

David Melding AM  
Chair, Constitutional and Legislative Affairs

19 November 2015

Dear David

**Draft Wales Bill: implications of the proposed powers model on the Assembly's legislative competence**

At its meeting on 11 November, the Health and Social Care Committee ('the Committee') considered the draft Wales Bill, particularly its implications for the Assembly's legislative competence in areas relevant to the Committee's remit.

The Explanatory Notes to the draft Bill state that it will "create a clearer and stronger settlement in Wales which is durable and long-lasting". The Constitutional and Legislative Affairs Committee has stated that the new devolution settlement for Wales should have the principle of 'subsidiarity', i.e. the principle that decisions should, where appropriate, be taken at local level, at its core. It also stated that alongside subsidiarity, the other core principles in drafting the new model should be "clarity, simplicity, and workability".

Having considered the draft Bill carefully, the Committee is disappointed and concerned to conclude that there is little evidence that these general principles have been considered and applied in preparing the draft Bill.

The Committee's concerns are outlined overleaf.

- The history, geography and legal landscape of Scotland and Wales are very different. Therefore, it was always going to be difficult to lift the Scottish model of devolution and drop it into a Welsh context without causing damage. The Committee does not question the use of a reserved powers model, but firmly believes that Wales should have a reserved powers model

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that is tailored to Wales. This should have been the basic starting point towards creating a clearer and stronger settlement. The Committee believes that the Bill should provide for a legal jurisdiction which delivers a clear, durable and workable settlement.

- The sheer number and breadth of the reservations will present significant restrictions on the Assembly’s ability to legislate and implement policies effectively, i.e. they will present significant restrictions on the Assembly’s ability to do what it is elected to do. Any Assembly legislation which has more than a “loose or consequential connection” with any of the 200+ reservations will automatically be outside competence; this raises questions as to the workability of the proposed reserved powers model.
- The Committee believes that the UK Government should have good reasons for reserving each of the 200+ matters that are reserved, and that those reasons should be made available. While the Committee has no issue with reservations such as defence, House of Commons elections and currency, the Committee does not understand the reasoning behind other reservations.
- Of particular concern and relevance to the Committee is the reservation of the sale and supply of alcohol. Consumption of alcohol is a serious health issue on which the Committee has undertaken a significant amount of work. Moreover, it is a health issue that is best dealt with at a local level where effective and appropriate action can be taken. The Committee believes that the UK Government should clarify the reasons for reserving alcohol in Wales, particularly when (a) it is not reserved in Scotland, and (b) EU alcohol law restrictions would apply in any case.
- The Committee has reviewed the 200+ reservations from a health and social care perspective. Reservation 149 (regulation of health professionals) raises particular concern and uncertainty. Paragraph (a) of reservation 149 reserves a lengthy list of health professions; paragraph (b) of reservation 149 contains a catch-all provision which reserves “any other profession concerned with the physical or mental health of individuals”. This catch-all provision is very broad. The Committee is unclear about whether this is intended to capture social care workers such as domiciliary care workers. Such workers often have a central role to play in the physical and mental health of vulnerable persons, and it is vital that the Assembly’s competence



is not restricted in this area, where it is crucial that decisions are taken at a local level. The Committee notes that a specific exception has been carved out for the “social work profession”, which is a very narrow and specific profession. The Committee would welcome clarification as to where this leaves social care workers.

- The Committee raises a more general concern with reservation 154 (employment rights and duties) as it turns current silent subjects into detailed reservations. It appears that any Assembly legislation which has more than a loose or consequential connection with any of the long list of employment-related legislation in reservation 154 will automatically be outside competence. The Committee does not believe that this reduction in competence is appropriate, particularly in light of the Supreme Court judgment in the Agricultural Sector (Wales) Bill reference. Further, it seems that the Assembly could not legislate in relation to wages and holidays in the social care sector (not only under reservation 154, but also possibly reservation 149). This interpretation is confirmed by the inclusion of the Agricultural Sector (Wales) Act 2014 as a specific exception. The Committee is unclear where this leaves the Assembly’s competence to legislate in relation to wages and holidays in other sectors. It assumes that reservation 154 is a significant reduction in the Assembly’s competence.
- The Committee notes that in addition to Assembly legislation not being able to relate to a reservation, the draft Bill also specifies that Assembly legislation must not modify the law on reserved matters. The Committee does not see any practical difference between these two tests, and questions the need for the inclusion of them both.
- The Committee shares the concerns expressed publicly by many stakeholders about the “necessity tests”, particularly in the context of the private law test and the criminal law test. The restriction on modifying private law is likely to have a significant impact on the ability of the Assembly to legislate in relation to, for example, NHS contracts and social care agencies. The Committee is unclear about what is meant by “necessary”, as it is open to many different interpretations. However the Committee also believes that, on a higher level of principle, the Assembly should not have to demonstrate that any modification of the private law has no greater effect than is **necessary** to give effect to a devolved purpose. It



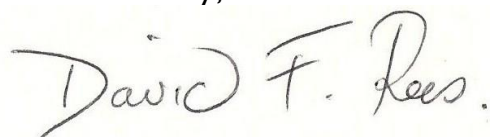
believes that it is the legitimate role of a democratically elected legislature to decide how to implement and enforce policies, and for that legislature to do so as it thinks **appropriate**. The same concerns apply to the necessity test as it applies to modifying criminal law.

- The Committee is concerned about the requirements imposed by the draft Bill for the UK Government to give consent to Assembly legislation which modifies the functions of Ministers of the Crown, government departments and reserved authorities. For example, the Committee is considering the Public Health (Wales) Bill, which applies the current restriction on using tobacco cigarettes in workplaces to e-cigarettes. "Workplaces" in this context includes the premises of what would under the draft Bill be reserved authorities, such as HMRC in Cardiff. Therefore this provision in the Public Health (Wales) Bill would require UK Government consent. The provision does not currently require such consent. Thus the draft Bill would reduce the Assembly's competence and poses a serious risk to the Assembly's ability to legislate in a comprehensive and consistent way across Wales.

The above issues are a concise summary of the issues the Committee has identified, particularly in the context of health and social care. The Committee does not believe that the draft Wales Bill delivers a clearer and stronger settlement which is durable and long lasting. Indeed, its lack of clarity, simplicity and workability appears to the Committee to do nothing more than pave the way to the Supreme Court. However, the Committee would welcome any opportunity to contribute further to the development of the draft Wales Bill, particularly in the context of health and social care, if it would be of assistance.

A copy of this letter will be shared with the Presiding Officer, the First Minister, and the Secretary of State for Wales, to inform their consideration of the draft Wales Bill.

Yours sincerely,



**David Rees AM**

Chair, Health and Social Care Committee

