



Welsh Liberal Democrats
Democratiaid Rhyddfrydol Cymru

Securing Home Rule for Wales:
proposals to strengthen devolution in Wales

The Welsh Liberal Democrat submission to
part two of Commission on Devolution in Wales

February 2013

Introduction

1. Welsh Liberal Democrats have long supported a proper Parliament for Wales. This was our aspiration when our predecessors supported the Cymru Fydd and Home Rule Movements in the nineteenth century and our support then continued through referendum campaigns, government commissions and election campaigns.
2. Welsh Liberal Democrats were instrumental in ensuring that the Silk Commission was established and we have been pleased to work with it to develop a new vision for Welsh devolution. We strongly welcomed the publication of the first report of the Silk Commission, which presented a series of proposals which were broadly similar to what we proposed in our submission. Ensuring the proper financing of the National Assembly for Wales is essential to ensure accountability, fairness and growth.
3. In this submission to the second part of the Commission's work, we offer another series of proposals to bolster the National Assembly, moving closer towards a proper Parliament for Wales.
4. This includes a new model for devolution which will more clearly define what is devolved and what is not. But it also means transferring to the National Assembly those areas of responsibility which are best decided at a Welsh level. For Welsh Liberal Democrats, this includes a substantive transfer over areas such as policing, energy generation and local government.
5. A proper Parliament for Wales will be equipped to deliver substantive changes. It will be funded fairly but will remain accountable for its spending. It will have a wide-range of powers but it will be clear to everyone what those powers are. If the recommendations of the Silk Commission's first report and the proposals set out in this submission are adopted, then the National Assembly will have made the transition to becoming a proper Parliament.
6. Our submission covers all of the areas listed in the Commission's call for evidence. Throughout this submission we will refer to the competence of the National Assembly as "devolved powers" and the competence of the UK Parliament as "reserved powers".

Section 1: A new approach to devolution

- 1.1 Welsh Liberal Democrats support a system of devolution which makes it as clear as possible which areas are devolved to Wales and which are reserved by the UK Parliament. This distinction must be made clear regardless of which powers are devolved and which are reserved.
- 1.2 Recent events have shown that the current model, wherein the powers of the National Assembly are specifically stated, has become increasingly complex to negotiate. Legal disputes about the power of the National Assembly to legislate on the issue of local government by-laws saw the relevant legislation referred to the Supreme Court for determination.
- 1.3 However, a number of other issues have demonstrated the lack of clarity over which areas of policy are devolved and which are reserved. For example, there have been disputes between the Welsh and UK governments over which body is responsible for the Agricultural Wages Board and over the impact of the move from schedule 5 to schedule 7 of the Government of Wales Act on incidental powers relating to pensions. The complexity of the relevant legislation, replete with both powers and carve-outs, makes it extraordinarily difficult to clearly delineate between devolved and reserved powers.
- 1.4 Welsh Liberal Democrats made this point during the scrutiny of the passage of the Government of Wales Bill. We feel that our concerns have now been realised and that evidence suggests a new approach to the legal basis for devolution is required. We would prefer a model which specified the areas over which the Assembly was not able to legislate. We do not believe that a 'tidying up' of the existing legislation would be sufficient.
- 1.5 The Scotland Act 1998 provided a better settlement for Scotland than was proposed for Wales in this Government of Wales Act. It gave the Scottish Parliament primary legislative powers, control over the justice system and set out what the Scottish Parliament couldn't do rather than what it could do.
- 1.6 The Northern Ireland Act 1998 was also a better settlement than envisaged here in some ways. Acts of the Northern Ireland Assembly could be overruled by Parliament on a negative resolution – that is legislation by the Northern Ireland Assembly is laid before parliament

but would automatically become law unless MPs object. The Northern Ireland Act lists both those matters reserved for Parliament (the Scottish model) and those matters devolved to the Assembly (the Welsh model).

- 1.7 We believe that the Scottish model would be more appropriate for Wales. This would enable the National Assembly to have confidence that it was not likely to see a challenge to its legislation as the areas of which it could not legislate would be clearer.
- 1.8 We also believe that this model is the simplest and clearest model available. This will have benefits for both the National Assembly and the UK Parliament. However, it will also provide additional clarity for the public on which government is responsible for delivering, and is accountable for, the services it provides. It will also make the process of devolving powers to the National Assembly easier by allowing the transfers of power through simply deleting areas that were reserved, instead of the current process of adding in a new series of devolved issues and a series of accompanying exceptions.
- 1.9 In addition, we believe that this model would be preferable even if the National Assembly acquired no new significant areas of responsibility. This model will simplify the delineation between reserved powers and devolved powers and would be preferred regardless of which powers are reserved and which are devolved.

