Cynulliad Cenedlaethol Cymru I National Assembly for Wales
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol I Constitutional and Legislative Affairs Committee
Ymchwiliad: Llais cryfach i Gymru: ymgysylltu â San Steffan a'r sefydliadau datganoledig
Inquiry: A stronger voice for Wales: engaging with Westminster and the devolved institutions
IGP011
Ymateb gan: Yr Athro Thomas Glyn Watkin
Response from: Professor Thomas Glyn Watkin

1. I should like to thank the Committee for the invitation to submit written evidence to it in relation to this inquiry, and for the subsequent notification of the extended period permitted for the submission of evidence. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated. I have to admit that I was in two minds as to whether I had anything of value to say on this issue as my direct knowledge and experience of inter-institutional working between Wales and Westminster is limited to my time as Legislative Counsel during the Third Assembly, a period now perhaps more of historical interest than of direct relevance to the inquiry. Indeed, even then, the occasions on which I was directly involved in discussions with UK institutions, as opposed to having to deal with the outcomes of such negotiations, were very few in number. However, the similarities between what I experienced then and more recent experience of involvement in discussions leading up to the passing of the Wales Act 2017 have led me to believe that things may not have changed as much as the length of time which has passed might lead one to suppose.

Experience during the Third Assembly (2007–11)

2. Towards the end of the Third Assembly, I gave evidence to this Committee as First Welsh Legislative Counsel.[1] This related to the difficulties which had been experienced in delivering the Welsh Government's legislative programme under the devolution settlement contained in Part 3 and Schedule 5 of the Government of Wales Act 2006. Under that model of

[1] Constitutional Affairs Committee, CA(3)-04-10 : Paper 1 : 4 February 2010, and the transcript of that meeting.

devolution, the Assembly acquired legislative competence incrementally through the periodical insertion of matters into the 20 fields set out in Part 1 of Schedule 5, which matters could be inserted either by Act of Parliament or through the making of Orders in Council, commonly referred to as Legislative Competence Orders or LCOs. I shall not repeat the evidence given by myself and Mr. Huw G. Davies, Senior Welsh Legislative Counsel, on that occasion regarding my Office's experience of the work. Suffice it to say that the experience had been very frustrating. The extent of the legislative competence to be enjoyed by the Assembly under Part 4 and Schedule 7 of the 2006 Act following a successful referendum was already known, as the 20 headings in Part 1 of Schedule 7 already had listed under them the subjects in relation to which Parliament had decided that the Assembly should be competent to legislate. Those 20 headings corresponded to the 20 fields in Schedule 5. They were in the main empty, matters having yet to be incrementally inserted into them. It was agreed that it was not anticipated that all of the subjects under a heading in Schedule 7 should be transferred into a field in Schedule 5 at any one time, but that each field should grow incrementally. It seemed therefore that what was intended was that the subjects already identified as being suitable for devolved legislative competence should be inserted into Schedule 5 individually or in groups as required to deliver the Welsh legislative programme. This however was not what happened. Following an initial attempt to proceed in this manner, it became apparent that the UK Government was not prepared to confer as broad a competence upon the Assembly as that given by Schedule 7 even in relation to the individual subjects identified there. Instead, each matter was subjected to sometimes very considerable limitations and exceptions which had not been imposed by Parliament when enacting the provisions of Schedule 7. Perhaps the classic example of this can be seen by comparing the text of the proposed Environment LCO promoted by the Welsh Government and agreed by the Assembly in 2007 with the eventual Environment LCO approved by Parliament following lengthy negotiations with the UK Government in 2010.[2]

[2] National Assembly for Wales (Legislative Competence) (No.2) Order 2007; National Assembly for Wales (Legislative Competence) (Environment) Order 2010.

Experience during the passage of the Wales Act 2017 – déjà vu?

3. The difficulties encountered in obtaining legislative competence during the Third Assembly seemed to be reproduced in the deliberations leading up to the Wales Act 2017, and the manner in which reserved matters – especially the specified reserved matters – are defined in that Act recall the manner in which matters had been defined for insertion into Schedule 5. It is also in my view significant that little seems to turn on the political complexion of the UK Government in this regard. Many believed at the time of the Third Assembly that problems may have lain more with officials in Whitehall than with UK ministers. The problem would appear to have been an unwillingness to address the issue as one of subsidiarity – "what subjects are most appropriately decided at national level and what subjects need to be retained at State level?" – but rather as one of administrative convenience – "what matters would make my work more difficult if decisions concerning them had to be shared with Wales?" The devolution of legislative competence appears to turn on the convenience or inconvenience of administrative decentralization rather than respect for any right to national self-determination.

