Submission to the All Wales Convention by the London branch of Plaid Cymru

Democratic Accountability and Principles

1. The work of the All Wales Convention (AWC) does not take place in a vacuum. Its terms of reference, as laid out in Report of the Establishing Committee of the All Wales Convention, March 2008 reflect the evolution of the constitutional settlement between Wales and the rest of the United Kingdom.

2. Because of the inadequacy of the original devolution settlement for Wales, the Richard Commission was established to analyse how the system might be reformed to make it more accountable and more effective in practice.

3. In the course of its extensive evidence gathering the Richard Commission reviewed the comparable devolution settlements in Scotland and Northern Ireland. It noted that in the government white paper leading up to the passage of the Scotland Act 1998 (the equivalent piece of legislation for Scotland to the Wales Act 1998) the following comment was made by the then Labour Government:

   "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. Consequently the legislation establishing the Scottish Parliament will follow the approach of the Northern Ireland Constitution Act 1973 in listing matters reserved to the UK Parliament rather than specifying devolved matters."

4. For some reason which is not readily apparent the Labour Government did not believe that the same arguments applied to Wales. The structure of the Welsh constitutional settlement under the Wales Act 1998 was very substantially different from that of Scotland. It was the unsatisfactory nature of that settlement that resulted in the establishment of the Richard Commission and ultimately the passage of the Government of Wales Act 2006.

5. The Richard Commission made a number of recommendations for remedying the faults of the original legislation. Part of its recommendations state:

   - "Wales Bill needed to amend Government of Wales Act [the 1998 Act] and confer primary law-making powers on the Assembly;
   - Bill specifies reserved matters (Westminster legislates); everything is devolved to the Assembly unless specifically reserved;
   - reserved matters could include: the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice;

- devolved matters: the fields set out in Schedule 2 of Government of Wales Act i.e. health, education and training, social services, housing, local government, planning, culture, sport and recreation, the Welsh language, ancient monuments and historic buildings, economic development, industry, tourism, transport, highways, agriculture, fisheries, food, forestry, environment, water and flood defence;"[1]

6. The UK Government decided not to implement the recommendations of the Richard Commission in respect of primary legislation, largely due to differences of opinion within the Labour Party. As a result the 2006 Act is a 'fudged' piece of legislation, which is not underpinned by principles of good governance, but rather by the pragmatism of political expediency.

7. The current situation is that Wales now has clearly defined areas of potential legislative competence within the areas laid out in Part 1 of Schedule 5 of the 2006 Act. It will acquire such competence on a case by case basis either through the LCO process or by clauses in Acts of the UK Parliament. If it acquired direct primary law making powers through a referendum it would have the areas of legislative competence laid out in Part 1 of Schedule 7 of the Act. These twenty broad fields are the same in both schedules, but the number of specific exclusions in Schedule 7 demonstrates that Westminster has already agreed a detailed definition of what it is prepared to see devolved to the Assembly. There is therefore no matter of principle at stake over the extent of devolved powers, it is only the means by which they are acquired that is in question.

8. The 2006 Act provides for the Welsh Assembly to acquire primary law making powers in two ways. Prior to a referendum it has to request a legislative competence order (LCO) which, once granted, will enable it to pass Assembly Measures within its scope. These Measures will be primary legislation. The passage of an LCO is a very convoluted process requiring the consent of the Secretary of State for Wales (who may have little or no connection with Wales if recent precedent is anything to go by), the approval of the House of Commons, where by definition the vast majority of MPs will not sit for Welsh constituencies, and the House of Lords which has a minimal Welsh representation. It should be noted that Plaid Cymru, the second largest party in Wales and a member of the Welsh coalition government, appears to have had its nominations to the House of Lords blocked by Downing Street. It is therefore being denied the opportunity to debate in the House of Lords legislation which it may have initiated in the Assembly. This highlights just one aspect of the unsatisfactory nature of the current procedure.

9. In addition since the legislation will be in respect of matters that have been devolved to the Welsh Assembly, none of the members of the UK Parliament who are involved in this complex process will have any democratic accountability to the electorate whether the legislation is passed or not. This includes Welsh MPs since they do not have responsibility in the UK parliament for those matters which have been devolved.

[1] Box 13.5, p.250

10. It is thus self evident that the current procedure for acquiring primary law making powers is almost wholly undemocratic; apart from the Assembly Members themselves the other participants in the process are neither responsible for the matter being legislated on, nor accountable to the Welsh electorate for their decisions concerning those matters.

