



## **Draft Wales Bill – Evidence from Marie Brousseau-Navarro, YourLegalEyes**

1. It would seem that this draft Bill is different to previous Devolution Acts which were, in my opinion designed to create a new level of governance in Wales, first by creating an executive body and secondly a legislature. This Bill however appears to replace the interpretation of the extent of the Assembly's legislative powers which was decided by the Supreme Court in the Byelaws and Agricultural Sector cases. The Bill seeks to do this by protecting the powers of the UK Government and by ring fencing them.
2. From this point of view, the Bill is therefore very well drafted. It addresses with great precision and efficiency the challenges that the Supreme Court cases created for the UK Government and in particular the question of UK Ministerial consents and of the Assembly legislating in areas which are reserved or 'were expected to be reserved' by the UK Government.
3. I very much welcome the aims of the draft Bill. The Explanatory Note to the Draft Bill states that the Bill's provisions "will create a clearer stronger settlement in Wales which is durable and long-lasting." The Note says this is to be achieved by creating a reserved powers model which "will provide a clearer separation of powers between what is devolved and what is reserved."
4. While I support the Bill's aims and recognise that the Bill provides some clarification and additional powers, I echo many views that the Bill needs to be simplified and further clarified. I believe that there are 4 areas in which amendments should be made to ensure that the Bill is clear and operable to ensure that the objects of the Explanatory Note are better achieved.

### **1 - A Clarification of some of the Specific Reservations in Part 2 of Schedule 7A**

5. Part 2 of Schedule 7A lists reserved matters under Heads and Sections. I regret that there is no uniformity of expression of the reserved matters. The extent of some of the reserved matters which are defined by reference to existing enactments is not clear and consequently open to challenge as to their extent. This creates unnecessary opacity which goes against the aim of the Draft Bill to clarify the settlement and the powers of the Assembly.
6. An example is the reserved matter described in paragraph 202 of Section M4 (Buildings and Development). Here the reservation is 'Parts 3 to 8 of the Planning Act 2008 so far as relating to the development of a kind for which development consent would have been required under that Act'. What does this mean? What is actually reserved? This contrasts with paragraph 203 where there is no such definition by reference to existing legislation -

‘the regulation of the design and construction of buildings’ which represents a clear statement of what is reserved.

7. It is anticipated that such differently worded expressions of reservations throughout the Schedule would command different interpretation techniques and this should be avoided.
8. As well as such a difference of approach within and between Sections, there is also the problem of trying to ascertain what is the “subject matter” of Parts of an Act. An example is the reservation in paragraph 42 of Section B6 (Anti-social behaviour) of ‘Parts 1 to 6 of the Anti-social Behaviour, Crime and Policing Act 2014’. Parts 1-6 consist of 106 sections. Each Part has an average of 10 sections Each Part and each of the sections have their own headings dealing with different aspects of law and order
9. Furthermore, Acts, Parts of Acts and sections of Acts may subsequently be amended or repealed by later primary or secondary legislation.
10. It must be possible to draft most or all of Part 2 of Schedule 7A by reference to general statements of reservations, with no reference to specific Acts.
11. This was achieved in Schedule 7 to the Government of Wales Act 2006 as originally enacted.
12. This has also been achieved in many of the paragraphs in Part 2 of Schedule 7A of the draft Bill.
13. Indeed in Section B14, “Entertainment and late night refreshment” paragraphs 53 and 54 have general reservations of the “Classification of films and video recordings.” and “the licensing of the provision of entertainment..” The parallel reservations in B5 of Schedule 5 to the Scotland Act 1998 refer to the subject matter of the Video Recordings Act 1984 and to sections 1-3 and 5-16 of the Cinema Act 1985. If the expression of the subject matter can be achieved for one matter in the draft Wales Bill, this can be achieved throughout the draft Bill Schedule.
14. Such subject matters of Acts can be used as an illustration of the general matter as is done in the Draft Bill for example paragraph 154 in Section H1, “Employment rights including the subject matter of the Employers’ Liability and Compulsory Insurance Act 1969”.
15. The same principle applies to interpretation provisions in Sections of Schedule 7A whereby some defined by references to Acts as seen in paragraphs 160-166 Section J4. This contrasts to those which are defined by general matters as seen in paragraph 143 in Section F3. Why cannot there be uniformity of definition throughout?

