

Huw Irranca-Davies AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
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30 September 2016

Dear Huw

Wales Bill 2016 – Minister of Crown consents

Ahead of your Committee's engagement with the Lords, I wanted to share with you and your members my views on the provisions in the Wales Bill relating to Minister of Crown consents. My concern relates to the roll back of the Assembly's freedom to legislate without UK Government consent.

While some progress has been made, in my view, the Wales Bill still rolls back some of the current competence of the Assembly and does not yet provide the necessary clarity to ensure the new constitutional settlement is workable for the future. During the passage of the Bill through the Commons, I published a series of amendments which were subsequently tabled and discussed. In some cases the issues were taken up by the Government and the Bill was amended at Report Stage, which is positive.

Since then, I have had the opportunity to consider in more detail advice on the Minister of the Crown provisions. I am particularly concerned about the the removal of the Assembly's ability to remove or modify a function of a UK Minister, where to do so is incidental or consequential - effectively reversing the Supreme Court's decision on the Local Government Byelaws (Wales) Act 2012; and the introduction of new consent requirements where the Assembly wishes to affect the functions of non-devolved public bodies.

My other outstanding concerns, which I have previously drawn to your attention relate particularly to the statutory expression of the convention requiring Assembly consent; the prohibition on the Assembly from legislating in any way that 'relates to' a reserved matter; and having comprehensive powers in relation to finance matters.

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English



I very much value the work that your Committee is undertaking to ensure robust scrutiny of the Wales Bill and that the Assembly is well informed prior to further work considering in earnest the Legislative Consent Memorandum on the Bill. I look forward to reading your forthcoming report on the Wales Bill.

I have set the issues relating to Minister of Crown consents briefly on the following pages. If you would like to discuss or receive any more detail please contact my Private Office.

A handwritten signature in blue ink that reads "Elin Jones". The signature is written in a cursive, flowing style.

Elin Jones AM
Presiding Officer



Minister of Crown Consents – Schedule 2 paragraphs 8 -11

Schedule 2 of the Wales Bill proposes a new Schedule 7B to the Government of Wales Act which sets out general restrictions on the Assembly’s legislative competence. Included within this are areas for which UK Government – or Minister of the Crown - consent is required before the Assembly can affect the functions of “reserved authorities”, i.e. UK Ministers, UK government departments and other public authorities (other than Wales Public Authorities).

There has been considerable improvement since the draft Bill and many of the requirements for consent under the current settlement have been removed. However there are some areas where the changes proposed under the Bill roll back on the Assembly’s current competence.

In summary, the Bill would:

- remove the Assembly’s ability to remove or modify functions of a UK Minister, where to do so is incidental or consequential
- remove the Assembly’s ability to remove or modify specified functions of a UK Minister in devolved area set after 2011 – notably the Welsh Language functions of UK Ministers
- introduce a new restriction, preventing the Assembly from affecting the functions of other reserved authorities (other than Wales Public Authorities) in any way.

The consent requirements apply in different ways as set out in the tables below, depending on whether the reserved authority is a UK Minister (or a government department) or another type of reserved public authority. Additionally, the consent requirements apply in different ways depending on whether the Assembly legislation is conferring / imposing functions on reserved authorities or whether Assembly legislation is removing / modifying functions of reserved authorities.¹

The tables illustrate the issues and provides a contrast with the current position.

¹ Consent is also required if the Assembly were to modify the constitution of a Reserved Authority, or impose/confer/remove /modify “functions specifically exercisable in relation to” a Reserved Authority (paragraph 8(1)(b) and (c). These also represent a roll back in competence, given there are no such restrictions under the current settlement, however they are of less concern in comparison with the other issues, therefore are not included in the table.



