



**Response to:** Silk Commission Part II Report: Devolving legislative powers to Wales

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## About the UK's Changing Union project

The UK's Changing Union project is a joint initiative between the Wales Governance Centre at Cardiff University, the Institute for Welsh Affairs and Tomorrow's Wales/Cymru Yfory, engaging with debates about the future of the Union and the Welsh devolution settlement. More information is available at <http://ukchangingunion.org.uk>.

The project is funded by the Joseph Rowntree Charitable Trust and the Nuffield Foundation. The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)

### Introduction

The UK's Changing Union project welcomes the opportunity to respond to the House of Commons Welsh Affairs Select Committee's call for evidence to its inquiry on "Silk Commission Part II Report: Devolving legislative powers to Wales."

Our response focuses on two main aspects of the Report:

1. The recommendation that Welsh devolution dispensation be re-founded on a so-called 'reserved powers' basis, a recommendation that we strongly endorse.
2. The recommendation that the size of the National Assembly for Wales should be increased so that it can perform its scrutiny role better. While supporting an increase, we wish to draw the Committee's attention to the report that we have recently published (in partnership with the Electoral Reform Society) entitled *Size Matters* which argues strongly for a 100 member Welsh legislature.

As will become clear, the evidence that follows draws upon and summarises two much more substantial documents, copies of which are also appended. If the Committee requires further elaboration of the analysis contained in our evidence, we would be delighted to comply with any such request. We would also warmly welcome the opportunity to provide oral evidence to the Committee's inquiry in due course, should members deem that helpful.

Professor Richard Wyn Jones

Steering Committee Chair, UK's Changing Union project

10 April 2014

## 1. The case for a ‘reserved powers’ model for the National Assembly<sup>1</sup>

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.

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.

However, 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. This was in contrast to Scotland where a ‘reserved powers’ model was followed. In explaining why, the UK Government’s White Paper *Scotland’s Parliament* (1997), listed the drawbacks of the conferred powers model as follows:

“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.”

The same weaknesses of the conferred powers’ model of devolution as identified in relation to Scotland have proved to be the case in Wales, and doubly so since the National Assembly acquired full legislative powers as a result of the referendum held in 2011. These weaknesses stem 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, generating anomalies in both directions and leaves some areas in limbo.

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<sup>1</sup> This is a summary extract from *A stable, sustainable devolution settlement for Wales*, the UK’s Changing Union project’s evidence to the Silk Commission, published in February 2013.

- An absence of consistent principles that prevents Whitehall departments from developing a consistent approach to devolution across the UK.

The result is that the Welsh conferred powers model creates confusion, complexity and uncertainty for the Welsh and UK Governments, Assembly Members, MPs and Peers, and, most importantly of all, 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 also provide clarity for the public and civil society which is an essential part of a health democracy

Although only in effect for less than three years, following the 2011 referendum, there are already strong indications that the ‘conferred powers’ model of legislative devolution is proving problematic. It is 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, two further referrals have demonstrated that the ‘conferred powers’ model is causing significant problems.

In addition the McKay Commission, which reported in March 2013 on the impact of devolution on the House of Commons, recommended that English MPs should have a greater say on legislation that affects England only – a form of ‘English votes for English laws’. This means 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 Scotland, Northern Ireland and Wales in the basic constitutional architecture deployed.

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.

## **2. Size matters: Making the National Assembly more effective<sup>2</sup>**

With just 60 AMs in the National Assembly, our democracy in Wales is under powered, over stretched and under strain. With the role and responsibilities of the devolved level in Wales having grown very substantially since 1999, with the current Wales Bill set to further enhance powers of the National Assembly, and with the second report of Silk Commission presaging yet further, far-reaching change, we should not be afraid of advocating an Assembly of sufficient size in order to ensure effective scrutiny of the executive.

While the Scottish Parliament has 129 members and the Northern Ireland Assembly 108, the National Assembly only has 60 members. Nine of Wales' 22 local councils have more representatives. To bring it into line with the capacity of other comparable legislatures the National Assembly should have around 100 members. This would add approximately £10.1 million to the Assembly's current annual running costs of £49.5 million. However, this would be a small price to pay for the benefits that would accrue.

### **Insufficient backbenchers**

Leaving aside Ministers and other office holders, only 42 of the present 60 AMs are available to hold the Welsh Government to account and scrutinise legislation. This compares with 113 in the Scottish Parliament and 522 in the House of Commons. It means AMs have to attend multiple committees. They are always in a hurry, constantly moving from one meeting or issue to another. Many say that they do not always have time to read, let alone reflect properly on their documents ahead of meetings. As Rosemary Butler, Presiding Officer in the National Assembly, has put it:

“There are only 42 Members to scrutinise £15 billion of taxpayers' money, and to scrutinise the government on the big issues of the day – the future of our health service, our education system and the economy. On top of that they have to make sound, thoroughly scrutinized laws for our nation. A quarter of those 42 members sit on three committees, half sit on two. One would simply not find the same level of workload on Members in Westminster, Holyrood or Stormont” (*the welsh agenda*, IWA, Winter 2013).

