



DG Undeb Sy'n Newid
UK's Changing Union

Evidence to the Commission on Devolution in Wales

A Stable, Sustainable Devolution Settlement for Wales

UK Changing Union partnership

—Wales Governance Centre, Cardiff University

—Institute of Welsh Affairs

—Cymru Yfory/Tomorrow's Wales

March 2013

The UK Changing Union Partnership

The UK's Changing Union project is a joint initiative between the Wales Governance Centre at Cardiff University, the Institute of Welsh Affairs, and Cymru Yfory/Tomorrow's Wales. The project seeks to explore and debate the future of the Union and the Welsh devolution settlement through research and engagement with relevant public and civil society stakeholders.

It also seeks to involve young people and wider civil society in constitutional debate, disseminating the project's research findings in an accessible format and holding events in which organisations and individuals can understand what constitutional change might mean for them.

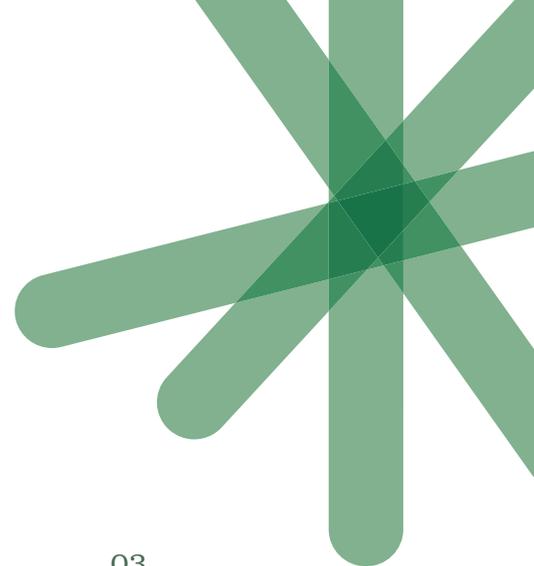
The project began work in January 2012 and will run for three years. It is funded by the Joseph Rowntree Charitable Trust and the Nuffield Foundation. Additional resources to the project are provided by the partner organisations.

The project has responded to the remit of the Silk Commission by forming three working groups on:

- Legal jurisdiction
- Finance and funding
- Scrutiny, capacity, accountability and powers

In parallel with this work the project has also convened a **Forum on the Changing Union**. This meets biannually to bring together experts in their fields drawn from the four countries of the UK. It is central to the project as a whole and contributes to the new thinking required to imagine the future shape of constitutional relationships within the British Isles. Each Forum has a different focus. Participants include academics, politicians, civil servants and other practitioners. The Forum produces discussion papers and reports on proceedings.

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Preface

The UK Changing Union project is pleased to submit evidence to the second phase of the Silk Commission's work, which follows previous submissions made on finance and funding. In preparation for this submission, the project formed two working groups, one on issues of law and jurisdiction in Wales, and one looking broadly at issues of scrutiny, capacity, accountability and powers in Wales.

The former was chaired by Emyr Lewis, Senior Fellow in Welsh Law at Cardiff University, and the latter by Cynog Dafis, former AM and MP. A wide range of contributors drawn from academia, civil society and the four main political parties in Wales provided on-going advice and expertise as members of these groups.

This submission has also drawn on a wide range of research and consultation activity undertaken by the working groups. We have actively sought the opinion of leading experts, and engaged independent researchers in collecting and analysing information. In addition, expert, peer-review seminars were carried out to test the validity of the research conducted.

In total, the project has commissioned 10 research papers in the following areas:

- Capacity of the civil service in Wales
- Capacity of the National Assembly for Wales
- Political parties and policy development
- Energy policy and powers
- Wales and the welfare agenda
- Policing powers
- Broadcast media in Wales
- Scrutiny capacity of civil society in Wales
- The European influence in Wales and the UK

These themes were not meant to provide an exhaustive portrait of the current arrangements, but were chosen to illustrate and explore their practical effect and potential improvements. While the background papers are all available from our website this submission does not seek to replicate the structure of that research plan. We believe, on the evidence that we have assembled, that the future of the Welsh devolution dispensation needs to be addressed holistically rather than on a piecemeal basis.

Indeed, our experience in exploring the issues raised by the Commission's remit reinforces our view

that to adopt a piecemeal fashion is to risk replicating the very incoherence and short-termism that has been such a strongly negative feature of the Welsh constitution-making process so far.

What is required is a fundamental, principle-based rethinking of the constitutional underpinnings of devolved government aimed squarely at providing the people of Wales with a stable and sustainable system of devolved government within the United Kingdom. It is precisely this we have sought to undertake in the following submission.

The paper represents the collective views of the Steering Committee but, like all such submissions, does not commit each member to every single aspect.

We would welcome an opportunity to discuss our findings with the Commission.

Submitted by the UK's Changing Union project.

Project Steering Group

- Professor Richard Wyn Jones, Wales Governance Centre (UKCU Chair)
- Hywel Ceri Jones, Wales Governance Centre
- Dr Rebecca Rumbul, Wales Governance Centre
- Geraint Talfan Davies, Institute of Welsh Affairs
- Gerald Holtham, Institute of Welsh Affairs
- John Osmond, Institute of Welsh Affairs
- Peter Price, Cymru Yfory/Tomorrows Wales
- David Llewellyn Davies, Cymru Yfory/Tomorrows Wales
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Working Group Chairs

- Emyr Lewis, Wales Governance Centre (Chair - Working Group on Jurisdiction and Legal Matters)
- Cynog Dafis, Cymru Yfory/Tomorrows Wales (Chair - Working Group on Powers, Capacity, Scrutiny and Accountability)



Executive Summary

1 – A new model for devolution to Wales

A story of increasingly effective practice by both the legislative and executive branches of devolved governance in Wales has been achieved despite rather than because of the constitutional arrangements that have underpinned our democratic institutions. All talk of a Welsh devolution ‘settlement’ has been more aspirational rather than accurate. The reality has been anything but stable.

The development of devolution in Wales has been characterized by constant change and upheaval, and the triumph of pragmatism over constitutional principles.

Instead of piecemeal change, what is required is a fundamental, principle-based rethinking of the constitutional underpinnings of devolved government, aimed squarely at providing the people of Wales with a stable and sustainable system of devolved government within the United Kingdom. It is precisely this we have sought to undertake in the following submission.

We believe that six core principles should underpin any solution, some of which strongly echo those set out by the Silk Commission itself in its first report on the financial powers of the Welsh Government. They are:

- **Respect for the settled will of the Welsh electorate**
 - demonstrable and stable public support for further empowerment of the National Assembly and Welsh Government
 - the best foundation for democratic accountability
- **Democratic accountability**
 - taxation powers that enhance accountability
 - better balance between the executive and an empowered legislature
 - an Assembly large enough to do the job
- **Stability and sustainability**
 - not subject to constant change
 - an end to constant experimentation
 - a lasting settlement to meet the needs of the present and future generations

- **Clarity and predictability**
 - reducing ambiguity and imprecision in powers
 - powers that are readily understood by politicians, officials and public alike
 - avoiding unnecessary conflicts between jurisdictions

- **Effectiveness**
 - able to set own priorities and timetables for action
 - allowing holistic approach to policy development
 - able to implement all stages of delivery

- **Consistency across the UK**
 - allowing the same constitutional principles to be adopted across the UK, even where specific powers may differ
 - encouraging consistent behaviours between UK and devolved institutions

It is our belief that the current constitutional arrangements do not meet the test of adherence to these principles.

The key issue is the choice for Wales between two devolution models: the existing 'conferred' powers model and the 'reserved' powers model that is in place in Scotland and Northern Ireland. There is no reason why Wales should remain an anomaly in this regard among the three devolved administrations.

In summary, we believe that devolution in Wales should move to a reserved powers model. The weakness of the 'conferred powers' model stems from:

- it being a hangover from the executive devolution model, and not appropriate for legislative devolution
- the impossibility of defining all legislative possibilities suitable for conferral
- the fact that separate lists of conferred and reserved (excluded) powers must inevitably overlap, generates anomalies in both directions and leaves some areas in limbo
- an absence of consistent principles that prevents Whitehall departments from developing a consistent approach to devolution across the UK.

The result is that a conferred powers model creates confusion, complexity and uncertainty for the Welsh and UK Governments, Assembly Members, MPs and Peers, and the Welsh public. This confusion

- leads to inefficient use of the time of the National Assembly and Welsh Ministers
- hinders the effectiveness of Welsh Government in developing and implementing policy
- encourages an adversarial relationship between Cardiff and London
- damages democratic accountability.

A reserved powers model would do away with most limbo areas. It would mean much more certainty about the basic subject-matter competence of the Assembly. It would save much work for Welsh Ministers, their staff and the Assembly Commission. It would begin to put the relationship between Cardiff Bay and Westminster on a more adult footing. It would provide clarity for the public and civil society. It is the right solution and the right moment to adopt it.

Wales should adopt the Scottish model of reserved powers, with largely the same powers reserved to the UK Parliament in both cases – with the exception of certain powers over broadcasting, policing and

criminal justice, which should be devolved.

The switch to reserved powers should not wait until after the 2020 or 2021 Assembly elections, but be enacted not later than the first Parliamentary term following the 2016 Assembly election.