Section 2: Furthering the devolution process

- 2.1 Welsh Liberal Democrats have always felt that the number of devolved powers ought to be increased. We have always thought it unreasonable that the Scottish Parliament was established with a much broader scope of powers than the National Assembly for Wales.
- 2.2 In our submission to the Richard Commission, we highlighted those areas where we felt that the National Assembly lacked sufficient powers to deliver real change for the people of Wales. Many of our concerns were related to the lack of law-making powers, which saw the Assembly's scope for action significantly impaired. Consequently, we were pleased when the National Assembly finally had full law-making powers conferred upon it after the referendum result in 2011.
- 2.3 This has underlined our belief that the National Assembly for Wales should be able to legislate fully on those areas over which it has executive control. We would therefore wish that any new settlement ensures that if the Welsh ministers have executive control over an area of policy, then the National Assembly should also be able to legislate fully on that issue.
- 2.4 We also believe that there are a number of reserved powers which would better fit within the scope of the National Assembly for Wales than with the UK parliament. In this section we will outline what those areas are, and why they should be devolved.
- 2.5 **Prisons and policing:** Welsh Liberal Democrats believe that both the police service and rehabilitation work best when they are linked to local communities. That is why we support a stronger local link between communities and their police forces and it is why we support a fairer approach to the prison system which focuses on rehabilitation and restorative justice, rather than simply detention.
- 2.6 In both these cases, we believe that this would be most easily achieved by placing them under the competence of the National Assembly. For example, local government, social justice and community safety are already devolved and we believe that policing, which fits more naturally with these issues than with the remaining reserved powers should be also.

- 2.7 Likewise, the strong links between rehabilitation, education & skills and the health service, particularly in relation to substance misuse and mental health, demonstrate that a coherent approach to prisons policy that encompasses these areas will help to reduce levels of recidivism.
- 2.8 As a consequence, we believe that it makes more sense for prisons and policing issues to be devolved to the National Assembly for Wales than to remain with the UK Parliament. We believe that this should also cover youth justice and crime prevention.
- 2.9 However, we also acknowledge that the preparations for the devolution of policing and prisons will take a significant amount of time to prepare. That is why we would like to see a firm commitment to the devolution of these issues and a comprehensive timetable for preparations. This process would culminate in an Order-in-Council which would remove policing, prisons and justice from the reserved powers list.
- 2.10 In addition we note that the small number of highly-secure prisons that do not exist in Wales, as well as the lack of a women's prison in Wales, present difficulties for the devolution of prisons and would either require a reciprocal agreement with England or capital intensive start-up costs. As a result, we would expect to see a concordat on shared services developed before devolution was completed.
- 2.11 **Energy generation:** We support the devolution of energy planning (including for so-called section 36 consents relating to planning permission for energy generation facilities with an output of greater than 50MW). This would place the National Assembly for Wales and the Welsh government at the heart of energy planning and generation.
- 2.12 This would have the immediate advantage of allowing the Welsh government to develop a more comprehensive approach to energy reform, rather than only being able to influence smaller-scale facilities. This will make it easier for the Welsh government to reduce carbon emissions and develop renewable resources.
- 2.13 Energy is a major employer in Wales and we support the development of the green economy by investing in energy infrastructure and jobs. The full devolution of energy powers would allow economic policy to take advantage of the full range of energy generation techniques.

- 2.14 We would also anticipate that this settlement would include powers over Renewable Obligations Certificates, as the Scottish Government is already able to do. However, we acknowledge that significant parts of the energy market would have to remain at a UK-level in order to ensure competition.
- 2.15 For an energy generation facility which is geographically located in both England and Wales, such as any proposed Severn Barrage, then clearly responsibility would have to rest at a UK level. Likewise, we note that Scotland does not have power over nuclear energy or oil and gas.
- 2.16 **Local government:** Local government is an almost wholly devolved matter and as a result, we find it incongruous that elections to local authorities, and community councils, are not a matter for the National Assembly to legislate on. As a result, we would wish to see the National Assembly for Wales given the power to alter the electoral arrangements for local authorities. This would include both electoral reform and lowering the voting age to 16.
- 2.17 We are aware of the fact that the National Assembly's electorate is based on the electorate used for local government elections and that the likely consequence of this would be that lowering the voting age in the UK could lead to lowering the age for elections to the National Assembly. We would support this.
- 2.18 In addition, the final element of local authority powers which are not devolved to the National Assembly should be made devolved powers. Specifically, licensing regimes which are decided by local authorities, such as alcohol and venue licensing and taxi licensing, should be devolved.
- 2.19 **Broadcasting:** Given the traditional UK-wide remit of broadcasting in the United Kingdom, current financial arrangements for BBC Wales and S4C, and the inability to retain broadcast signals within Wales, we do not support the complete devolution of broadcasting to Wales.
- 2.20 We note that the new governance arrangements for S4C demonstrate that it is possible to increase Welsh government involvement in broadcasting policy without necessitating full devolution of broadcasting. This approach can be applied to other elements of broadcasting policy.

