

Committee on the Government of Wales Bill

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From:

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Y Trefnydd a'r Gweinidog dros Gydraddoldebau a phlant

Our ref/ Ein cyf: Cardiff Bay/Bae Caerdydd

Your Ref/ Eich cyf: Cardiff/Caerdydd

CF99 1NA

To:

Lord Dafydd Elis-Thomas AM

Chair

Government of Wales Bill Committee

National Assembly for Wales

Cardiff

CF99 1NA

2 March 2006

Assembly Committee On Government Of Wales Bill

The Committee has raised a number of issues on which I have agreed to respond.

Amendment 2 – Scheme for Parliamentary Legislative Provisions

Amendment 2 proposed a requirement that the Secretary of State draw up a scheme setting out the arrangements that the UK Government proposes to make in order to provide definitions of the scope of framework powers conferred on the Assembly by Acts of Parliament. I have considered the issue and whilst we understand the sentiments behind the amendment we do not believe that a statutory scheme is necessary.

In further clarification of our response the Devolution Guidance Note was updated following the

publication of the White Paper, "Better Governance for Wales" to reflect the Government's commitment to the use of framework powers. The guidance has been issued to all government departments and is available on the Wales office, Assembly and Department for Constitutional Affairs' websites. The Department of Constitutional Affairs will update this after the Government of Wales Bill is enacted.

Amendment 4a – New Schedule 5

Amendment 4a proposed to delete Schedule 5 and replace it with a provision similar to that in the Scotland Act 1978. Whilst the amendment replicated the Schedule from the Scotland Act, the principle behind the amendment was clear.

The First Minister and Secretary of State set out the reasons for taking the approach in Schedule 5 of the Bill in their written evidence to the Welsh Affairs Committee (Annex 2 – Copy enclosed).

For the reasons detailed in that Annex, we see no reason to change the approach that has been adopted.

Amendment 9 – Standing orders in relation to Assembly Measures

At the meeting on 25th January I gave an assurance that we were content for the Standing Orders to make provision to protect a set amount of time for private members legislation. I am happy to repeat that assurance.

You also asked for clarification on why the Bill provides for the Counsel General to be able to put forward an Assembly Measure (Clause 96(1)(a)). Although the Counsel General will not from the outset have functions in respect of which he or she might be able to propose an Assembly Measure, the Counsel General will nevertheless be a member of the Welsh Assembly Government (albeit one without a vote, if not an Assembly Member). The Bill has to cater for circumstances which might arise whereby a member of the Welsh Assembly Government would seek to bring forward a proposed Measure relating to their functions. Including the Counsel General among those who may propose an Assembly Measure is a prudent provision to cover a possible future eventuality.

Amendment 12 – Children's Commissioner

I agreed to clarify the reference to the Children's Commissioner in Schedule 7, paragraph 15 of the Bill. I can confirm that this reference is to the Children's Commissioner for England which was established by the Children Act 2004. the Children's Commissioner for Wales was established by the Children's Commissioner for Wales Act 2001 and the Care Standards Act 2000. Consequently I am able to reassure the Committee that legislation relating to the Children's Commissioner for Wales would be within the competence of the Assembly.

Amendment 95 – Salary provision for Assembly Members

At the meeting on 1st February Ieuan Wyn Jones raised a query as to why the Assembly appeared to have discretion over Assembly Members' salaries.

Clause 20 says that the Assembly must make provision for the payment of salaries to Assembly Members. Clause 22 (1) says that different provision may be made under Section 20 or 21 "for different cases".

This gives the Assembly discretion, for example, to pay different salaries to the Presiding Officer, Deputy Presiding Officer and members holding other positions. There is similar provision in Section 83 (5) of the Scotland Act 1998. This is an Assembly power, not a power of the Welsh Ministers.

Amendment 45 – Election of Presiding Officer and Deputy Presiding Officer

There was also a query about the appointment of the Presiding Officer and the requirement in Clause 25 (7) that the Presiding Officer and Deputy Presiding Officer must not belong to the same political group or to political groups both of which have an executive role.

Clause 25 of the Bill requires the Assembly to elect a Presiding Officer and Deputy Presiding Officer at its first meeting following a general election. Paragraph 2 of Schedule 11 to the Bill confirms that this meeting must be held within 7 days after the May 2007 election. Paragraph 15 of Schedule 11 confirms that Clause 25 (1) applies following the May 2007 election.