Legal jurisdiction

It seems to be common ground, even among those not previously disposed to devolution, that a distinct Welsh jurisdiction, or something very much like it, will emerge. That being so, we consider it necessary to plan ahead for that constitutional change, rather than let it emerge in a gradual, ad hoc and unmanaged manner. Our view is that any Act of Parliament establishing a reserved powers model should also make provision for establishing a Welsh legal jurisdiction.

Regardless of whether or not a formal Welsh legal jurisdiction is created, the growing body of Welsh law requires a judge with expertise in Welsh law to be appointed to the Supreme Court.

2 – Powers

Broadcasting

We recommend

1. that full responsibility for S4C should be transferred to the NA and WG, with the relevant Welsh minister responsible for appointing the Chair and members of the S4C Authority
2. that the Welsh member of the BBC Trust should be a joint appointment by the Welsh minister and DCMS
3. that National Broadcasting Trusts should replace the BBC's Audience Councils in the devolved nations and should have responsibility for policy, content and allocation of resources for all services delivered solely for audiences in their respective countries
4. that Welsh ministers should appoint representatives to the main board of Ofcom
5. that responsibility for local and community radio policy and licensing should be handed to a renamed Ofcom Advisory Committee for Wales.

Policing

Devolution of responsibility for policing would be likely to facilitate partnership working, act as a catalyst for reform of public services in related areas of community safety, and lead to Welsh Government ministers becoming fully informed about policing matters. The lines of accountability between police forces, the Police and Crime Commissioners and the WG, and, just as importantly, with the public would become clearer. The potential for the system to be fully aligned with a Welsh criminal justice system would also be of significant benefit to those involved. It would create coherence and accountability at a local level.

Transport

The boundaries between responsibilities in this field held at the Welsh and UK, and in some cases local-government levels, is particularly complicated. This can bedevil the process of making decisions effectively and swiftly and even frustrate their implementation altogether.

3 – Capacity

National Assembly

The National Assembly is one of the smallest legislatures in the world, both in absolute terms and in relation to the size of the population which it represents. In terms of per capita representation it ranks well below the Northern Ireland Assembly and Scottish Parliament. It also has fewer representatives than are elected to the local authorities in Wales' two largest cities. The Assembly is below the 'floor size' that would allow Members to undertake effectively all necessary functions. The case for an increase in the number of Assembly Members is unanswerable.

Civil service

The civil service in Wales should be strengthened by reforms aimed at its organization, culture and capacity. These reforms should include:

- making the First Minister responsible for the appointment of the Permanent Secretary
- creating a stronger First Minister's Department
- creating a robust Treasury function
- prioritising outcomes over process
- breaking down ministerial territorialism
- making greater use of secondments from and into the civil service from other sectors
- establishing a civil service staff college.

Political parties

The allocation of Policy Development Grants by the Electoral Commission should be revisited in order to strengthen the capacity and autonomy of the Welsh parties in developing policy.

In selecting candidates, parties should pay more regard for the need to strengthening the quality and diversity of skills in the Assembly as a body.

Civil society

There is a need to expand the capacities of civil society in Wales. This should be addressed jointly by the Welsh Government and civil society organizations. The latter need to have confidence that their own interests will not be prejudiced if they are openly critical of Government policy and performance.

1



Introduction

The story of Welsh devolution since the establishment of the National Assembly for Wales in 1999 is, demonstrably, one of increasing public support for the principle of devolved government. It is also, in our view, a story of increasingly effective practice by both the legislative and executive branches of devolved governance. Paradoxically, this has been achieved despite rather than because of the constitutional arrangements that have underpinned our democratic institutions.

Thus far, all talk of a Welsh devolution ‘settlement’ has been more aspirational rather than accurate. The reality has been anything but stable. The 20th century saw the gradual development of administrative and, post 1964, accelerating executive devolution within a unitary British polity. This was fundamentally recast in a devolved democratic mould by the 1997 referendum, the ensuing Government of Wales Act 1998 and the creation of the National Assembly in 1999. In less than a decade even this new Welsh polity was re-shaped by the Government of Wales Act 2006, which half-opened the door to primary legislative powers. The door was more fully opened following the decisive affirmative vote in the 2011 referendum that brought into play Part 4 of the 2006 Act.

This latest move took place far sooner than had been originally envisaged, in part due to the manifest failings of the arrangements that existed under Part 3 of the Act. Despite all the speeches made and ink spilled trying to argue the virtues of the executive model and of Legislative Competence Orders, we would hazard that few if any of their then proponents would wish to return to them, or even be reminded of their previous enthusiastic endorsement.

Although only in effect for less than two years, there are already strong indications that the latest Part 4 arrangement – a ‘conferred powers’ model of legislative devolution – is proving problematic, prolonging many of the faults and flaws that characterised the architecture of devolved government in the period from 1999 to 2011.

Most obviously, the first piece of legislation passed by the National Assembly for Wales using its Act making powers was referred by the UK Government to the Supreme Court. It is widely reported that it was only the intervention of the Attorney General that halted the referral of the second piece of legislation. Even if the decision of the Court to uphold the Local Government Byelaws (Wales) Act 2012 may help to clarify the powers of the National Assembly, it has, nonetheless, been demonstrated that the new dispensation can cause significant problems.

In addition to being based on a constitutional architecture that expert opinion – almost universally – regards as flawed, the new dispensation does not address what might be termed the unfinished

business of legislative devolution. Some of this is covered by what are sometimes termed the ‘Richard consequentials’. Having made the case for legislative devolution the Richard Commission argued that a 60-seat National Assembly was not large enough to scrutinise legislation and hold Ministers to account effectively. It recommended a move to 80 members elected by STV. The Richard case for increasing the size of the legislature remains compelling, and in the light of further extensions of competences even conservative. In addition, as pointed out by First Minister Carwyn Jones, the Welsh situation of enjoying legislative devolution without a separate legal jurisdiction is certainly anomalous and, arguably, problematic.

In our view it would be a mistake to judge too harshly the work of the constitutional architects whose efforts have thus far failed to provide Wales with a stable, sustainable devolution dispensation. While all politics may well be the art of the possible, this seems particularly true of the politics of Welsh devolution. Devolution has moved forward only at a pace and in a direction sanctioned by the country’s dominant political force and proponents of democratic reform (in all parties) have shown great skill and sensitivity in ensuring that considerable progress has been made.

It is also the case that doubts about the level of public support for devolution have acted as a constraint on progress. Although the weight of survey evidence amassed after 1997 suggested a very substantial growth in support for what an earlier generation termed ‘home rule’, the narrowness of the 1997 referendum result served to call into question the extent to which devolution was the ‘settled will’ in Wales.

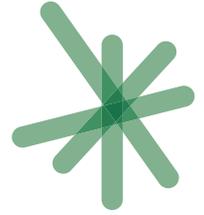
Given this context it would be facile to be overcritical of the actors involved in the process of Welsh constitution making. Indeed, it is more appropriate that we applaud the political commitment, imagination and courage that has underpinned the development of a democratic tier of Welsh government. But neither should we gloss over or minimise the problematic legacy of a development process characterized by constant change and upheaval, and the triumph of pragmatism over constitutional principles.

We hope that the Commissioners will feel emboldened to focus on mapping out a more comprehensive and stable dispensation, in circumstances that are particularly propitious for doing so, for three reasons.

- The first is the wide-ranging terms of reference the Commission has been given, that allow for consideration of the full range of elements required to create a sustainable and effective system of devolved government.
- The second is the endorsement of the Commission’s terms of reference by all the political parties in Wales as well as by the UK government. This is sure to imbue the Commission’s recommendations with particular authority.
- A third reason is that, following the referendum result in March 2011, the Commission is deliberating in a context in which the question of public consent for devolution has been definitively answered. The Rubicon of legislative devolution has been crossed, irrevocably.

The establishment of the Commission on Devolution in Wales is a unique opportunity to address these weaknesses and to create new arrangements that might better deserve the description ‘settlement’.

2



Core principles

In preparing this submission we have sought to address the issues not only from a Welsh perspective, but also from the perspective of the United Kingdom as a whole. Accepting that there will need to be some differences in the arrangements for each of the devolved administrations, a foundation of consistently applied principles will be of benefit to all.

We believe that six core principles should underpin any solution, some of which strongly echo those set out by the Silk Commission itself in its first report on the financial powers of the Welsh Government. They are:

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It is our belief that the current constitutional arrangements do not meet the test of adherence to these principles.

The settled will of the Welsh electorate

The evidence from the March 2011 referendum, as well as a plethora of social attitudes surveys and opinion polls, is clear: an overwhelming majority want a system of devolved government enjoying extensive powers over daily life in Wales, while still remaining part of the United Kingdom. Although the Welsh electorate may not always be engaged with the detail of this or that policy area – let alone questions of constitutional architecture – majority opinion clearly supports a further shift in the balance of powers and responsibilities from London to Cardiff.

It is time for a devolution dispensation that reflects and respects the fact that a generous and extensive scheme of devolved government is demonstrably the ‘settled will’ of the Welsh people. In the 2011 referendum the Welsh public have themselves provided the soundest basis for democratic accountability. It is time for a devolution settlement worthy of the name.

Democratic Accountability

Democratic devolution was largely framed as a matter of accountability: making the institutions of administrative devolution accountable to the Welsh electorate. This was and remains an important dimension and a vital consideration in considering the future of Welsh devolution. It is our view, however, that the mechanics of democratic accountability also need improvement.

On the financial side, the Silk Commission’s first report on financial powers has put forward ideas for substantial and radical improvement. In its second phase it will also have to address issues relating to the balance of power between the executive and the legislature.

