accountable to Welsh Government Ministers as well as to Ministers of the UK Government. This would recognise the fact that both have equality responsibilities.
- 12.6.10 In addition we understand that there are concerns about under-representation of people from many of the protected groups in public appointments to the boards and governing bodies of devolved public sector organisations in Wales. The Equality Act 2010 allows positive action only in very limited circumstances. The Welsh Government is seeking legislative competence for the National Assembly over whether and to what extent positive action is permitted in public appointments to the boards or governing bodies of devolved public sector organisations in Wales.

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<sup>106</sup> Commission on a Bill of Rights (2012) *A UK Bill of Rights? The Choice Before Us*.

12.6.11 In the light of the above evidence, we support the principle that, while in general rights should apply throughout the United Kingdom, the Welsh Government should have powers over rights in devolved areas of policy and we support the clarification of existing powers as sought by the Welsh Government.

## 12.7 FAMILY WELFARE

### *Current position*

12.7.1 Social welfare and the safeguarding of children require cross-agency working and are more complex because of the inter-relationship between what is devolved and what is not. At present, the National Assembly has competence in the field of Social Welfare, including the protection and well-being of children and young people. Children and Family Court Advisory and Support Service (CAFCASS) Cymru, which provides expert independent advice to Courts on the interests of children involved in family proceedings, is accountable to Welsh Ministers.

12.7.2 However, family justice, including the family courts system, is non-devolved, with the UK Government responsible for the justice system in Wales.

#### **Box 12.6: Evidence on family welfare**

The UK Government stated that *'both the private and public family justice system in Wales works well, with good cooperation between devolved and non-devolved partners, for example CAFCASS Cymru and HMCTS Wales. The Family Justice Network, established by the Welsh Government, brings together the key players within the family justice system in Wales to improve services and outcomes for children and families in Wales. The Network has the same remit as the Family Justice Board and compliments the work of the Board by ensuring that it takes full account of Welsh perspectives on non-devolved family justice issues. Four Local Family Justice Boards in Wales bring together the key players at a local level to improve the delivery of family justice. Current arrangements already allow integration between the activities of public bodies engaged in the protection of children to take place.*

*'We propose that we maintain the current system, that is, the vast majority of family law policy is not devolved. Her Majesty's Courts and Tribunal Service (HMCTS) and the judiciary act across England and Wales as a single jurisdiction. If policy on children's family law was devolved then, over time, HMCTS would find themselves needing to operate different laws in England and Wales. The elements of family law which are devolved relate to local authority practice and Cafcass. In England, Cafcass is an NDPB, whereas CAFCASS Cymru is part of the Welsh Government. In practice, the two organisations operate in a similar manner because of the requirements of the courts.'*

In its evidence the Welsh Government noted that *'the Assembly already has significant legislative competence in the field of Social Welfare, and these powers should be built upon under a Reserved powers model. The Welsh Government wishes to ensure that the Assembly will be able to legislate in relation to the powers and responsibilities of public authorities in connection with vulnerable adults and children, including taking children into care, and fostering and adoption (public child law). We do not seek powers for predominantly private law aspects of family relationships. One way of expressing this might be to Reserve to*



*Westminster legislative responsibility for the formation and dissolution of marriages and civil partnerships, allocation of legal parentage and consequential matters, including distribution of property and post-separation parenting arrangements; and wills and intestacy. Remaining family matters could be within the Assembly's legislative competence'.*

*The views of the Children's Commissioner and Older People's Commissioner were 'whilst much provision is already devolved, some additional transfer is needed especially in the areas of safeguarding, adoption, fostering, and managing the process of entering and leaving care'.*

### **Assessment**

- 12.7.3 This is a complex area of the Welsh devolution settlement. The approach set out by the Welsh Government has merit in terms of our principles, including coherence, whilst recognising key UK Government interests.
- 12.7.4 There may also be scope to learn from Scotland. The Care Inspectorate (formally known as Social Care and Social Work Improvement Scotland) was set up in April 2011 by the Scottish Government as a single regulatory body for social work and social care services, including child protection and the integration of children's services.
- 12.7.5 The two Governments should work together to reduce the complexity of the present system. They should draw on the experience in Scotland. Cooperation between the two Governments in this area should be based broadly on the principle proposed by the Welsh Government that the National Assembly should be able to legislate in relation to the powers and responsibilities of public authorities in connection with vulnerable adults and children. This includes taking children into care, and fostering and adoption (public child law), but not predominantly private law aspects of family relationships.

## **12.8 HIGHER EDUCATION AND SCIENCE**

### **Current Position**

- 12.8.1 Higher Education is a devolved responsibility under the Government of Wales Act 2006, with the Exception of Research Councils.<sup>107</sup> Higher Education Institutions (HEIs) in Wales receive funding from a number of sources. These include the Higher Education Funding Council for Wales (HEFCW), which distributes the grant in aid which it receives from the Welsh Government; students, either directly or indirectly through the Student Loans Company; industry and business; private sources such as donations and benefactors; European Union sources, including research funding and structural funds; and United Kingdom-wide research funders such as the Research Councils, the Technology Strategy Board and UK Government departments such as the Ministry of Defence and the Department for Environment, Food and Rural Affairs.

<sup>107</sup> The Research Councils are: the Arts and Humanities Research Council; the Biotechnology and Biological Sciences Research Council; the Engineering and Physical Sciences Research Council; the Economic and Social Research Council; the Medical Research Council; the Natural Environment Research Council; and the Science and Technology Facilities Council.

- 12.8.2 Thus the position is a complex one, with HEIs being autonomous bodies that work within the broad framework of Welsh Government policy but whose funding is derived from private and public sources, some of the latter being devolved and others not. Furthermore, student recruitment and research funding constitute competitive environments that are United Kingdom-wide and, in the case of a number of HEIs, international.
- 12.8.3 Higher Education funding policy has developed along significantly different lines in the countries of the United Kingdom. In particular, this is seen in relation to funding received for teaching from the national Funding Councils and that received via the contributions of students and graduates. A number of sector wide bodies (for example, the Quality Assurance Agency for Higher Education (QAA)), operate across the United Kingdom and respond to the circumstances and policies of the different countries and their governments.
- 12.8.4 Research in HEIs is funded partly through the Funding Councils and partly through the range of other bodies mentioned in 6.3.1. The Research Councils play a significant role in this context. These funders of research develop their own priorities and consequently policy for science and research generally is not a devolved responsibility.

#### **Box 12.7: Evidence on Higher Education and Science**

The UK Government said: *'Higher Education (HE) is devolved and Higher Education institutions operate as independent entities in Wales, overseen by the Higher Education Funding Council for Wales (HEFCW). Science and research policy is complex, with key elements non-devolved but some aspects devolved. Specifically Research Councils are non-devolved and operate throughout the UK. University research (where part of HEI policy) is devolved. Welsh Ministers are able to fund and carry out any type of medical research by virtue of paragraph 13 of Schedule 1 to the NHS (Wales) Act 2006'.*

The Welsh Government argued: *'Education... should continue to be matters for the Assembly's legislative competence, although the two Exceptions to the existing legislative competence in Schedule 7 relating to the Research Councils... should become matters Reserved to Westminster'.*

Higher Education Wales believed there should be: *'a more structured approach to intergovernmental relations, with regular meetings between ministers responsible for HE from the UK Government and devolved governments – to ensure all relevant parties are aware of developments under discussion, and the potential impact of these; a greater clarity at the UK Government level about the interaction between devolved and non-devolved policy areas and the impact on universities'.*

Professor John Harries said: *'My experience as CSA [Chief Scientific Adviser] for Wales has been that devolution is beneficial to Wales. However, where communications and interactions between the Devolved Administrations and the UK Government are needed to make the devolution settlement work, then there is some evidence, reported by several bodies (e.g. UUK, and Higher Education Wales, HEW), that these links need more care and attention, and better mechanisms should be set up. For science it is reasonable to expect that the CSAs in Whitehall, Edinburgh and Cardiff would take a central role in making these interactions work'.*



## Assessment

### Higher Education

- 12.8.5 We have not heard calls for changes in powers, nor ought the autonomy of HEIs or academic freedom be diminished. The Higher Education systems in England and Wales, in particular, are closely intertwined and our recommendations take account of this.
- 12.8.6 In the light of the close and complex relationships which we have noted and the possibility of policy changes in England impinging strongly on Wales, we propose that there should be a formal intergovernmental forum to ensure mutual understanding of Higher Education policy issues within the framework of the Welsh Intergovernmental Committee. Among other roles, this forum would provide early information on proposed changes and would promote international excellence and competitiveness.

### Science and other research

- 12.8.7 As noted in 12.8.3, research in science and other areas is funded partly through the national Funding Councils and partly by a wide range of United Kingdom-wide bodies, including UK Government departments. These include the various Research Councils (with the umbrella body Research Councils UK), the Technology Strategy Board, the Ministry of Defence, the Department for Environment, Food and Rural Affairs and other UK Government departments. European research funding and structural funds are also significant for research.
- 12.8.8 In recent years Research Council funding has been linked more strongly than has previously been the case to broad policy objectives relating to economic development. In addition, the Research Excellence Framework, which is the assessment of the quality of research, conducted periodically on a United Kingdom-wide basis and which determines the distribution of funding for research by the Funding Councils, includes an assessment of the 'impact' of research. This has led to a significant inter-relationship between devolved and non-devolved policy implementation.
- 12.8.9 We have heard of the need to ensure that the requirements of Wales are better understood by UK Government departments, particularly in relation to the economic impact of science research and wider policy. We propose that the major funders of Science and the Welsh Government should establish effective means of reciprocal communication and that this should be a mechanism for a mutual understanding of the needs of Wales in this policy area.
- 12.8.10 In relation to research more broadly, we have received little evidence in favour of changes to current powers. However, we note that Wales has consistently received considerably less funding from the Research Councils than its relative population share of the United Kingdom.<sup>108</sup>
- 12.8.11 The Research Councils should continue to allocate funding on the basis of competitive excellence and it is important that Wales is represented on bodies determining research funding. We suggest that each Research Council should designate one member of their Council with relative expertise to represent the interests of Wales and be a conduit for the exchange of information.

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<sup>108</sup> See, for example, *Research Funding Across the UK* on the website of Research Councils UK.

## 12.9 TEACHERS' PAY

### *Current position*

- 12.9.1 Education and training are devolved in Wales. So the Welsh Government is responsible for setting the initial teacher training intake targets, for teaching standards and appraisal arrangements for teachers in Wales, and for the provision of funding.
- 12.9.2 Pay and conditions for teachers are not devolved. Under the Education Act 2002, pay and conditions for teachers in England and Wales are matters for the Secretary of State for Education.
- 12.9.3 Changes to teachers' pay and conditions in maintained schools are made through a referral by the Secretary of State for Education to the independent School Teachers' Review Body (STRB). The Secretary of State's evidence to that body applies to both England and Wales. The Welsh Government can however submit its own evidence to the STRB on the potential consequences for Wales, as it did in 2012.

#### **Box 12.8: Evidence on teachers' pay**

In its evidence the UK Government stated that *'the school systems in the two countries are diverging at a growing rate, and it could be argued that devolving the pay and conditions of teachers in Wales is a logical consequence of deregulating teachers' pay and conditions in England and should be explored. The Secretary of State is responsible for a single pension scheme covering teachers and lecturers in England and Wales. The UK Government has set out the proposed scheme design for the TPS [Teachers' Pension Scheme], which will be implemented in April 2015. As part of these reforms, the Government has expressed its belief that no further reform to public service pensions should be necessary for the next 25 years, hopefully longer'*.

The Wales Trade Union Congress highlighted that *'in our evidence to the Welsh Government Green Paper consultation on Working Together for Wales: The Public Sector Workforce in July 2012, we reiterated the commitment made by the Labour Party in their manifesto for the 2011 elections when they stated that "In valuing the stability and equity that comes from national pay bargaining we will do whatever we can to try and protect the link between teachers' pay and conditions in Wales and those of their colleagues elsewhere in the UK". This is particularly pertinent in view of the current policies being pursued to undermine teacher's pay and conditions by the UK Government'*.

The Institute of Welsh Politics said: *'we recommend the devolution of teachers' pay and conditions.'*

### *Assessment*

- 12.9.4 In general under devolution where an area of responsibility is devolved, pay of public sector workers in that area is also devolved. However, in the case of health, the Welsh Government has decided to be part of a United Kingdom-wide approach, even though pay is devolved. Pensions for health workers are not devolved.
- 12.9.5 Teachers' pay and pensions are devolved in Scotland and Northern Ireland, so it is anomalous that teachers' pay is not devolved in Wales. We believe that it should be devolved. This accords with our principles of accountability, equity and subsidiarity.



- 12.9.6 There are arguments for and against aligning public and private sector pay in Wales, but if teachers' pay were devolved this would be a policy choice for the Welsh Government, which at the moment must fund pay decisions taken by the UK Government.
- 12.9.7 There is a much stronger case for maintaining England and Wales arrangements for pensions: public sector pensions have recently undergone long-term reform and it is important not to discourage continued cross-border movement of teachers because of pension concerns. We do not therefore believe that teachers' pensions should be devolved at the present time.

## 12.10 LORDS LIEUTENANT

### *Current position*

- 12.10.1 Lords Lieutenant represent the Crown in each of the counties of the United Kingdom, and are important to civic life. The Monarch appoints them on the advice of the Prime Minister. In Wales, the First Minister conveys the name of an individual to the Secretary of State for Wales for recommendation to the Prime Minister (who in turn makes the recommendation to the Queen).<sup>109</sup>

#### **Box 12.9: Evidence on Lords Lieutenant**

The Welsh Government said: *'There is also the question of the responsibility for recommending the appointments of Lord Lieutenants. Currently, this is a UK Government function, although the administrative work in relation to these appointments, and to Lords Lieutenants' budgets, is undertaken by Welsh Government officials. These arrangements appear to the Welsh Government to be outdated now that the First Minister of Wales is both a Crown appointee and Privy Counsellor, able to make recommendations to Her Majesty in his own right.'*

### *Assessment*

- 12.10.2 In Scotland, the First Minister's recommendation is conveyed directly to the Prime Minister to make to the Queen. There seems to be no reason why Wales has an additional step.
- 12.10.3 We believe that there is a good case for greater transparency in the appointment process, with recommendations for appointments being devolved while continuing to be agreed by the two Governments.

## 12.11 MATTERS FOR FURTHER CONSIDERATION

- 12.11.1 As discussed in Chapter 5, a number of matters have been raised in evidence on which we have not made recommendations. These include responsibilities that are devolved in Northern Ireland and Scotland, such as the law of marriage and burials, licensing and Sunday trading; and the devolution of responsibility for setting bank holidays (devolved to some extent elsewhere).

<sup>109</sup> Ministry of Justice (2009) *Protocol for Appointment Process of Lord-Lieutenants*.

- 12.11.2 There are also some highly technical issues (such as how to ensure a consistent approach to mental capacity tests across the devolution settlement while maintaining the existing executive functions of Welsh Ministers in the health area) and some recondite issues (for example, it is not clear why the current exception to local government powers in relation to overseas activities was ever made, nor to what it refers). We make no recommendations on these issues.
- 12.11.3 We have not come to conclusions in these cases, and a number of others, because we have not had the opportunity to take sufficient evidence from the specialists whom we would be duty bound to consult before we came to a firm view. Further issues will undoubtedly arise in the future - one issue will be the handling of employment law issues after the Supreme Court has given judgement on the agricultural wages legislation.
- 12.11.4 We propose that these matters should be considered further by the two Governments through the Welsh Intergovernmental Committee proposed in Chapter 5.

#### **Recommendations**

- R.39 The UK Government and Welsh Government should systematically assess and keep under review the way in which the Welsh language is used across government, in particular with a view to amending any United Kingdom legislation that does not give equal status to the Welsh language in Wales.
- R.40 Welsh Ministers should be able to make building regulations in respect of all buildings in Wales.
- R.41 The two Governments should ensure that there is a clear understanding of their respective roles in relation to civil contingencies and emergencies. There should be an agreed transfer of executive powers if that is necessary to ensure resilience.
- R.42 The administration and conduct of local government elections should be devolved.
- R.43 On equal opportunities, we recommend that legislative competence should be devolved:
- a. in respect of specific equality duties for the Welsh devolved public sector; and
  - b. to provide for accountability for the Equality and Human Rights Commission in devolved areas.
- R.44 The two Governments should work together to reduce the complexity of the present family welfare system. This should be based on the principle that the National Assembly should be able to legislate in relation to the powers and responsibilities of public authorities in connection with vulnerable adults and children.
- R.45 On Higher Education and research, there should be a formal intergovernmental committee to ensure a coherent approach to policy and to assess the impact of decisions taken at a United Kingdom level on Higher Education Institutions in Wales.



- R.46 The Research Councils and Technology Strategy Board should ensure that they are aware of Welsh needs, especially in relation to economic development, and designate a Council member with relevant expertise to represent the interests of Wales and be a conduit for the exchange of information.
- R.47 Teachers' pay and conditions should be devolved. Responsibility for pensions should remain with the UK Government.
- R.48 The First Minister should be able to make a recommendation for a Lord Lieutenant directly to the Prime Minister.

## 12.12 SUMMARY

- 12.12.1 We make a number of recommendations in relation to devolving powers over the Welsh language, building regulations, civil contingencies, elections, equal opportunities, family welfare, Higher Education and science, teachers' pay and the appointment of Lords Lieutenant.
- 12.12.2 Where we have been unable to take sufficient evidence on certain matters to make a decision on the case for devolution, we recommend that these matters should be given further consideration by our proposed Welsh Intergovernmental Committee. The Committee should also consider a number of technical issues in certain other areas that have been raised in evidence.

# Chapter 13 – The National Assembly for Wales and UK Parliament

## 13.1 OVERVIEW

13.1.1 In this chapter we use the principles outlined in Chapter 3 to assess whether there should be changes in the law relating to the National Assembly for Wales and how inter-parliamentary relations could be improved. Our terms of reference specifically enjoined us to look for ways in which the present constitutional arrangements could be changed so that they “would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales”. We were, however, excluded from considering “the structure of the National Assembly for Wales, including issues relating to the election of Assembly Members”.

## 13.2 CURRENT POSITION

### *The procedures of the National Assembly*

13.2.1 In 1998, the Government of Wales Act created a sixty member National Assembly. This National Assembly continued under the Government of Wales Act 2006, but became a legal entity separate from the Welsh Government as well as taking on a wider role. The original, unusual, mix between an executive and a scrutiny body had perhaps not been as well thought through as it might and it was not sustainable. The National Assembly now has the classic parliamentary purposes of representation, scrutiny of government and public bodies, and legislation.

13.2.2 National Assembly business is conducted through Plenary sessions twice a week and Committee sessions. Important stages of primary legislation are considered in Plenary; there are debates on topics initiated both by the Welsh Government and the opposition parties; Ministers are held to account through question time and questions on statements; and a number of other scrutiny activities take place.

13.2.3 National Assembly procedures are generally governed by Standing Orders. The Government of Wales Act 2006 made provision for the Secretary of State for Wales to make Standing Orders until the National Assembly convened after the 2007 election. Since then the National Assembly has been able to amend or suspend Standing Orders (subject to a two-thirds majority) and has done so on a number of occasions.

13.2.4 The structure and purpose of the National Assembly’s Committees have changed several times since 1998. With the attainment of primary legislative powers in the Fourth Assembly, the number of Committees was reduced, and subject committees took on responsibility for scrutinising relevant legislation as well as scrutinising the Welsh Government and devolved public bodies. At present the National Assembly has twelve



Committees.<sup>110</sup> As well as Committees with a legislative/scrutiny role, there are also a number of committees with specific functions similar to those found in other legislatures. Examples are the Public Accounts Committee, the Business Committee and the Standards of Conduct Committee. The National Assembly has freedom to design a committee structure based on its priorities. However, there is a requirement to ensure that key functions listed in Standing Orders are delivered by the committee structure.

