



ORAL EVIDENCE SESSION

DATE: Thursday, 25 July 2013

LOCATION: Commission Office, Cardiff

COMMISSIONERS PRESENT:

Paul Silk (Chair)

Nick Bourne

Rob Humphreys

Trefor Jones

Eurfyl ap Gwilym

Helen Molyneux

Noel Lloyd

THE FOLLOWING GAVE EVIDENCE:

Ann Sherlock, Lecturer, Department of Law and Criminology, Aberystwyth University

Professor Daniel Wincott, Professor of Law, Cardiff University and co-chair of the Wales Governance Centre

This note, prepared by the Secretariat and agreed with the witnesses, captures the key points of the discussion.

1. Asked to provide an outline of the arguments in favour of the powers conferred model of devolution, ~~the witnesses said that it was difficult to do so. it was felt that any theoretical advantages could not be realised without fundamental redrafting of the current schedule of conferred powers, which~~ The current position reflected an incremental accumulation of powers by the pre-devolution Secretary of State, lacking a rationale. ~~There needed to be a required~~ fundamental revision of the settlement. This was best achieved through changing the model, rather than 'tinkering' with the schedule of conferred powers, which may result in limited changes that did not make the settlement clearer. The arguments put forward~~th~~ in the late 1970s in favour of the conferred powers model for Scotland may be helpful for the Commission to consider, though ~~it seemed that a~~the conferred powers model did not align well with the principle of the sovereignty of the Westminster Parliament, which could continue to legislate on the issues it had specifically 'conferred'. Many federal states listed the conferred and reserved powers in broad terms, and also stipulated where residual powers would lie. ~~It, though it~~ was also noted, however, that devolution in the UK was fairly clear-cut, with no financial levers available to the UK Government to intervene directly in devolved responsibilities.



2. It was felt that the greatest disadvantage ~~for~~ Wales ~~in~~ moving to the reserved powers model was the task, both political and bureaucratic, of re-drafting the settlement. It was hoped that there would be a clearer statement of principles to underpin what would be reserved and what would be devolved, which would enable 'grey areas' arising in the future to be determined as a reserved or devolved responsibility in line with the original settlement. The incremental devolution of primary law-making powers in the 2006 Act was intended to have continued for some time, which may have reflected a belief that the settlement would grow organically, rather than according to a rationale.
3. Asked whether legal challenges were more likely under the conferred powers model, ~~the witnesses~~~~it was~~ instinctively felt they were, and that the reserved powers model would more clearly demarcate responsibilities. It was noted that challenges to the Welsh settlement arose from the political system rather than business or the public, and Supreme Court referrals could be an efficient way of testing and clarifying the scope of the settlement. Challenges over competence ~~had~~ actually occurred less frequently than academics had predicted at the outset of devolution. The executive functions of Ministers of the Crown were a particular issue for challenge in the current settlement, and this ought to be resolved if a reserved powers model was to be adopted. While it was seen as unlikely that the Assembly would deliberately legislate in an *ultra vires* area, there would never be an entirely challenge-proof system ~~but and the~~ settlement ~~that was~~ less likely to create ~~challenges~~~~them~~ would be preferable. Additionally, there may be some good practice to learn from the Scotland Office on how ~~good~~ administrative cooperation ~~could~~~~sought to~~ avoid legal challenges.
4. Asked whether the burden of proof would shift from demonstrating it was within competence with the conferred powers model to demonstrating it was without in the reserved powers model, ~~witnesses~~~~it was~~ felt that ~~this~~ would in effect ~~be the case~~, though this was more a practical or administrative feature than one ~~that arose directly from the~~~~set out in~~ legislation.
5. Asked whether a reserved powers model would necessarily lead to a separate legal jurisdiction, ~~witnesses~~~~it was~~ felt that the model of devolution would not ~~of itself~~ determine the need for a separate legal jurisdiction. It was recalled that the absence of a distinct Welsh jurisdiction was as an argument against the establishment of the Secretary of State for Wales in the 1960s.
6. Asked whether there were advantages of the Northern Ireland model being adopted for Wales, ~~witnesses~~~~it was~~ noted that an argument could be made for future incremental change to the settlement to be set out clearly and made more straightforward both politically and administratively, though the ~~differences between the~~~~local~~ history ~~of Wales and Northern Ireland~~ made a 'Northern Ireland' model seem less appropriate ~~in Wales than it was in the circumstances of Northern Ireland~~. Additionally, the two categories of reserved powers did not in fact make future amendment to the settlement any more easy than it would be for Scotland, with ~~its~~ one category of reserved power. A reserved powers model for Wales could provide for further incremental changes to the settlement, for



example at the request of the Assembly and ~~subject to following a~~ negative resolution ~~procedure in~~ Parliament.

7. As an additional point, it was suggested by Ms Sherlock that the Secretary of State's intervention powers in s114, which was longer than the equivalent lists for Scotland or Northern Ireland, may be better ~~fram~~termed as a legal question rather than a ~~matter for~~ political decision. This could be achieved by a requirement to refer an Act which may have an adverse effect (eg, on English citizens or national security) to the courts, rather than ~~giving the Secretary of State powers to prevent~~ing Royal Assent. This would allow a more transparent exploration of the issues and better protection for the settlement. ~~It was, however, acknowledged that the Secretary of State's exercise of these powers was potentially judicially reviewable.~~