The National Assembly suffers from the legacy of executive devolution and, subsequently, the Part 3 scheme of legislative devolution. It also suffers from the inescapable, if politically inconvenient fact that the National Assembly for Wales is quite simply too small. In particular, too little attention has been paid to the balance of power between the legislature and the executive. For these reasons we believe that despite its best efforts the National Assembly is currently not able to hold the Welsh Government to account to the extent that it should.

One important dimension of this will be to ensure greater clarity in the legislative powers of the National Assembly itself. An overlooked consequence of the current lack of clarity is that it has created for the Welsh Government a broker role, side-lining the legislature in favour of an executive to executive relationship between Cardiff and London. A better empowered Welsh legislature will be better able to hold the government to account.

Stability and Sustainability

Wales has been ill served by the constant upheaval that has characterised Welsh devolution. The story of the first 14 years of Welsh devolution has been not only a story of constitutional upheaval

and instability but also – not coincidentally – a story of serial constitutional experimentation. In the context of UK constitutional history, executive devolution, ‘Measure’ making powers and, now, conferred powers legislative devolution, all represent experiments.

All have proven or are proving to be problematic. A corollary of making a stable and sustainable settlement an explicit aim of constitution-making is to bring to an end this process of constant experimentation and adopt for Wales constitutional and institutional frameworks and practices that have demonstrated their effectiveness elsewhere in the UK.

The goal of a stable and sustainable constitutional framework will also require the Commission to engage with the unfinished business of legislative devolution, ranging from the size of the National Assembly to the absence of a Welsh jurisdiction.

The establishment of the Commission with a broad mandate, on the basis of allparty support, and in the context of the strong endorsement of devolution delivered in March 2011, provides a unique opportunity to design a lasting and comprehensive devolution settlement.

Clarity and predictability

The adoption of the conferred powers model of devolution, especially when applied to a primary legislature such as the National Assembly, cannot but create areas of ambiguity and imprecision that do not serve the interests of good and transparent government or of democratic accountability.

Uncertainty within Welsh government about the range of its competence can limit its thinking and planning and policy development. Similar uncertainty amongst UK Ministers and their departments can lead to unnecessary political conflict. If governments, whether in Cardiff Bay or Westminster, are uncertain on these matters, the uncertainty will be even more pronounced in civil society organisations. The potential for dysfunction is considerable.

It is an observable fact that legislators in Scotland have greater certainty and clarity about the extent of their powers than do law-makers in Cardiff (and the people of Wales) about theirs. Legislators in Wales, not to mention the Welsh public, deserve the same consideration.

Effectiveness

Wales requires a settlement that can allow Government to be truly effective. The central vision outlined by the Richard Commission remains germane, and thus far unfulfilled:

“The Assembly is the democratically elected representative body for the whole of Wales. The [Welsh Government] should be able to formulate policies within clearly defined fields, and should have the power to implement all the stages for effective delivery, in partnership with the UK Government and other stakeholders. The [Government] should be able to set its own priorities and timetables for action. It should be accountable to the people of Wales through the elected Assembly for its policies and their implementation.”

Consistency and fairness across the UK

Constitutional change within the UK has been notorious for eschewing principles in favour of pragmatism. Devolution in the UK has seen a series of pragmatic responses to different political pressures in Scotland, Wales and Northern Ireland. Despite the steps forward taken after the 2011

referendum, the position of Wales, when seen in the round, remains anomalous.

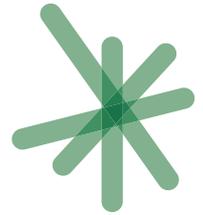
First, support for devolution as the preferred constitutional option is higher in Wales than in either Scotland or Northern Ireland, yet the devolution arrangements in Wales are the weakest of the three devolved territories. It is in our view an inequitable, unjustifiable and, ultimately, untenable situation.

Second, every official report and every piece of academic research of which we are aware, have all served to confirm that the Whitehall machine is still not devolution-sensitive. As the devolved territory with the least political leverage, but with the most complex constitutional dispensation, Wales has been particularly badly served in this respect. In our view greater consistency between the systems in the three devolved territories is a necessary, if not sufficient condition for improving inter-governmental relations within the post-devolution United Kingdom.

Third, the evidence on public attitudes confirms that it is now incumbent on advocates of devolution to take greater cognisance of the implications of developments in the devolved territories for opinions and attitudes in England. If, as seems likely, the McKay Commission recommends some form of 'English votes for English laws' (perhaps, through some form of English Committee for English laws), it is going to be important to be able to delineate more clearly what, in legislative terms, English matters are. This will be greatly aided if there is greater consistency across the three territories in the basic constitutional architecture deployed.

Bringing Wales into line with the models adopted in Scotland and Northern Ireland (although they, too, differ in some regard) will create a sense of equity in the constitutional arrangements across the UK and foster more mature governance within Wales. A consistent devolution architecture, in combination with the greater clarity of the reserved powers model, should also encourage more consistent and constructive behaviours between UK and devolved institutions.

3



The case for a reserved powers model

The following section argues the case for a 'reserved powers' model of legislative devolution, rather than the current 'conferred powers' model.

3.1 Wales – the continuing anomaly

The powers of the National Assembly for Wales and the Welsh Government are defined quite differently from those of the Scottish Parliament and the Northern Ireland Assembly. In the case of Wales, both the Government of Wales Acts of 1998 and 2006 specify the powers that are devolved. In the case of Scotland and Northern Ireland the relevant legislation instead lists matters reserved to the UK Parliament (although these reserved matters are not identical in both countries).

The problems now being experienced in practice in Wales will come as no surprise to students of devolved government. By adopting the 'conferred powers' model the authors of Part 4 of the GOWA 2006 chose to recreate in Wales the model of legislative devolution that would have existed in Scotland had the 1978 Scotland Act been implemented. That model was heavily criticised by commentators, legal professionals and, most strikingly, even the very civil servants who had worked on the legislation.

As early as 1976 the Scottish Law Commission¹ had concluded that reserved powers were the best and probably only way 'ensuring legal clarity'. Two decades later, in 1996, a report by the UCL Constitution Unit argued strongly for a reserved powers model for Scotland, on the grounds that it would make the system of government clearer and more comprehensible and that there would be a smaller likelihood of litigation arising.

Such was the persuasive power of this critique that in preparing the 1998 Scotland Act the then UK government chose to adopt a 'reserved powers' model of legislative devolution for the Scottish parliament.

The UK Government's 1997 White Paper on Scotland, in explaining why it wished to adopt the reserved powers model, listed the very drawbacks of the conferred powers model that we have since seen demonstrated in Wales. The White Paper, Scotland's Parliament, explained why it now wanted to take a different route. It said:

"The Government have given careful thought to the best way of building stability into the settlement. The Scotland Act 1978 provided for the transfer of specified areas of legislative

and executive competence.....It would have required frequent updating and might have given rise to regular legal arguments about whether particular matters were or were not devolved. This approach now seems incompatible with the Government's objective of ensuring maximum clarity and stability."²

The Northern Ireland Act 1998 took substantially the same form, though with the variant of having three rather than two categories of legislative responsibility: 'excepted' (only Westminster can legislate, in most circumstances); 'reserved' (the Assembly can legislate with the agreement of the UK Government); and 'transferred' matters (Assembly can legislate). Functions in the reserved and transferred categories can be moved between categories by consent through Orders in Council.

Despite this, a different route was chosen for Wales, although there was little debate - and almost no public debate - on the issue. In a memorandum submitted to the Welsh Affairs Committee in 2005, Peter Hain and Rhodri Morgan adduced two main reasons for rejecting the reserved powers model in 1998.³

The main one relates to the fact that Wales forms part of a single unified England and Wales jurisdiction. It was thought that, in such a context, giving the National Assembly general power to legislate would threaten that unity, because the application of different laws would require different systems of legal education, different sets of judges and lawyers and different courts. A subsidiary reason was that the list of reserved powers would be substantially longer and more complex in Wales compared to Scotland.

As was implicitly recognised by the Welsh Counsel General, Theo Huckle, in his speech to the Society of Legal Scholars in November 2012, neither argument bears close scrutiny.

Following the March 2011 referendum the National Assembly has already begun to pass legislation that will, over time, ensure that different bodies of law apply in Wales and England. This will, of itself, necessitate changes to legal education in Wales as well as changes to the legal profession. Substantial changes to the organisation of the courts have already taken place. In other words, whether it be based on a reserved or conferred powers model, legislative devolution may ensure the developments Hain and Morgan were seeking to avoid. Moreover, while the list of reservations may indeed prove to be longer for Wales than Scotland, there is still every reason to believe that a reserved powers model will provide greater clarity and stability than is possible under the present dispensation.

'Grotesque' was the adjective famously deployed by Lord Richard to describe the system of government established for Wales by the 1998 Act, and in retrospect we suspect that few would object to extending its use to the ways in which legislative powers were endowed at the devolved level between 2007 and 2011.

In both systems of devolution, basic lines of accountability were blurred: confusing even for experts let alone the electorate. The work of both legislature and executive were rendered needlessly inefficient. Countless hours were wasted and considerable reservoirs of ingenuity squandered in efforts to make fundamentally flawed constitutional design functional. A concern with process has (of necessity) diverted the energies of the political class away from outcomes.