2.21 However, we would prefer to see a significant number of changes to the way that broadcasting is regulated. These include:

- The Welsh government to be responsible for the appointment of Welsh members of the BBC and Ofcom.
- A single ITV licence to be created which covers all of Wales and no other area and the Welsh government to be involved in licensing decisions.
- Further Welsh government involvement in appointments for senior positions within S4C.
- Community Radio licensing to be devolved to Wales, given that these are predominantly local in nature and that the Welsh government has already established a Community Radio Fund.

2.22 **Other areas:** We are also aware of a number of areas in the devolution settlement that require tidying-up, to ensure that the Welsh government has power over the full-range of policy areas within its remit. For example:

- The First Report of the Silk Commission recommended that a number of taxes be devolved to Wales, specifically in relation to business rates. This must be accompanied by legislative powers so that the National Assembly has greater powers to pursue reform. We note that the report considers that Wales could have additional control over the Community Infrastructure Levy and, given that this is closely linked to both planning issues and economic development, we consider that this should be devolved.
- Transport issues remain complex due to the large number of cross-border roads and rail facilities. However, some areas could be reformed to allow greater scope for a Welsh solution to transport issues, specifically relating to speed limits and road safety.
- A St David's Day bank holiday has been routinely endorsed by the National Assembly for Wales. We consider that Wales should be given the power to set its own bank holidays, even if this is initially capped at the current total number of bank holidays.
- We accept that most elements of water policy are already devolved powers, but we believe that the removal of the existing exception relating to licensing should be removed so that the

National Assembly may legislate on all aspects of water supply within Wales.

- Additional powers over family services, including fostering and for vulnerable children, given that most of family support issues are devolved.
- We note that the Commission is specifically forbidden from looking at the composition and structure of the Assembly. However, we would like to see additional measures developed if this is devolved to the National Assembly, such as a legal requirement to retain an independent boundary commission and the need for a super-majority decision, especially if proposals will reduce the proportionality of the Assembly.

2.23 We note that these areas would bring Wales broadly into line with the settlements that have been reached for the Scottish Parliament and the Northern Ireland Assembly. Although we are comfortable with some differences between the settlements based on the needs of the individual nations, we feel that a broadly equitable settlement reflects Wales' position as an equal partner in the UK.

Section 3: Aligning legal and political jurisdictions

- 3.1 The growth in recent years of a separate body of law in Wales has prompted debate on whether or not the application of a single legal jurisdiction of “England and Wales” is still appropriate. This is especially pertinent now that the National Assembly has developed more significant law-making powers and is able to develop a more divergent body of law than previously.
- 3.2 We have no objection in principle to the development a separate legal jurisdiction for Wales. We note that the National Assembly’s cross-party Constitutional and Legal Affairs Committee has said, “*we accept that the case for a separate legal jurisdiction will be strengthened as divergence between laws in Wales and England increases.*”¹
- 3.3 We note that the definition of jurisdiction used by the Committee was that a jurisdiction would comprise the following features:
- A defined territorial extent
 - A body of law
 - A unique system for administering the courts and legal profession
- 3.4 We also note that a significant number of small common law jurisdictions exist across the world. This includes Northern Ireland but also includes New Zealand, Ireland, the provinces of Canada (except Quebec) and the individual states of America (except Louisiana). In addition, a number of much smaller common law jurisdictions exist. The existence of a separate jurisdiction in Northern Ireland shows that such a separation can be made even when both the transfer of and operation of a justice system remain highly controversial.
- 3.5 We also note that both the likelihood of greater divergence between Welsh legislation and English legislation and the possible move to a reserved powers model makes the case for a separate jurisdiction for Wales stronger.
- 3.6 We consider therefore that Wales would be able to maintain its own jurisdiction. We also believe that a series of recent administrative

¹ Constitutional and Legal Affairs Committee *Inquiry into a separate legal jurisdiction* (National Assembly for Wales, December 2012). Conclusion 5.

changes have helped to create a stronger Welsh element within the existing England & Wales jurisdiction. These are welcome steps.

