



In-depth Briefing

Draft Wales Bill 2016

In June 2016 the Secretary of State for Wales, Alun Cairns, published the re-worked Draft Wales Bill with the intent of 'delivering a long-lasting settlement' for the constitution of Wales through devolving further powers and by allowing the National Assembly for Wales to move from a conferred powers model (where the Assembly is told what powers it does have) to a reserved powers model (where the Assembly is told what powers it does not have, as is the case in Scotland and Northern Ireland). Another key aspect to this draft is the continued commitment of the UK Government to devolve some income tax powers to Wales without the need to first hold a referendum.

Background

Despite its relative youth, the Welsh Assembly has gone through significant change in a short period of time as the need and support for more powers increases with each passing Assembly term. The most recent significant change to the constitution of Wales came in 2011 which gave the Welsh Assembly law-making powers for the first time over 20 specific policy areas. Since then, however, a number of Welsh pieces of legislation have been challenged by the UK Government in the Supreme Court which highlighted two major issues with the current settlement in Wales: the complexity of the constitution and the lack of clarity for Welsh politicians when it comes to the actual powers of the Welsh Assembly.

These issues initially led to the Silk Commission (officially The Commission on Devolution in Wales) which was tasked to look into the financial (Part I) and legislative (Part II) powers of the National Assembly for Wales. The Commission was made up of representatives from each of the Welsh parties at the time with an ambition of achieving cross-party support on any decisions to recommend further powers. Part I of the Commission's report, which focused on financial powers, led to the Wales Act 2014 which allowed for the devolution of stamp duty land tax and landfill tax, and borrowing powers, and started the process of the limited devolution of income tax.

Part II of the Silk Commission on further legislative powers for the Welsh Assembly proved to be more contentious. The Silk Commission recommended the move to a reserved powers model and the transferral of electoral powers to the Assembly, both of which are present in the current draft bill, but the Commission went further, recommending the devolution of policing, broadcasting and water, all of which have long been issues of contention in Wales'



history of devolution. Part II of the Silk report led to what is known as the St. David's Day Process – a series of cross-party talks between the parties of Wales and the UK coalition government. The result of these talks was the controversially titled 'St. David's Day Agreement' and the 2015 draft Wales Bill, which fell very short of Silk's recommendations.

The 2015 draft Wales Bill was met with great opposition in Wales from across the Welsh parties, academics, lawyers and the media. The 2015 bill was overly long and complicated, therefore falling short of the promise to deliver a 'clear and long-lasting settlement' for Wales. Some, including the leaders of Plaid Cymru, the Welsh Liberal Democrats, and the First Minister Carwyn Jones, argued that the 2015 bill would actually weaken the powers of the Welsh Assembly as it would install an English veto over Welsh laws. Faced with an Assembly united in opposition to the bill, the then Secretary of State for Wales, Stephen Crabb, initiated a pause to the progression of the bill in order to amend it, paying particular interest to the overly long list of reserved powers.

Constitution

The key principles of devolution outlined in the 2016 draft don't differ from the 2015 draft and provide the Assembly with permanence and the powers to manage its own affairs. The headline constitutional powers for the Assembly include:

- Permanence in law – the Assembly can only be abolished if the people of Wales vote in favour of its abolishment via a referendum.
- Powers to rename – the Assembly will be given the power to rename itself should it wish to do so. A recent debate in the Senedd showed support for 'the Parliament of Wales' and 'Senedd'.
- Electoral arrangements – the Assembly will be able to decide the number of seats, the number of constituencies/regions, the system used to elect representatives and the minimum age of voters.

While these powers are of no major consequence to the sector, they could represent significant change in the way that the Assembly operates and could mean changes to lobbying efforts and relationships with politicians.

New Powers

The bill delivers devolution of the following powers:

- Onshore Petroleum licences (including fracking)



- Roads: speed limits, pedestrian crossings and traffic signs
- Bus service registration and taxi regulation
- Executive functions over Welsh Harbours
- Planning consent for energy generating stations with 350MW capacity or less
- Marine Conservation zones
- Wider powers to administer the public sector equalities duty
- Stronger powers for the Assembly to compel evidence for the Gas and Electricity Markets Authority in Wales

Some sought-after powers that have been identified by the Welsh Government, Plaid Cymru, the Welsh Liberal Democrats and the Silk Commission, including policing, broadcasting and water, remain contentious issues between the UK and Welsh Governments and have not been indicated for devolution.

Financial Powers

The Wales Act 2014 paved the way for a wave of financial powers for the Welsh Assembly. Stamp duty land tax and landfill tax were devolved (with the Welsh Assembly taking control in 2018) but the most contentious financial power that Wales has yet to receive was the power to vary income tax and to raise some of its own funds. The Wales Act 2014 originally allowed for the limited devolution of income tax (10p in the £1) with two caveats: it would only be devolved with a successful referendum vote and it would come with a lockstep.

