



Eich cyf/Your ref
Ein cyf/Our ref
Gwenda Thomas AM
National Assembly for Wales
Cardiff Bay
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4th November 2015

Dear Gwenda,

I am responding to the question you raised in Plenary on 21 October 2015 in relation to the draft Wales Bill ('the draft Bill').

I have understood your question to relate to the legislative competence of the Assembly to create an appeals process via a devolved Tribunal. While the answer to that question will turn on the precise detail of any particular proposal and it would not, of course, be for me to provide advice in public on such matters, I set out below some general observations as to how the tests for competence differ under the draft Bill to those under the Government of Wales Act 2006 ("GoWA 2006").

Under the current devolution settlement, it would be a relatively straightforward process to determine whether any particular proposed appeal process is within the Assembly's competence. In the case of children's rights, for example, any appeals process would need to relate to a devolved subject under Part 1 of Schedule 7 to GoWA 2006, such as the protection and well-being of children in order to fall within the Assembly's core competence under section 108(4) GoWA 2006; or to provide for the enforcement or effectiveness of rights conferred on children for a purpose which relates to a devolved subject (in order for the creation of an appeals process to fall within the Assembly's competence under section 108(5) GoWA 2006).

So long as such a proposal did not fall within any of the exceptions in Part 1 of Schedule 7 to GoWA 2006, was compatible with Convention rights and EU law, and did not modify or confer Minister of the Crown functions, it would fall within the Assembly's competence.

The tests for competence under the UK Government's draft Bill are more numerous, more complex and, as currently drafted, open to different interpretations.

The starting point, under the reserved powers model on which the draft Bill is based, is that competence over matters which are not reserved is conferred upon the Assembly. The test, however, for whether a matter "relates to" a reservation (and therefore falls outside the

Assembly's competence) is broad: the Supreme Court cases on the Scottish reserved powers model indicate that anything more than a "loose or consequential" connection with a reservation will be sufficient to take the matter outside competence.

Schedule 7A to the draft Bill contains 6 general reservations, and a further 206 specific reservations. It is difficult to say, without sight of precise proposals, whether they would relate to the *specific* reservations, but there are *general* reservations at paragraph 6 of Schedule 7A of both "courts and tribunals (including, in particular, their jurisdiction)" and "civil proceedings", either of which might conceivably be engaged by the creation of an appeals process.

There is an exception to the "courts and tribunals" reservation for a tribunal whose purpose is to make determinations in relation to matters that are not reserved matters, but the position is further complicated (at least in relation to children's rights) by the reservation at paragraph 7 of "international relations" and the exception to that reservation for "observing and implementing international obligations". Careful consideration would need to be given as to whether, for example, a tribunal dealing with appeals in relation to the children's rights protected by the United Nations Convention on the Rights of the Child related to the paragraph 7 reservation (taking into account the exception to that reservation); and if so, whether that would then take the tribunal outside the exception to the reservation under paragraph 6.

Should the Court find that an appeals process relates to one or more of the reservations, there is (in contrast to GoWA 2006) no scope for the Assembly to rely on any ancillary competence: it will simply not be able to legislate.

There are also, at Schedule 7B to the draft Bill, some general restrictions upon the Assembly's competence, including (at paragraph 8) a restriction that the Assembly cannot legislate to confer functions upon a "reserved authority" without the consent of a UK Minister. The definition of a "reserved authority" is extremely complex, involving the application of multiple tests, and has the potential to include many of the bodies which would currently be regarded as devolved bodies. It would appear to include, for example, the First Tier Tribunal, the Upper Tribunal, and the civil courts.

In summary, the tests which would have to be applied under the draft Bill in order to determine the Assembly's competence to create an appeals process, even within a policy area which is currently devolved, are numerous, complex and are open to interpretation by the Court. They are perhaps a very good example of how what is currently proposed in the draft Bill will simply not produce a simplified and clearer settlement in which the citizen in Wales can understand the devolved competence of his/her National Assembly.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Theo', is written over a light blue rectangular stamp area.

Theodore Huckle QC
Cwnsler Cyffredinol
Counsel General