- 13.2.5 The committee remits are broad and, in the main, cut across ministerial portfolios, with committees having the flexibility to examine any issue of relevance to their remit. European issues are included within the work of the Constitutional and Legislative Affairs Committee and the thematic or subject-based committees. These can, at least in theory, undertake multiple streams of work by establishing formal sub-committees and informal groups, as well as operating as a full committee. Scrutiny and legislative work is expected to take place simultaneously. However, legislative work is a requirement while scrutiny is an option. There is always a risk that a heavy legislative workload will squeeze out proactive scrutiny work.
- 13.2.6 The Government of Wales Act 2006 continues the provisions in the 1998 Act for the Secretary of State for Wales's participation in National Assembly proceedings. While the Secretary of State is not allowed to vote in the National Assembly, he or she is entitled to participate in proceedings, and to have copies of any document made available to Assembly Members or relating to any proceedings of the National Assembly made available to him or her.
- 13.2.7 The Secretary of State is also required by the Government of Wales Act 2006 (as he or she was by the 1998 Act) to consult with the National Assembly on the United Kingdom Government's legislative programme as soon as is practically possible following the Queen's Speech, and normally within a month. He or she is also required to participate at least once in plenary session as part of this consultation, which normally immediately follows the presentation of the UK Government's legislative programme.
- 13.2.8 Additionally, the Secretary of State is required to make a statement of estimated payments to the National Assembly. He or she must make this statement each financial year and lay it before the National Assembly.

#### **Legislative competence in relation to the National Assembly**

- 13.2.9 Some matters relating to the National Assembly are devolved. Schedule 7 of the Government of Wales Act 2006 lists the following matters relating to the National Assembly as within the competence of the National Assembly (Subject 13):

*'Complaints about Assembly members (including provision for and about an office or body for investigating such complaints and reporting outcomes of investigations). Assembly Commission. Salaries, allowances, pensions and gratuities for and in respect of Assembly Members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General and Deputy Welsh Ministers. Meaning of Welsh words and phrases in Assembly Measures and Acts of the Assembly, in subordinate legislation made under Assembly Measures and Acts of the Assembly and in other subordinate legislation if made by the Welsh Ministers, the First Minister or Counsel General. Private legislation in the Assembly. Financial assistance for political groups to which Assembly members belong. The Welsh Seal. Arrangements for printing of Acts of the Assembly, of subordinate legislation made*

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<sup>110</sup> It is also possible to set up a Committee of the whole National Assembly.

*under Assembly Measure or Acts of the Assembly and other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General.'*

- 13.2.10 While Schedule 7 does not mention any exceptions obviously relevant to this Subject, other parts of the Government of Wales Act 2006 place certain restrictions and constraints on the National Assembly that it is not itself able to alter.<sup>111</sup> These include provisions in respect of National Assembly elections; terms of office of Assembly Members; disqualification; oath of allegiance; the Presiding Officer and Clerk; how Committees are composed; the Audit Committee; Standing Orders; participation by United Kingdom Ministers in Assembly proceedings; integrity (including roles of regional AMs); power to call witnesses and defamation.

#### **Box 13.1: Evidence on demands on the National Assembly**

*According to the Presiding Officer 'The pressure on Members of the Assembly is very different to those of its larger counterparts elsewhere in the UK. Necessarily, most Assembly committees have very broad remits, certainly stretching beyond the portfolio of a single Minister, and are responsible for the scrutiny of legislation, policy and finance within those remits.*

*'In addition to these high committee demands, the majority of Members will be active every week in plenary - again, in contrast to larger parliaments where the opportunity to question or participate in statements or debate will come along less frequently.*

*'The multiple roles, as office holders and party spokespeople, which many Members must inevitably assume within a small legislature, add to the pressure on Member capacity and bring distinct institutional challenges.*

*'As a result, most Assembly Members find themselves in a weekly cycle of committee work, demanding a high level of specialised policy, legislative, financial and procedural expertise, timetabled around two plenary sessions where a high level of attendance and participation is the norm.*

*'While the Assembly Commission and the independent Remuneration Board seek to provide Members with support to enable them to be as effective as possible in their role, there is a limit to what we can expect of such a small institution.'*

#### **The scrutiny capacity of the National Assembly**

- 13.2.11 One of the most important functions of a legislature is that of scrutinising legislation and holding the executive to account. By definition, this can be done only by those who do not hold ministerial office. Of the sixty members who sit in the National Assembly, thirteen currently hold ministerial office as First Minister, Ministers or Deputy Ministers. This is the limit set in the Government of Wales Act 2006 and it represents 21.7 per cent of the National Assembly's membership. An additional member could be added to the Cabinet as Counsel General (this is an appointment which does not have to be given to an Assembly Member). If the Counsel General were an Assembly Member, almost a quarter of the National Assembly would hold government office.

<sup>111</sup> By virtue of Government of Wales Act 2006, Schedule 7, Part 2, paragraph 5.



13.2.12 At the time the Presiding Officer submitted her evidence, forty-four Assembly Members undertook the work of the National Assembly's five main Committees (excluding Ministers and Deputy Ministers, the Presiding Officer, and a number of other office-holders). Of these, fourteen served on one Committee, twenty-four on two, and six on three. In order to ensure proportional representation on the Committees, smaller parties have a higher level of demand on their members; but there are only sixteen members of the majority party who must provide the majority on each committee. This leads to severe strains, as was frequently mentioned to us both by observers of the National Assembly and Assembly Members themselves.

### *Welsh representation in the UK Parliament*

13.2.13 Wales returns forty Members of Parliament, currently elected from the same constituencies as the forty constituency Assembly Members. The Parliamentary Voting Systems and Constituencies Act 2011 would have harmonised the number of electors per constituency throughout the United Kingdom, reducing the number of Members of Parliament from 650 to 600. This would have meant ten fewer MPs for Wales. The impact would have been greater for Wales than any other part of the United Kingdom as Wales currently has the fewest electors (and population) per MP. The reduction of the number of MPs has been postponed until at least 2018.

13.2.14 There are four main forums for discussion of Welsh matters in the House of Commons. The first is the Welsh Affairs Committee, comprised of twelve MPs broadly reflecting the wider party balance in the Commons and not necessarily elected from Welsh seats. Its terms of reference are to examine matters within the responsibility of the Secretary of State for Wales, including relations with the National Assembly. The second is the Welsh Grand Committee, comprised of all forty Welsh MPs and up to five additional MPs. This meets from time to time at the behest of the Secretary of State for Wales to discuss issues relevant to Wales. The third is the five-weekly questions to the Secretary of State for Wales, in which all members of the House of Commons can participate. The fourth is the very rarely used Welsh Parliamentary Party, convened by the longest serving Member from Wales. Unlike the other three forums, there is no administrative support given to the Welsh Parliamentary Party and its proceedings are not in law "proceedings in Parliament".

13.2.15 There is no official or definitive list of Peers from Wales or of those with an interest in Wales. The House of Lords does not have a specific forum for consideration of Welsh matters, though Peers can propose debates or introduce legislation or ask questions about matters to do with Wales within the UK Government's responsibility. The Wales Office currently has a Minister in the Lords, but this had not been so previously either in the case of the Wales Office or the former Welsh Office.<sup>112</sup>

### *Inter-Parliamentary Relations*

13.2.16 The main formal link between the UK Parliament and the National Assembly is through Legislative Consent Motions. These are the means by which the National Assembly gives the UK Parliament consent to legislate in areas where the National Assembly has competence. The negotiation of these motions, and agreement or otherwise about whether they are necessary, is in practice conducted between officials, and if necessary

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<sup>112</sup> Lord Brecon was Minister of State for Welsh Affairs from 1957 till 1964, when the Welsh Office was created after the General Election of that year.



Ministers, in the UK and Welsh Governments. Any Legislative Consent Motion is then tabled in the National Assembly by the Welsh Government.

- 13.2.17 There are also a number of less formal ways in which members of the two legislatures work together, ranging from cooperation by individual Members at constituency level through to the formal mechanism under which joint meetings can be held between the Welsh Affairs Committee and National Assembly Committees. There are also wider forums such as the British Irish Interparliamentary Assembly or the regular meetings of the Speakers and Presiding Officers of the United Kingdom's legislatures.

**Box 13.2: Evidence on Legislative Consent Motions and Inter-Parliamentary relations**

On the Legislative Consent Motion process, the Presiding Officer welcomed the *'formalisation of what is currently an inter-governmental convention relating to LCMs'*. Noting that *'we rely on the Welsh Government to negotiate with the UK Government what provisions should or should not find their way into UK Bills, to lay the Motion and related Memorandum on the UK Bill, and to communicate the consent (or lack of) granted to the UK Government'*, the Presiding Officer added that *'whilst our main focus should be on holding the Welsh Government to account on its actions in relation to LCMs, this should not preclude us from seeking better inter-parliamentary communication. For example, the effectiveness of our scrutiny would be strengthened through a formal inter-parliamentary agreement on the legislative consent convention and the EU Protocol on the application of the principles of subsidiarity and proportionality'*.

The Speaker of the House of Commons was *'happy for the House to endorse'* the recommendation of the Welsh Affairs Committee that the Standing Orders of the House provide for the Speaker to lay before it any formal communication conveyed to him or her from the National Assembly for Wales.

In its evidence, the Wales Study Group of the Study of Parliament Group noted that the *'means of communication between the Assembly and the two Houses of the UK Parliament are controlled almost entirely by the two governments. We believe it is a regrettable aspect of the current constitutional arrangements that there is so little formal opportunity for exchanges of views between the legislators themselves in the three bodies involved'*.

On inter-parliamentary relations, the Presiding Officer told us that *'the Presiding Officers and Speakers meet on a regular basis and I would certainly support the creation of a wider, structured forum for dialogue between the legislatures. It seems to me that we could learn from the approach we take within the UK and devolved legislatures to engaging with the European Parliament and Institutions when it comes to inter-institutional dialogue'*.

The Speaker of the House of Commons believed that *'there may be a case for a more widely-based and structured forum focused on intra-UK questions of policy and legislation, and the meetings of the presiding officers may be one forum in which this could be further explored. I would certainly be sympathetic to a proposal to explore options for such an organisation should your Commission propose this, and should there be support in principle from the devolved legislatures'*.

The Wales Study Group of the Study of Parliament Group stated that it believed *'that*



*the time has arrived for there to be a more structured forum focussed on intra-UK devolved legislature dialogue about the operation of the devolution settlement, to promote the exchange of information and best practice and to examine specific policy topics of shared concern’.*

### **Procedures in the Scottish Parliament and the Northern Ireland Assembly**

- 13.2.18 Standing Orders govern the proceedings of both the Scottish Parliament and the Northern Ireland Assembly. In the latter case, several provisions reflect the history of a divided community. Neither the Scottish Parliament nor the Northern Ireland Assembly is able to change certain aspects of the law under which they were established and operate. Thus it was necessary for the Scotland Act 2012 to make some minor changes to the arrangements for the election of the Presiding Officer and Deputy Presiding Officers as recommended by the Calman Commission.
- 13.2.19 There is no power for the relevant Secretary of State to take part in Scottish Parliament or Northern Ireland Assembly proceedings and there is no provision for them to present the United Kingdom legislative programme to the Parliament or Assembly. There are other differences between the statutory constraints placed on the three legislatures. In the case of Northern Ireland these largely stem from the need to secure cross-community buy-in, and these would not be required in Wales. It is less easy to see justification for differences between Wales and Scotland.

#### **Box 13.3: Evidence on the size of the National Assembly**

The Presiding Officer stated that *‘given the weight of responsibility resting with the Institution, and the unavoidable scale of the workload faced by Members, I am in no doubt that the number of Assembly Members should be increased from 60 to 80’.*

The UK’s Changing Union project noted that *‘research indicates that the Assembly is below the ‘floor size’ that would allow Members to undertake effectively all necessary functions. With the granting of primary legislative powers under the 2006 Government of Wales Act, there can be no justification for this state of affairs to continue. Should the Assembly acquire further powers, the case for an increase in the number of Assembly Members in our view becomes unanswerable’.*

In his evidence, Professor John Williams, Aberystwyth University stated that *‘the capacity of the Assembly to scrutinise legislation is restricted by the limited number of AMs available to undertake that role’.* He proposed whether *‘a standing body appointed to scrutinise and advise the appropriate Assembly Committee (would) provide the necessary additional support? This would not undermine the democratic accountability of the Assembly, but would rather enhance its ability to ensure that legislation is fit for purpose’.*

The Electoral Reform Society recommended *‘an increase in the number of Assembly Members’* and noted that *‘it is vital to democratic policy outcomes that we have sufficient oversight and scrutiny capacity in order to shape those outcomes so that they serve the people of Wales as well as possible’.* It stated that *‘it is clear that the size of the Assembly means that there are not enough people to provide effective scrutiny already’.* The Society, however, did not recommend *‘a Second Chamber for Wales’.*

The Church of Wales expressed concern that *'in-depth scrutiny of important legislation may suffer because there are not enough back-bench AMs to carry out all the necessary tasks. Where large numbers of AMs have to be part of the government, it is hard for them to be sufficiently independent'*.

In its evidence, Unite Wales noted that *'as earlier raised by the Richard Commission and others, the existing 60 Assembly Members is not sufficient enough to effectively scrutinise the legislative and departmental work of the Welsh Government'*. It acknowledged that *'there is a case for an increase in the number of Assembly Members'* and that it had *'previously supported having 80 elected members in the National Assembly for Wales'*.

The Law Society noted that *'current complement of just 60 Assembly Members is too few'* and that the *'figure compares unfavourably with the Parliament in Scotland which has 129 and the Northern Ireland Assembly which has 108'*. It added that *'this is an issue which if not addressed when the powers of the National Assembly for Wales are widened will intensify'*.

In its evidence to the Commission, the Institute of Welsh Politics stated that there *'is already a strong case for increasing the number of AMs elected to the NAfW'*. It added that *'any further transfer of competencies to the NAfW makes increasing the number of elected representatives essential if the body is to undertake its legislative and scrutiny functions effectively'*. The institute recommended that *'the number of AMs be increased from 60 to 80'*.

The Wales Study Group of the Study of Parliament Group noted that it is *'hard to disprove that substantial capacity constraints arise from having such a relatively small number of AMs'*. It added that at *'some stage the core capacity issues will have to be addressed, otherwise there will be an inevitable continued impact on the profile, effectiveness and legitimacy of the Assembly'*. The Group proposed a number of shorter-term alternatives for increasing capacity in the National Assembly for Wales including *'Assembly Associate, 'Overhang' seats, and changes to the dual candidacy ban'*.

### **Size of United Kingdom and other legislatures**

13.2.20 With its sixty members, or one member per 51,000 of the Welsh population, the National Assembly is more stretched than either the Scottish Parliament (129 members, or one member for every 41,000 members of the public) or the Northern Ireland Assembly (108 members, or one member for every 17,000 members of the public).

13.2.21 While it is necessary to be cautious in drawing conclusions from other countries' practices, some relevant figures for regional and national legislatures are set out, and put in context, in a valuable paper published recently by the Electoral Reform Society and the UK's Changing Union project.<sup>113</sup> This suggests that the National Assembly is also more stretched than its international comparators, especially those where the executive is drawn from the members of the legislature.

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<sup>113</sup> UK's Changing Union (2013) *Size Matters: Making the National Assembly more effective*.



13.2.22 In its 2004 report, the Richard Commission recommended the capacity of the National Assembly be increased to eighty members. This figure was supported in the evidence given to us by the Presiding Officer. The Electoral Reform Society and UK's Changing Union project paper proposes an Assembly of around 100. It calculates that this would cost an extra £10.1 million annually.

### 13.3 ASSESSMENT

#### *Better scrutiny*

13.3.1 We start from the position that the National Assembly ought to have the capacity to scrutinise the Executive in a way that delivers better governance and better legislation. It is important to stress that this scrutiny role is as much a role of government backbenchers as it is of opposition Members. There are some excellent examples in the House of Commons of independent-minded government MPs exercising a scrutiny role that cannot always be comfortable for government, but which is vital for good governance. Government backbenchers in the National Assembly are particularly stretched.

13.3.2 A number of possible remedies to the 'capacity gap' have been suggested. One is to add unelected, non-voting members to committees, or to create a second Chamber. These are democratically problematic and we do not recommend them. Greater flexibility on the number and size of committees; increased research staff capacity; and better use of Assembly Members' time - 'smarter working' - are other suggested remedies. Each may bring some relief, and we encourage the National Assembly and its Business Committee to consider them. However, they cannot provide the long-term solution needed. We are convinced that the National Assembly requires more backbench members who will be able to scrutinise Welsh Government legislation and policy more thoroughly.

#### *Size of the National Assembly*

13.3.3 The size and capacity of the National Assembly is a contentious issue on which there is no overall consensus in Wales. Robust views are expressed against any suggestion that numbers need to be increased, and political parties are naturally cautious about making any recommendations that might appear to support the case for more politicians. It is all the more incumbent upon us to come to a view on this question.

13.3.4 The National Assembly is small in relation to the Scottish Parliament, the Northern Ireland Assembly and its international comparators. We are clear that this causes problems for effective governance. What may have been appropriate before the National Assembly had a full legislative role (though it was questioned even then) is certainly less appropriate now. There is simply not sufficient strength in depth, given the number of Members on more than one committee. Specialism is difficult and the scrutiny that keeps governments on their toes is less easy. This problem will grow substantially once the National Assembly begins to scrutinise tax legislation, and will grow even further if the important additional responsibilities we are recommending in this report are given to the National Assembly.

13.3.5 We have concluded that there should be more Members of the National Assembly. As we mentioned earlier, membership figures of between eighty and a hundred have been proposed (with the Richard Commission and the Presiding Officer proposing eighty and the UK's Changing Union project supporting one hundred). We do not ourselves propose a

definite figure, though it seems to us that increasing the National Assembly to eighty would balance enhanced scrutiny capacity with restraint in public spending. Other factors also need to be taken into consideration in determining the increased size, especially the read-across to the changes to the voting system that would be necessary - a matter outside our terms of reference. There are also practical issues, like the adaptability of the National Assembly Chamber, which can, we understand, be adapted to house eighty Members but which may not easily accommodate more, and office space. In coming to this conclusion, we recognise that even a substantially larger National Assembly will not allow the sort of specialisms to develop that are seen in the House of Commons: even the larger Scottish Parliament is sometimes seen by some commentators as struggling to perform its scrutiny role as well as it should.

- 13.3.6 The annual cost of an increase in the range we suggest has been estimated to be around £5.3 million if the new size were eighty.<sup>114</sup> However, we believe that the cost would be off-set by the scrutiny benefits. As we said in our First Report, *'good scrutiny means good legislation and good legislation pays for itself'* - an assertion that has since been backed by academic analysis.<sup>115</sup>
- 13.3.7 Some people have argued that consideration of the size of the National Assembly should be part of a wider consideration of political representation in Wales and that that an increase in the number of Assembly Members should be linked to a reduction in the number of Welsh parliamentary constituencies. It is not part of our role to comment on the size of the House of Commons or the number of councils in Wales. But as the law presently stands, there will in due course be ten fewer MPs representing Wales, and there are indications that there will be fewer councillors in the Wales of the future. The cost savings that would flow from 10 fewer MPs and, say, a number of Welsh councillors commensurate with the number in Scotland would outweigh the cost of an increase in the number of Assembly Members. Increasing the number of Assembly Members would certainly mean that the outcomes of the political process became more effective.
- 13.3.8 Before leaving this issue, we need to explain why we regard the size of the National Assembly as not excluded from our terms of reference, as we have heard a view that the exclusion of the "structure of the National Assembly for Wales" from our remit means excluding any recommendation on the National Assembly's size. On the narrow linguistic point, we are quite clear that size and structure are different concepts. Objects of different size can have the same structure. No-one suggested that the 'structure' of the House of Commons was altered by the reduction of the number of seats provided for under the Parliamentary Voting Systems and Constituencies Act 2011. What would alter structure would be, say, a proposal that Ministers should not be Assembly Members. More generally, what is clearly within our terms of reference is anything that we believe will enable the National Assembly to better serve the interests of Wales. It is our clear judgement that, without its enlargement, the National Assembly cannot serve the interests of the people of Wales as it ought.

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<sup>114</sup> See UK's Changing Union (2013) *Size Matters: Making the National Assembly more effective* p. 19.