The contrast between Wales and Scotland in this regard is particularly striking. While the devolved constitution in Wales has been subject to a constant process of revision, the model created for Scotland in the Scotland Act 1998, has proved remarkably robust. Beyond important reforms in the area of devolved finance, the Calman Commission and subsequent Scotland Act recommended only the most minor revisions to the legislative powers of Scotland's parliament.

In 2004 the Richard Commission examined the devolution arrangements in Wales. In deciding to recommend the progression to a legislative Assembly for Wales, it considered whether or not to recommend adoption of the Northern Ireland model, but rejected it on the grounds that “this approach would risk creating greater complexity and uncertainty in the settlement.” It opted for the Scottish model instead.

If the position of the National Assembly was anomalous in 2004, in the aftermath of the 2011 referendum it is doubly anomalous today.

3.2 Conferred powers – a hangover from executive devolution

Many of the issues facing the National Assembly for Wales as a legislature relate to its origins as an executive body. In the 1998 Act the Assembly was conceived as a hybrid institution – a local authority-style corporate body, with powers vested in Assembly Members collectively, but with a Cabinet system bolted on. The 2006 Act did away with the corporate body in favour of a clear separation of powers between the executive – the Cabinet and civil service – and the legislature – the Assembly and Commission.

The continuing practice of listing specific powers conferred on the National Assembly for Wales and the Welsh Government is largely based on the history of the gradual transfer of executive functions to territorial departments (and Secretaries of State) in Scotland since 1885, and in Wales, since 1964.

This was not unreasonable in the context of conferring powers on territorial Ministers while retaining a unitary British legislature across England, Scotland and Wales. Ministers, understandably, were required to act within parameters set by the legislature to which they were accountable.

But in 1998, unlike Scotland, this practice of conferring specific executive powers – with powers over secondary legislation – was extended to the National Assembly when it was established by the Government of Wales Act 1998. Under this Act the first functions of the National Assembly were essentially those that had previously been the functions of the Secretary of State for Wales, and fell into 18 categories.⁴ Although the executive powers devolved to the Assembly included increasingly broad framework powers they remained within the 18 categories until the 2006 Act gave the Assembly the powers to pass ‘Measures’ that were confined instead to 20 ‘fields’.⁵

An elected Assembly, however, could not be accountable to Parliament for the exercise of its executive functions in the same way as a Secretary of State. Assembly members and Ministers could not be held to the same collective responsibility as a member of the UK Cabinet.

A further constraint on the Assembly’s law-making powers reinforces the fact that they originate from executive powers. The Assembly cannot (with some exceptions) make laws which affect existing – ‘pre-commencement’⁶ – executive powers of UK Ministers, even in the subject areas where the Assembly can legislate.⁷

There is no equivalent provision in Scotland. In Scotland, there is a general transfer of executive functions to the Scottish Ministers (by section 53 of the Scotland Act 1998) to the extent that the functions are exercisable within the devolved legislative competence of the Scottish Parliament. In other words, executive competence follows legislative competence, rather than the other way round.

Like its 1998 predecessor, the 2006 GOWA is based, at least in part, on the premise that the current

executive competence of UK Ministers in Wales must be preserved. The powers of the London executive trump those of the Cardiff legislature, a point reinforced by the powers given to the Secretary of State both to consent to the Assembly legislating in certain cases, and to block Assembly legislation as an executive act in certain others.⁸

This also creates a real practical difficulty for those drafting legislation in Wales. If the Assembly must not legislate so as to affect the 'pre-commencement functions' of the Ministers of the Crown - even in areas where the Assembly has legislative competence - the practical consequence is that the person promoting or drafting the Assembly legislation needs to have in mind all those precommencement functions. It would be an almost impossible task to ascertain with any certainty the full extent of all the powers of a Minister of the Crown as at the relevant date.

In our view it is time to be rid of these elements of the hangover of executive devolution, and to take on board the full implications of the legislative role that the National Assembly has now been given, following the Government of Wales Act 2006 and the implementation of Part 4 after the 2011 referendum. A conferred powers model is not a suitable model for a legislative Assembly - a Parliament - which is what the National Assembly for Wales unquestionably now is.

3.3 The 'two lists' problem – a source of ambiguity and confusion

There is abundant evidence from the recent past that legislators in Cardiff and Westminster, civil society and the wider public find it difficult to determine what the National Assembly and the Welsh Government can or cannot do. This arises primarily because the 2006 Act contains two lists: a list of subject areas in which the Assembly can legislate, and a list of exceptions. The two relevant parts of the Act, for this purpose, are clause 108(4) and Part 1 of Schedule 7.

This means that there are certain categories that are not contained in either list. This is hardly surprising, given that:

1. it would be an impossible task to describe comprehensively all aspects of the world, or even Wales, about which legislation might be made;
2. the categories into which we classify things, the ways in which we choose to describe the world, are not closed (100 years ago there was no such category as "broadcasting"); and
3. because there are different ways in which we classify things - taxonomies - so that things can belong in more than one category. For instance a prohibition on schoolteachers smacking children relates to the protection of children, but also to the criminal law and to education.

There is, therefore, a wide range of things that are neither expressly included in, nor expressly excluded from, the Assembly's subject-matter competence. They are in limbo.

These matters can be brought out of limbo and into the Assembly's subjectmatter competence, through the operations of clause 108 (4) of the Act, because under that clause a provision is with Assembly's competence if it 'relates to' one or more of the subjects listed under any of the headings in Part 1 of Schedule 7.

Even so, the fact that a provision relates to something which is not expressly set out in Schedule 7 of GOWA 2006 does not mean that it falls outside the Assembly's subject-matter competence. On the

contrary, it is within that competence if it relates to an expressly-included matter, and is not an express exception. This is not an easy matter to determine without close study – usually by lawyers – and there has been more than one example of people failing to grasp the concept. For instance, a particularly frequent observation has been that the Assembly cannot legislate about the criminal law, because it is not listed in Schedule 7. That is wrong. It can do so if it relates to a subject which is expressly set out in Schedule 7. So the Assembly can legislate to create criminal offences and has done so.

There are some consequences of this that are perhaps surprising, in that the Assembly's subject-matter competence is in some cases broader than was perhaps intended, and in some cases narrower.

An example of a possibly broader than intended subject-matter competence relates to the recruitment of children into the armed forces. Subject 15 of Schedule 7 of GOWA 2006, gives the Assembly power to legislate in relation to the 'protection and wellbeing of children and young people'. Does this mean that the Assembly's subject-matter competence would include banning the recruitment in Wales of young people between the ages of 16 and 18 into the Armed Forces? (Deployment of such recruits in battle violates the United Nations Convention for the Rights of the Child).

This would appear to 'relate to' the protection and wellbeing of children, and it does not appear to fall within any exception under any heading. Specifically (and unlike the situation in Scotland and Northern Ireland), there is no exception in relation to 'the armed forces' nor 'defence'. Consequently, it appears on the face of it to fall within the Assembly's subject-matter competence, even though many would assume that this was not intended.

By contrast, a possibly narrower than intended subject-matter competence is in the area of combating violence against women. Schedule 7 does not expressly refer to this. Express words in Schedule 7 mean that provisions to protect older and younger women from violence in almost all circumstances would be within subject-matter competence. For provisions protecting other categories of women in particular circumstances, special pleading would be needed to fit them within the Schedule 7 powers.

As explained above, the Welsh model of conferred powers with defined exceptions contrasts with the 'reserved' or 'excluded' matters models for Scotland and Northern Ireland. It is indicative of the approach to devolution that the legislation for Scotland and Northern Ireland uses the word 'reserved' in different ways. Perhaps 'excluded' is a more precise term.

Under the Scottish and Northern Ireland models problems associated with multiple taxonomies and overlapping categories are much rarer. There can be no categories in limbo, since the default position will be that those categories are within competence, unless expressly excluded. The Scottish Parliament would have no problem in passing a comprehensive Act for protecting women from violence, since it would not have to pick over and construe a list of detailed conferred powers in order to determine whether it could pass a particular provision. It would have to ensure that a provision did not relate to an excluded matter, but that is a far less precarious starting point than in Wales.

Furthermore, in both Scotland and Northern Ireland, the phrase 'relating to' is used in connection with defining what is excluded from subject-matter competence rather than what is included within it. Under Section 29(2)(b) of the Scotland Act, a provision is excluded from the Scottish parliament's subjectmatter competence if it 'relates to a reserved matter'. So, the Scottish Parliament would be unable to legislate to ban the recruitment of children into the armed forces, because such a provision would 'relate to' something which is excluded from the Parliament's subject-matter competence.

A further practical difficulty caused by the "two lists" problem arises when the Westminster Parliament

wants to make laws in relation to Wales. By convention, if the proposed Act covers a matter within the Assembly's legislative competence, Parliament will seek a Legislative Consent Motion (LCM) from the Assembly. A recent example is given by the proposed abolition of the Agricultural Wages Board. Assembly members took the view that it related to agriculture, and therefore was within competence, so an LCM was needed. DEFRA, on the other hand, said that it related to employment, which was not a devolved matter, so no LCM was needed. But employment law is not an exception. It is, therefore, in limbo. The Welsh Government decided to table an LCM on its own and this was later refused by Assembly Members in plenary.

As the Richard Commission argued in 2004, the adoption of the reserved powers model, as in Scotland, would not mean that complexity would disappear from the arrangements in Wales – there will continue to be areas where the competences of the legislatures in Cardiff and Westminster will overlap. But, said Richard, “in cases of doubt, the burden of proof will benefit devolution – matters not specifically reserved to the UK would fall within the competence of the Assembly.”

It is clear to us that the scope for ambiguity that inevitably flows from the conferred powers model is such as to create unnecessary uncertainty for government and is damaging to transparent democratic accountability.

3.4 Conferred powers – a source of friction and inefficiency

The ambiguities referred to in the preceding section have undoubtedly been wasteful of the time of ministers and legislators. As was made clear in the reports of both the Richard Commission and All Wales Convention, both executive and Part 3-style legislative devolution proved deeply problematic.

As we have noted above, basic lines of accountability have been blurred: confusing even for experts let alone the electorate. Countless hours were wasted and considerable reservoirs of ingenuity squandered in efforts to make fundamentally flawed constitutional design functional. The work of both legislature and executive were rendered needlessly inefficient, and less effective. A concern with process has, of necessity, diverted the energies of the political class away from outcomes.

The system also seemed to encourage an adversarial approach between Cardiff Bay and Westminster. When the 2006 Act came into force, the 20 ‘fields’ in which the Assembly was supposed to operate were largely empty of the ‘matters’ over which the Assembly could seek legislative competence. The process of filling the fields with matters was, however, painful. The degree of scrutiny employed and type of language used by some MPs in relation to requests from Cardiff for devolution of law-making powers suggested a mindset which still considered the Assembly to be an executive body whose (delegated) powers needed to be circumscribed and narrowly defined, rather than a distinct legislature that was not in any sense a delegate.

Ironically, Westminster scrutiny of what the National Assembly wanted to do as an independent legislature was arguably more rigorous than Westminster scrutiny of what Welsh Office Ministers had actually done as a ‘delegated’ executive before 1999. It is not unfair to suggest that certain voices at Westminster used their position to try to micromanage the Welsh legislative process.

The activation of Part 4 after the 2011 referendum has not eradicated this tendency. Most obviously, the first piece of legislation passed by the National Assembly for Wales using its Act making powers was referred by the UK government to the Supreme Court. It is widely reported that it was only the intervention of the Attorney General that halted the referral of the second piece of Assembly legislation. Even if the unanimous decision of the Supreme Court to uphold the Local Government

Byelaws (Wales) Act may help to clarify the powers of the National Assembly, it is nonetheless the case that potential and actual sources of conflict will still arise from the current model.

It is perhaps significant that no attempts have ever been made by a UK Minister or law officer to challenge in the courts the validity of an Act of the Scottish Parliament or of the Northern Ireland Assembly.

The anomalous situation of Wales, when compared with the constitutional models adopted for Scotland and Northern Ireland, has another insidious effect. UK Ministers and Whitehall officials are not able to develop a consistent approach to the relationship with the three devolved administrations. We will address this issue in a later paper on inter-governmental relations within the UK.

3.5 Ministerial functions – the known unknowns

We have referred above to the provision which prevents the Assembly from legislating so as to affect pre-commencement functions of Ministers of the Crown, even in areas where the Assembly has legislative competence.

The practical consequence is that the person promoting or drafting Assembly legislation needs to have in mind all those pre-commencement functions. This would not be such a problem if it were possible to ascertain with a degree of certainty the full extent of all powers of the Ministers of the Crown as at the relevant date. That is, however, an almost impossible task.

The difficulty is that these powers are not defined or listed anywhere. Ascertaining the full extent of all powers of the Ministers of the Crown would involve a detailed trawl through all UK legislation prior to May 2011 to identify the relevant functions. In some cases where they arise under the prerogative, these functions cannot readily be identified at all.

The Welsh Affairs Committee reported that in proposing amendments to Schedule 7 it might have been an opportunity to bring some clarity about the extent of the Ministers' powers. However, the former Secretary of State for Wales, Cheryl Gillan, told them that it 'would have been too extensive an exercise in terms of time and resources for the Wales Office.'

With no composite list of relevant Minister of the Crown functions, the All Wales Convention questioned whether there could ever be clarity on the extent of the Assembly's law-making powers under Part 4.

3.6 Advantages for the UK of reserved powers for Wales

We have argued that a move to a model of devolution based on a general conferral of legislative (and consequently executive) competence, but subject to exclusions, would provide much greater clarity as to the scope of the National Assembly of Wales powers. It should be noted, however, that this is not to claim that Reserved Powers would provide absolute clarity. Questions and indeed disagreements at the margin are a feature of even fully federal constitutions. In the context of the Scottish settlement Lord Kerr has noted that

“...it is impossible to devise a comprehensive charter which, for every conceivable situation, infallibly prescribes the limits of that legislature's enacting power. This, it seems to me, is the inevitable consequence of the transfer by the United Kingdom government of some – or even many – powers to a devolved administration while retaining or, as it is more usually put, reserving certain other matters to Parliament

in Westminster. Whether a particular Act of the Scottish Parliament falls within its legislative competence will, for the most part therefore, depend on a consideration of the particular provisions of the enactment in question.”

This is a point to which we return in the next section of this paper.

In general terms, however, it is demonstrably the case that the people of Scotland and their legislators have greater certainty and clarity about the extent of the powers residing at the devolved level than the Welsh citizenry and their law-makers. It is also an undeniable fact that, in stark contrast to the Welsh experience, the Scottish devolution settlement has proved to be remarkably stable. Welsh governance would be greatly enhanced by a move to a reserved powers model.

It is also our contention that the UK as a whole would benefit, most obviously as such a development would help reduce the number of unnecessary disputes between London and Cardiff over competencies and their consequences.

It would also obviate another potential difficulty directly relevant to the Assembly's funding – a factor pointed out by a member of our steering group, Gerry Holtham, former Chairman of the Holtham Commission. Commenting on the effect of funding decisions in and for England on the Welsh block grant, he makes the following point:

‘...if spending is moved between departments that have different consequentialities (i.e. their expenditure is assessed as being devolved to different degrees) then the grant is affected even if the overall level of public expenditure is unchanged. Wales is more likely to be affected by this than Scotland. The Scottish reserved powers model means most things are fully and unambiguously devolved to Scotland so switching expenditure among different headings or most departments will have little effect in general. Wales...has a much messier settlement. It is consequently easier for English decisions to be moving expenditure across that ‘ragged edge’ and so be changing the Welsh block grant.’

His conclusion is that ‘Welsh devolution should move to a reserved powers model to reduce potential sources of conflict or confusion.’⁹

It is hard to imagine any objections to steps to reduce potential points of tension and possible conflict between the UK state and one of its constituent elements. But there are further potential benefits for the wider UK that would accrue from a move to Reserved Powers for Wales.

First, more consistency between the devolution dispensations in force across the three devolved territories would aid attempts to bring better order to the territorial management of the state. At present, differences not only in the policy areas that have been devolved but also, and crucially, in the constitutional basis on which devolution occurs, serve to complicate greatly the task of ensuring that Whitehall is sensitive to the impacts of its decisions on Wales, Scotland and Northern Ireland. Wales is particularly poorly served in this regard due to the combination of its lack of political weight and the complexity of its dispensation. Consistency would thus not only provide for more equitable status and treatment but also more effective inter-governmental relations within the UK.

Secondly, we are witnessing a strengthening of English demands for full recognition as a constituent part of the Union rather than simply a residual category left over as a result of devolution to other nations and territories. The McKay Commission is currently considering the procedures of the House of Commons in this light and seems likely to recommend some form of English Committee

for English Laws - a variant of a policy that has already been offered to the electorate in three general elections by the Conservative Party, and which appears to be finding increasing favour with sections of the Labour Party.

In such a context it will become vital to be able to specify more clearly than is currently possible what constitutes an English issue/law. This task will clearly be aided by a move to reserved powers for Wales and would be further accentuated by the establishment of a Welsh Jurisdiction. As such a revised settlement for Wales has an important role to play in making the UK as a whole fairer and more equitable for the largest constituent nation of the Union.

3.7 Solutions

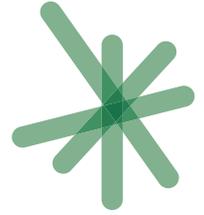
There are, in our view, four possible methods of dealing with the weaknesses of the conferred powers model:

1. To exclude from subject-matter competence everything which is not expressly conferred. This would be, in effect, the mirror image of the Scottish and Northern Irish models. It might provide clarity, but at the cost of severely limiting the Assembly's legislative competence. In almost any case where there are multiple possible taxonomies and overlapping categories, the Assembly would be unable to legislate.
2. To extend the categories of exceptions, so that they covered, as well as the current exceptions, at least those areas currently excluded from the subjectmatter competence of the Scottish Parliament and Northern Ireland Assembly. This presents two difficulties. Firstly, there may be certain matters that are expressly within the subject-matter competence of the Assembly which are excluded from that of the other legislatures. Secondly, and more profoundly, while this solution deals with the problem of competence which is possibly too broad, it does not deal with that of competence which is possibly too narrow - such as that relating to violence against women cited above - since the list of conferred subjects is not changed.
3. To combine the previous method with a more generous list of conferred subjects on which the Assembly could legislate. This would give the Welsh Assembly greater flexibility, but would still leave limbo areas.
4. To apply the reserved powers model to Wales. It would do away with most limbo areas and resolve the issues of both too narrow and too broad competence. It would mean much more certainty about the basic subjectmatter competence of the Assembly. It would save much work for Welsh Ministers, their staff and the Assembly Commission. It would begin to put the relationship between Cardiff Bay and Westminster on a more adult footing. It would provide clarity for the public and civil society. This is the right solution and the right moment to adopt it.