- 3.7 We therefore note that, given our support for the devolution of policing and prisons, this would mean that justice issues, relating to the operation of courts in Wales, would eventually sit more adequately with the National Assembly than with Westminster.
- 3.8 We therefore support, following the correct preparations, the creation of a separate legal jurisdiction for Wales. However, we acknowledge that this will be a significant change in the way that justice is administered and there would need to be substantial preparatory work.
- 3.9 In the meantime, we support the need for a more distinctive Welsh approach to the administration of justice within the existing jurisdiction. These would include having a greater number of cases primarily relating to Wales being heard in Wales and the appointment of a member of the Supreme Court from Wales.
- 3.10 This approach should be accompanied by the establishment of a Royal Commission specifically examining the process by which a separate legal jurisdiction would be created. It is our opinion that the issue involved, particularly relating to legal training and education and to the regulation of the legal profession need to be considered.
- 3.11 We would also support a joint training regime and right of audience in both courts, so long as a specific level of competence can be demonstrated in the laws of both jurisdictions. This should include, at least in the first decade while there was significant overlap in law, a joint appointments body for judges. We would like to see a wide-range of legal service providers in Wales that retain the current expertise.
- 3.12 We also believe that, as part of this process, the devolution of criminal law will should follow in the long-term. Again, we are comfortable with this move, although we acknowledge that this would be a significant constitutional change. We believe that it will bring Wales into line with other devolved government in the UK and in other federal states.
- 3.13 Finally, we acknowledge the substantial costs and challenges to the civil service that would accompany the establishment of a separate legal jurisdiction. This re-enforces our view that substantial preparatory work

would need to be undertaken by a range of participants including the Welsh government, the National Assembly and the legal profession.

Section 4: A stable basis for Welsh devolution

- 4.1 Welsh Liberal Democrats believe that any expansion in the powers of the National Assembly needs to be accompanied by a number of additional reforms in order to ensure that democracy will be strengthened and that the National Assembly has the capacity to use and scrutinise the use of its new powers.
- 4.2 In the first instance, we repeat our calls, made in our submission to part 1 of the Silk Commission, to reform the Barnett formula to base it on need. This was subsequently taken up in the Commission's final report, which recommended that "*the transfer of income tax powers to the Welsh Government should be conditional upon resolving the issue of fair funding in a way that is agreed by both the Welsh and UK Governments.*"²
- 4.3 We do not wish to repeat the arguments in favour of a fairer funding settlement again here. However, we note that if additional areas are devolved to the National Assembly, then the current Barnett formula will transfer the money in the same way as it has done so for the current range of devolved power. In effect, Wales will receive 5.79% of the funding required in England.
- 4.4 However, given Wales' demography, relative levels of deprivation and sparsity of population, the cost of delivering services *on an equal basis with England*, is higher than this raw population-based percentage. We have consistently supported a UK-wide reform of the discredited Barnett formula to ensure that money is fairly distributed amongst the nations and regions.
- 4.5 Given that there is a shortfall of funding for existing services in Wales, and that the devolution of a greater range of areas to the National Assembly, then any addition accrual of powers would be accompanied by a concomitant widening of the funding gap, in absolute if not in percentage terms.
- 4.6 We also acknowledge that that there is currently a period of Barnett funding divergence (i.e. the gap in spending between England and Wales is widening) rather than convergence. This will, however, cease to

² Silk Commission *Empowerment and Responsibility: Financial Powers to Strengthen Wales* (2012, Recommendation 18)

be the case when public expenditure begins to rise, year-on-year, in the future.

- 4.7 Welsh Liberal Democrats strongly support additional responsibility for the National Assembly for Wales. However, the funding issues that would arise from the acquisition of additional devolved powers underline our strong belief that reform of the Barnett formula in order to account for relative need is vital for a fair constitutional settlement for Wales and for the UK. We re-iterate our calls for a fair funding settlement which provides levels of funding to all nations and regions of the UK based on their relative needs.
- 4.8 In addition to this, we believe that the Commission and both the UK and the Welsh governments need to consider the capacity of both the National Assembly and the Welsh government to deliver with new powers. This consideration should cover not just policy development and implementation, but also scrutiny.
- 4.9 We note that the report of the Richard Commission, released in 2004 before the Assembly had acquired either law-making powers and before significant tax-levying powers were being suggested, reported that “the existing size and structure of the Assembly would be placed under considerable strain if the Assembly’s powers were significantly broadened to include new policy fields.”³
- 4.10 We would expect that the Commission would need to examine how to improve the capacity of the Welsh government and the civil service to implement new policy changes and of the National Assembly for Wales to scrutinise legislation and financial policy. This becomes especially important if significant new responsibilities are passed to the National Assembly.

³ Report of the Richard Commission (2004) p. 80

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