<sup>115</sup> Per Petterson-Lidborn (2012) in *Journal of Public Economics*, quoted in UK's Changing Union (2013) *Size Matters: Making the National Assembly more effective*.



### Recommendations

- R.49 A range of options should be considered in the short term for increasing the capacity within the existing National Assembly, including greater flexibility on the number and size of committees, increased numbers of research staff and better use of Assembly Members' time.
- R.50 The size of the National Assembly should be increased so that it can perform its scrutiny role better. The practical implications, and those for the electoral system, will need further consideration.

### Legislative constraints on National Assembly

13.3.9 The legislative provisions that govern the operation of the National Assembly itself, as contained in the Government of Wales Act 2006, reflect an earlier stage of devolution. Some of them even date back to the 1998 Act. We have asked ourselves whether, in the light of our principles, it remains appropriate for these provisions to remain. In this context, we believe that the important evidence from the Presiding Officer of the National Assembly should be given special consideration.

13.3.10 It seems to us particularly open to question as to whether a legislative restriction that does not apply to the Scottish Parliament should apply in Wales now that the National Assembly has the same fundamental functions and powers as the Parliament in Edinburgh.<sup>116</sup> Asymmetry between the positions in Scotland and Wales can only make sense in this area if there is a fundamental difference between the two legislatures: we believe that differences between the arrangements pertaining in Wales and Scotland are tenable only if they can be objectively justified.

13.3.11 The Presiding Officer mentioned in this context:

- passing the powers to call an extraordinary general election or to vary election dates by one month from the Secretary of State to the Presiding Officer, and to give the National Assembly a role in its own electoral arrangements;
- introducing flexibility as to the size of the Assembly Commission;
- allowing the National Assembly to decide itself as to the composition of its committees, including what the Act calls the Audit Committee;
- removing the requirement for a Code on relations between regional and constituency Members; and
- giving the National Assembly greater power to regulate its own standards of conduct.

We believe that the presumption in each of these cases should be that the law in Wales should be no more prescriptive than that in Scotland.

13.3.12 The Presiding Officer also made some proposals that are not, as we understand it, intended exactly to reflect practice in Scotland. Some of these appear uncontroversial. For example, she proposes:

- to remove the requirement for the National Assembly to meet within seven days of a

<sup>116</sup> There are well-known particular community issues in Northern Ireland which mean that it is not appropriate to consider legislative restrictions on the Northern Ireland Assembly in this context.

general election so allowing more time for any necessary coalition-building;

- to remove some restrictive provisions affecting the Presiding Officers of the National Assembly;
- less prescription of notices to witnesses by the Clerk;
- notification to the National Assembly of references of legislation to the Supreme Court and a right to intervene;
- clarification of powers to remove the Auditor General for Wales; and
- joint Statutory Instruments to be made bilingually.

In each of these cases, we believe that the presumption should be that the UK Government should seek to amend the law in the way the Presiding Officer proposes.

13.3.13 Some areas may be considered more controversial, but we believe that change is now desirable. Under the 1998 Act, the National Assembly had no primary powers, and under the first stage under the 2006 Act there remained a role for the UK Parliament in deciding on the National Assembly's legislative competence. The Westminster legislative programme was therefore of direct relevance to the National Assembly. However, given the changes in powers of the National Assembly since the 2011 referendum, it no longer seems appropriate that there should be a statutory duty on the Secretary of State for Wales to make an annual legislative statement to the National Assembly nor that he or she should have the right to participate in proceedings.

13.3.14 Nor is it appropriate for the Secretary of State to have any wider powers to block Assembly Bills from receiving Royal Assent than is the case in Scotland.<sup>117</sup> At present, the Secretary of State can intervene to prevent a Bill passed by the National Assembly from becoming law if it would have an adverse effect on any matter not listed under Schedule 7 or if it falls within an exception; if it would have an adverse effect on the operation of the law applying in England; or if it would be incompatible with any international obligation or the interests of defence or national security. The last of these is also contained in the Scotland Act and is unexceptionable, but otherwise in Scotland, the Secretary of State can only prevent from becoming law a Bill that he or she believes might *'make modifications of the law as it applies to reserved matters and....would have an adverse effect on the operation of the law as it applies to reserved matters'* (the word "and" here is important). Even putting aside the difference between the conferred and reserved powers models, there is a more significant and, in our view, unjustifiable intervention power in the case of Wales as opposed to Scotland.

13.3.15 We do, however, want excellent relationships to be fostered between the National Assembly and UK Government Ministers. We believe that it is important that UK Government Ministers, and especially the Secretary of State for Wales, regularly attend National Assembly proceedings and that they be invited to do so. We welcome the Presiding Officer's view that the Secretary of State should continue to consult the National Assembly about the UK Government's legislative programme.

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<sup>117</sup> We deal separately with the Secretary of State's powers in respect of Assembly legislation affecting water interests in England.



- 13.3.16 There is one duty of the Secretary of State that the UK Government itself recognises may be a historical anomaly: the duty to make the annual financial statement to the National Assembly. This should be presented by the Welsh Government rather than the UK Government. But, as we recommended in our First Report,<sup>138</sup> there should also be a general relaxation of the provisions of the Government of Wales Act that regulate the National Assembly's financial procedures. The Scotland Act 1998 is minimalist in this area, requiring a basic minimum and leaving details of financial procedure to the Scottish Parliament - procedures there are now very satisfactorily regulated by an Act of the Scottish Parliament, the Public Finance and Accountability (Scotland) Act 2000. The constraints upon the National Assembly should similarly be removed, and it should be given the freedom to choose its own financial procedures in a way that best suits the institution. The private legislation procedures recently adopted by the National Assembly, and regarded by experts as superior to those in either Westminster or Scotland, show what can be done.
- 13.3.17 Some of the Presiding Officer's other proposals may require wider consideration than in Wales alone. For example, she proposes amending the law on disqualification so that a candidate is not required to relinquish a disqualifying office until elected. It may only be appropriate for such a change to be made if it affected all candidates for all elected offices. Her proposal to extend the privilege of Assembly Members in respect of the law of defamation or of contempt of court, and her view that the grant-making power of the National Assembly in the interest of public awareness should be widened, may also raise wider issues. Nevertheless, we believe that these proposals also deserve careful consideration by the UK Government.
- 13.3.18 There are two areas where we understand that the UK Government has already agreed to change – the proposal that National Assembly terms should be five years rather than four, and the removal of the bar on standing for a regional and a constituency seat. These changes are welcome.
- 13.3.19 As far as the title of the institution is concerned, the Presiding Officer believes that the statutory designation of the legislature should be as a Parliament, and she (and the Welsh Government) wish to see the statutory designation of Welsh Assembly Government replaced by "Welsh Government". In this area, we believe that it is appropriate for the legislature and the government to decide themselves what they should be called.

#### **Recommendations**

- R.51 On the National Assembly's relationship with the UK Government, we recommend:
- a. the National Assembly and Secretary of State should agree appropriate engagement on the UK Government's legislative programme, rather than one based on the legislative requirement for the Secretary of State's appearance before the National Assembly;
  - b. the unused right for the Secretary of State to participate in the proceedings of the National Assembly should be removed;

<sup>138</sup> See paras 8.4.29 to 31.

- c. the Secretary of State's powers to prevent Assembly Bills proceeding for Royal Assent should be aligned with those in Scotland; and
  - d. the annual financial statement to the National Assembly should be presented by the Welsh Government rather than the UK Government, and the National Assembly should be able to regulate its own financial procedures.
- R.52 Obligations and restrictions on the National Assembly in the Government of Wales Act 2006 should be reviewed and amended or repealed where no longer appropriate. This should be done on the basis of the detailed memorandum provided to us by the Presiding Officer. In particular, there should be a presumption in favour of adopting changes that bring the National Assembly in line with the Scottish Parliament.
- R.53 If the National Assembly wishes to change its name to the Welsh Parliament, this should be respected.

### *Inter-parliamentary relations*

- 13.3.20 Whatever changes are made, it is essential that a strong link between the National Assembly and UK Parliament continues and is fostered. This is particularly the case in relation to United Kingdom or England and Wales legislation – the UK Parliament is still able to, and frequently does, legislate in non-devolved and devolved matters either on behalf of Wales, or in a way that affects citizens of Wales. It is also desirable more generally that legislatures work together cooperatively.
- 13.3.21 We recognise the vital role that Members of both Houses of Parliament play in promoting the interests of Wales in the United Kingdom. This is, of course, particularly true of MPs representing constituencies in Wales. The Clerk of the House of Commons told us that Welsh issues were represented well in the House of Commons, both in the Chamber and especially at Committee level.
- 13.3.22 More could perhaps be done institutionally in the House of Lords to promote Welsh interests, despite the fact that peers have no territorial role. We do, however, recognise the work that many peers do on behalf of Wales. Future appointments to the House should reflect fairly the proportion of the United Kingdom population domiciled in Wales, and any reformed Chamber should represent Wales appropriately.
- 13.3.23 The need for improved inter-parliamentary cooperation was widely recognised. This is particularly the case on Legislative Consent Motions (LCM), where the ambition should be to increase accountability and transparency. In this context, we welcome the recent agreement between the authorities of the National Assembly and of both Houses of Parliament that mean that the decision of the National Assembly on a LCM is recognised officially on the agenda of the two Houses as the Bill proceeds. The Presiding Officer suggested that there should be a further step: that the convention on LCMs should become a statutory rule. While this would clearly affect Scotland and Northern Ireland as well, we can see a strong case for LCMs to have a formalised status in law or at least in the standing orders of both legislatures. The Presiding Officer also drew our attention to



the fact that LCMs in Wales have a narrower applicability than in Scotland and she called for the relevant Devolution Guidance Note to be amended so that the two systems are brought in line. We support this.

- 13.3.24 One further practical step would be for all government public Bills at Westminster to contain a statement by the Minister in charge as to the Bill's relevance, applicability and effects in Wales. This would be in addition to what is already contained in the Explanatory Memorandum attached to Bills. A similar practice could be adopted in the National Assembly so that there is a published assessment of any implications for other parts of the United Kingdom of each Assembly Bill.
- 13.3.25 Good general working relations are essential to both the National Assembly and the UK Parliament. It is essential that these relationships are fostered and maintained beyond the LCM process especially in relation to parliamentary and National Assembly Committees. A number of interesting ideas were put to us by the Study of Parliament Group, and we welcome the support of the Presiding Officer and the Speaker of the House of Commons for increased committee-to-committee cooperation, and their willingness to contemplate quite radical proposals for joint committee proceedings. Less radically, we hope that invitations from either legislature to Ministers and other Members of the other legislature to attend its proceedings as witnesses will always be regarded positively. The way that good relations between the federal and provincial/state legislatures in Canada and Australia provide international examples of what can be done well.
- 13.3.26 Some witnesses told us that parliamentarians are not regularly informed about the work of the National Assembly. If that is correct, it is regrettable, and we hope that the Assembly Commission will consider what it might do to remedy this so that parliamentarians are regularly informed about its legislative and committee work. Face-to-face meetings are also important, and we believe that the Houses of Parliament should facilitate visits by Assembly Members by giving them entry passes - the National Assembly does this to facilitate visits to the Assembly by Members of Parliament. The Speaker of the House of Commons told us that he would invite the House's Administration Committee to consider this issue if we were to recommend that he did so. We are grateful for this, and so recommend.
- 13.3.27 One particular concern was raised with us by Members of Parliament who represent seats in England that border Wales. Their constituents may be affected by things that happen just across the border (for example, development of a plant with noxious emissions) or the need to use hospitals, GP surgeries, schools or other public services in Wales. In the case of water provided in England by suppliers regulated in Wales, their constituents may be affected by decisions of Welsh Ministers. When these border MPs make representations about such matters to Welsh Ministers, they ought to be treated with exactly the same consideration as Assembly Members. The same ought to be the case for Assembly Members from border areas raising issues with Ministers responsible for England, though in that case, Welsh MPs can also raise the relevant issue with the Minister.
- 13.3.28 The report of the McKay Commission contained a number of recommendations of relevance to Wales. It is not for us to comment on those recommendations so far as they apply to House of Commons consideration of laws affecting England,<sup>119</sup> though we believe

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<sup>119</sup> Or "England-and-Wales" as the Commission refers to legislation that may actually affect only England but which, for technical reasons, is part of the law that applies in the jurisdiction of England and Wales.

that the Commission's recommendation of a Devolution Committee of the House of Commons that could consider the consequences of United Kingdom decisions on cross-border effects, hold United Kingdom/English ministers to account, evaluate LCMs and how they work in practice and raise awareness of the implications of devolution, is consonant with our own recommendations.

13.3.29 As well as the UK Parliament in London, the European Parliament contains representatives of Wales and legislates on matters of great importance to the people of Wales. We welcome the existence of the National Assembly's European Union office in Brussels and we commend its work. The proposal of the Study of Parliament Group for an inter-legislature forum to discuss European Union matters deserves wider consideration.

### Recommendations

R.54 On the relationship between the National Assembly and UK Parliament, we recommend:

- a. there should be improved inter-parliamentary cooperation to increase mutual understanding of the work of the National Assembly and both Houses of Parliament, especially in terms of committee-to-committee cooperation (including attendance by Ministers from each administration at Committees of the other legislature); information-sharing should be improved; Assembly Members should be given parliamentary passes; and the Legislative Consent Motion procedure should be formalised and apply as widely as the same procedure does in Scotland;
- b. there should be a detailed statement published with every UK Government-proposed Parliamentary Bill on its implications for Wales; and there should be a similar practice in respect of Assembly Bills in relation to any implications for the wider United Kingdom; and
- c. Members of Parliament representing constituencies bordering Wales who raise cross-border issues that affect their constituents should be accorded the same courtesies by Welsh Ministers as Assembly Members receive. This should apply equally to Assembly Members raising issues in England that affect their constituents.

R.55 The House of Lords should ensure adequate consideration of Welsh matters, and future appointments to the House should fairly represent Welsh-domiciled people. Any reformed second Chamber should represent Wales fairly.



### *Constitutional permanence of National Assembly*

13.3.30 A number of people responding to our call for evidence pointed to the overwhelming popular support in Wales for devolution and argued that, even though the National Assembly is technically a subordinate legislature within the United Kingdom, its existence should not depend on the UK Parliament alone. The British Constitution does not allow for the entrenchment of any law except in the sense that a law can achieve a perceived constitutional status. Even though the UK Parliament would still have the power to abolish the National Assembly, the National Assembly has now in our view achieved a constitutional status that means it has become inconceivable that Parliament would be able to abolish the National Assembly without a clear mandate from the people of Wales.

#### **Recommendation**

R.56 It should be recognised that the National Assembly is permanent, so long as that is the will of the majority of the people of Wales.

## **13.4 SUMMARY**

- 13.4.1 The National Assembly should have greater control over its own proceedings. This would help it fulfil its roles of passing legislation, scrutinising the Welsh Government and representing the views of the people of Wales.
- 13.4.2 The National Assembly is at present too small to fulfil the role decided for it by the population. There is a real risk of the governance of Wales being impeded by insufficient capacity to scrutinise legislation and the Welsh Government. The size of the National Assembly should be increased, and we note that most analysis suggests that it should comprise at least eighty Members. The practical implications, and those for the electoral system, will need further consideration.
- 13.4.3 There should be improved arrangements for fostering closer working between the National Assembly of Wales and the UK Parliament, and we make a number of specific proposals.

# Chapter 14: Public sector capacity

## 14.1 OVERVIEW

14.1.1 This chapter sets out some of the issues in relation to the capacity of the public sector in Wales and at Westminster to govern Wales well and in the interests of its people.

### Box 14.1: Evidence on public sector capacity

The UK Government said: *'We believe that present arrangements offer appropriate flexibility over how different administrations are structured; their patterns of recruitment; and the terms and conditions provided to the vast majority of their staff. This flexibility allows those in the civil service supporting Welsh Ministers to reflect their distinctive priorities and needs. At the same time, a united Home Civil Service also ensures that civil servants and others working in Wales are part of a wider framework that brings opportunities for exchange of people and ideas as well as reinforcing the professionalism of the civil service'*.

The Welsh Government said: *'Within this shared Civil Service framework, there has been, since devolution, recognition of the need for flexibility to enable civil servants to follow sensitively the political leadership of their government. Under a devolved model of governance, this leadership will always be distinctive, and may hold fundamentally different positions of policy or principle'*.

The UK's Changing Union project said: *'The civil service fulfils a crucial function in ensuring high-quality policy development, strategy and delivery to meet the needs of the Welsh nation, its communities and people. It currently suffers from incoherence and a lack of transparency'*.

Citizens Advice Cymru said: *'We believe that there are general principles that should inform decision on these matters:*

- *the structures and processes must be as clear, transparent and easy to engage with as possible*
- *it must be possible for individuals to have ready access to justice and to be able to find out what law applies in their circumstances*
- *it must be easy to identify easily which elected representatives have the power to change that law'*.

Professor James Foreman-Peck, Cardiff University said: *'Performance has been so poor from a desire not to follow English managerialism without finding an effective alternative, coupled with inadequate performance monitoring'*.

The Church in Wales stated that in relation to UK Government policy and legislation development *'England-based civil servants are not always aware of the Welsh context, and how UK legislation may affect Wales'*.



## 14.2 CURRENT ARRANGEMENTS

- 14.2.1 As set out in Chapter 2, the Welsh Office was the Whitehall department with responsibility for delivering and adapting many of the UK Government's policies in Wales prior to devolution. In 1999, most of the officials who staffed the Wales Office were transferred to the National Assembly as the devolved corporate body. They remained members of the Home Civil Service, rather than of a separate civil service.
- 14.2.2 Over time, the number of officials supporting the governmental functions of the National Assembly was increased, particularly with the merger with executive agencies in 2006. These agencies, for example the Welsh Development Agency, had previously taken a key role in the Welsh public sector, and now formed part of the Welsh Assembly Government.
- 14.2.3 The Welsh Assembly Government came formally into being in 2007, with the legal separation of the corporate National Assembly into a legislature and executive. The majority of officials remained with the executive.
- 14.2.4 The Welsh Government is now served by approximately 5,000 officials, who remain part of the Home Civil Service. In broad terms, this means that the officials of the Welsh Government are subject to the same professional development and codes of practice as civil servants elsewhere in Great Britain.<sup>120</sup> Most importantly, civil servants who serve the Welsh Government share the ethos, values and apolitical status of civil servants elsewhere in the United Kingdom, whether they work for the UK Government or the devolved Governments.
- 14.2.5 The Wales Office was created as a new department within Whitehall at the outset of devolution. It is a small department of fewer than fifty staff, and has the main responsibility for representing Welsh interests in Whitehall and for representing the UK Government's interests in Wales. To assist Whitehall departments' handling of relations with Scotland, Wales and Northern Ireland, each department has a working-level devolution contact,<sup>121</sup> who leads on engagement with the Devolved Administrations and can advise colleagues on devolution matters, and a senior devolution champion, who takes a strategic overview of how the department is engaging with devolution.
- 14.2.6 Within Wales, there are approximately 27,000 officials employed by UK departments and their agencies. This includes officials providing non-devolved services direct to local communities, for example employees of JobCentre Plus or the Courts and Tribunal Service. It also includes officials providing services for the whole of Great Britain, for example the Driver and Vehicle Licensing Agency at Swansea, or the whole of the United Kingdom, such as those who work for Companies House.

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<sup>120</sup> The Northern Ireland Civil Service has been separate from the Home Civil Service since the partition of Ireland.

<sup>121</sup> GOV.UK website (2013) *Guidance on Devolution - Devolution coordinator contact details*.

## 14.3 IMPROVING THE CAPACITY OF THE UK AND WELSH GOVERNMENTS

- 14.3.1 The increase of powers that we propose in this report will require some increased administrative capacity within the Welsh Government. A long-standing principle exists that where a responsibility is devolved, its administrative costs should be transferred, along with the costs for actually delivering the service.<sup>122</sup> It was encouraging that the Welsh Government took early action following the publication of our first report in announcing that it would develop a Treasury function, which we had recommended. We would hope that the proposals of the present report would be acted on in a similar manner; for example, if policing is devolved, a Welsh Government Policing Team would need to be created to support the Welsh Government Policing Minister.
- 14.3.2 During our evidence gathering, we heard from members of the public and some civil society organisations of concerns about the performance of the Welsh Government in the administration of its existing responsibilities, and of their wish that it could respond to external opportunities and challenges more rapidly. This often led to the view that the range of devolved responsibilities should not be amended or extended without an improvement in performance.
- 14.3.3 While it is not for us to evaluate Welsh Government policies, we believe that the improvement of publicly available information that we propose in Chapter 5 would allow a more informed debate on performance, and a more sophisticated appraisal of the ability of the Welsh public sector to deliver the elected Welsh Government's programme. The Williams Commission's considerations on improving the effectiveness of the Welsh public sector are also relevant.
- 14.3.4 When we met the Permanent Secretary of the Welsh Government, he emphasised the commitment of Welsh Ministers and the Welsh Government management board to improving public sector capacity and performance, building on progress so far.
- 14.3.5 While the Welsh Government wishes to retain its membership of the Home Civil Service, it sees some scope for further flexibilities in the way in which it manages staff. This includes greater autonomy over the use of the Fast Stream,<sup>123</sup> greater interchange with other parts of the Welsh Public Sector and greater delegated responsibility for the Senior Civil Service. We agree that the two Governments should look to increasing flexibility in these areas.
- 14.3.6 We also heard some suggestions in evidence that the UK Government sometimes regards Wales as similar to regions of England, to a greater extent than other devolved parts of the United Kingdom. It was also put to us that United Kingdom officials sometimes did not understand the devolution settlement very well, particularly in non-devolved areas of responsibility.
- 14.3.7 It would be helpful for both UK Government departments and the Welsh public if departments' responsibilities in relation to Wales were more apparent. For example, UK Government departmental plans, from which all divisional and individual work plans are developed, should clearly set out whether a featured policy area was executed by the department on behalf of the whole of the United Kingdom, or Great Britain, or England

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<sup>122</sup> Costs of the administrative changes recommended in this report are discussed further in Chapter 16.

<sup>123</sup> This is the scheme for accelerated promotion for talented entrants.



and Wales or just England. This will help ensure that departments' communications around new policy initiatives are clear at the outset. Departments' performance in relation to Wales, and the other devolved countries, should also be set out in their annual reports, and included in the Wales Office's annual report. While we welcome the fact that the devolution coordinator for each Whitehall department is published online, the senior champions' role and contact details should also be publicly available.

- 14.3.8 As we have mentioned previously, we met the Head of the Home Civil Service during our work. We noted his emphasis that officials of the two Governments should work closely and cooperatively together. While he acknowledged that performance on devolution was somewhat patchy, we welcome his commitment to develop further Whitehall's capacity to deal with devolution.
- 14.3.9 The Welsh Affairs Committee of the House of Commons undertook a wide-ranging and comprehensive review of Wales and Whitehall in the last Parliament.<sup>124</sup> Its report of late March 2010 set out some helpful suggestions for improving Whitehall's capacity for dealing with Wales and how this could be monitored.
- 14.3.10 One of the recommendations of the Committee's report was to improve the Welsh Government's and Whitehall's capacity to deal with devolution by better organisation and facilitation of secondments. The Head of the Home Civil Service was also keen to develop staff interchange, and told us that participants in the Fast Stream graduate programme would be encouraged to spend part of their programme of intensive development working for a devolved administration. We welcome this commitment to exchanging personnel and expertise.
- 14.3.11 We also had a very helpful discussion with the National Audit Office and the Wales Audit Office (WAO) on the role of the two organisations in relation to public sector performance. The WAO noted that there was generally good follow-up to their recommendations in their value-for-money reports. While recognising that they are responsible for setting their own priorities, in consultation with the National Assembly and House of Commons Public Accounts Committees, we have set out in Chapter 5 how their role could be developed further.

#### **14.4 THE ROLE OF WELSH CIVIL SOCIETY**

- 14.4.1 We received a great deal of evidence that an important benefit of devolution was perceived to be better access to government by organisations and individuals. However, an issue raised in evidence was the need for further opportunities for greater engagement between government and civil society in Wales.<sup>125</sup> The UK's Changing Union project commented extensively on this issue.
- 14.4.2 We also heard that, though the role and effectiveness of civil society in Wales in relation to government have grown greatly since the advent of devolution, they still remain under-developed, particularly compared with some other parts of the United Kingdom, especially Scotland.

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<sup>124</sup> Welsh Affairs Committee (2010) *Wales and Whitehall - Eleventh Report of Session 2009-10*.

<sup>125</sup> Civil society might include, for example, public affairs organisations, academia, the voluntary sector, trade unions and business, political parties, and campaigning organisations.

- 14.4.3 While some progress has been made in utilising the capacity of civil society for the benefit of Wales under devolution, there is scope to go further. Ensuring there is an effective challenge and independent analysis from civil society is especially important.
- 14.4.4 A proposal made in some submissions to us was that more public money ought to be available for civil society organisations to contribute to and challenge policy development in Wales. It would be for the National Assembly to respond to such requests.
- 14.4.5 We also recognise that the focus of many civil society organisations in Wales is not solely on devolved matters. It would therefore be helpful if they were kept better advised of UK Government activity and consultation opportunities. The Wales Office has developed its capacity for communicating the impact of UK Government activity on Wales to interested organisations, for example in the Budget. There is scope for both Governments to engage more proactively with civil society. For example, if the UK Government's devolution coordinators' and champions' roles and contact details were publicly available, they would provide a helpful contact point within Whitehall departments.

## **14.5 A WELSH CIVIL SERVICE AND PUBLIC SECTOR**

- 14.5.1 As we note above, officials supporting the Welsh Government are employed as part of the Home Civil Service. Some evidence suggested that the Welsh Government should be served by a distinct Welsh civil service, separate from the Home Civil Service.
- 14.5.2 The advantages claimed for a separate civil service were that it would ensure there was absolute clarity about whom officials served and where their loyalty lay. There would also be greater opportunity for a Welsh Public Service to emerge. Such a Welsh Public Service could include officials of local government and of other devolved public bodies in Wales, as well as those of the Welsh Government. This would facilitate a more cohesive Wales-wide public service ethos and better cooperation.
- 14.5.3 We believe on balance that the current arrangements serve Wales well within the United Kingdom. There is greater potential for interchange within a single civil service, and while the distinct code of conduct applicable to Welsh Government civil servants makes clear whom they serve, the important ethos of the Home Civil Service is preserved.
- 14.5.4 There has been one significant change that demonstrates that Welsh Government officials serve the Welsh Ministers. Following a recommendation of the Calman Commission in Scotland that was applied by analogy to Wales, the only political input into the appointment of the Permanent Secretary, as head of the Welsh Government's administration, comes from the First Minister; the Prime Minister no longer has a role.

### ***A Welsh public service***

- 14.5.5 The Permanent Secretary of the Welsh Government emphasised to us that the fact that Welsh Government officials remain part of the Home Civil Service does not inhibit closer working between public officials in Wales. We support further opportunities for better collaboration between officials of the Welsh Government and officials of local government and other public employees in Wales. As in relation to our support for interchange and good relations between officials of the Welsh Government and the UK Government, we believe this would be beneficial for the governance of Wales and delivery of good public services.



- 14.5.6 We believe this would have two main effects – developing the capabilities of the public sector in Wales and allowing interchange of officials. The first could include common training and professional development, which could perhaps build further on the work of Academi Wales as the Welsh Government initiative to assist the development of managers within the Welsh public sector. This could be expanded to draw in a wider range of public sector employees, including those of UK Government departments and agencies, such as the DVLA. Secondly, greater interchange should allow better understanding of the perspectives and challenges of the Welsh Government and local government, which should lead to constructive relations.
- 14.5.7 The work of the Williams Commission is also relevant. In the future, there could also be greater collaboration between public sector organisations, including shared provision of back-office functions to reduce the overall cost of administration in Wales.

#### **Recommendations**

- R.57 The Welsh Government should continue to be supported by civil servants who are members of the Home Civil Service; secondments should be encouraged and facilitated; and there should be increased flexibility for the Welsh Government to manage staff.
- R.58 The two Governments should seek to develop the capacity of the Welsh public sector (both devolved and non-devolved) to deliver more efficient and better-integrated public services and economic growth.
- R.59 The capacity of Whitehall Departments for dealing with Welsh matters should be strengthened, and Departments should be clearer about the extent of their responsibilities for the different parts of the United Kingdom; and devolution coordinators' and champions' roles and contact details should be publicly available.

## **14.6 SUMMARY**

- 14.6.1 We considered the capacity of the public sector in Wales and in Whitehall to govern Wales well and in the interests of its people.
- 14.6.2 The Welsh Government should continue to be staffed by officials of the Home Civil Service, and a wider Welsh Public Service should be nurtured. The Welsh Government's capacity, and that of the UK Government to deal with devolution, should be developed with a more structured system of interchange.
- 14.6.3 Greater engagement of the Welsh public sector with Welsh civil society would improve the operation of devolution in Wales and benefit the Welsh Government's capacity for policy-making, delivery and reform.

# Chapter 15 – Implementation

## 15.1 OVERVIEW

15.1.1 In this chapter, we set out a timetable for the implementation of our recommendations.

### **Box 15.1: Evidence on implementation**

In our opinion poll, 80 per cent of those who wanted the National Assembly to have more powers wanted this to happen within five years.

The Welsh Government said: *‘The restructured settlement would logically be constructed in three stages which will require a broad analysis of the division of powers. Stage 1: identify what core matters should be reserved to Westminster, using Schedule 5 to the Scotland Act as a checklist or starting point; Stage 2: identify which additional matters, over and above those identified in Stage 1, should be reserved in the case of Wales (this will include the conversion of, for example, the general restriction on Minister of the Crown functions into more targeted reservations (if necessary)); Stage 3: examine the subjects in Schedule 7 to see whether any of the current exceptions should be reclassified as Reservations.*

*‘We accept that it will be for the UK Government to be formed following the 2015 General Election to take all this forward. Building on this the key stages might be:*

*Autumn 2016 Publication of Draft Bill*

*Summer 2017 Bill Introduction*

*Spring 2018 Royal Assent*

*2018-2020 Planning/Implementation*

*2021 Assembly elected with new powers’.*

The UK’s Changing Union project said: *‘The switch to reserved powers should not wait until after the 2020 or 2021 Assembly elections, but be enacted not later than the first Parliamentary term following the 2016 Assembly election. Our view is that any Act of Parliament establishing a reserved powers model should also make provision for establishing a Welsh legal jurisdiction’.*

True Wales said: *‘We believe that a referendum must be held if these changes [devolution of policing and criminal justice] are to have legitimacy’.*

## 15.2 REFERENDUM

15.2.1 In the light of the evidence we have received, we do not think a further referendum is necessary beyond that recommended in Part I in relation to the devolution of income tax, and now to be legislated for in the current Parliament. We concluded that it was appropriate to have a referendum on devolving income tax for reasons that we set out in our first report. If and when that referendum takes place, the people of Wales will have



been consulted on whether they wanted any devolution, whether they wanted full law-making powers and whether they want taxation powers. These are three fundamental questions that are of a different category from the modifications that we are proposing in this report.

- 15.2.2 Instead there should be democratic endorsement of our proposals through party manifestos at the next United Kingdom and National Assembly elections. We recognise that it will be for the parties to decide to what extent they wish to endorse our recommendations. However, given the cross-party representation on our Commission and the unanimous support for our recommendations within the Commission, we would expect wide cross-party support in the manifestos.

### 15.3 TIMETABLE FOR IMPLEMENTATION OF OUR RECOMMENDATIONS

15.3.1 As in Part I our recommendations fall into two categories:

- those which can be implemented administratively without legislation; and
- those which require legislation.

#### *Recommendations that do not require legislation*

15.3.2 Many recommendations can be introduced administratively without legislation, for instance those designed to improve inter-institutional relations. These are unlikely to be contentious particularly if, as we expect, they receive cross-party support when our report is published. Recommendations that are intended to promote good governance in Wales and Whitehall should be adopted without delay.

#### **Box 15.2: Recommendations which can be introduced administratively**

In general our recommendations in Chapter 5 on intergovernmental relations and those in Chapter 14 on improving public sector capacity can be introduced without legislation. Most of our recommendations in Chapter 13 on improving relations between the National Assembly and the UK Parliament can also be introduced without legislation.

Taken together these would have a substantial impact.

#### *Recommendations that require legislation*

15.3.3 The legislative changes are potentially of two kinds:

- those which require primary legislation in the UK Parliament; and
- those which require secondary legislation, for example transfers of functions or giving Welsh Ministers executive powers.

15.3.4 It would be possible to introduce many of our recommendations through secondary legislation. The Government of Wales Act provides a process for transferring powers from the UK Parliament to the National Assembly by using secondary legislation known as Orders in Council to amend Schedule 7. These Orders in Council must be approved by the National Assembly and by both Houses of Parliament. It is a process that has been used on several occasions since devolution.

15.3.5 Some witnesses even argued that a reserved powers model would not require primary legislation and could be legislated for by Order in Council. However in practice we think that the UK Government would regard this as a legislative change that ought to be subject to full consideration in the UK Parliament in a way that secondary legislation is not. We agree.

### *Two possible timetables*

15.3.6 We therefore envisage the need for a Bill to legislate for the reserved powers model. This Bill could also be the vehicle for transferring new powers to the National Assembly (by not reserving them), and it might be particularly appropriate for it to be used to transfer powers in a significant area, like policing. It could also contain provisions that would not come into force immediately (for example, to transfer various areas of the justice system) but that could be activated later by a trigger mechanism similar to that contained in the Government of Wales Act 2006 to trigger primary legislative powers. There would also be a mechanism provided for in the Bill to change the list of reservations in the future by Order in Council, in the same way as this is provided for in the Scotland Act 1998.

15.3.7 However, though our preference is for an early Bill that would introduce the reserved powers model and transfer powers by not reserving them, it is not necessary to wait for primary legislation to transfer new areas of responsibility to the National Assembly, albeit under the conferred powers model. New subjects could be added to the existing Schedule 7 by Order in Council. There are two advantages to this mechanism: it would allow a phased approach to the transfer of powers; and there would be no need to wait for a primary legislation slot for a Government of Wales Bill in the parliamentary timetable.

15.3.8 Under either scenario, following the 2015 United Kingdom election and the 2016 National Assembly election, a White Paper would be introduced by the UK Government. The White Paper would set out what powers should be transferred to the National Assembly and over what timetable. It would also explain what was proposed to be reserved to Westminster and why.

15.3.9 Under the second scenario, the White Paper would be followed by Orders in Council to transfer a number of powers identified in this report (for example, in respect of transport, S4C, teachers' pay, sewerage, energy consents, and youth justice). This would in turn be followed by the Bill to create a reserved powers model, which would incorporate the transfer of powers regarded as sufficiently important to require full parliamentary scrutiny.

15.3.10 While this process would be taken forward by the UK Government in Parliament, the formal approval of the National Assembly and Welsh Government would also be necessary for each transfer. The Welsh Intergovernmental Committee we recommend in Chapter 5 should be charged immediately with undertaking the preparatory work necessary to take forward all our recommendations. The experience of drafting the 1997 and 2006 Acts demonstrates that there would need to be close collaboration between officials of the Welsh and UK Governments during this process. Senior secondments from the Welsh Government to the Wales Office might be necessary.

15.3.11 There will, of course, be a Wales Bill in the current Parliament to implement our Part I recommendations. Though we do not expect our more substantial recommendations in this Report to be implemented through this Bill, it would be an opportunity to implement some of our more straightforward recommendations, such as in relation to the removal of the legislative restrictions on National Assembly procedure.



15.3.12 Box 15.3 sets out the key legislative recommendations that we suggest should be included in party manifestos at the next election.

**Box 15.3: Our key legislative recommendations for party manifestos**

The key recommendations which we suggest should be included for endorsement by the people of Wales in party manifestos at the next elections are:

- replacing the existing conferred powers model by a reserved powers model;
- transferring powers from the UK Parliament to the National Assembly for transport, S4C, teachers' pay, sewerage, energy consents, youth justice, policing and in the longer term other justice powers; and
- strengthening the capacity of the National Assembly to scrutinise legislation and hold the Welsh Government to account, without increasing overall political representation in Wales.

These measures would produce a stronger and more accountable democracy in Wales.

15.3.13 To summarise, our preference is for an early Bill that would provide a vehicle for both a reserved powers model and transfer of powers. Our suggested timetable would be as follows:

Year	Part II implementation
2014	March: Commission report published April: National Assembly discusses initial views; and initial Welsh Government views September: Scottish referendum October: UK Government responds to our report November: preparatory joint UK Government/Welsh Government implementation committee established Consideration of any recommendations that could be included in this Parliament's Wales Bill
2015	By April: administrative recommendations in our report implemented April: Manifesto commitments include response to Part II May: United Kingdom General Election
2016	May: Election to the National Assembly June: White Paper published including details of reserved power model Autumn: Bill published and introduced
2017	Summer: Bill enacted Introduction of next BBC's Royal Charter, including a Welsh Trust
2018	Completion of the review of devolution of prisons and probation
2020	May: United Kingdom General Election
2021	May: Election to the National Assembly May: New National Assembly elected operating under reserved powers model
By 2025	Completion and implementation of the review of legislative devolution of other aspects of the justice system

- 15.3.14 In the timetable above, we have assumed that it would be preferable to change the model of devolution when a new National Assembly convenes. This would mean that the reserved powers model would not be introduced until 2021, somewhat later than some of the evidence suggested would be desirable. The UK Government and Welsh Government may wish to discuss whether it would be possible to change the model of devolution part-way through a National Assembly's term.
- 15.3.15 The programme and timetable would need to be kept under review to take account of changing external circumstances, for example, to review any implications for Wales if there were a further substantial increase in powers of the Scottish Government.
- 15.3.16 Our proposed timetable is realistic and achievable, with most of our recommendations being implemented over the next five years.

#### **Recommendation**

- R.60 On implementation, we recommend a ten year programme of reform with three phases:
- a. implementation of administrative recommendations before the next United Kingdom general election;
  - b. subject to endorsement through election manifestos, introduction through a Wales Bill of a reserved powers model including the transfers of powers recommended in this report; and
  - c. completion and implementation of the review of legislative devolution of other aspects of the justice system by 2025.

## **15.4 SUMMARY**

- 15.4.1 We recommend a ten-year programme of reform to implement our recommendations and believe that this should take place in three phases.
- 15.4.2 Many of the recommendations in this report can be introduced without legislation. This should be done before the next United Kingdom General Election.
- 15.4.3 A Bill introducing a new reserved powers model, including the transfers of powers recommended in this report, should be enacted by 2017.
- 15.4.4 Further devolution of responsibilities in relation to justice requires a sufficient degree of consensus in Wales, and reviews by the UK and Welsh Governments. We suggest these should be carried out and their conclusions implemented by 2025.



# Chapter 16: Overall impact and looking to the future

## 16.1 OVERVIEW

- 16.1.1 This chapter assesses the overall impact of our recommendations in a number of areas, particularly in terms of their impact on public finances, on households and individuals in Wales, and on the Welsh economy and businesses. We also consider here whether the recommendations meet our original remit and vision, and discuss how they might take account of possible future developments in devolution in both the United Kingdom and European Union contexts.
- 16.1.2 This impact assessment is inevitably high-level. If the UK and Welsh Governments decide to implement our recommendations, as we believe they should, we would expect them to carry out more detailed impact assessments of their specific proposals in accordance with their normal practices.

### Box 16.1: Evidence on overall impact

In our opinion poll, 48 per cent thought that the National Assembly had done a better job for Wales than the UK Parliament; 8 per cent thought worse.