4. It is difficult to separate this problem, if it is recognized, from the manner in which devolution has been pursued within the United Kingdom, and in particular from the dual rôle of the UK Government as being both the government of the UK as a sovereign state and also the government of England regarding matters which are not devolved. Until the imbalance of power and sometimes the conflict of interest which results from this situation is satisfactorily addressed, I do not believe that a lasting constitutional settlement will be achieved nor that satisfactory inter-institutional relations can be maintained.

5. Silk II recommended the provision of a statutory Code of Practice on intergovernmental relations.[3] It is to be regretted that the Wales Act 2017 did not deliver on this recommendation.

[3] Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, March 2014, (hereafter Silk II) chapter 5 and recommendation 4.

Cross-Border Issues

6. Silk II also recommended that the Welsh and UK Governments should establish a Welsh Intergovernmental Committee to oversee the operation of the devolution settlement by, amongst other things, resolving cross-border issues.[4]

7. The Wales Act 2017 has addressed two specific cross-border issues by a form of statutory regulation. In relation to cross-border harbours, this involves duties being placed upon both governments to consult one another when exercising certain functions, although in one instance the duty of the UK Minister to consult corresponds to a duty on the Welsh Ministers to obtain consent – an example of the imbalance referred to above.[5]

8. The 2017 Act does however implement to a large extent Silk II's recommendation that a formal intergovernmental protocol should be established with regard to cross-border issues relating to water resources, water supply and water quality, and that the Secretary of State's power of intervention to prevent Assembly bills proceeding to Royal Assent if he or she had reasonable grounds to believe that any of its provisions would have a serious adverse effect on water resources, water supply or water quality in England should be removed in favour of mechanisms under the protocol.[6]

9. The 2017 Act provides for the replacement of the intervention power by a water protocol, and also provides that in exercising functions relating to water resources, water supply and water quality the Welsh Ministers must have regard to the interests of consumers in England and the Secretary of State must have regard to the interests of consumers in Wales,[7] thus introducing a welcome balance between the two governments regarding the exercise of these functions. Pending the development of a more balanced constitutional structure between the governments of the component nations of the United Kingdom, the approach taken with regard to cross-border water issues as between England and Wales may offer the best way forward for the present in relation to cross-border issues affecting the two nations.

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[4] Silk II, recommendation 6, especially (e).

[5] Wales Act 2017, ss. 34—38.

[6] Silk II, recommendation 16, discussed in chapter 8 of the report.

[7] Wales Act 2017, ss. 50—52.

Legislative Issues

10. Imbalance however continues to exist with regard to the legislative processes of the two legislatures. Putting aside the issue of the sovereign UK Parliament's power to continue to legislate for the devolved nations even on devolved matters subject to the convention that it will not 'normally' do so without consent,[8] there is also the bone of contention that it legislates in the same sovereign manner when legislating for England only under the procedures regarding 'English Votes for English Laws'. This effectively means that the restrictions placed upon the legislative competence of the devolved legislatures regarding compatibility with EU law and Human Rights legislation do not operate in the same manner with regard to England-only legislation as they do to Wales-only legislation passed by the Assembly. Nor do the same consequences follow from successful challenge. The consequences of devolved legislation straying into matters which are reserved or subject to restriction are therefore materially different from the lack of consequences if England-only legislation wanders across the devolution boundary. England-only legislation is not subject to judicial oversight with regard to competence as are the nation-specific enactments of the devolved legislatures.

11. While with regard to cross-border water issues, Silk II's recommendation relating to the intervention powers of the Secretary of State is potentially poised to bear fruit in the form of a water protocol, the same is not the case with its recommendation that those powers generally should be aligned with those existing in Scotland.[9] Indeed, the 2017 Act gives the Secretary of State a further power to make regulations which can amend, repeal, revoke or modify Assembly legislation without any requirement to obtain the approval of the Assembly for the statutory instrument making the change.[10] It was this provision which so outraged the former Lord Chief Justice, Lord Judge, during the House of Lords debates that he described it as an 'insult to the democratic process' and a 'constitutional aberration'.[11] It will an interesting test of the legislative balance which it is claimed has been

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[8] Government of Wales Act 2006, s. 107(6), as inserted by Wales Act 2017, s. 2.

[9] Silk II, recommendation 51(c), discussed in chapter 13 of the report.

[10] Wales Act 2017, s. 69.

[11] Hansard, House of Lords, 14 December 2016, col. 1340-41.

achieved by the EVEL procedures and of the logic which lies behind them to see whether, if and when a statutory instrument is laid before the House of Commons containing such regulations, it is only Welsh MPs who will be permitted to vote on its approval, given that any laws being amended apply only in relation to Wales.

Despite my misgivings expressed earlier, I hope these reflections will prove of some use to the Committee in its deliberations.