Notes

- 1 Scottish Law Commission, *Comments on White Paper 'Our Changing Democracy: Devolution to Scotland and Wales'* Memorandum no.32, 18 June 1976
- 2 Scottish Office, *Scotland's Parliament*, CM 3658 (London: Stationery Office, July 1997), para 4.3
- 3 Written evidence from the Rt Hon Peter Hain MP, Secretary of State for Wales, and Rt Hon Rhodri Morgan AM, First Minister for Wales to the Welsh Affairs Committee, Evidence 58
<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmwelaf/551/551.pdf>
- 4 They were: 1 agriculture, forestry, fisheries and food; 2 ancient monuments and historic buildings; 3 culture (including museums, galleries and libraries); 4 economic development; 5 education and training; 6 environment; 7 health and health services; 8 highways; 9 housing; 10 industry; 11 local government; 12 social services; 13 sport and recreation; 14 tourism; 15 town and country planning; 16 transport; 17 water and flood defence; 18 Welsh language.
- 5 The fields were: 1 agriculture, fisheries, forestry and rural development; 2 ancient monuments and historic buildings; 3 culture; 4 economic development; 5 education and training; 6 environment; 7 fire and rescue services and promotion of fire safety; 8 food; 9 health and health services; 10 highways and transport; 11 housing; 12 local government; 13 National Assembly for Wales; 14 public administration; 15 social welfare; 16 sport and recreation; 17 tourism; 18 town and country planning; 19 water and flood defence; 20 Welsh language.
- 6 This refers to the date on which the Assembly's power to make Acts came into force, i.e. following the first Assembly General Election after the 2011 Referendum.
- 7 para 1 of Part 2 of Schedule 7 to GOWA 2006
- 8 By virtue of s.114 of GOWA 2006 the Secretary of State has (extensive) powers to intervene where an Assembly Act may adversely affect non-devolved matters; water supply, resources or quality in England; the law operating in England; or UK international obligations.
- 9 <http://www.clickonwales.org/2012/07/english-votes-for-english-laws-a-flexible-solution/>

4



Reserved power in relation to Wales

4.1 Scottish and Northern Irish precedents

If it is accepted that a reserved powers model is preferable to the current model, it becomes necessary to consider which areas should be reserved to the UK Government.

The arrangements for Scotland and Northern Ireland provide two different approaches to defining and dealing with these areas.

Under Section 29 of the Scotland Act 1998, a matter is outside the Scottish Parliament's legislative competence if

- (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
- (b) it relates to reserved matters (these are set out in Schedule 5),
- (c) it is in breach of the restrictions in Schedule 4,
- (d) it is incompatible with any of the Convention rights or with EU law,
- (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Both Schedule 4 and Schedule 5 can be amended by Order in Council.

The Northern Ireland Act 1998 distinguishes between excepted, reserved and transferred matters. Section 4(1) of that Act states:

“excepted matter” means any matter falling within a description specified in Schedule 2;

“reserved matter” means any matter falling within a description specified in Schedule 3;

“transferred matter” means any matter which is not an excepted or reserved matter.

An excepted matter is one on which the Northern Ireland Assembly cannot legislate at all.¹⁰

A reserved matter is one on which the Northern Ireland Assembly can legislate only with the consent of the Secretary of State (Section 8(a)).

There are provisions which enable reserved matters to become transferred matters and vice versa, through Orders in Council. A prominent example of this process was the change of status of policing from a reserved matter to a transferred matter in Northern Ireland.

There are no such provisions enabling excepted matters to change their status.

The first question for Wales is whether either of these models would be appropriate, and if so which one? In our view the Scottish model is clearly more appropriate for Wales. It has the benefit of allowing further devolution in (almost) all cases through Order in Council. By contrast the Northern Ireland model has the twin impediments of the need, in many cases, for the Secretary of State's consent, and of an inability in certain cases to devolve further without an Act of Parliament. This reflects, at least in part, Northern Ireland's polarized and (in 1998) still potentially violent political milieu, a situation which simply does not obtain in Wales.

4.2 Recommendations for reserved powers in relation to Wales

Which areas should be reserved to the UK Parliament in the case of Wales? While we have not examined all the reservations and restrictions in detail, it appears to us that that the Scotland Act 1998 is a useful baseline for what should be reserved in a Welsh context. The issue is to what extent should there be greater reservation, or less reservation in Wales?

The Scotland Act 1998 distinguishes between "General Reservations" (such as the constitution, foreign affairs, defence, immigration, many of which are not currently expressly excluded from the Welsh Assembly's legislative competence) and "Specific Reservations" which cover detailed areas, for instance, "The creation, operation, regulation and dissolution of types of business association."¹¹

We emphasise that in this paper we are adopting a broad brush approach, looking at "large" areas of competence. Detailed work will be needed to delineate precisely the extent of reserved powers. In this respect, we follow the lead of another useful starting point, the Richard Commission, which proposed the following high-level list of reserved matters:

'the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice.'¹²

Even within this list there are by now several areas in which the further devolution of legislative competence to Wales would be beneficial. In particular, we consider that a case can be made for devolution of legislative competence to the Welsh Assembly in broadcasting and policing. The rationale for these recommendations is set out in the next section on function and capacity.

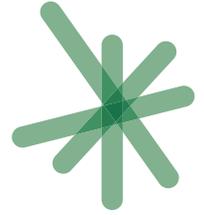
Notes

10 except to the extent that it is ancillary to other provisions dealing with reserved or transferred matters

11 Government of Scotland Act 1998 Schedule 5 Part II Head C Trade and Industry Matter C1

12 *Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* p.250

5



A Welsh Legal Jurisdiction

Peter Hain and Rhodri Morgan argued in 2005 that since Wales does not have its own legal system and institutions, and because it shares a common legal jurisdiction with England, a reserved powers model would be complicated, and could have far reaching consequences in terms of the common legal jurisdiction.

As mentioned earlier in our submission, Hain and Morgan argued, that under the Scotland Act 1998, the Scottish Parliament can make changes to basic principles of law. It was considered that Wales on the other hand should only be able to make laws which apply in relation to activities in Wales because of the single unified England and Wales jurisdiction. They believed that the courts would have to apply different laws and that would necessitate different systems of legal education, different sets of judges and lawyers and different courts if the Assembly were to change basic principles of law.

As argued above, the Assembly's legislative powers under Part 4 of GOWA 2006 now extend to changing 'basic principles of law provided they 'relate to' Schedule 7 subjects. The courts in England and Wales are already having to apply different laws: laws that apply to Wales only, and laws that apply to England only and, in fact, have had to do so since the nineteenth century. However, there is likely to be further divergence between the law which applies in Wales and the law which applies in England, not only because the Assembly has increased legislative powers, but the UK Parliament is also likely to pass more legislation, in areas which are devolved to Wales, that applies only to England.

Wales is currently part of the single 'England and Wales' legal jurisdiction. Laws made by the Welsh Assembly can only be made 'in relation to' Wales, but 'extend to' England and Wales, which means that - at least in theory - Nottingham magistrates could hear the case of someone prosecuted for doing something which is a criminal offence contrary to an Act of the Assembly, even if that thing would not be a crime in England.

Whether a Welsh jurisdiction should be created is a political decision. Jurisdictions differ in nature from one to the other and there are several possible definitions. Our view is that the essential feature of a distinct jurisdiction within the UK is its recognition as such at law. In the case of Wales, that would mean the creation of a Welsh jurisdiction by Act of Parliament, as the Northern Ireland jurisdiction was created in the last century. Courts in Wales would have exclusive jurisdiction over cases arising in Wales.

It is often maintained that a "jurisdiction" is based on three features: a defined territory, a body of

law and distinct legal institutions and system of courts.

Wales is a defined territory.

There is also a body of law that can be considered to be Welsh law arising from the very fact of the existence of the constitutional arrangements which pertain only to Wales and from the divergence caused by legislation (as much due to inertia as to momentum) between the law which applies in Wales and that which applies in England. As in the case of Northern Ireland, and jurisdictions such as Australia and New Zealand, the basis of that law is the Common Law.

Insofar as legal institutions and a system of courts are concerned, a series of changes to the courts system since devolution has delineated Wales increasingly as a distinct domain of judicial activity, even if it is not formally a distinct jurisdiction. These developments include

- boundary alignment so that Wales is a distinct administrative area within the HMCTS
- the designation of Civil, Mercantile and Chancery Court judges for Wales
- the hearing of judicial review cases, particularly those involving decisions of Welsh public authorities, including the National Assembly for Wales, by the Administrative Court sitting in Wales
- regular sittings of the Court of Appeal in Cardiff
- the appointment of a Welsh speaking High Court Judge
- the Employment Appeals Tribunal's decision to sit in Wales.¹³

In addition, distinctively Welsh tribunals exist - for example, the Mental Health Review Tribunal for Wales, the Agricultural Lands Tribunal and the Traffic Penalty Tribunal, and the Assembly can set up new tribunals such as the Welsh Language Tribunal established by the Welsh Language (Wales) Measure 2011.