The UK Government said: *'This review is important for Wales. It will help to map a course for the future of devolution in Wales by carrying out a thorough analysis of which powers are best undertaken in Cardiff Bay, and which at Westminster, and making recommendations accordingly on where the current settlement could be modified'.*

The Welsh Government said: *'Where we make proposals for enhanced powers for the devolved institutions, we do so having in mind the principle of "powers for a purpose". We wish the Welsh devolved institutions to have those powers which, used well, are most likely to enable us to improve the quality of life of people in Wales'.*

Joan Costa Font, London School of Economics said: *'Devolution is a mechanism to enhance the efficiency of a country like the UK which is in line with what is already happening in other countries in Europe'.*

Professor Malcolm Prowle, Nottingham Business School told us: *'The evidence I have presented above suggests that Welsh Government has not been very successful at improving public services in Wales compared to the rest of the UK which let alone other developed countries. Personally I believe this has come about because of a combination of poor public policy formulation coupled with inadequate implementation of policy'.*

The Church in Wales said: *'Devolution is an appropriate model of government for Wales. For it to work effectively, however, serious consideration needs to be given to the capacity of Wales, both administratively and legislatively, to manage its own affairs'.*

The Wales TUC argued: *'There is a real risk that the poverty gap is widening as a result of the current measures being taken to 'tackle' the economic crisis. Any consideration of modifications to the devolution settlement must be considered in this context'*.

The Wales Federation of Small Business said: *'Ultimately, the Commission should seek to deliver a lasting and sustainable settlement that is fit for Wales' needs'*.

## 16.2 SIZE OF THE PUBLIC SECTOR

16.2.1 We expect our recommendations will be broadly neutral in terms of the size of the public sector in Wales. Changing the distribution of powers between the UK and Welsh Governments does not of itself increase or reduce the size of the public sector.

## 16.3 FISCAL IMPACTS

16.3.1 We have received evidence that our proposals should be affordable and should not carry unacceptable fiscal risks to either the UK Government or Welsh Government. A number of possible fiscal impacts are assessed below.

16.3.2 Our package of recommendations has four elements:

- replacing the conferred powers model by a reserved powers model;
- devolving more powers;
- improving the effectiveness and capacity of the National Assembly and Welsh Government; and
- improving inter-institutional relations.

16.3.3 The public expenditure impacts are set out below. In addition, we have commented on the cost of particular measures in the relevant chapters.

16.3.4 Replacing the conferred powers model with a reserved powers model is unlikely to have a substantial public expenditure impact, although the Scotland and Northern Ireland models have involved proportionately fewer Supreme Court referrals, so there could be some modest savings.

16.3.5 Devolving more powers involves a transfer of funding from the UK Government to the Welsh Government. Any additional spending or savings beyond that would have to be absorbed by the Welsh Government within its existing budget. There will therefore be no net additional United Kingdom public spending as a result of our recommendations.

16.3.6 Some of the transfers in powers are about transfers of regulatory functions, for example, energy consenting powers, which do not involve substantial levels of public spending. The biggest spending items are:

- Policing – over half the cost of policing is already borne within the Wales budget. The rest would be transferred from the Home Office. Provided there is sensible cost sharing on items such as the Police College as we propose, there should not be substantial additional costs for the Welsh budget;



- Justice – the cost of devolving youth justice would be modest. We are recommending that devolution of other services such as prisons would require further review; and
- Rail – the franchise costs are already devolved. There would be some transfer from the Department for Transport in respect of Network Rail. There would be some transfer of risk, but we think this would be manageable if well planned.

- 16.3.7 In terms of increasing the capacity of the National Assembly and Welsh Government, we do not expect any overall increase in political representation in Wales; nor do we recommend any overall increase in the size of the Welsh Government’s administration, over and above transfers from the UK Government.
- 16.3.8 We do not expect our recommendations on improving inter-institutional relations to involve material additional costs, and indeed we would expect better cooperation to lead to cost reductions.
- 16.3.9 It is not just a question of minimising the additional costs of devolution. Clear and coherent devolution, based on the more certain reserved powers model we recommend, is an opportunity for a stronger and more imaginative focus on more effective and efficient delivery, so reducing cost. This could be achieved in a number of ways. The sharing of resources should be built into the design of devolution, for example, a devolved police force could use the existing England and Wales Police College. New models of public delivery could be developed based on buying in specialist services, rather than providing them all in Wales - by, for example, using UK Government ports or renewable energy consent specialists. Successful innovative cost-saving solutions pioneered in Wales should be replicated in England and vice versa. Joint initiatives should be undertaken with the UK Government to maximise economies of scale, for example, in procurement.
- 16.3.10 We sought information from the Welsh and UK Governments on the possible additional costs of the changes we suggest - in the main, the proposals in this report would entail a transfer of resources and therefore no additional costs. For the most part, additional costs might arise from transitional costs or diseconomies of scale from having a separate Welsh administration, though there would also be opportunities for economies of scale arising from integration of devolved services.
- 16.3.11 We appreciate that it is difficult for the Welsh and UK Governments to estimate accurately and comprehensively the overall transfer of resources from the UK Government to the Welsh Government and the additional costs to the Welsh Government associated with our proposals. Public spending plans have not been agreed beyond 2015-16 and in practice these transfers would need to be discussed and agreed between the two Governments.
- 16.3.12 However in broad indicative terms, the transfer of funding to the National Assembly from the UK Government might be in the range of £500 million per annum (mainly for police and rail) to £800 million (if justice powers were eventually fully devolved). This would represent an increase in the Welsh devolved budget of approximately 5 per cent. We would expect net additional annual costs for the Welsh Government to be less than £5 million.<sup>126</sup>

<sup>126</sup> If the courts were eventually devolved, this might involve additional costs of around £10 million; and if prisons were devolved in a way which meant building extra accommodation for women and high security prisoners (which we are not recommending at this stage), this might involve over £100 million.

16.3.13 In addition, risks to the Welsh Government budget would need to be carefully assessed and managed, for example, in the event that the Welsh rail franchise were to fail or if funding for S4C from the BBC licence fee were to be discontinued.

#### **Recommendation**

R.61 On costs, we recommend:

- a. transfers of powers should be accompanied by (and be conditional on) transfers of funding being fully agreed between the two Governments in each case, and by agreed changes to the Barnett formula comparability factors;
- b. any additional costs to the Welsh Government, for example arising from diseconomies of scale or transitional costs, should be kept to a minimum and to levels which are absorbable within the Welsh Government's budget; where costs are particularly problematic to identify there should be further work by the two Governments before devolution is agreed;
- c. the Welsh Government should maximise any opportunities to increase the efficiency which devolution of further powers might bring, for example through a more holistic approach to transport planning or reducing crime;
- d. there should be a stronger and more imaginative focus by the two Governments on reducing spending by more effective and efficient public service delivery. This might be done through shared use of facilities by the two Governments, by buying in appropriate expertise, or by joint efficiency savings; and
- e. the effect on third parties including business should be subject to careful impact assessments in the normal way to ensure our proposals are implemented in a way that will maximise benefits and minimise costs.

## **16.4 ROLE OF THE SECRETARY OF STATE AND WELSH INTERGOVERNMENTAL COMMITTEE**

16.4.1 Elsewhere in this report, we make a small number of recommendations that would affect the role of the Secretary of State for Wales, removing some unique characteristics of the office and bringing it closer to the roles of the Secretaries of State for Scotland and Northern Ireland. Nevertheless the Secretary of State's role in representing Wales's interests and acting as a conduit between the UK Government and Welsh Government will remain crucial, and will be developed greatly by the Welsh Intergovernmental Committee, where the Secretary of State's responsibilities are likely to be of great importance.

16.4.2 The Welsh Intergovernmental Committee we propose will undertake a central function in enhancing the collaborative relationship between the Welsh Government and the UK Government. We have proposed that it should oversee the operation of the Welsh devolution settlement (including the process of moving to a reserved powers model), and that it should assess future proposals for amendments to the devolution boundary. The Committee will also have responsibility for resolution of disagreements and for resolving cross-border issues. It will have a number of other specific responsibilities: monitoring and influencing the impact of European Union developments on Wales; encouraging data sharing and evidence-based



policy development between both Governments; working to ensure a coherent approach to Higher Education; and agreeing the implementation of a formal intergovernmental protocol on water. By operating transparently, we expect the Committee to help assure the people of Wales that they are being well served by their elected Governments.

## **16.5 IMPACT ON THE EFFECTIVENESS OF THE PUBLIC SECTOR IN WALES**

16.5.1 We have heard evidence that devolution has not led to an improvement in public services and the economy in Wales. We are responsible for the consideration of where powers should lie, and not how powers are used, but we have considered this evidence carefully and believe:

- devolution is widely regarded as a success, albeit a qualified success. For example, our opinion poll found that, when asked to rate the level of trust for an institution on a scale of 0 to 10 (being highest), the National Assembly had an average of 5.6 compared to 4.3 for the UK Parliament. From our oral evidence sessions with experts we consistently found that devolution had benefitted sectors such as health, higher education, science, environment, transport and local government;
- while it is claimed that Welsh performance lags behind England in some respects,<sup>127</sup> the causes are complex and it is not clear to what extent this reflects external factors such as demographic issues, or policy differences;
- the Welsh Government has recognised the need for improvement by setting up the Commission on Public Service Governance and Delivery, chaired by Sir Paul Williams, which reported in January 2014;
- better data should be collected and published so people can know in a more informed way how Wales is performing comparatively and make more informed judgements; and
- a mature National Assembly and Welsh Government should not be afraid to identify what works best and adopt policies from elsewhere in the United Kingdom and beyond; and vice versa.

16.5.2 More generally we expect that improving the coherence of the devolution settlement will facilitate more effective public service delivery in Wales; an example would be through an integrated transport policy.

16.5.3 While we recognise and share concerns about the need to improve Welsh public services and the economy, we believe that the recommendations in our report should facilitate such improvements.

## **16.6 IMPACT ON WELSH INDIVIDUALS AND HOUSEHOLDS AND ON DIFFERENT PARTS OF WALES**

16.6.1 We have been concerned to make recommendations that will deliver improvements for the people of Wales.

16.6.2 Such improvements include:

- where powers are devolved as a result of our recommendations, for example in the areas of transport, energy, and policing, different policies are likely to emerge to reflect what people in Wales want and Welsh values and priorities. Individuals and households

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<sup>127</sup> OECD PISA tables (on education attainment) and comparative health data are often cited as evidence.

would potentially see better integrated transport services; more locally accountable energy consenting decisions; teachers' pay and conditions determined in Wales; broadcasting decisions affecting Wales being made in Wales; strategic policing decisions and funding that suit Wales; and better access to justice;

- the Welsh devolution settlement would be easier for people in Wales to understand and they would be better able to hold the Welsh Government and National Assembly to account. People would know that the Welsh Government is responsible for all matters other than those explicitly reserved to the UK Government;
- our recommendations on improving intergovernmental and interparliamentary relations would ensure that United Kingdom and Welsh institutions work better together to deliver increased prosperity for the people of Wales; and
- there would be better comparative information for people to be able to assess how well Wales is doing.

16.6.3 As noted in Chapter 3, we heard in our visits around Wales that some people feel that devolution has not delivered as positive outcomes for their part of Wales as they believe that it has for other areas. Any future Welsh Government should use its new and existing powers for the benefit of all parts of Wales and make it a priority to demonstrate that this has been achieved.

16.6.4 The transfer of powers that we have suggested, such as the devolution of rail infrastructure and policing, should be used in a way that is sensitive to the needs of people across the border as well as those in Wales.

## **16.7 IMPACT ON THE WELSH ECONOMY AND BUSINESS**

16.7.1 We have been particularly keen to ensure that our recommendations strengthen the Welsh economy and Welsh business and employment.

16.7.2 We have received a good deal of evidence in support of the view that devolving more powers would provide the Welsh Government with more instruments to increase economic growth in Wales. However, we have also heard concerns that, since devolution, Wales has fallen further behind England economically.

16.7.3 In our view the two objectives of increasing accountability and increasing growth are complementary. Increasing accountability by devolving more powers would give the Welsh Government mechanisms it could use to make Wales more prosperous. This would be in the interests of both Wales and the United Kingdom more generally.

16.7.4 Elsewhere in this report we make a large number of recommendations, many of which have a bearing on increasing economic growth. Of course the devolution of powers does not by itself increase growth but depends on how the Welsh Government chooses to use these powers. The potential impacts include those set out in Box 16.2 below.



### **Box 16.2: Impact of our proposals on the Welsh economy, business and employment**

We attach great importance to ensuring that our package promotes the objective of improving the competitiveness of the Welsh economy and business.

We have met businesses in Cardiff, Swansea and Wrexham and met representatives of the CBI, Institute of Directors, Federation of Small Businesses and TUC in Wales.

Our package will promote the Welsh economy in a number of ways:

- it will ensure that Wales continues to be part of the United Kingdom fiscal and economic union;
- the reserved powers model and our other recommendations will bring greater certainty and clarity for business to help their decision making;
- our proposals will increase the economic levers available to the Welsh Government in areas such as transport and energy; and in tackling crime and the causes of crime, as well as creating a stronger Welsh legal profession;
- our proposals will improve the effectiveness of the Welsh devolution settlement in handling economic issues, for example, through stronger joint working between the two Governments and business; and a stronger focus on areas of shared interest such as inward investment and better regulation; and
- we propose improvements in economic data and modelling to improve understanding of how the Welsh economy works and the quality of economic policy making.

## **16.8 LOOKING TO THE FUTURE – POSSIBLE FUTURE DEVELOPMENTS**

16.8.1 We recognised in our first report the need to “future proof” our report to safeguard our recommendations against being overtaken by wider events. This is also an important consideration in the work of the UK’s Changing Union project. We consider the main issues below.

### ***Scottish independence vote***

16.8.2 While we are making our recommendations before the referendum on 18 September 2014, our recommendations are for implementation after the vote. We have put forward proposals that are not contingent upon, and that will not be invalidated by, the outcome of the vote. However, we recognise that there will be a continuing need in the future to take account of any developments in Scotland that might impact on Wales.

### ***A United Kingdom constitutional convention***

16.8.3 The current UK Government has not accepted the case for a United Kingdom constitutional convention.<sup>128</sup> This may well change in the future, and if it does, our report should be of great value to any such convention or similar body. We hope the convention would use our

<sup>128</sup> ‘At a time when the economy is the first priority of Government and there has been recent and ongoing significant constitutional reform, the Government does not consider that there is a strong case for holding a constitutional convention at this time’. HM Government (Nov 2013) *Government Response to the House of Commons Political and Constitutional Reform Committee Fourth Report of Session 2012-13: Do we need a constitutional convention for the UK?* Cm 8749.

conclusions as a basis for its consideration of Wales within the wider territorial constitution of the United Kingdom. One would expect intergovernmental relations, and the allocation of responsibilities and citizens' rights, to be parts of their work, and our conclusions in these areas are relevant. If a United Kingdom constitution emerged, this might be a vehicle for making permanent the existence of the three devolved legislatures.

### *English devolution*

16.8.4 There is a growing trend in England towards greater localism, as noted in Chapter 2. The devolutionary thrust of our approach is compatible with devolution within England. The point was made, for example in our meeting with the Mersey Dee Alliance in Wrexham, that a more devolved framework benefits both sides of the border and provides opportunities to learn from each other. There is a growing sense of an English polity, as seen in the IPPR's recent research and the work of the McKay Commission.

### *The McKay Commission*

16.8.5 The McKay Commission on the implications of devolution for the House of Commons made a number of recommendations which go with the grain of our conclusions:

- their recommendation for the development of an England-specific legislative process within the House of Commons on the basis of a constitutional principle that decisions at a United Kingdom level with a separate and distinct effect for England (or England and Wales) should normally be taken only with the consent of a majority of MPs for constituencies in England (or England and Wales). The greater clarity over Welsh devolution which we propose would help to facilitate this process;
- the report argues that there is scope to give Legislative Consent Motions a more formal status in a more clearly structured, explicitly parliamentary communication between Westminster and the devolved legislatures. This would emphasise the cooperative nature of the law-making process after devolution. Our proposals are consistent with this; and
- in order to consider fully the consequences for the devolved nations of the United Kingdom of decisions made for England, the report recommends the establishment of a House of Commons Devolution Committee. In addition to providing a more articulated Westminster response to the challenges of devolution, the report envisages such a committee as a central element in the machinery by which the House of Commons holds UK Ministers to account for their responsibilities in connection with devolution and in respect of their relations with the devolved administrations. A stronger Parliamentary focus on devolution would be consistent with our recommendations.

### *Federalism and symmetric devolution*

16.8.6 It is well beyond our remit to advocate, or otherwise, a federal constitution for the United Kingdom, or to suggest that one has arisen by default. We have earlier referred to the comments of the Deputy President of the Supreme Court that the United Kingdom has become de facto a federal state with a constitution regulating the relationships between the federal centre and the component parts. But we recognise that this view is not shared by other constitutional experts, who point particularly to the absence of any political institutions for England alone.



- 16.8.7 What we certainly believe is that the Union can only be based on mutual respect between the different governments and legislatures, and that there should be recognition by all that the existence of the National Assembly and the Welsh Government, with their fundamental responsibilities for domestic policies in Wales, is now a settled part of the constitution.
- 16.8.8 Within this constitution, some believe that there should be a symmetric system of devolution for all the countries of the United Kingdom.<sup>129</sup> It is interesting in this context to see how Spain is moving from asymmetric to symmetric devolution.
- 16.8.9 Our recommendations would still mean that devolution would be asymmetric as we are not advocating the same powers for Wales as are held by Scotland and Northern Ireland. There is some objective justification for differences, for example arising from the more populated Welsh border and the historic England and Wales shared legal system. However our recommendations would reduce the degree of asymmetry and bring greater long-term stability.

### *The European Union*

- 16.8.10 The UK Government is currently undertaking a department-by-department Review of the Balance of Competences, which considers if competence is properly allocated at the United Kingdom or European Union level. This work is scheduled to conclude by Autumn 2014. It is envisaged that the conclusions will comprise part of the Prime Minister's proposal of a renegotiation of membership in advance of a 2017 referendum, depending on the outcome of the 2015 United Kingdom General Election. That review has reflected on some devolved matters already, for example health, where it reinforced the importance of consultation with the Devolved Administrations on European Union discussions of health.
- 16.8.11 The principle of devolving powers to the lowest level consistent with effective government informs our own report as well as the UK Government's review. Our recommendations on intergovernmental relations will also help to ensure that Wales plays its full part in the European Union.

## **16.9 DO OUR PROPOSALS MEET OUR REMIT AND PRINCIPLES, AND DELIVER OUR VISION?**

- 16.9.1 We have carefully considered the views of all, including those who have expressed scepticism about the benefits of devolution, and we have addressed the concerns that have been expressed to us.
- 16.9.2 It is clear that, while devolution has in many ways been a success and is now an accepted part of the Welsh landscape, the current arrangements are not sustainable. They do not meet the aspirations of a majority in Wales. The structure of the devolution settlement in Wales lacks clarity and consistency. It is too complex for people to understand or to find easily where power lies, what is devolved, what is retained and where there are joint powers.
- 16.9.3 Our recommendations as a whole provide for a stable long-term settlement, promoting a more confident, outward looking and self-reliant country, and bringing to an end a period during which constitutional issues have overly dominated the debate in Wales.

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<sup>129</sup> For example, by Michael Fabricant MP, whom we met.

- 16.9.4 Our view is that the presumption should be in favour of devolving powers to ensure decisions are made as close to the Welsh people as possible, while also ensuring that powers continue to be held at the United Kingdom level where it is most effective to do so.
- 16.9.5 We have met our vision set out in Chapter 3. The recommendations we make will lead to a clear, well-founded devolution settlement that allows coherent political decisions to be made in a democratic and accountable manner, and political institutions that operate effectively and efficiently and work together in the interests of the people they serve. Our proposals will benefit the whole of Wales and the United Kingdom.
- 16.9.6 Our recommendations will create a stronger Welsh democracy that is more in line with international norms:
- the implementation of our first report will bring to an end the anomaly of a country with legislative but no tax and borrowing powers;
  - the implementation of our second report will bring to an end the anomaly of a country that does not have a reserved powers model in a reserved powers Union, and the anomaly of a devolved legislation but no devolved law enforcement or justice powers.
- 16.9.7 We are satisfied that our recommendations meet the Commission's remit and that they will strengthen accountability and responsibility:
- we have reviewed the existing powers of the UK and Welsh Governments. We have not proposed changes in a majority of the existing powers, where devolution is working well but have suggested modifications elsewhere;
  - we have suggested recasting the devolution settlement as a reserved powers model by defining the powers of the National Assembly and Welsh Government in a clear and coherent way;
  - we have suggested other ways of improving the effectiveness of devolution, including better data and better intergovernmental relations; and
  - we have proposed a realistic phased timetable over ten years.
- 16.9.8 Our recommendations will benefit Wales and the whole of the United Kingdom by providing additional levers to strengthen the Welsh economy and the management of natural resources; they will promote equity, for example by improving access to justice; and they will promote a stable and lasting devolution settlement based on the principles of agreement and mutual consent.
- 16.9.9 We have produced a report which we have all agreed and which we commend for implementation according to the timetable we propose.