For the "initial period" – that is, the period from the day of the May 2007 poll to the day when the First Minister of the Welsh Assembly Government is appointed – the question of whether the Presiding Officer and Deputy Presiding Officer both belong to a political group with an executive role will not be an issue as far as Clause 25 (7) of the Bill is concerned: it will not come into operation until the First Minister and Welsh Ministers have been appointed, under Clauses 46 and 48.

If, following the appointment of the First Minister and Welsh Ministers, it did become apparent that both the Presiding Officer and the Deputy Presiding Officer were members of a political group with an executive role, then they would have to take action to comply with Clause 25 (7). This action could consist of one or other of them resigning from the role or they could seek a resolution under Clause 25 (9) to disapply the rule. The same would apply in any future circumstance where the Presiding Officer and Deputy Presiding Officer found themselves in the same situation.

Amendment 108 – Consultation with the voluntary sector

As promised at the last meeting I have met with representatives of the voluntary sector to discuss the Voluntary Sector Partnership Scheme. The Bill provides that the Assembly Government will inherit the current scheme following the separation in May 2007. I gave assurances to the voluntary sector that the current Welsh Assembly Government would, if re-elected, continue to maintain the Voluntary Sector Partnership Council as part of the scheme.

Whilst not being able to agree the proposal to put the Voluntary Sector Partnership Council on a statutory footing, I agreed to discuss these arrangements further with voluntary sector spokespersons in the National Assembly for Wales.

We also discussed the success of the Council since its establishment and the need to maintain the best elements of the Council within the new constitutional framework.

Amendment 109 – Consultation with business

At the Report Stage of the Bill in the House of Commons the Government accepted an amendment which would place a statutory requirement on the Welsh Ministers to make a scheme setting out how they intend to take account of the effect upon the interest of business, in the exercise of their functions, as well as how they intend to consult business organisations, including trade unions. This replaces the current requirement on the Assembly to consult with business organisations. We welcome the amendment and we look forward to building on the positive working relationship we have established with business and trade unions.

As with the voluntary sector, we do not think that it is necessary to have a statutory requirement for a business council. The only statutory partnership council is with another tier of government, local government, and that is an important distinction between partnership councils and the consultation schemes which should be maintained.

Amendments 146 and 147 - Public Services Ombudsman for Wales

These amendments, through amending Schedule 10, would make consequential amendments to the Public Services Ombudsman (Wales) Act 2005.

Amendment 146

The effect of amendment 146 would be to list the Assembly as an appropriate person under section 16 of the 2005 Act, so that the Ombudsman would be required to send to the Assembly all full reports of investigations into complaints against listed authorities.

Having had the opportunity to consider this further, I cannot see any reason why there should be a requirement to send copies of these reports to the Assembly.

I appreciate that the First Minister will be an appropriate person for these purposes, but the First Minister, as part of the Welsh Assembly Government, is in a different position to the Assembly. Listed authorities such as local authorities and various NHS bodies, for example, are funded by the Welsh Assembly Government. As a result, the Government has a direct interest in ensuring that these bodies carry out their functions efficiently.

Even though the Ombudsman will not be required to send copies of reports to the Assembly, Assembly Members will be able to access reports which are of interest to them. Listed authorities

must make full reports of investigations into complaints against them available to the public when they receive them (for a period of at least three weeks) - on their website if they have one, and also at their offices. Any Assembly Member could pick up on these reports, or have them drawn to their attention by constituents, and they could also request copies of reports under section 16(5) of the 2005 Act.

Further, the Ombudsman can send a copy of a report to any person he thinks appropriate. If an investigation raises issues which the Ombudsman considers should be brought to the particular attention of the Assembly then he can, and I am sure he will, do so.

Finally, there is a mechanism for ensuring that the Assembly will be informed where the Assembly Government or Assembly Commission, as listed authorities, have not responded in a satisfactory way to an Ombudsman report. Where a report relates to an investigation into a complaint against the Welsh Assembly Government or Assembly Commission, and the Government or Commission have not responded in a way which is satisfactory to the Ombudsman, the Ombudsman can issue a special report - and this special report must be laid before the Assembly. The detail of this mechanism for laying special reports before the Assembly is the subject of amendment 147.