## 2- Ministerial consents

16. While I fully understand that as a matter of balance of interests or fairness, there should be a UK equivalent to the Legislative Consent Motion when Wales legislate in reserved matters, the current draft Bill does not offer satisfactory arrangements. First there is the question of constitutional balance: in my opinion it should be for the legislatures to consent to the other legislature legislating in their sphere of competence. This could be included in the Draft Wales Bill. The Bill could require the Secretary of State to prepare and lay before Parliament a Legislative Consent Memorandum as do the Welsh Ministers under the current Sewel Convention. This represent the ideal constitutional scenario and this would seem to solve all

the problems of the need or not for a necessity test, the effect on reserved bodies etc. While this seems nearly impossible in the UK constitutional tradition, amendments to the Draft Bill are in my opinion necessary.

17. The Draft Bill needs to be amended to include procedural guarantees and in particular ensure transparency and expediency.
18. As the draft Bill stands there is no transparent procedure by which the opinions of Whitehall are known or discussed before a decision as to whether consent should be given. This contrasts the transparent procedure relating to Legislative Consent Motions for which there is a published Memorandum and a debate taking place in the Assembly.
19. If the consenting powers of the Secretary of State were to remain then there should be a public procedure, statutory grounds for refusal, a statutory presumption of consent and most importantly there should be a statutory deadline to avoid unnecessary blockages of Welsh Bills.
20. I also note that the requirements for consents have expanded quite importantly in the draft Bill.
21. It was understandable why, under GOWA 2006, Ministerial consents were required for Assembly legislative amendments to pre-referendum ministerial functions within devolved areas, (Para. 1(1) Part 2 General restrictions of Schedule 7 of the 2006 Act). Provision was then being made for a transition from the pre-devolution world to the devolved era. However, I do not understand the rationale in the draft Bill for extending the application of the restriction to all Ministerial including for the future. This links to the next point.

### 3- Matching of executive and legislative powers

22. The draft Bill should provide for an automatic transfer of all executive powers under the devolved areas to the Welsh Government as is the case in Scotland. This would seem to solve the problems outlined above at point 2. This would greatly simplify the existing system whereby every single executive function has to be tested to see if it is currently devolved or not. This is extremely time consuming and unnecessary. There seems to be no reasons why the Scottish Model should not be followed. It would mean that if a matter is not reserved then both the existing and future executive and legislative powers have been transferred.

### 4- Necessity test

23. Concern has been expressed about the necessity test which is contained in the draft Bill. I note that the concept is contained in paragraph 3 of Schedule 4 to the Scotland Act 1998.
24. I do not think that this test is required as there are already two powers for the Secretary of State to intervene if it is considered that an Assembly Bill would have an adverse effect on the operation of the law in England and Wales (section 114 (1)(a) and (c) GOWA 2006) and because of the ancillary test at paragraph 2(1)(a) of Schedule 7B. The draft Bill does not propose that these provisions would be repealed.
25. I refer the Committee to the alternative models proposed by the Presiding Officer in her evidence to the Assembly.

26. Furthermore, the proposed necessity test is not a clear test as challenges on similar grounds in Scotland show that the judges have already been divided on its interpretation and application. (*Martin v Miller* and *Imperial Tobacco* cases). It is therefore my opinion that this extra test adds unnecessary additional complication to an already complicated system and it opens a new door to challenges of Welsh legislation in an unconstructive manner, once they have become Acts and have started to produce legal effect.