# Recommendations

## *Chapter 4 – The model of devolution*

- R.1 The existing conferred powers model should be replaced by a reserved powers model. The two Governments should agree a process and timetable for developing and agreeing the new legislation setting out the powers reserved to Westminster.
- R.2 There should be a general transfer of pre-devolution Minister of the Crown powers to Welsh Ministers, subject to any necessary exceptions. In the meantime, consideration of potential Minister of the Crown powers in National Assembly Bills should be done promptly by the UK Government and with a presumption of consent.

## *Chapter 5 – Intergovernmental relations*

- R.3 The two Governments should identify and circulate guidance on good practice on intergovernmental relations and areas for development by drawing on examples provided to us. They should also review existing guidance notes and adherence to them regularly.
- R.4 A statutory Code of Practice on intergovernmental relations should be provided for in a new Government of Wales Act.
- R.5 It would be helpful for the National Audit Office and the Wales Audit Office jointly to audit intergovernmental relations. This audit could be reported to the Welsh Affairs Committee and the corresponding National Assembly committee which could then, from time to time, jointly review intergovernmental communication and engagement.
- R.6 The Welsh and UK Governments should establish a Welsh Intergovernmental Committee, supported by separate sub-committees if needed. It should oversee the operation of the Welsh devolution settlement by:
  - a. seeking to simplify the existing devolution model, and taking forward the process of moving to a reserved powers model;
  - b. considering detailed proposals for changes to devolved responsibilities raised in the future;
  - c. resolving disagreements without invoking the full dispute resolution process;
  - d. monitoring EU developments impacting on Wales; and
  - e. resolving cross-border issues.
- R.7 There should be an arbitration mechanism for resolving disagreements between the Welsh and UK Governments in relation to legislative competence of Bills passed by the National Assembly before a referral to the Supreme Court is contemplated.
- R.8 To improve evidence-based outcomes, the two Governments should:
  - a. collaborate with the Scottish Government and the Northern Ireland Executive to publish more comprehensive and consistent comparative data and analysis on public service and economic outcomes across the countries and regions of the United Kingdom. This should be built on existing data sources as far as possible; and

- b. identify and learn from each other what works well in policy and delivery to improve public services and the economy, especially building on the work of the Wales Audit Office and National Audit Office.

### ***Chapter 6 – Economic powers***

- R.9 The UK and Welsh Governments should provide a clearer and better-coordinated approach to employment and training policies. This should include consideration of the role of the Welsh Government in the administration of Department for Work and Pensions employment programmes.
- R.10 Given that the border is administrative and not economic, and given their shared ambition for economic growth, the UK and Welsh Governments should take account of each other's policies in a coherent way when developing their economic strategies for Wales. This would include a better-coordinated approach to business regulation and inward investment.
- R.11 The two Governments should improve the collection of Welsh economic data and economic modelling capacity.

### ***Chapter 7 - Transport***

- R.12 On transport, the following should be devolved:
- a. port development, including harbour orders and oversight of Trust ports;
  - b. the Wales and Border rail franchise;
  - c. funding of Network Rail in relation to the Wales network;
  - d. speed limits and drink drive limits;
  - e. bus regulation, including the relevant functions of the Traffic Commissioner; and
  - f. taxi regulation.
- R.13 While responsibility for inter-city cross-border rail franchises (Great Western, CrossCountry and Virgin Trains) should remain non-devolved, the Welsh Government should have a greater role in the consultation process for appointing a new franchise operator for these routes.
- R.14 There should be close coordination between the two Governments to ensure good quality cross-border routes. Matters to be considered should include:
- a. improvements to the Trans-European Network along the M4 and the A55 corridors;
  - b. the future of the Severn Crossings tolls; and
  - c. roads that straddle the border, including a formal process for decisions on proposed route improvements on either side of the border that takes full account of the strategic importance of the route for Wales.

### ***Chapter 8 – Natural resources***

- R.15 To encourage the development of energy projects in Wales, we recommend:
- a. the responsibility for all energy planning development consents for projects up to 350MW onshore and in Welsh territorial waters should be devolved to the Welsh Government;



- b. there should be a statutory obligation for the UK Government to consult the Welsh Government and take account of Welsh planning policies when granting consents for projects over 350MW;
- c. associated development consents should be aligned with responsibility for the main project;
- d. responsibility for issuing marine licences in Welsh offshore waters should be devolved; and
- e. Wales should have parity with Scotland and Northern Ireland for the proposed Contracts for Difference (CfD) that will replace Renewables Obligation Certificates from 2017 as part of the wider Electricity Market Reform.

R.16 On water, we recommend:

- a. powers over sewerage should be devolved to the National Assembly for Wales;
- b. the boundary for legislative competence for water should be aligned with the national border. We recognise the need for further consideration of the practical implications of alignment, with particular regard for the interests of consumers, and involving the regulator, consumer representatives, water companies and both Governments;
- c. a formal intergovernmental protocol should be established in relation to cross-border issues; and
- d. the Secretary of State's existing legislative and executive powers of intervention in relation to water should be removed in favour of mechanisms under the intergovernmental protocol.

R.17 On the Crown Estate, we recommend:

- a. there should be a Welsh Crown Estate Commissioner appointed in consultation with the Welsh Government;
- b. a Crown Estate office should be established in Wales, subject to normal value-for-money criteria, to promote the development of the Crown Estate for the benefit of Wales;
- c. the existing memorandum between the Crown Estate and Welsh Government should be published and regularly updated; and
- d. emphasis should be given by the Crown Estate to the Welsh supply chain, especially in developing offshore energy in Wales.

R.18 The existing executive responsibilities of Welsh Ministers for marine conservation and licensing in the Welsh inshore area should be extended to the Welsh offshore area.

### **Chapter 9 – Broadcasting**

R.19 The regulation of broadcasting should remain the responsibility of the UK Government.

R.20 On the BBC, we recommend:

- a. the creation of a devolved governance body within the UK Trust framework with powers to provide oversight and scrutiny of BBC outputs in Wales; and
- b. the appointment of the representative of Wales to the overall BBC governance body (currently the BBC Trust) should be by formal agreement between the Welsh and UK Governments.

- R.21 On S4C, we recommend:
- a. within the framework that the bulk of funding should continue to be met from the licence fee, responsibility for funding the public expenditure element of S4C should be devolved to the National Assembly for Wales; and
  - b. in the meantime the appointment of the S4C Authority members by the UK Government should require Welsh Government agreement.
- R.22 The interests of Wales should be represented on the Ofcom board through a board member with specific responsibility for representing Wales.
- R.23 Public service broadcasters of specific content to Wales should provide an annual report on performance to the National Assembly for Wales, including more transparent data on trends in Welsh broadcasting output.

### *Chapter 10 – Policing and justice*

- R.24 On policing, we recommend:
- a. policing and related areas of community safety and crime prevention should be devolved;
  - b. existing levels of cross-border police cooperation should be maintained;
  - c. powers in respect of arrest, interrogation and charging of suspects, and the general powers of constables, should not be devolved unless and until criminal law is devolved;
  - d. the National Crime Agency should not be devolved;
  - e. police pay should be devolved, but police pensions should not be devolved; and
  - f. the two Governments should agree charging systems and terms of service provision for the Police College, Independent Police Complaints Commission, HM Inspectorate of Constabulary and common services such as the Police National Computer system.
- R.25 The treatment and rehabilitation of youth offenders should be devolved.
- R.26 On probation and prison services:
- a. there is a persuasive case for the devolution of the prison service, as well as the probation service, though we also recognise the difficulties of implementation in this area. The two Governments should jointly carry out and publish a study of the feasibility of implementation; and
  - b. in the meantime, we propose that a formal mechanism be established for Welsh Ministers to contribute to policy development on adult offender management.
- R.27 There should be further administrative devolution in the court system, including by the following means:
- a. the various divisions of the High Court should sit in Wales on a regular basis to hear cases that arise in Wales, other than highly specialist cases;
  - b. a High Court office should be established in Wales to coordinate High Court sittings in Wales;
  - c. the divisions of the Appeal Court should continue to sit in Wales on a regular basis to hear cases that arise in Wales; and



d. High Court and Appeal Court judges should be allocated to sit in Wales only if they satisfy the Lord Chief Justice that they understand the distinct requirements of Wales.

- R.28 There should be a review within ten years of the case for devolving legislative responsibility for the court service, sentencing, legal aid, the CPS and the judiciary to the National Assembly.
- R.29 There should be at least one judge on the United Kingdom Supreme Court with particular knowledge and understanding of the distinct requirements of Wales.
- R.30 Welsh Ministers should continue to have competence on tribunals in devolved areas of policy; there should be clarity and coherence in the relationship between devolved and non-devolved tribunals; the process of appointment, training and terms and conditions of employment should be consistent; and tribunals should be seen to be independent of government.
- R.31 Until and unless legal aid is devolved, the UK Government should fully consult the Welsh Government and other key stakeholders to ensure that the operation of the legal aid system reflects Welsh circumstances.
- R.32 Welsh Ministers should be able to propose law reform projects to the Law Commission on a similar basis to UK Government Ministers.
- R.33 There should be improved access to all legislation in areas of devolved powers through publication of a consolidated body of Welsh primary and secondary legislation.
- R.34 There should be a periodic report by the UK Government in consultation with the Welsh Government to the UK Parliament and to the National Assembly on how access to justice is improving in Wales; and there should be regular dialogue between the Lord Chief Justice of England and Wales and Welsh Ministers on the administration of justice in Wales.
- R.35 A Welsh Criminal Justice Board, bringing together both Governments and their relevant agencies, should be created.

### ***Chapter 11 – Health and social security***

- R.36 There should be no change to the devolution settlement in relation to health.
- R.37 There should be equitable cross-border access for patients and a strategic approach to joint delivery of health services. This should be delivered through:
- a. regular and frequent review by the Welsh Intergovernmental Committee of the UK Government and Welsh Government protocol on cross-border healthcare;
  - b. individual protocols developed between each border Local Health Board in Wales and neighbouring NHS Trusts in England; and
  - c. a cooperative and coherent approach to joint delivery of health services, particularly highly specialist facilities, and joint efficiency savings.
- R.38 The social security system in Wales should remain non-devolved.

## ***Chapter 12 – Further matters***

- R.39 The UK Government and Welsh Government should systematically assess and keep under review the way in which the Welsh language is used across government, in particular with a view to amending any United Kingdom legislation that does not give equal status to the Welsh language in Wales.
- R.40 Welsh Ministers should be able to make building regulations in respect of all buildings in Wales.
- R.41 The two Governments should ensure that there is a clear understanding of their respective roles in relation to civil contingencies and emergencies. There should be an agreed transfer of executive powers if that is necessary to ensure resilience.
- R.42 The administration and conduct of local government elections should be devolved.
- R.43 On equal opportunities, we recommend that legislative competence should be devolved:
- in respect of specific equality duties for the Welsh devolved public sector; and
  - to provide for accountability for the Equality and Human Rights Commission in devolved areas.
- R.44 The two Governments should work together to reduce the complexity of the present family welfare system. This should be based on the principle that the National Assembly should be able to legislate in relation to the powers and responsibilities of public authorities in connection with vulnerable adults and children.
- R.45 On Higher Education and research, there should be a formal intergovernmental committee to ensure a coherent approach to policy and to assess the impact of decisions taken at a United Kingdom level on Higher Education Institutions in Wales.
- R.46 The Research Councils and Technology Strategy Board should ensure that they are aware of Welsh needs, especially in relation to economic development, and designate a Council member with relevant expertise to represent the interests of Wales and be a conduit for the exchange of information.
- R.47 Teachers' pay and conditions should be devolved. Responsibility for pensions should remain with the UK Government.
- R.48 The First Minister should be able to make a recommendation for a Lord Lieutenantcy directly to the Prime Minister.

## ***Chapter 13 – The National Assembly for Wales and the UK Parliament***

- R.49 A range of options should be considered in the short term for increasing the capacity within the existing National Assembly, including greater flexibility on the number and size of committees, increased numbers of research staff and better use of Assembly Members' time.
- R.50 The size of the National Assembly should be increased so that it can perform its scrutiny role better. The practical implications, and those for the electoral system, will need further consideration.



- R.51 On the National Assembly's relationship with the UK Government, we recommend:
- a. the National Assembly and Secretary of State should agree appropriate engagement on the UK Government's legislative programme, rather than one based on the legislative requirement for the Secretary of State's appearance before the National Assembly;
  - b. the unused right for the Secretary of State to participate in the proceedings of the National Assembly should be removed;
  - c. the Secretary of State's powers to prevent Assembly Bills proceeding for Royal Assent should be aligned with those in Scotland; and
  - d. the annual financial statement to the National Assembly should be presented by the Welsh Government rather than the UK Government, and the National Assembly should be able to regulate its own financial procedures.
- R.52 Obligations and restrictions on the National Assembly in the Government of Wales Act 2006 should be reviewed and amended or repealed where no longer appropriate. This should be done on the basis of the detailed memorandum provided to us by the Presiding Officer. In particular, there should be a presumption in favour of adopting changes that bring the National Assembly in line with the Scottish Parliament.
- R.53 If the National Assembly wishes to change its name to the Welsh Parliament, this should be respected.
- R.54 On the relationship between the National Assembly and UK Parliament, we recommend:
- a. there should be improved inter-parliamentary cooperation to increase mutual understanding of the work of the National Assembly and both Houses of Parliament, especially in terms of committee-to-committee cooperation (including attendance by Ministers from each administration at Committees of the other legislature); information-sharing should be improved; Assembly Members should be given parliamentary passes; and the Legislative Consent Motion procedure should be formalised and apply as widely as the same procedure does in Scotland;
  - b. there should be a detailed statement published with every UK Government-proposed Parliamentary Bill on its implications for Wales; and there should be a similar practice in respect of Assembly Bills in relation to any implications for the wider United Kingdom; and
  - c. Members of Parliament representing constituencies bordering Wales who raise cross-border issues that affect their constituents should be accorded the same courtesies by Welsh Ministers as Assembly Members receive. This should apply equally to Assembly Members raising issues in England that affect their constituents.
- R.55 The House of Lords should ensure adequate consideration of Welsh matters, and future appointments to the House should fairly represent Welsh-domiciled people. Any reformed second Chamber should represent Wales fairly.
- R.56 It should be recognised that the National Assembly is permanent, so long as that is the will of the majority of the people of Wales.

### ***Chapter 14 – Public sector capacity***

- R.57 The Welsh Government should continue to be supported by civil servants who are members of the Home Civil Service; secondments should be encouraged and facilitated; and there should be increased flexibility for the Welsh Government to manage staff.
- R.58 The two Governments should seek to develop the capacity of the Welsh public sector (both devolved and non-devolved) to deliver more efficient and better-integrated public services and economic growth.
- R.59 The capacity of Whitehall Departments for dealing with Welsh matters should be strengthened, and Departments should be clearer about the extent of their responsibilities for the different parts of the United Kingdom; and devolution coordinators' and champions' roles and contact details should be publicly available.

### ***Chapter 15 – Implementation***

- R.60 On implementation, we recommend a ten year programme of reform with three phases:
- implementation of administrative recommendations before the next United Kingdom general election;
  - subject to endorsement through election manifestos, introduction through a Wales Bill of a reserved powers model including the transfers of powers recommended in this report; and
  - completion and implementation of the review of legislative devolution of other aspects of the justice system by 2025.

### ***Chapter 16 – Overall impact and looking to the future***

- R.61 On costs, we recommend:
- transfers of powers should be accompanied by (and be conditional on) transfers of funding being fully agreed between the two Governments in each case, and by agreed changes to the Barnett formula comparability factors;
  - any additional costs to the Welsh Government, for example arising from diseconomies of scale or transitional costs, should be kept to a minimum and to levels which are absorbable within the Welsh Government's budget; where costs are particularly problematic to identify there should be further work by the two Governments before devolution is agreed;
  - the Welsh Government should maximise any opportunities to increase the efficiency which devolution of further powers might bring, for example through a more holistic approach to transport planning or reducing crime;
  - there should be a stronger and more imaginative focus by the two Governments on reducing spending by more effective and efficient public service delivery. This might be done through shared use of facilities by the two Governments, by buying in appropriate expertise, or by joint efficiency savings; and
  - the effect on third parties including business should be subject to careful impact assessments in the normal way to ensure our proposals are implemented in a way that will maximise benefits and minimise costs.



# Annex A: Commissioners' Biographies and members of the secretariat



*The Commission (left to right): Rob Humphreys, Dr Eurfyl ap Gwilym, Jane Davidson, Lord Bourne, Paul Silk (Chair), Trefor Jones CVO CBE, Helen Molyneux, Prof Noel Lloyd CBE*

**Paul Silk** was named as chair of the Commission by the Secretary of State for Wales on 11 October 2011. He is a former Clerk to the National Assembly for Wales, serving from March 2001 until December 2006. During this period he was the most senior official in the Assembly and acted as the principal advisor to the Presiding Officer and was responsible for all the services that are delivered to Assembly Members.

Paul was a Clerk in the House of Commons from 1975-1977 and 1979-2001, clerking at different times three departmental select committees – the Foreign Affairs (1998-2001), Home Affairs (1989-1993) and Energy (1984-1989) Committees. He is a former Clerk of the Welsh Grand Committee and was the Clerk in charge of the Government of Wales Bill in 1998. He also contributed to drafting the first standing orders of the National Assembly for Wales. He was Director of Strategic Projects in the House of Commons from 2007 to 2010.

He has worked as Presidential Adviser in the Parliamentary Assembly of the Council of Europe and has written and lectured extensively on Parliament and the constitution. He is an honorary Professor at the Wales Governance Centre at Cardiff University, and now works regularly for the Westminster Foundation for Democracy and for Global Partners Governance advising Parliaments around the world. He was born in Crickhowell and lives near there now.

**Lord Bourne** was nominated by the Welsh Conservative Party. He served as the Leader of the Welsh Conservative Party and as a member of the National Assembly for Wales for the Mid and West Wales electoral region from 1999 until 2011. He is a former Professor of Law and has also been Assistant Principal of Swansea Institute of Higher Education and Dean of Swansea Law School (now Swansea Metropolitan University). Lord Bourne was elevated to the House of Lords in October 2013.

First elected to the National Assembly for Wales in 1999, and re-elected in 2003 and 2007, Lord Bourne sat on the Assembly's European and External Affairs committee and was the party's spokesman on constitutional matters. He became leader of the Welsh Conservatives in August 1999, and Leader of the Opposition in the National Assembly in July 2007. Lord Bourne also became the Shadow Minister for Finance and Public Service Delivery in addition to his role as Leader of the Opposition in the National Assembly from June to October 2008. He was a member of the National Assembly Advisory Group, the body which set up the Assembly's working arrangements.

Prior to his appointment in the Assembly he has also held positions in a number of private companies including as Director of Holborn Group Ltd (1988 – 1991) and Company Secretary and Director of Chart Foulks Lynch plc (1984 – 1988) both specialising in distance learning and oral tuition.

He has served on the British Council Welsh Advisory Committee from 2011 and from 2012 has been Chair of the Haven Enterprise Zone. He is a member of the External Advisory Board of the Wales Governance Centre. He was a member of the Williams Commission on Public Service Governance and Delivery, appointed by the First Minister in May 2013.