There are also distinctively Welsh judicial institutions:

- the Judges' Council Committee for Wales
- the Association of Judges for Wales
- the Welsh Bench Chairmen's Forum
- the Circuit and District Judges Associations have a Welsh dimension
- a Welsh Committee of the Judicial College is to be formed
- the Law Society office in Wales

Formalising and recognising these developments through establishing a Welsh jurisdiction by Act of Parliament would help ensure clarity and consistency between Wales, Northern Ireland and Scotland. It makes constitutional and political sense that laws made and executed in Wales should also be administered in Wales. On that basis we recommend that such laws should only extend to Wales, whether or not a separate Welsh jurisdiction is created. We consider that all cases dealing with legislation applicable only to Wales should be commenced or listed to be heard in Wales (so avoiding the "Nottingham Magistrates" problem above).

We also believe it is axiomatic - whether or not a Welsh jurisdiction should be created - that that Courts in Wales should decide cases on the basis of distinct Welsh Law where it applies, and that all lawyers can advise and represent their clients on this basis as well. Therefore, regardless of whether or not a separate Welsh jurisdiction is formally recognised, lawyers advising clients in Wales, and judges hearing cases in Wales will need to be able to show that they are competent to do so.

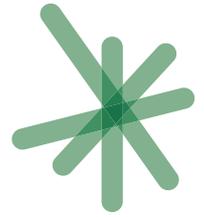
Given the growing body of distinct Welsh primary law, we also believe that a judge with expertise in Welsh law should be appointed to the Supreme Court. We also consider that the establishment of a Welsh Law Commission would be essential, to be able to prioritise consideration of those issues which are important for the people of Wales.

It seems to be common ground, even among those not previously disposed to devolution, that a distinct Welsh jurisdiction, or something very much like it, will emerge. That being so, we consider it necessary to plan ahead for that constitutional change, rather than let it emerge in a gradual, ad hoc and unmanaged manner. Our view is that any Act of Parliament establishing a reserved powers model should also make provision for establishing a Welsh legal jurisdiction.

Notes

- 13 As set out in the Assembly's Constitutional and Legislative Affairs Committee's Inquiry into a Separate Welsh Jurisdiction Report <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laiddocs/cr-ld9135-e.pdf?langoption=3&ttl=CR-LD9135%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20-%20Inquiry%20into%20a%20Separate%20nWelsh%20Jurisdiction>

6



Powers and capacity

The choice between conferred and reserved powers models is far from being an arcane matter of legal abstractions. A switch to reserved powers would bestow important new functions on the National Assembly and Welsh Government. It would also present several challenges to the capacity of the institutions as well as to Welsh civil society. Such a change, however, will require consideration by political parties, endorsement in general elections, and further UK legislation. In its evidence to the Commission the Welsh Government has suggested that a 'reserved powers' system might not be implemented until after an Assembly election in 2020 or 2021.

We believe this to be much too conservative a timescale. It should be possible to bring forward a Bill, at the latest, in the Parliamentary session immediately after the 2016 Assembly elections with a view to implementation early in that Assembly's term. Nevertheless, we acknowledge the potential for delay and have had to consider what might happen in the interim. We also note the Welsh Government's view that 'changes to Ministers' executive competence can take place at a mutually agreed time before that, as the current settlement continues to develop organically.'

In this context the UK's Changing Union project felt it should consider the adequacy of the current powers and assess the potential for assuming responsibility for additional fields and matters.

Our Working Group on Powers, Scrutiny, Capacity and Accountability commissioned a series of research papers to explore the case for the devolution of additional responsibilities powers and the ability of the Welsh institutions to assume them. Whilst it was impossible to carry out an exhaustive research programme into all areas of current and potential competence, a number of functional areas were identified and examined in order to demonstrate areas of strength and weakness that exist as a result of the current structures. In so doing it has given us a sense of the functional benefits that a more comprehensive move to reserved powers would bestow.

Papers were commissioned in the following areas:

Powers

Energy, Transport, Welfare, Policing and Broadcasting.

Capacity

The National Assembly, the Welsh civil service, Welsh civil society, Europe

These papers are available for reference on the UK Changing Union website.

The papers under the first heading examine the case for devolving significant new responsibilities, either fields or matters within fields, to the Welsh level. The advantages of having powers sufficiently broad as to enable the integration and coordination of policy, and thus achieve the greatest practical effect, are self-evident. The list of examples considered here is far from exhaustive, but with one exception, Social Security (1), they are topics about which there has already been active debate on further devolution. Authors consulted with experts and interested parties in considering the issues and making recommendations.

Following receipt of the papers there were two further stages

- i) Each paper was scrutinised in round-table discussions attended by experts
- ii) The Working Group considered the outcome of this process and came to an agreed position, bearing in mind the decision of the UKCU steering group to recommend the adoption of the reserved powers model.

6.1 Powers

There are three areas in which we would challenge the current reservation of powers to the UK Parliament, even though such reservation was included in the 1998 Scotland Act. These are

- Broadcasting
- Policing and criminal justice
- Commercial law

6.1.1 Broadcasting

Broadcasting is a vitally important field as a result of its crucial contribution to the development of Welsh cultural life, including the promotion of the Welsh language, the media's daily engagement with public life and its role in the scrutiny of policy and political activity. The centralized ownership and control of broadcast media and the dominance of the London-based press does not sit comfortably with fact of extensively devolved government.

We regard it as both anomalous and detrimental to a vibrant and engaged democracy that the NA and WG should have no formal responsibility for broadcasting in Wales. At the same time, we recognise that certain key functions are best delivered at the UK level, bearing in mind too that there is a significant European dimension. This is one field therefore, where it is appropriate that responsibility should be shared between the UK and Welsh levels.

We recommend as follows:

1. that full responsibility for S4C should be transferred to the NA and WG, with the relevant Welsh minister responsible for appointing the Chair and members of the S4C Authority
2. that the Welsh member of the BBC Trust should be a joint appointment by the Welsh minister and DCMS
3. that National Broadcasting Trusts should replace the BBC's Audience Councils in the

- devolved nations and should have responsibility for policy, content and allocation of resources for all services delivered solely for audiences in their respective countries
4. that Welsh ministers should appoint representatives to the main board of Ofcom
 5. that responsibility for local and community radio policy and licensing should be handed to a renamed Ofcom Advisory Committee for Wales.

6.1.2 Policing

A range of benefits would flow from the devolution of policing in Wales. It would be likely to facilitate partnership working, act as a catalyst for reform of public services in related areas of community safety, and lead to WG ministers becoming fully informed about policing matters. The lines of accountability between police forces, the Police and Crime Commissioners and the WG, and, just as importantly, with the public would become clearer. The system could be fully aligned with a Welsh criminal justice system. It would create coherence and accountability at a local level.

Whereas concerns exist on the priority which a WG might give to policing as compared to certain other key policy areas, we do not regard this as a legitimate consideration in determining whether or not policing should be a devolved function. When enhancing democratic accountability the present should not seek to pre-judge or pre-empt the future.

New agreements on the operation of mutual aid between forces would also need to be reached. Clarity would be needed on how cross-border operations would be arranged and funded. This is equally true of the way that Welsh police forces would interact with UK-level organisations such as the National Crime Agency and its constituent commands.

Clearly there would be significant capacity implications to devolving policing and there are also issues of timing to be borne in mind.

6.1.3 Criminal Justice and Commercial Law

Reserving the entire fields of 'Commercial Law' and 'Criminal Justice' would give rise to difficulties which would restrict the Assembly's law-making powers inappropriately. This is because they both potentially include vast areas of legislative competence which are all-pervasive: in the former case, the law of contract and tort, and in the latter case criminal law (including the creation of criminal offences, and the means of dealing with offenders).

To the extent that commercial law concerns the formation and regulation of business entities and financial institutions, we would accept that this should be a reserved matter, particularly since much of it is determined by European legislation. We would not, however, support a reservation of commercial law so broad that it prevented the Assembly from legislating to regulate any commercial activity, or from legislating at all in relation to the law of contract and the law of tort as it applies to commercial activities.

Similarly, in the field of criminal justice, even if it is considered inappropriate to devolve legislative competence over the criminal courts (because for instance it's too early to move to a Welsh legal jurisdiction), that should not prevent the Assembly from being able to legislate to change aspects of the criminal law relevant to its other powers.

6.1.4 Transport

The need for a properly integrated transport policy to achieve key economic, social and environmental objectives provides a powerful case for transferring to the Welsh level a range of currently undeveloped functions. The boundaries between responsibilities in this field held at the Welsh and UK, and in some cases local-government levels, is particularly complicated. This can bedevil the process of making decisions effectively and swiftly and even frustrate their implementation altogether.

New responsibilities that would facilitate an integrated transport policy would include:

- public transport policy
- rail and bus industry regulation
- rail investment (with the operational and financial interface between the Welsh Government and Network Rail set out in statute and mirroring the current DfT - Network Rail position)
- contractual arrangements for the operations in Wales of train operating companies
- powers currently held by the Traffic Commissioners
- ports
- airport development and air passenger duty.

6.1.5 Energy

The existing division of powers on energy, which has been identified by the First Minister as strategically crucial for Wales, is effectively an arbitrary one, specifically in the areas of planning and consent. Some of the disadvantages of this include: uncertainty over policy direction and inconsistency of process for developers, a temptation to indulge in a cross-border blame-game, and the potential for UK and Welsh Government policy aspirations to be at odds.