Amendment 147

This makes a consequential amendment to section 24 of the Public Services Ombudsman (Wales) Act 2005.

Its effect would be that, where a special report has been made in relation to a complaint against the Assembly Commission, then it is for the Presiding Officer rather than the First Minister to lay a copy of the report before the Assembly, and also (unless action to the satisfaction of the Ombudsman has been taken or proposed) to give the Assembly notice of intention to move that the Assembly resolve to approve the recommendations in the special report.

I can see why this amendment was proposed, so that the responsibility for laying the special report lies with the Presiding Officer in the case of a report against the Assembly Commission.

However, I am not sure that this amendment is necessary. Section 24(2) and (3) of the 2005 Act merely set up a mechanism to ensure that a special report relating to the Welsh Assembly Government or the Commission is laid before the Assembly. There is no discretion involved. Therefore, in the case of a special report against the Assembly Commission, whether it is laid before the Assembly by the First Minister or the Presiding Officer, the end result would be the same.

Finally, there were a number of other assurances I gave the Committee which will now be on record and I am happy to re-iterate those assurances.

Annex 2

Primary Legislative Competence of the Assembly - Commentary

1. When defining the subjects on which the Assembly will be able, subject to a "yes" vote in a referendum, to exercise primary legislative powers there are two broad options:

- a) to specify the subjects on which the Assembly may legislate (this is the model adopted in relation to Scotland in the Scotland Act 1978, which never came into force);
- b) to provide that the Assembly may legislate on anything unless it is specifically reserved to the UK Parliament and then to specify those reserved matters (which is the model adopted in relation to Scotland by the Scotland Act 1998)

2. Whichever of the two approaches is adopted, the aim would be exactly the same, namely to define as clearly as possible what the Assembly could and could not do, in accordance with Parliament's wishes as to what should be devolved and what should not be devolved.

3. Under the approach of the Scotland Act 1998 changes to the law which are made by the Scottish Parliament are not limited to specific subjects. They can include changes to basic principles of law. For example, the Scottish Parliament has made changes in land law in Scotland, beginning with the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

4. Scotland has its own distinct legal jurisdiction, with its own system of courts, judges, legal profession and provision for legal education. An ability on the part of its legislature to change basic principles of law and specific rules relating to subjects such as land law which have a general impact across almost all day-to-day activities is consistent with this situation.

5. Wales is different. It forms part of a single unified England and Wales jurisdiction with a common courts system, judges who can act throughout the two countries and lawyers who are educated and who practice in a way which does not distinguish between England and Wales. There is no intention to change this. The Assembly is to be able to make laws which apply in relation to activities in Wales but these will be part of the general law of the jurisdiction of England and Wales.

6. Lawyers who practice in Wales and judges who normally sit in Wales would inevitably be more familiar with laws which applied only to Wales than their colleagues in England but they would still be working within a single unified jurisdiction and if, in the course of a case being heard in England, it were relevant to consider something done in Wales to which an Assembly Act applied then the court would apply that Act in exactly the same way as it would apply an Act of Parliament.

7. If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different

systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

8. In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects. (The fact that this model was adopted in the 1978 Act reflects the fact that either model would work in relation to Scotland. Group 24 of Schedule 10 to the Scotland Act 1978 - "Civil law matters" was intended to ensure that the proposed Scottish Assembly would be able to legislate on at least some of these fundamental legal principles and rules of common application.)

9. The other approach having, in principle, the same effect would be to transfer general law-making powers to the Assembly but then to reserve fundamental legal principles and basic legal rules to the UK Parliament. The view of Parliamentary Counsel is that such a reservation would be so complex and its effect so uncertain that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach.

10. There are further, subsidiary, reasons for adopting the Scotland Act 1978 approach in relation to Wales. Firstly, the list of reserved subjects which would apply in relation to Wales would be substantially longer and more complex than that in the Scotland Act 1998, in that it would need to include subjects such as criminal justice and the courts which are generally devolved in relation to Scotland but not in relation to Wales. Secondly, the task of formulating a list of devolved subjects in relation to Wales, which builds on the executive functions already devolved to the Assembly, is one which can develop out of the existing pattern of Welsh devolution and is therefore much easier to accomplish accurately and effectively than would be that of compiling an exhaustive list of subjects in relation to which the Assembly does not exercise executive functions.