**Jane Davidson** was nominated by the Welsh Labour Party. She was Minister for Environment, Sustainability and Housing in Wales from 2007- 2011 where she was responsible for the Welsh Government agreeing to legislate to make sustainable development its central organising principle, the Wales coastpath, legislation on waste which has seen Wales come from behind the rest of the UK to be the lead recycling country in Britain and the introduction of a charge on single use carrier bags. Prior to that she was Minister for Education and Lifelong Learning from 2000 – 2007 where she introduced a new Foundation Phase for 3-7 year olds, the Welsh Bacalaureate and Education for Sustainable Development and Global Citizenship (ESDGC) into the Welsh curriculum.

Jane was the third most influential environmentalist in the UK for the Independent on Sunday in 2009 and has been Resource magazine's no 1 and 2 in 2009 and 2010 for her work on waste. She holds honorary fellowships from CIW (Chartered Institute of Waste) and CIWEM (Chartered Institute of Water and Environmental Management) and has joined WWF's UK Council of Global Ambassadors. She is patron of the Institute for Ecology and Environmental Management (IEEM) and Tools for Self Reliance Cymru (TFSR). She holds an honorary doctorate from the University of Glamorgan for her work.

In 2012 she created a new sustainability institute, INSPIRE, (Institute for Sustainability Practice, Innovation and Resource Effectiveness) at the University of Wales, Trinity Saint David, which is introducing sustainability content into every student's experience from 2013.

**Dr Eurfyl ap Gwilym** was nominated by Plaid Cymru. He is Deputy Chairman of Pure Wafer plc, chair of the Principality Building Society Pension Trustees and a director and trustee of the Institute of Welsh Affairs. He is a member of the audit committee of the National Museum of Wales and of the Investment Committee of the University of Wales.



Dr ap Gwilym recently stepped down from the board of the Principality Building Society where he was Deputy Chairman and from NCC Group plc where he was a non-executive director. He has also served as a non-executive director of iSOFT Group plc and Eqos Limited. In 1999, he was one of a three man team responsible for floating the Terence Chapman Group on the London Stock Exchange and has since been involved in floating three other companies. Prior to that he was Chief Executive of BIS Banking Systems International, a subsidiary of Nynex Inc, and the Chief Executive of GE Information Services where he also served as UK National Executive for GE and as a member of the CBI President's Council. His early career was spent with Unilever and Philips. He is the author of many articles on treasury matters and economic policy and has served as Director of Research and National Chairman of Plaid Cymru.

**Rob Humphreys** was nominated by the Welsh Liberal Democrats. He is the Director of the Open University in Wales, having held posts previously at Swansea University and as Director for Wales of the National Institute for Adult Continuing Education.

During his time at Swansea Rob worked on the innovative and award-winning Community University of the Valleys project, and was awarded a Distinguished Teaching Award for his work with adult students. In 2005 he was a founder member and first chair of the Swansea Festival of Learning. He was appointed by the Minister of Education to the first and second 'Rees Reviews' of higher education funding, which led to significant changes to the funding of universities in Wales.

In 2008 and 2009 he held the post of Specialist Adviser to the Welsh Affairs Committee of the House of Commons during its Inquiry into Cross-Border Services. In 2008 he was appointed by the First Minister and Deputy First Minister to the All-Wales Convention. He was chair of the independent review of governance within the Further Education sector in Wales, which reported to the Minister for Education in 2011. He is a member of the BBC Audience Council for Wales.

Originally from Montgomeryshire, he now lives in Swansea with his wife, the broadcaster and filmmaker Catrin Evans, and their eleven year old daughter.

**Trefor Jones CVO CBE** was appointed Lord Lieutenant for Clwyd in 2001 by the Queen following the retirement of Sir William Gladstone. He was awarded the CVO in the 2012 Jubilee Honours List, and the CBE in 1998.

Mr. Jones is a well known local businessman. He was the Chairman and Chief Executive of Pilkington Optronics (Thales), a large employer in the Clwyd area which has won the Queen's Awards for Industry. Before joining Pilkingtons, Mr. Jones worked for De Havillands (Airbus), for eleven years after serving an apprenticeship.

In the past, Mr. Jones has held a number of public appointments including Chairman of the North Wales Area Committee of the CBI; Chairman of Celtec (the Training & Enterprise Council for North West Wales); member of Welsh Industrial Development Advisory Board; Member of the Clwyd Health Authority; Vice-Chairman of the Conwy & Denbighshire NHS Trust; Chairman of North Wales Institute (Glyndwr University), Chairman of the North Wales Economic Forum; and Deputy Chairman of the WDA.

Mr. Jones has been an active member of several charitable organizations connected with cancer and children, and is the current Chairman of St. Kentigern Hospice based in St Asaph.

He was Chairman of the North Wales Justices' Advisory Committee.

Mr. Jones is married to Shirley, has three children and six grandchildren. He was born in Rhyl and educated at the Town's Emmanuel Secondary Modern School and Flintshire and Denbighshire Technical Colleges. He now lives in St Asaph.

**Professor Noel Lloyd CBE** was the Vice-Chancellor of Aberystwyth University from 2004 to his retirement in 2011, having previously been Registrar and Secretary, Pro Vice-Chancellor, Dean of Science and Head of the Department of Mathematics. He was awarded a CBE in the Birthday Honours List in 2010 for services to Higher Education in Wales.

He graduated in Mathematics from the University of Cambridge, completed his PhD there and was a Research Fellow at St John's College. His research interests are in Nonlinear Analysis and Dynamical Systems. He is a Fellow of the Learned Society of Wales and was admitted as an Honorary Member of the Gorsedd in 2012.

From 2008 to 2011, Professor Lloyd was chair of Higher Education Wales and a Vice-President of Universities UK. From 2005 to 2011, he was a member of the board of UCEA, chairing its Health and Safety Committee, and of the board of QAA, chairing its Access Regulation and Licensing Committee.

He currently serves on the Judicial Appointments Commission. He is a trustee of Jisc and chair of Fair Trade Wales. Until recently he chaired High Performance Computing Wales. He has served on various Research Council committees and a number of editorial boards. He has also been a member of several other committees relating to Higher Education and Training in Wales.

He is an active member of Capel y Morfa, Aberystwyth, having been church secretary from 1989 to 2004. He is a member of the Church and Society Department of the Presbyterian Church of Wales. He is also President of Aberystwyth Music Club.

**Helen Molyneux** is the founder and Chief Executive of NewLaw Solicitors, a law firm employing 390 people in Cardiff, Glasgow, Bristol and Basingstoke. Helen established NewLaw in 2004, following a career as a partner in Eversheds.

Helen is a non-executive Director of the Brightside Group PLC where she is a member of the audit committee, a director of CIQ Ltd and a director of Head Office – an HR consultancy business advising SMEs.

Helen originally trained as a journalist after leaving school, but returned to study law at UWIST. She is a member of the Association of Personal Injury Lawyers. She was named Legal Businesswoman of the Year by the Law Society in 2013.

### ***Members of the secretariat***

The Commission has been supported by a secretariat consisting of officials from the Wales Office, HM Treasury and the Welsh Government:

Michael Kay, Joint Secretary;

Mark Parkinson OBE, Joint Secretary;

Angharad Richards, Constitutional Advisor;

Ben Jones, Research Officer; and

Sara Parry, Communications Officer.



# Annex B: List of sources of evidence

We would like to thank everyone who took the time to contribute to our work. The evidence we received was invaluable to us.

We also held a number of expert seminars on specific policy areas.

All evidence, including notes of our expert seminars, are available on our website.

## *Written Evidence*

### **Organisations**

Abergele Town Council	Electoral Commission
ACPO Cymru	Electoral Reform Society
Amgueddfa Cymru – National Museum Wales	Equality and Human Rights Commission
Barry Town Council	Equity Wales
BBC Trust	Federation of Master Builders
BECTU	Friends of the Earth Cymru
Bevan Foundation	FSB Wales
BMA Cymru Wales	Gofal
Board of Deputies of British Jews	Gwent Police
Bristol Airport	Higher Education Wales
Cardiff Law School	Hywel Dda Institute School of Law
Centre for the Study of Media and Culture in Small Nations	Swansea University
Chartered Institute of Taxation	Institute of Welsh Politics
Children’s and Older People’s Commissioners for Wales	Institution of Civil Engineers Wales Cymru
Church in Wales	Law Commission
Citizens Advice Cymru	Law Society
commonrepresentation.org.uk	Legal Wales
Community Housing Cymru Group	National Assembly for Wales
Community Transport Association	National Assembly for Wales Enterprise and Business Committee
Confederation of Passenger Transport	National Union of Journalists
Consortium of Wye Valley Councils	Natural Resources Wales
Consumer Focus	NFU Cymru
Cymdeithas yr Iaith Gymraeg	Ofwat
Dee Valley Water	Parliament for Wales Campaign
Dŵr Cymru	Passenger Focus
	Plaid Cymru

Play Wales  
Police Federation of England and Wales  
Public Transport Users' Committee  
Royal College of Surgeons Professional Affairs Board in Wales  
RSPB Cymru  
S4C  
Scottish and Southern Energy  
Sewta  
SNAP Cymru  
Sovereign Wales  
Superintendents Association  
Supreme Court  
Sustrans and the Bevan Foundation  
Swansea University School of Law  
SWWITCH  
True Wales  
UCAC  
UK's Changing Union  
UK Government

### Individuals

Anon  
Joan Asby  
Rt Hon John Bercow MP  
Cllr Richard Bertin  
H R Bethell  
Norman Bond  
Mrs Janet Bowen  
K.M.Bowen  
Dr T Brain  
Martyn Brown  
Ieuan Buckley  
W C Chilcott  
James Cole  
Professor Stuart Cole  
Mr V Collier  
Stewart Connell  
Joan Costa Font LSE  
Dr Richard Cowell  
Jeffrey Cuff

UK's Changing Union: Our Future  
Unite Wales  
Valero Energy Ltd  
Wales Council for Voluntary Action  
Wales Study Group of the Study of Parliament Group  
Welsh Committee of the Administrative Justice and Tribunals Council  
Welsh Conservative Group  
Welsh Conservative Party  
Welsh Government  
Welsh Language Commissioner  
Welsh Liberal Democrats  
Welsh Ports Group  
Welsh Regional Council of the Royal College of Pathologists  
WLGA  
Writers' Guild of Great Britain, Wales  
WTUC  
Your Legal Eyes

Cllr E Culshaw & Cllr A Roberts  
Cllr Ray Davies  
R K Davies  
Mark Drakeford AM  
The Rt Hon Baroness D'Souza, CMG  
Stan Edwards  
Charles Ellis  
Rhys ab Elis  
Y Parchedig Aled Edwards OBE  
G Evans  
Hon Mr Justice Roderick Evans  
Professor James Foreman-Peck  
Bob Gaffey  
Jonathan Gammond  
J.L Gardner  
Mr & Mrs C.A Greenslade  
Rhys Gwynn  
Robert Hancock  
Robert Howells



Cllr W Gwyn Hopkins	Ann Poole
Garth & Helen Hughes	Professor Malcolm J Prowle
Gerallt Huws	Andrew Reid-Jones
Clive James	Emrys Roberts
HH Judge Milwyn Jarman QC	Keith Roberts
Cllr Dr Ian Johnson	Margaret Roberts
Ian Johnson, PPC Gwent	Medwyn Roberts
D.I Jones	Winston Roddick CB QC, PCC North Wales
Janie Jones	Christopher Rowlands
Steve Jones	Christopher Salmon, PCC Dyfed Powys
Amanda Langley	Sprocketman
Sir Stephen Laws	Ivor Stokes
Gwilym Levell	A Thomas
Martin Lewis	Rhys Thomas
Michael Lewis	Professor Alan Trench
John Llewelyn	Martyn Vaughan
Cllr Dilwyn Lloyd	Peter Weale
Mrs Lloyd	Professor Thomas Watkin
Lord Chief Justice of England and Wales	Nick Webb
James Maloney	Professor John Williams
John Mellor	Stephen Williams
Lord Morris	Cllr R H Wyn Williams
Professor Tom O'Malley	Nigel Window
Cllr Michael Sol Owen	MJF Wynn
Robert Phillips	

### **Oral Evidence**

#### **Organisations**

Arriva Trains Wales – *Ian Bullock, Managing Director*

Associated British Ports – *Callum Couper, Deputy Port Manager South Wales*

Association of Chief Police Officers Cymru – *Peter Vaughan, Chief Constable of South Wales Police*

Attorney General's Office – *Faridah Eden, Head of Public and Civil Law Team*

BBC Trust – *Elan Closs Stephens, Trustee for Wales; Karl Davies, Chief Adviser Wales*

Bevan Foundation – *Dr Victoria Winckler, Director*

British Medical Association - Welsh Council – *Dr Philip Banfield, Chair; Dr Richard Lewis, Welsh Secretary*

British Ports Association - *Richard Ballantyne*

Cabinet Office – *Ciaran Martin, Director, Constitution Group*

CBI Wales – *Emma Watkins, Director; Chris Sutton, Senior Council Member*

Children's Commissioner for Wales – *Keith Towler*

The Crown Estates – *Dr David Tudor, Senior Marine Policy & Planning Manager*

Dee Valley Water – *Norman Holladay, Managing Director*

Department for Culture, Media and Sport – *Lise-Anne Boissiere, Head of Media; Henry Anderton, Head of Broadcasting Content and Regulation*

Department for Environment, Food and Rural Affairs – *Gabrielle Edwards, Head of Water Reform; Eleanor Fletcher, Legal Advisor, Water and Sustainable Development; Catherine Harrold, Head of Water Resources Management, Efficiency, Innovation, Drainage and New Sewers, Water and Sustainable Development; Francis Marlow, Head of Internal Communications, Stakeholder Management and Engagement and Local Growth; Simon Mundy, Legal Advisor, Water and Sustainable Development; Moira Redmond, Team Leader, Sustainable Drainage Systems and Adoption of New Sewers; Carol Skilling, Team Leader, Water Resources Management Policy*

Department of Energy and Climate Change - *Giles Scott, Head, National Infrastructure Consents; Mandy King, Policy & Environment, National Infrastructure Consents; Tim Lord, Head of Industry & Investment, Office for Renewable Energy Deployment; Jonathan Ainley, Policy Adviser, Energy Bill and Devolution*

Department for Transport – *Anthony Ferguson, Bus and Taxi Regulation; Philip Grindod, Maritime Commerce & Infrastructure Division; Steve Marshall-Camm, Head of Sponsorship and Stakeholders, Rail Strategy and Funding Directorate; Andrew Price, International Cooperation (covering Transeuropean); Fiona Wilson, Deputy Director, High Speed Rail Funding and Policy*

Dŵr Cymru – *Chris Jones, Chief Executive; Nicola Williams, Company Secretary*

Electoral Commission – *Kay Jenkins, Head of Wales and English Regional Offices*

Electoral Reform Society Wales – *Stephen Brooks, Director; Owain ap Gareth, Campaigns & Research Officer*

Equality and Human Rights Commission – *Kate Bennett, National Director for Wales; Marie Brousseau-Navarro, Wales Committee Member*

Federation of Small Businesses in Wales – *Iestyn Davies, Head of External Affairs*

Higher Education Wales – *Professor Julie Lydon, Vice Chancellor of the University of South Wales and Chair of HEW; Amanda Wilkinson, Director*

Highways Agency – *Andrew Page-Dove, Asset Development Manager – South West,*

House of Commons - *Sir Robert Rogers KCB, Clerk of the House; Paul Evans, Principal Clerk of the Table Office*

HMCTS Wales – *Nick Albrow, Head of Crime; Luigi Strinati, Delivery Director*

Institute of Directors Wales – *Robert Lloyd Griffiths, Director; Huw Roberts, Chairman*

ITV Wales – *Phil Henfrey, Director of News and Programmes*

Magistrates' Association – *Sarah Dew, Wales representative on the Board of Trustees*



Marine and Maritime Organisation – *Dickon Howell, Head of Marine Licensing*

Ministry of Justice – *Hugh Barrett, Director of Legal Aid Commissioning and Strategy, Legal Aid Agency; Paul Candler, Deputy Director, Youth Justice; Geraint Davies, Justice Devolution; Simon James, Deputy Director, Information Rights and Devolution; Steve Jones, Head of Freedom of Information & Justice Devolution; Mike Maiden, Deputy Director Rehabilitation Programme*

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

National Audit Office – *John Thorpe, Director*

Natural Resources Wales – *Dr Maggie Hill, Head of Sustainable Communities*

Network Rail – *Tim James, Head of Strategy and Planning – Wales*

Ofcom – *Rhodri Williams, Director, Wales*

Office for National Statistics – *Andy Bates, Crime, Regional and Data Access Division*

Office for Rail Regulation – *Michael Beswick, Director of Rail Policy*

Ofwat – *Andrew Beaver, Director of Strategy; Simon Markall, Interim Parliamentary and Public Affairs Manager*

Older People’s Commissioner – *Alison Phillips, Finance and Performance Director*

Police Federation – *Steve Williams, Chairman*

Port of Milford Haven – *Mark Andrews, Corporate Affairs Director*

Prison Reform Trust – *Juliet Lyon CBE, Director*

Royal College of Surgeons Professional Affairs Board in Wales – *Colin Ferguson, Director for Professional Affairs*

S4C Authority – *Huw Jones, Chairman*

Scotland Office – *Chris Flatt, Deputy Director, Constitution and Corporate Services*

Severn Trent Water – *Sarah Stimpson*

True Wales – *Rachel Banner; Nigel Bull; Michael Crouch*

UK’s Changing Union – *Cynog Dafis; Emyr Lewis*

Wales Audit Office - *Gillian Body, Assistant Auditor General*

Wales Council for Voluntary Action - *Phil Fiander, Director of Programmes*

Wales Office – *Geth Williams, Deputy Director, Constitution and Corporate Services*

Wales Probation Trust – *Sarah Payne, Chief Executive, and Director-designate of National Offender Management Services Wales; Ian Barrow, Director of Operations*

Wales Study Group of the Study of Parliament Group – *Prof Laura McAllister*

Wales Trades Union Congress (Wales TUC) – *Martin Mansfield, General Secretary*

Welsh Committee of the Administrative Justice and Tribunals Council (WCAJTC) – *Gavin McLeod, Secretary*

Welsh Government – *Rt Hon Carwyn Jones AM, First Minister of Wales; Sir Derek Jones CB, Permanent Secretary; Dr Hugh Rawlings CB, Director, Constitutional Affairs and Inter-Governmental Relations*

Welsh Language Commissioner – *Meri Huws, Welsh Language Commissioner; Dr Tomos Dafydd, Senior Policy Officer*

Welsh Local Government Association – *Naomi Alleyne, Director of Equalities and Social Justice; Jon Rae, Director of Resources*

Welsh Royal College of Nursing – *Peter Meredith-Smith, Associate Director (Employment Relations); Martin Semple, Associate Director (Professional Practice)*

Youth Justice Board Cymru – *Dusty Kennedy, Head of Youth Justice Board Cymru*

### **Individuals**

Professor Stuart Cole CBE, Professor of Transport, University of South Wales

Dr Richard Cowell, Cardiff School of Planning and Geography, Cardiff University

Philip Davies, former Parliamentary Counsel

Sir Roderick Evans, Former High Court Judge and Presiding Judge of Wales

James Foreman-Peck, Professor of Economics, Cardiff University

Professor Jim Gallagher, former Director General of Devolution, UK Government

Sir Nigel Hamilton, former Head of the Northern Ireland Civil Service

Professor John Harries, former Welsh Government Chief Scientific Adviser

Simon Humphreys, Chief Superintendent, Corporate Services North Wales Police (on behalf of the Association of Chief Superintendents of England and Wales)

Professor Martin Innes, Director of the Cardiff University Police Science Institute

Sir Bob Kerslake KCB, Head of the Civil Service

Alun Michael, Police and Crime Commissioner, South Wales

Professor Rod Morgan, Professor Emeritus, University of Bristol

Ann Sherlock, Lecturer, Department of Law and Criminology, Aberystwyth University

Professor Alan Trench, University of Ulster

Professor Thomas Glyn Watkin

Huw Williams, Partner, Geldards

Professor John Williams, Professor of Law, Aberystwyth University

Professor Daniel Wincott, Professor of Law, Cardiff University and Co-chair of the Wales Governance Centre