Respondents have, however, expressed concern about a lack of clear policy direction and leadership by the WG as well as about civil service capacity. We regard these as issues to be tackled rather than obstacles to the acquisition of more comprehensive powers for which the constitutional as well as pragmatic case is apparent. In some instances capacity could be shared between the UK and Welsh levels, for example in the case of the Planning Inspectorate, which would then make recommendations to Welsh ministers based on WG strategic priorities

In this field, too, there are issues of timing. For example, it would be advantageous for further devolution to be co-ordinated with the planned Energy Market Reform.

6.1.6 Welfare

Current changes to the Social Security system are seen by many as damaging to certain key objectives in fields where the WG has responsibility. However, we do not regard devolution in this field as either feasible or desirable. The recent transfer to the WG of responsibility for administering certain social welfare functions illustrates the danger of devolving functions without consultation with the WG and without any accompanying transfer of resources.

6.1.7 European policy

The question of the extent to which the WG and the Assembly are able effectively to advance the interests of Wales at European Community level raises issues of both powers and capacity.

Regarding the former, the First Minister has highlighted the fact that, even in devolved areas such as agriculture, it is the UK Government that speaks for the devolved administrations in the Council of Ministers. This raises particular concerns when Welsh interests diverge from those of the UK as a whole. This difficulty can often be exacerbated when Welsh and UK Governments are 'incongruent', i.e. controlled, as at present, by different political groupings. In these circumstances the informal means of coordinating policy positions that apply when the two levels of government are congruent are not usually available. This points to the need for clearer and more robust mechanisms for intergovernmental relations within the UK.

In many ways the record of the WG and the Assembly on European matters has been impressive. However there are concerns (a) about the Welsh Government's capacity to play a role in influencing European policy formulation and (b) the ability of the Assembly to maintain a strategic focus on EU affairs in the absence of a dedicated committee, while also scrutinising the WG's performance. These questions are related to the wider issues of WG and Assembly capacity discussed below.

6.2 Capacity

Powers of themselves are evidently only part of the story. One theme that has emerged clearly in our discussions is that capacity issues must be considered simultaneously. Adequate capacities are crucial for scrutiny, accountability and the legislative process, and thus for effective governance. This is not just a matter of powers and capacity being mutually dependent, but rather about setting in train a dynamic process in which the two aspects reinforce and stimulate each other.

It is reasonable to argue, for example, that the granting of broader, more clearly-defined powers to the Assembly is likely to encourage greater public participation as well as engage and stimulate the growth of the civil society organisations that can play a vital role in devising, implementing and scrutinising policy. Being in possession of such powers also makes it more likely that the brightest and best will be attracted into the Welsh civil service. Such capacity development will in turn generate confidence in the ability to make good use of powers and indeed to acquire more. It would also challenge media organizations to raise their game.

The capacity of the Welsh institutions to work effectively and productively within a new dispensation is integral to a vibrant Welsh democracy, and this was the rationale behind our exploration of the 'capacity' themes. Whilst the UK's Changing Union project fully supports a move to reserved powers including further devolution of specified areas, additional measures have to be put in place to enhance the effective of our institutions and their democratic engagement with the Welsh people.

6.2.1 The National Assembly

The National Assembly is one of the smallest legislatures in the world, both in absolute terms and in relation to the size of the population which it represents. In terms of per capita representation it ranks well below the Northern Ireland Assembly and Scottish Parliament. It also has fewer representatives than are elected to the local authorities in Wales' two largest cities.

	Number Members	Population	Pop. per member
Swansea (LA)	72	238,691	3,315
Vermont (US State)	148	626,431	4,233
Cardiff (LA)	75	345,442	4,606
North Dakota (US State)	94	683,932	7,276
Bremen (German Land)	83	663,000	7,988
Maine (US State)	151	1,328,188	8,796
Northern Ireland Assembly	108	1,811,000	16,769
Scottish Parliament	129	5,254,800	40,735
National Assembly	60	3,063,800	51,063

This has serious implications for scrutiny in committee and plenary, with only 75% of members available for scrutiny and legislative functions, significantly lower than in Scotland (88%), Northern Ireland (85%) and at the UK level (85%). As a consequence, the talent pool available to populate committees and the Ministerial complement is limited and the demand placed on each Member – not least in respect of the subject knowledge required of individuals sitting on one or more committees covering a breadth of matters – is high.

Research indicates that the Assembly is below the ‘floor size’ that would allow Members to undertake effectively all necessary functions. With the granting of primary legislative powers under the 2006 Government of Wales Act, there can be no justification for this state of affairs to continue. Should the Assembly acquire further powers, the case for an increase in the number of Assembly Members in our view becomes unanswerable.

Further means of increasing capacity could also be implemented over the short to medium term:

1. Expert advisors

It should become the norm for committee inquiries to appoint an expert advisor, drawn from civil society. This would enable the committees to draw on specialist knowledge in a more in-depth manner than is possible through individual calls to give evidence. To ensure appointment of high calibre advisers, it is likely that this would need to be a paid position.

2. Economic and Social Committee

An approach similar to that evident in the Danish “consensus conferences” should be considered.

This would entail the creation of an Economic and Social Committee, populated by a diverse range of individuals from across civil society and with a broadly defined scope. The Committee would serve to inform the work of the National Assembly. It would therefore exist in addition to the existing single-issue Partnership Councils, which inform the Government.

3. Externally-appointed Ministers / Deputy Ministers

Appointing Ministers or Deputy Ministers from outside the Assembly would create a larger gene pool from which to select Ministers. This approach is not uncommon beyond the United Kingdom. Suggested safeguards against diversion of the balance of power from elected officials include:

- making it optional for the First Minister to exercise this power.
- limiting the number of unelected Ministers to two.
- disallowing unelected Ministers voting rights within the Assembly.

6.2.2 WG Civil Service

The civil service fulfils a crucial function in ensuring high-quality policy development, strategy and delivery to meet the needs of the Welsh nation, its communities and people. It currently suffers from incoherence and a lack of transparency.

We recommend a number of specific changes aimed at ensuring a sense of commitment, distinctiveness and shared purpose among WG civil servants:

- The First Minister to become the political head of the WG civil service and to have responsibility for approving the appointment of the Permanent Secretary.
- The head of the WG civil service – the Permanent Secretary – should have an alternative title such as Chief Executive to the Welsh Government while retaining her/his position in the Permanent Secretary network
- In the interests of clear accountability, and crucially to drive reform, there should be a clear distinction between decisions that ministers and the civil service can make.

We recommend further reforms under three headings:

Organisation

- a) strengthening the First Minister's Department to create better coordination and delivery that matches overall priorities
- b) creating a robust Treasury function to improve prioritization and efficiency in spending

Culture

- a) prioritising outcomes over processes and compliance
- b) breaking down ministerial territorialism and improving cross-departmental working
- c) greater openness to external inputs and expertise
- d) recognition of achievement

Capacity

- a) further devolution will require some permanent increase in civil service numbers. In addition secondments and buy-in from other parts of the home civil service and beyond, as well as from the public, private and third sectors, should be commonplace.
- b) The potential for establishing a new civil service college for Wales should be explored. Its remit could usefully be extended to provide training for all tiers of public service.

6.2.3 Political Parties

Political parties have a responsibility to ensure that their actions are conducive to the development of a robust Welsh democracy and effective policy development and delivery as well as to promote their own electoral success. It is a matter on which there has been insufficient debate within the parties themselves.

The degree of autonomy at the Welsh level, and the total resource allocated to the process of policy-development varies among the parties. It is our view that the active participation of members

contributes to the growth of political awareness and understanding and parties should make arrangements to encourage and facilitate such participation.

The role of publicly-funded special advisers (SPADs) in party policy development is significant. A new procedure for appointing SPADs, including external advertisement and a clear requirement for expertise in one or more policy areas, would not only improve transparency, but could be expected to enhance the quality of the policy making process and its outcomes.

The criteria by which the Electoral Commission allocates Policy Development Grants (PDGs) should be revisited so as to strengthen the capacity and autonomy of the Welsh parties in developing policy.

Finally, there is considerable public concern about the narrow range of experience from which Assembly Members are drawn. In selecting candidates for election as AMs parties have a responsibility to consider how they can contribute to strengthening the quality and diversity of skills in the Assembly as a body. The political parties in Wales have not paid sufficient regard to this obligation.

6.2.4 Civil Society

A vibrant and engaged civil society is essential to effective democracy, in terms of contributing to policy-formulation and challenging policy and delivery and calling both ministers and Assembly Members to account. An expansion of civil society capacity will be needed, and is more likely to occur, as the responsibilities of devolved government are increased.

There are a number of issues that need to be addressed, partly by the WG, partly by the Assembly, and partly by civil society organisations themselves, in order to strengthen the civil society contribution:

- civil society organisations need to have confidence that their own interests will not be prejudiced if they are openly critical of Government policy and performance
- access to ministers and civil servants needs to be simplified
- formal consultation needs to be meaningful
- the sense that there is a small number of preferred, dominant organisations needs to be addressed
- the capacity of civil society organisations themselves should be enhanced, with greater specialisation among staff members
- affordable public affairs training by appropriate providers needs to be expanded
- the workings of the Assembly itself should be made more transparent to civil society
- there is scope for both NA and WG to partner with external bodies for information and training sessions
- both NA and WG should ensure that their workforces become more knowledgeable about civil society and the expertise that exists within organizations
- the contribution of civil society organisations to the legislative process needs to be more focused in order to have the maximum effect on decisions
- civil society organizations at both Welsh and UK levels need to thoroughly understand the Welsh constitutional landscape and to recognise the extent of the powers that now exist at the Welsh level