### **Making the Welsh Government more accountable**

A comparative analysis of equivalent small nation and 'regional' legislatures elsewhere in the world indicates that 60 members is extremely low for a legislative Assembly that also provides an Executive. In the first two terms the Assembly gradually took on a more parliamentary character. It separated the executive from the legislature,

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<sup>2</sup> This is a summary of the report, *Size Matters – Making the National Assembly more effective*, published in October 2013 jointly by the UK's Changing Union and the Electoral Reform Society Cymru, the first systematic, evidence-based investigation of the size of the National Assembly for Wales.

abandoned its corporate body status and, with the 2006 Wales Act, acquired the potential for gaining full legislative powers. This was approved in the 2011 referendum. These developments increase the importance of independent findings from the Richard Commission in 2004 onwards that 60 AMs are not enough to provide adequate oversight and accountability, thus ensuring responsible government.

The present Assembly is split between the governing party and the opposition, with 30 on each side. During the previous 'One Wales' coalition, 41 members were either from Labour or Plaid Cymru, leaving only 19 AMs from a non-governing party. This did not provide for a strong opposition or effective scrutiny. Mathematically, there can never be more than 30 AMs in opposition. Several of their number will have roles such as Deputy Presiding Officer or Party Leader, which will restrict their ability to play a full role in scrutiny. Some others will be Committee Chairs – largely confining their work to a single committee.

Currently, the Labour Party has a technical majority. However, it is likely that coalition arrangements will continue to be a regular occurrence, as happened between 2000-3 and 2007-11. Therefore, we can expect in future relatively weak opposition within the Assembly as a direct result of the small number of AMs remaining outside the governing parties. The overall result is to strengthen the executive and weaken the legislature.

### **Improving the distribution of elected representatives**

The present allocation of elected representatives between local authorities, the National Assembly and Welsh MPs and Peers at Westminster is poorly distributed.

Under the UK Government's proposals to equalise the size of Welsh constituencies to those of the rest of the UK, the number of MPs would have fallen to 30. As these proposals were deferred to 2017, the Welsh position remains anomalous among the devolved territories. Scotland cut the number of its Westminster MPs from 72 to 59 in 1999. The ratio of Welsh MPs per head of population is 1:76,586, whereas the average MP per head of population in the UK as a whole is 1:97,202. At an average of £590,000 a year, the cost of an MP is equivalent to that of 2.6 Assembly Members. The likely reduction of 10 MPs at that average figure would save £5.9 million.

Wales has 1,254 councillors compared with 1,222 in Scotland. This is despite Scotland having a population of 5.3 million compared with 3.1 million in Wales. The ratio of councillors per head in Wales is 1:2,742, and 1:4,270 in Scotland. It's also worth noting that the Welsh Government's Commission on Public Service Governance and Delivery has recently recommended reducing the 22 Welsh county councils by around a half.

### **An arbitrary number**

A history of the half-century leading to democratic devolution in 1999 illustrates the arbitrary way in which the present number of 60 AMs came about. During the half-century that preceded the establishment of the National Assembly in 1999, six detailed proposals for Welsh devolution were put forward. Four of them were contained in Bills

presented to the House of Commons - in 1955, 1967, 1977, and 1996. One was put forward by the Royal Commission on the Constitution in 1973. Another was proposed by a Welsh Labour Policy Commission in 1995. All varied in their recommendations about the number of members that should be elected, but none fell below 75, and generally a figure of around 100 was suggested.

### **Timing**

There will never be a 'right time' to increase the number of AMs – despite the inadequacy of the present Assembly size, the strength of the case for the increase and even the evidence that good scrutiny leads to improved value for money and better public services. However, robust advocacy, especially stressing that the costs would be tiny in comparison to potential savings on wasted resources, would make it politically 'doable'.

Each time the powers of the Welsh Government have been enlarged, politicians have failed to address the need for more effective scrutiny capacity. Parliament has recognised the need for more powers over more areas of government but chosen to ignore the corollary – matching increase in scrutiny capacity. If the Assembly had begun with sufficient members, that problem would have grown over time but, in the case of the National Assembly, the load has been placed on too few shoulders from the outset.

It will not become any easier the longer this vital step is postponed. If it is again deferred while tax and borrowing powers are added to the Assembly's responsibilities, then it must become an essential prerequisite for the implementation of Silk Part II.

**ENDS**