### *Expert Seminars*

#### *Broadcasting: Cardiff University – 21 May 2013*

- Professor Justin Lewis, Professor of Communication, Cardiff University (Chair)
- Professor Ian Hargreaves, Professor of Digital Economy, Cardiff University
- Professor Richard Sambrook, Director - Centre for Journalism, Cardiff University
- Geraint Talfan-Davies OBE, former Controller of BBC Wales
- Glyn Mathias, Content Board member for Wales, Ofcom

#### *Transport: University of South Wales – 23 May 2013*

- Professor Stuart Cole, Professor of Transport, University of South Wales (Chair)
- Martin Buckle, Secretary and Programme Manager, South East Wales Transport Alliance (SEWTA)
- Martin Evans, Chair, Chartered Institute of Logistics and Transport (UK) Cymru
- Matt Hemsley, Policy and Media Advisor, Sustrans
- Nick Jones, Traffic Commissioner for Wales and the West Midlands
- Michael Whittaker, Coordinator, Taith

#### *Economy: Glyndŵr University – 4 June 2013*

- Dr Arnaz (Ben) Binsardi (Chair) plus colleagues, Glyndŵr University
- Professor David Blackaby, Professor of Economics, Swansea University
- Dr Andrew Crawley, Cardiff Business School
- Councillor Bob Dutton, Mersey Dee Alliance
- Charlie Seward, Mersey Dee Alliance
- Councillor Neil Rogers, North Wales Economic Ambition Board

#### *Policing: Bangor University – 5 June 2013*

- Dr Martina Feilzer, Senior Lecturer in Criminology and Criminal Justice, Bangor University (Chair)
- Dr Stefan Machura, Senior Lecturer in Criminology and Criminal Justice, Bangor University
- Ann McLaren, Lecturer in Law, Criminology and Criminal Justice, Bangor University
- Christopher Salmon, Police and Crime Commissioner, Dyfed Powys
- Katherine Williams, Department of Law and Criminology, Aberystwyth University

*Models of Devolution: Aberystwyth University – 25 June 2013*

- David Dixon, Cardiff Law School
- Dr Catrin Fflur Huws, Department of Law, Aberystwyth University
- Professor R. Gwynedd Parry, Swansea Law School

*Natural Resources: Bridge Innovation Centre, Pembroke Dock – 26 June 2013*

- Alec Don, Chief Executive, Port of Milford Haven
- Llywelyn Rhys, Deputy Director, RenewableUK Cymru
- Ted Sangster, Pembrokeshire Business Initiative
- Dr Stevie Upton, Honorary Research Associate, Wales Governance Centre
- Dr Roisin Willmott, National Director, RTPI Cymru

*Justice System: Swansea University – 27 June 2013*

- Professor Timothy Jones, Professor of Public Law, Swansea University (Chair)
- Andrew Clemes, School of Law, Swansea University
- Professor Mike Maguire, Emeritus Professor of Criminology and Criminal Justice, Cardiff University
- Professor Peter Raynor, Professor of Criminology and Criminal Justice, Swansea University
- Winston Roddick CB QC, Police and Crime Commissioner, North Wales



# Annex C: Schedule 7 of the Government of Wales Act

## SCHEDULE 7

### ACTS OF THE ASSEMBLY

Section 108

#### Part 1

#### Subjects

#### *Agriculture, forestry, animals, plants and rural development*

1

Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds. Rural development.

In this Part of this Schedule “animal” means--

- (a) all mammals apart from humans, and
- (b) all animals other than mammals;

and related expressions are to be construed accordingly.

*Exceptions--*

Hunting with dogs.

Regulation of scientific or other experimental procedures on animals.

Import and export control, and regulation of movement, of animals, plants and other things, apart from (but subject to provision made by or by virtue of any Act of Parliament relating to the control of imports or exports)--

- (a) the movement into and out of, and within, Wales of animals, animal products, [. . .] plants, plant products and other things related to them for the purposes of protecting human, animal (or plant) health, animal welfare or the environment or observing or implementing obligations under the Common Agricultural Policy, and
- (b) the movement into and out of, and within, Wales of animal feedstuff. . . fertilisers and pesticides (or things treated by virtue of any enactment as pesticides) for the purposes of protecting human, animal (or plant) health or the environment.

Authorisations of veterinary medicines and medicinal products.

## ***Ancient monuments and historic buildings***

2

Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Historic wrecks.

## ***Culture***

3

Arts and crafts. Museums and galleries. Libraries. Archives and historical records. Cultural activities and projects.

### ***Exceptions--***

Public lending right.

Broadcasting.

Classification of films, and video recordings.

Government indemnities for objects on loan.

Payments to Her Majesty's Revenue and Customs in respect of property accepted in satisfaction of tax, apart from property in which there is a Welsh national interest.

## ***Economic development***

4

Economic regeneration and development, including social development of communities, reclamation of derelict land and improvement of the environment. Promotion of business and competitiveness.

### ***Exceptions--***

Fiscal, economic and monetary policy and regulation of international trade.

Regulation of anti-competitive practices and agreements, abuse of dominant position and monopolies and mergers.

Intellectual property, apart from plant varieties.

Creation, operation, regulation and dissolution of types of business association.

Insolvency.

Product standards, safety and liability, apart from in relation to food (including packaging and other materials which come into contact with food), agricultural and horticultural products, animals and animal products, seeds, fertilisers and pesticides (and things treated by virtue of any enactment as pesticides).

Consumer protection, including the sale and supply of goods to consumers, consumer guarantees, hire purchase, trade descriptions, advertising and price indications, apart from in relation to food (including packaging and other materials which come into contact with food), agricultural and horticultural products, animals and animal products, seeds, fertilisers and pesticides (and things treated by virtue of any enactment as pesticides).



Financial services, including investment business, banking and deposit-taking, collective investment schemes and insurance.

Occupational and personal pension schemes (including schemes which make provision for compensation for loss of office or employment, compensation for loss or diminution of emoluments, or benefits in respect of death or incapacity resulting from injury or disease), apart from schemes for or in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General or Deputy Welsh Ministers (and schemes for or in respect of members of local authorities).

Financial markets, including listing and public offers of securities and investments, transfers of securities, insider dealing and money laundering.

Telecommunications, wireless telegraphy (including electromagnetic disturbance), internet services and electronic encryption.

Postal services, post offices and the Post Office, apart from financial assistance for the provision of services (other than postal services and services relating to money or postal orders) to be provided from public post offices.

Generation, transmission, distribution and supply of electricity.

Energy conservation, apart from the encouragement of energy efficiency otherwise than by prohibition or regulation.

Coal, including mining and subsidence, apart from land restoration and other environmental matters.

Oil and gas.

Nuclear energy and nuclear installations--

- (a) including nuclear safety and liability for nuclear occurrences;
- (b) but not including disposal of very low level radioactive waste moved from a site requiring a nuclear site licence.

Units and standards of weights and measurement and the regulation of trade so far as involving weighing, measuring and quantities.

Industrial Development Advisory Board.

### ***Education and training***

5

Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge.

*Exception--*

Research Councils.

## ***Environment***

6

Environmental protection, including pollution, nuisances and hazardous substances. Prevention, reduction, collection, management, treatment and disposal of waste. Land drainage and land improvement. Countryside and open spaces (including the designation and regulation of national parks and areas of outstanding natural beauty). Nature conservation and sites of special scientific interest. Protection of natural habitats, coast and marine environment (including seabed). Biodiversity. Genetically modified organisms. Smallholdings and allotments. Common land. Town and village greens. Burial and cremation, (except coroners' functions).

## ***Fire and rescue services and fire safety***

7

Fire and rescue services. Provision of automatic fire suppression systems in newly constructed and newly converted residential premises. Promotion of fire safety otherwise than by prohibition or regulation.

## ***Food***

8

Food and food products. Food safety (including packaging and other materials which come into contact with food). Protection of interests of consumers in relation to food.

"Food" includes drink.

## ***Health and health services***

9

Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of national health service.

*Exceptions--*

Abortion.

Human genetics, human fertilisation, human embryology, surrogacy arrangements.

Xenotransplantation.

Regulation of health professionals (including persons dispensing hearing aids).

Poisons.

Misuse of and dealing in drugs.

Human medicines and medicinal products, including authorisations for use and regulation of prices.

Standards for, and testing of, biological substances (that is, substances the purity or potency of which cannot be adequately tested by chemical means).



Vaccine damage payments.

Welfare foods.

Health and Safety Executive and Employment Medical Advisory Service and provision made by health and safety regulations.

### ***Highways and transport***

10

Highways, including bridges and tunnels. Streetworks. Traffic management and regulation. Transport facilities and services.

*Exceptions--*

Registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

Road freight transport services, including goods vehicles operating licensing.

Regulation of the construction and equipment of motor vehicles and trailers, and regulation of the use of motor vehicles and trailers on roads, apart from--

(a) any such regulation which--

(i) relates to schemes for imposing charges in respect of the use or keeping of vehicles on Welsh trunk roads ("trunk road charging schemes"), or

(ii) relates to the descriptions of motor vehicles and trailers which may be used under arrangements for persons to travel to and from the places where they receive education or training, unless the regulation is the setting of technical standards for construction or equipment of motor vehicles or trailers which differ from the standards that would or might otherwise apply to them; and

(b) regulation of the use of motor vehicles and trailers carrying animals for the purpose of protecting human, animal or plant health, animal welfare or the environment.

Road traffic offences.

Driver licensing.

Driving instruction.

Insurance of motor vehicles.

Drivers' hours.

Traffic regulation on special roads, apart from regulation relating to trunk road charging schemes.

Pedestrian crossings.

Traffic signs, apart from the placing and maintenance of traffic signs relating to trunk road charging schemes.

Speed limits.

International road transport services for passengers.

Public service vehicle operator licensing.

Documents relating to vehicles and drivers for purposes of travel abroad and vehicles brought temporarily into Wales by persons resident outside the United Kingdom.

Vehicle excise duty and vehicle registration.

Provision and regulation of railway services, apart from financial assistance which--

- (a) does not relate to the carriage of goods,
- (b) is not made in connection with a railway administration order, and
- (c) is not made in connection with Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road].

Transport security, apart from regulation relating to the carriage of adults who supervise persons travelling to and from the places where they receive education or training.

Railway heritage.

Aviation, air transport, airports and aerodromes, apart from--

- (a) financial assistance to providers or proposed providers of air transport services or airport facilities or services,
- (b) strategies by the Welsh Ministers or local or other public authorities about provision of air services, and
- (c) regulation of use of aircraft carrying animals for the purposes of protecting human, animal (or plant health), animal welfare or the environment.

Shipping, apart from--

- (a) financial assistance for shipping services to, from or within Wales, and
- (b) regulation of use of vessels carrying animals for (the purposes of protecting human, animal or plant health), animal welfare or the environment.

Navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation.

Technical and safety standards of vessels.

Harbours, docks, piers and boatslips, apart from--

- (a) those used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales (or for two or more of those purposes), and
- (b) regulation for the purposes of protecting human, animal (or plant) health, animal welfare or the environment.

Carriage of dangerous goods (including transport of radioactive material).

Technical specifications for fuel for use in internal combustion engines.

## ***Housing***

### **11**

Housing. Housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. Encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation. Regulation of rent. Homelessness. Residential caravans and mobile homes.



## ***Local government***

12

Constitution, structure and areas of local authorities. Electoral arrangements for local authorities. Powers and duties of local authorities and their members and officers. Local government finance.

“Local authorities” does not include police authorities [police and crime commissioners].

### ***Exceptions--***

Local government franchise.

Electoral registration and administration.

Registration of births, marriages, civil partnerships and deaths.

Licensing of sale and supply of alcohol, provision of entertainment and late night refreshment.

Anti-social behaviour orders.

Local land charges, apart from fees.

Sunday trading.

Provision of advice and assistance overseas by local authorities in connection with carrying on there of local government activities.

## ***National Assembly for Wales***

13

Complaints about Assembly members (including provision for and about an office or body for investigating such complaints and reporting outcome of investigations). Assembly Commission. Salaries, allowances, pensions and gratuities for and in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General and Deputy Welsh Ministers. Register of interests of Assembly members and the Counsel General. Meaning of Welsh words and phrases in Assembly Measures and Acts of the Assembly, in subordinate legislation made under Assembly Measures and Acts of the Assembly and in other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General. Private legislation in the Assembly. Financial assistance for political groups to which Assembly members belong. The Welsh Seal. Arrangements for the printing of Acts of the Assembly, of subordinate legislation made under Assembly Measures and Acts of the Assembly and of other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General.

## ***Public administration***

14

Public Services Ombudsman for Wales. Auditor General for Wales. Audit, examination, regulation and inspection of auditable public authorities. Inquiries [in respect of matters in relation to which the Welsh Ministers, the First Minister or the Counsel General exercise functions]. Equal opportunities in relation to equal opportunity public authorities. Access to information held by open access public authorities.

The following are “auditable public authorities” and “equal opportunity public authorities”--

- (a) the Assembly,
- (b) the Assembly Commission,
- (c) the Welsh Assembly Government,
- (d) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions,
- (e) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers, and
- (f) persons established by enactment and having power to issue a precept or levy.

The following are “open access public authorities”--

- (a) the Assembly,
- (b) the Assembly Commission,
- (c) the Welsh Assembly Government, and
- (d) authorities which are Welsh public authorities, within the meaning of the Freedom of Information Act 2000 (c 36).

*Exception--*

Regulation of the profession of auditor.

### ***Social welfare***

15

Social welfare including social services. Protection and well-being of children (including adoption and fostering) and of young adults. Care of children, young adults, vulnerable persons and older persons, including care standards. Badges for display on motor vehicles used by disabled persons.

*Exceptions--*

Child support.

Child trust funds, apart from subscriptions to such funds by--

- (a) a county council or county borough council in Wales, or
- (b) the Welsh Ministers.

Tax credits.

Child benefit and guardian’s allowance.

Social security.

Independent Living Funds.

Motability.

Intercountry adoption, apart from adoption agencies and their functions, and functions of “the Central Authority” under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.



The Children's Commissioner (established under the Children Act 2004 (c 31)).

Family law and proceedings, apart from--

- (a) welfare advice to courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and
- (b) Welsh family proceedings officers.

### ***Sport and recreation***

**16**

Sport and recreational activities.

Exception--

Betting, gaming and lotteries.

### ***Tourism***

**17**

Tourism.

### ***Town and country planning***

**18**

Town and country planning, including listed buildings (and conservation areas). Caravan sites. Spatial planning. Mineral workings. Urban development. New towns. Protection of visual amenity.

Exception--

Development consent under the Planning Act 2008.

### ***Water and flood defence***

**19**

Water supply, water resources management (including reservoirs), water quality and representation of consumers of water and sewerage services. Flood risk management and coastal protection.

Exceptions--

Appointment and regulation of any water undertaker whose area is not wholly or mainly in Wales.

Licensing and regulation of any licensed water supplier within the meaning of the Water Industry Act 1991 (c 56), apart from regulation in relation to licensed activities using the supply system of a water undertaker whose area is wholly or mainly in Wales.

## Welsh language

20

Welsh language

*Exception--*

Use of the Welsh language in courts.

## Part 2

### General Restrictions

#### *Functions of a Minister of the Crown*

1

(1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown.

(2) A provision of an Act of the Assembly cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.

(3) In this Schedule "pre-commencement function" means a function which is exercisable by a Minister of the Crown before the day on which the Assembly Act provisions come into force.

#### *Enactments other than this Act*

2

(1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the Table below--

TABLE

<i>Enactment</i>	<i>Provisions protected from modification</i>
European Communities Act 1972 (c 68)	The whole Act
Data Protection Act 1998 (c 29)	The whole Act
Government of Wales Act 1998 (c 38)	Sections 144(7), 145, 145A and 146A(1)
Human Rights Act 1998 (c 42)	The whole Act
Civil Contingencies Act 2004 (c 36)	The whole Act
Re-Use of Public Sector Information Regulations 2005 (SI 2005/1505)	The whole set of Regulations

(2) Sub-paragraph (1) does not apply to any provision making modifications, or conferring power by subordinate legislation to make modifications, of section 31(6) of the Data Protection



Act 1998 so that it applies to complaints under an enactment relating to the provision of redress for negligence in connection with the diagnosis of illness or the care or treatment of any patient (in Wales or elsewhere) as part of the health service in Wales.]

(3) Sub-paragraph (1), so far as it applies in relation to sections 145, 145A and 146A(1) of the Government of Wales Act 1998, does not apply to a provision to which sub-paragraph (4) applies.

(4) This sub-paragraph applies to a provision of an Act of the Assembly which--

(a) is a provision relating to the oversight or supervision of the Auditor General or of the exercise of the Auditor General's functions,

(b) provides for the enforcement of a provision falling within paragraph (a) or is otherwise appropriate for making such a provision effective, or

(c) is otherwise incidental to, or consequential on, such a provision.]

### 3

A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any provision of an Act of Parliament other than this Act which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund.

### 4

A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any functions of the Comptroller and Auditor General or the National Audit Office.

## ***This Act***

### 5

(1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in this Act.

(2) Sub-paragraph (1) does not apply to the following provisions--

(a) sections 20, 22, 24, 35(1), 36(1) to (5) and (7) to (11), 53, 54, 78, 146, 147, 148 and 156(2) to (5);

(b) paragraph 8(3) of Schedule 2;

[(c) any provision of Schedule 8, other than paragraphs 1(1) to (3), 2(2) to (4) and 3.

(3) Sub-paragraph (1) does not apply to any provision--

(a) making modifications of so much of any enactment as is modified by this Act, or

(b) repealing so much of any provision of this Act as amends any enactment, if the provision ceases to have effect in consequence of any provision of, or made under, an Act of the Assembly.

(4) Sub-paragraph (1) does not apply in relation to a provision to which paragraph 2(4) applies.

(5) But, subject to sub-paragraph (6), a provision to which paragraph 2(4) applies cannot modify, or confer power by subordinate legislation to modify, paragraph 3 of Schedule 8.

(6) Sub-paragraph (5) does not prevent the conferral of functions on a committee of the Assembly that--

(a) does not consist of or include any of the following persons--

(i) the First Minister or any person designated to exercise functions of the First Minister,

(ii) a Welsh Minister appointed under section 48,

(iii) the Counsel General or any person designated to exercise the functions of the Counsel General, or

(iv) a Deputy Welsh Minister, and

(b) is not chaired by an Assembly member who is a member of a political group with an executive role.

### **Part 3**

#### **Exceptions from Part 2**

##### ***Functions of Ministers of the Crown***

**6**

(1) Part 2 does not prevent a provision of an Act of the Assembly removing or modifying, or conferring power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown if--

(a) the Secretary of State consents to the provision, or

(b) the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) Part 2 does not prevent a provision of an Act of the Assembly conferring or imposing, or conferring power by subordinate legislation to confer or impose, any function on a Minister of the Crown if the Secretary of State consents to the provision.

##### ***Comptroller and Auditor General and National Audit Office***

**7**

Part 2 does not prevent a provision of an Act of the Assembly modifying, or conferring power by subordinate legislation to modify, any enactment relating to the Comptroller and Auditor General [or the National Audit Office] if the Secretary of State consents to the provision.



### ***Restatement***

8

Part 2 does not prevent an Act of the Assembly--

- (a) restating the law (or restating it with such modifications as are not prevented by that Part), or
- (b) repealing or revoking any spent enactment,

or conferring power by subordinate legislation to do so.

### ***Subordinate legislation***

9

Part 2 does not prevent an Act of the Assembly making modifications of, or conferring power by subordinate legislation to make modifications of, an enactment for or in connection with any of the following purposes--

- (a) making different provision about the document by which a power to make, confirm or approve subordinate legislation is to be exercised,
- (b) making provision (or no provision) for the procedure, in relation to the Assembly, to which legislation made in the exercise of such a power (or the instrument or other document in which it is contained) is to be subject, and
- (c) applying any enactment comprised in or made under an Act of the Assembly relating to the documents by which such powers may be exercised.

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