Reserved Authorities (not including UKG Ministers – covered separately in the third table below)

Wales Bill requirement	Current Settlement comparison	My view
<p>Requires consent to <i>confer or impose any function</i></p> <p>Schedule 7B 8(1) (a)</p>	<p>No consent currently required therefore concern that 8(1)(a) is a significant roll-back. The words could be interpreted by a court as preventing the Assembly from requiring reserved authorities to comply with the general law applicable in Wales.</p> <p>For example, a duty to put up “no e-cigarette” signs in workplaces would be conferring or imposing a function.</p> <p>But note that while consent is not currently required to confer or impose such functions, under the current settlement the Assembly would still have to pass all the competence tests, for example, it would have to relate to a devolved subject or it would have to be within section 108(5).</p>	<p>I would like to seek clarity during the passage of the Bill as to Parliament’s intention with the scope of this restriction.</p> <p>If the Assembly chooses to confer or impose functions generally across Wales or generally across the public sector in Wales, thereby catching reserved authorities, then the Assembly should be able to do that without UK Government consent.</p> <p>Also, to mitigate the roll-back, if the Assembly sought to confer or impose functions on reserved authorities UKG consent will not be required if conferring or imposing the function is <i>incidental or consequential</i>.</p>

Reserved Authorities (not including UKG Ministers – covered separately in third table below)

Wales Bill requirement	Current Settlement comparison	My View
<p>Consent required to <i>remove or modify any function</i> Schedule 7B para 10 (1)</p> <p>Some listed exceptions include:</p> <ul style="list-style-type: none"> - Electoral Commission - Food Standards Agency - Water Services Regulation Authority <p>Para 10 (2) (a)-g)</p>	<p>No consent currently required (except in relation to HMRC) therefore this is a significant roll-back.</p> <p>But note that while consent is not currently required to remove or modify such functions, under the current settlement the Assembly would still have to pass all the competence tests, for example, it would have to relate to a devolved subject or it would have to be within section 108(5).</p>	<p>The roll back should be mitigated so that consent is not required for incidental or consequential modifications.</p>

Minister of Crown/UKG Ministers		
Wales Bill requirement	Current Settlement comparison	My view
<p>Requires consent to confer or impose function Schedule 7B, para 8(1)(a)</p>	<p>No change – consent currently required.</p>	<p>No concern</p>
<p>Requires consent to remove or modify any statutory function of MoC that relates to :</p> <ul style="list-style-type: none"> – concurrent / joint functions – Welsh language – many water and sewerage functions – specific marine and coastal functions, – specific railway financial assistance functions 	<p>Under the current settlement <i>any</i> pre 5 May 2011 function: (a) requires consent, or (b) must be incidental or consequential. If post 5 May 2011 function, <i>no</i> consent is required.</p> <p>The provision in the Bill is therefore a significant change. Many consent requirements are now removed (which is a welcome improvement), but the Bill does not contain any incidental or consequential power. This would, effectively, reverse the Supreme Court’s decision in the case concerning the Local Government Byelaws (Wales) Act 2012 where UK Minister’s consent was not needed where a removal of their powers was merely a consequence of the main purpose of the Byelaws Bill.</p> <p>The specified UK Minister functions are in devolved areas. The UK Government could continue to create UK Minister functions in these devolved areas, and the Assembly would need UKG consent to remove or modify them. Thus leading to complexity and uncertainty as the circumstances in which consent would be required would evolve.</p> <p>While the LCM process may protect such creation of new UK Minister functions (and some functions could only be created if the Welsh Ministers gave their consent), the statutory recognition of the consent process is not a complete veto on the UK legislating in devolved areas.</p> <p>Specification of Welsh Language is a particular change. Under the current</p>	<p>The roll back should be mitigated by limiting when consent is required to pre 5 May 2011 functions (so that UKG consent would not be needed to remove or modify the specified UK Minister functions created after 5 May 2011) and also include a consequential / incidental power.</p> <p>Remove Welsh Language functions from the list of specified UK Minister functions (so that UKG consent would not be needed to remove or modify any Welsh language functions of UK Ministers, whenever they were created).</p>

Schedule 7B para 11 (1) (a) –(e)	settlement, the Assembly can remove or modify any Welsh language function of UK Ministers created after 5 May 2011 , without UKG consent. But under the Wales Bill, consent would be needed before the Assembly could remove or modify such functions.	
Minister of Crown/UKG Ministers		
Wales Bill requirement	Current Settlement comparison	My view
Requires Welsh Ministers to consult UKG to remove or modify any function not listed in sub-paragraph (1) [above] Schedule 7B para 11 (2)	This is a significant change – many consent requirements are now removed (this is a welcome improvement) and replaced with the duty to consult.	No concern.