It was argued by all leaders in Wales that a referendum was unnecessary and some argued that it was right that the Assembly had tax powers so that it could be held to account. There was also strong opposition to the lockstep which would tie the hands of the Welsh Government in both raising and lowering taxes because it meant a rise for one tax band would mean a rise for all and vice versa. In the face of strong opposition, the Chancellor of the Exchequer, George Osborne, announced that the requirement for a referendum would be dropped and that the lockstep would also be dropped. As such, the 2016 draft bill would allow for the devolution of limited income tax powers without a referendum and without the lockstep. The removal of the requirement for a referendum remains contentious as some Conservative MPs, some Labour MPs and UKIP AMs believe that such a decision should be made by the people of Wales.

Law and Jurisdiction

The 2016 draft bill makes a major concession that its predecessor did not – namely, it recognises that there is a body of Welsh law that is created by the Welsh Assembly and Welsh Ministers and is part of the body of law of England and Wales.



This admission stops short of the creation of a distinct or separate jurisdiction for Wales which has been called for in Wales. A distinct jurisdiction for Wales most notably has support from the Welsh Government who included a distinct jurisdiction for Wales in their own alternative Wales Bill. Some argue that not separating the England and Wales jurisdiction will create problems, particularly as the Welsh Assembly's powers continue to grow and more Wales-specific laws are created. Wales remains the 'anomaly' of the UK in that it is the only UK nation that can legislate but does not have a distinct body of law.

Another key aspect in respect to law and jurisdiction in Wales was the recognition that the UK Government will not 'normally' legislate on devolved matters without the consent of the Welsh Assembly. The wording of this recognition would still require issues of sovereignty to be heard in the Supreme Court.

Conferred Powers versus Reserved Powers

Conferred Powers	Reserved Powers
Specific powers with which to legislate Other powers assumed non-devolved	Specific powers non-devolved Other powers assumed devolved

The National Assembly for Wales currently works under the conferred powers model which limits the competence of the Assembly to 20 policy fields (including housing, health, education). This model has proven to be a complicated system for the Assembly as it is sometimes unclear whether or not the Assembly can legislate on certain matters. Where disputes have arisen from this uncertainty, decisions have to be made in the Supreme Court which comes at a significant cost in terms of time and money. The principle behind moving to reserved powers is to simplify the process and introduce much-needed clarity.

The first reservations list (the list of specific powers that would be reserved to Westminster) in 2015 was met with a great deal of opposition in Wales from politicians and academics who said that the list was too long and that some of the reservations were unjustifiable. The reservations include some 'non-negotiable' general powers, such as the Crown, Defence and Foreign Affairs, while the bulk are made up of specific laws such as policing, teachers' pay, safety at sports grounds, hovercraft regulation, etc.

The 2016 list of reservations has reduced the number of reservations, though the list is still considerably longer than the reservation list of Scotland on which Wales' reservation model is based. The greatest cause for concern here is that a long reservation list is unlikely to achieve the clear and sustainable settlement that the UK Government is seeking.



Examples of reservations that may be of interest to the sector include:

- Immigration
- Anti-social behaviour
- Charities
- Energy conservation
- Social security schemes
- Job search and support
- Welfare foods

An English Veto?

The 2015 draft bill included a 'necessity test' which could limit the powers of Welsh Ministers to legislate in areas that the UK Government may have deemed non-devolved. The First Minister for Wales, Carwyn Jones, described this as an 'English veto' and as an unacceptable inclusion in the bill which would have meant that some key Welsh legislation, such as the Housing (Wales) Act 2014, would not have passed.

The necessity test has been watered down in the new draft bill, though a new potential 'veto' may arise via Justice Impact Assessments (JIAs). When changing a non-devolved law, the Welsh Government will have to carry out a JIA, the problem being that there is no given standard or content of what a JIA actually is which some fear may lead, in effect, to a veto. The Secretary of State has said that no veto could arise via a JIA but the lack of information concerning what a JIA actually is or how it will be used adds to the lack of certainty delivered in this draft bill.

A Clear and Sustainable Settlement for Wales?

Community Housing Cymru welcomes the 2016 draft Wales Bill and the improvements and concessions made following the publication of the 2015 draft bill. Moves to make the system of legislation in Wales clearer are necessary so the move to a reserved powers model is something to be supported, as is the devolution of powers in transport, energy and the powers that allow the Welsh Assembly to legislate on its own affairs.

There are clear concerns, however, that this bill is unlikely to achieve its goal of a clear, long-lasting and sustainable settlement for Wales. The list of reservations, the potential impacts of Justice Impact Assessments and the commitment to the single jurisdiction of England and Wales in the face of a maturing Assembly all bring greater uncertainties than they do certainties. There is also concern that one of the key ambitions of this legislation – to prevent cases of competencies being heard at the Supreme Court – is also likely to fail for the same reasons, with the pressure of



considerable time and money being spent to clarify that which could already be clear with a more robust and considered Wales Bill.

**Community Housing Cymru
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