



David T C Davies MP
Chair
Welsh Affairs Committee
House of Commons
SW1A 0AA

20th November 2015

Dear David

DRAFT WALES BILL

Further to my oral evidence to your Committee on Monday 9 November, I thought the Committee would be interested to see the written evidence which I subsequently submitted to the Assembly's Constitutional and Legislative Affairs Committee (CLAC). A copy is attached.

I will also take this opportunity to comment on the Secretary of State's letter to you of 5 November, with which he enclosed a table setting out the Wales Office assessment of the number of Assembly Acts and Measures which would be caught by the new reservations, restrictions or consent requirements in the draft Wales Bill.

The Secretary of State's table is a response to one I sent him on 7 September, as part of the detailed analysis by my officials of the two draft clauses and schedules sent to us on 31 July (this formed part of the analysis and correspondence relating to the draft Bill which I placed in the Library of the National Assembly on 20 October).

The reference in the Secretary of State's letter to 25 Assembly Acts may cause confusion, as there are still only 21 Acts of the Assembly on the Statute Book. To clarify, he is referring to the 25 entries in the 7 September table, which contains 19 Acts or parts of Acts and 6 Measures or parts of measures.

My officials have considered the Wales Office analysis, and for ease of reference I attach an amended table including in the last column the Welsh Government comments on the Wales Office analysis.

The fact that the legal advisers of the Welsh Government and the Wales Office disagree on the potential effects of the provisions is in itself illustrative of the risks and uncertainties we would face in determining the scope of the Assembly's competence if the Bill were enacted in its current form.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

In summary, the position is that both Governments agree that three Acts would be unaffected by the draft Bill provisions, and five would be outside competence under the new model, as we argued and the Secretary of State has conceded. This is not consistent with his contention that the Bill simply mirrors the existing settlement. In respect of one Act, the clarification provided by the Wales Office commentary enables me now to agree that it would not fall outside competence.

The difference in our positions therefore relates to 12 Acts and four Measures.

I set out briefly below the areas of disagreement, but first I should point out that we have approached our competence analysis in light of Lord Hope's comments in the Imperial Tobacco case. In that case, the Supreme Court indicated, although it has not yet decided this point, that where a provision has two or more purposes, one of which relates to a reserved matter, the fact that one of its purposes relates to a reserved matter will mean that the provision is outside competence, unless the purpose can be regarded as consequential and thus of no real significance when regard is had to what the provision overall seeks to achieve.

The areas of disagreement can be summarised as follows.

First, in some cases the Wales Office argues that provisions are within competence with reference to the *purpose* of the relevant provisions. The Welsh Government analysis is a response to the Bill as drafted, rather than to what the Wales Office claims to be the policy intent. This underlines the crucial importance of improving the drafting to remove the uncertainty which this exercise highlights.

Second, on the consent issue, the fact that consent is required means that a proposal is outside competence. In other words, the Assembly cannot legislate without permission. So what matters is whether consent is required, not whether or not it would have been given. Thus, for example, the Secretary of State's table includes the Planning (Wales) Act in his green category, on the grounds that 'consent would likely have been given'. This misses the point. The requirement for consent retains power at the centre and means that the progress or otherwise of the provision is at the discretion of the UK Government both in terms of substance and timing. That is why the objective must be to minimise consent requirements, and where they are required, to achieve clarity on definition and scope.

Third, the impact of the new category of Reserved bodies, and the inclusion of the Courts and Tribunals in that category, creates uncertainty as to the implications for the enforcement mechanisms available to the Assembly. This underlines the need for clarity that the new model should not constrain the Assembly's ability to make effective provisions to enforce its legislation.

To conclude, in raising concerns about the implications of the new model for Assembly Acts now on the Statute Book, my intention was to underline that the problems are not technical legal issues, but go to the heart of the Assembly's ability to legislate on matters of concern to the people of Wales. The matters addressed in the table are ones that we must get right in this legislative scrutiny process.

I am copying this letter with the attached table and written evidence to the Secretary of State, to the Presiding Officer, and to the Chair of CLAC (letter and table only).

The Secretary of State placed a copy of his letter of 5 November in the libraries of both Houses of Parliament. That option is not open to me, so in order to ensure that a wide range of Welsh Parliamentarians have the information they need, I am copying this letter and attachments also to the shadow Secretary of State for Wales, Hywel Williams MP, Mark Williams MP, Baroness Morgan of Ely, Baroness Randerson, and Lord Wigley.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES