

The Rt Hon. the Lord Lang of Monkton
Constitution Committee
House of Lords

6 October 2016

Dear Lord Lang

UK Government's Wales Bill

As you may be aware, the National Assembly's Constitutional and Legislative Affairs Committee published its report today on the UK Government's Wales Bill.

Copies of the report and an evidence booklet have been sent to you today under separate cover, as well as to members of the Constitution Committee and other Lords who are likely to have an interest in the scrutiny of the Bill.

In advance of our meeting next week and to aid discussion, I am enclosing a hypothetical example of the steps that would need to be taken, as a consequence of the Bill, in order to convert policy proposals into an effective piece of law. I think it illustrates some of the potential difficulties and complexities quite well.

I look forward to meeting you next week,

Yours sincerely

Huw Irranca-Davies

Huw Irranca-Davies
Chair

Enc.



Working through the tests of legislative competence on a hypothetical Bill

Background

1. The purpose of the following hypothetical example is to demonstrate some of the complexity in the Wales Bill and to explain why it may prove difficult for the National Assembly to make well-constructed, joined-up law.
2. In this scenario a Bill is proposed that would require every public authority (i.e. a body exercising public functions) in Wales to employ a Mental Health Support Officer (“MHSO”). Each MHSO has power to do whatever the MHSO thinks appropriate in order to help employees of the body who may be suffering from mental health illness.
3. For the purpose of this example the Bill includes:
 - preventing, treating and alleviating mental illness;
 - protecting employees from harming themselves; and
 - protecting employees from harming others.
4. The MHSO must offer support in Welsh and English.
5. The Bill sets out wages and holiday entitlements of MHSOs.

Consideration

6. The following issues would need to be taken into account when determining how to convert the policy proposals into effective law. References to tests are references to the tests of legislative competence set out in Chapter 6 of the Constitutional and Legislative Affairs Committee report.

Test 8

- The Bill is imposing a duty on public authorities in Wales. This includes reserved authorities such as the police, Crown Prosecution Service, the Crown, the DVLA, the Land Registry, courts and tribunals etc. Therefore, UK Government must consent before these duties can be imposed on such reserved authorities. If UK Government does not give consent, then the duty will only apply to Wales Public Authorities (such as local authorities, local health boards, HEFCW, the Assembly Commission, the Welsh Ministers etc.). This means the duty would not apply consistently across public authorities in Wales.



Test 3

- But even if UK Government does consent, if the duty to have an MHSO applies to the police (as a public authority) then there must be an assessment of whether the Bill relates to the reservation of 'policing'. If the Bill has more than a 'loose or consequential' connection to policing, then the Bill would be outside competence (even if it also relates to mental health which is not reserved and even if the UK Government would be willing to consent to the duty being imposed on the police). If the Bill relates to a reservation such as policing then it is outside competence, regardless of anything else.
- 'Policing' is not the only relevant reservation. All other reservations must be considered, in case the Bill has more than a loose or consequential connection to any one of them. For example, if one of the purposes of the Bill is to stop a person who suffers from mental health illness from harming other people, this could relate to the reservation of 'the prevention of crime'.
- With regard to any Welsh language functions being imposed on public authorities, the Bill would not relate to any reserved matter just because it is imposing Welsh language functions on a reserved body. (But Test 8 would still apply).
- With regard to the provisions around the wages and holiday entitlements of an MHSO, these provisions are outside competence because they would be very likely to relate to the employment reservation. Again, it would not matter if they also related to mental health.

Test 4

- Even if the Bill does not relate to a reservation such as policing (because, given the purpose and effect of the Bill, it is really about mental health) then the Bill will still be modifying the law on the reserved matter of policing. The law on the reserved matter of policing includes all of the law around policing. This means the Bill will only be able to modify any of the law around policing if doing so is ancillary and has no greater effect on the law on policing than is necessary.
- Again, this test applies to all reservations. So there would be a need to assess all of the law around all of the reservations, in case any of it was being modified. And if it was being modified, that modification would have to be ancillary and have no greater effect on the law around a reserved matter than necessary. For example, if the Bill does not relate to 'the prevention of crime' then it may still be modifying the law around the prevention of crime, in which case the ancillary and necessary elements of this test must be satisfied.



Test 6

- If the Bill in any way provides for a sexual offence being committed against a person suffering from mental health illness, then that provision of the Bill is automatically outside competence. This is because Test 6 prohibits Assembly legislation from creating or modifying any sexual offence.

Subordinate legislation

- The Bill says that the MHSO can do whatever the MHSO thinks appropriate. If the Welsh Ministers make regulations that give more detail around this, then all the tests of competence remain relevant. For example, the regulations couldn't say that the MHSO could suspend a person's passport because 'travel documents' are reserved. Therefore, the power that enables the Welsh Ministers to make regulations cannot include a power to allow the regulations to relate to passports.
- If the regulations say that any assault against an MHSO is such a serious issue that it should be an indictable only offence, then the regulations will be ultra vires because the power that enables the Welsh Ministers to make regulations cannot include a power that creates or modifies an offence against the person that is an indictable only offence.