11. There can be no principled justification of this undemocratic process in a modern society. Indeed the framework is reminiscent of Poyning's Law, passed in 1494 to subject the legislation of the Irish parliament to that of the English parliament, a wholly unsatisfactory precedent.

12. After a successful referendum the Welsh Assembly would acquire direct primary law making powers, enabling it to pass legislation in the same way as in Scotland, Northern Ireland and the UK parliament by a simple majority of the AMs. The Welsh Assembly should adopt this most basic of democratic approaches, accepted not just in all the other parts of the UK but in all developed countries - that the democratically elected representatives of a legislative body should be able to legislate in their own field of responsibility without seeking the approval of persons or bodies who have not been democratically elected to carry out those responsibilities. This democratic deficit is likely to be seen in even sharper clarity should a Conservative government be elected to Westminster. The Act is very one-sided in any event. The drowning of the Tryweryn Valley in Wales to supply water to Liverpool was passed by the UK parliament without the assent of a single Welsh MP. The 2006 Act provocatively provides that where any action taken by the Assembly might have an adverse impact on water supply, quality and resource in England the Secretary of State for Wales can effectively veto such legislation and take over its functions, thereby enshrining in legislation the primacy of English interests over Welsh interests in respect of Welsh water resources. The structure of primary law making in all the fields of competence of the Assembly is affected by the same kind of approach – the primacy of decision makers outside Wales. This is a wholly unacceptable and unstable state of affairs and will certainly lead to increasing resentment when more widely understood.

13. As demonstrated above the current settlement is wholly unjustified by democratic principle or democratic precedent.

Practicalities

14. The Welsh Assembly is already engaged in primary law making, but the current experience has not been a happy one. The ongoing discussions in respect of the housing LCO and the great delays in respect of the Welsh language LCO are testament to the potential for obfuscation and delay. These wrangles have shown themselves to be time-consuming, (with complaints from Welsh MPs of overload, even though they do not have responsibility for these matters in Wales), and must necessarily involve both a great deal of Civil Service time both in London and Wales and a substantial degree of additional cost. As a consequence of the disputes over the housing LCO it appears that the Secretary of State is to be given a veto over certain aspects of future Assembly housing legislation, undermining further the devolution

settlement and making it even less democratic and accountable. Indications are not good for the passage of the language LCO. It is difficult to avoid the conclusion that having given a method of obtaining primary law making powers to Wales the current government wanted to make the process so elaborate as to be almost unworkable in practice. Should a Conservative government be elected in Westminster it seems highly likely that the degree of acrimony would increase even further. There is a simple John Redwood test which the Convention should consult on. If John Redwood were Secretary of State would it be acceptable that he could veto LCO requests from the Assembly? That is the issue at its clearest and starkest.

15. The Richard Commission looked at the cost and practicalities of primary legislation. The Commission anticipated that the Assembly would need an additional 20 AMs to cope with the workload of primary legislation, and made an estimate that the cost of these, plus ancillary work required, would be in the order of £10 million (of which more than half would be the cost of the additional AMs) [2] to pass about six Acts per year. Under the 2006 Act it is the case that no new AMs were created, but this is by no means an insuperable barrier to enabling the Assembly to pass primary legislation after a successful referendum, and to do so in a much more cost effective manner. First of all, as pointed out above, the resources required to obtain primary law making powers under the current system are almost certainly considerably greater, given the number of stages through which the legislation has to go and the number of peoples and institutions that have to be consulted.

16. Secondly, it should be relatively simple to provide the Assembly with the additional resources it needs to draft and effectively scrutinise proposed legislation without additional legislation and without additional AMs.

17. One way of dealing with this is to appoint a panel of experts (probably through the Presiding Officer's Office), for a period of years, who could be called upon from time to time for their particular area of expertise, depending on the subject in question. Such individuals would be available on a part time basis, thereby ensuring that they could be individuals with an up to date and continuing knowledge of their area, and who would not have to choose to give up their work to become a 'civil servant' or equivalent. The responsibility of these people would be to advise the Assembly or, for committee work, perhaps a particular committee, rather than the Welsh government, about the technical aspects of proposed legislation or government policy. Their remit would not, of course, include the desirability of a particular policy since this would be a political matter, but they could certainly be called upon to comment on the likely practicality and practicability of any proposals. There would need to be legal as well as subject experts to review whether the legislation as drafted actually achieved its stated aim.

18. Such a system would then incorporate within the legislative architecture a continuing body of expertise that would enable the Assembly to carry out its job. It would assist individual AMs to access professional help more effectively. By creating a proper structure for scrutiny it would also be less time-consuming, without the need for ad hoc arrangements on a case by case

[2] Table 11.5, p.221

basis. Nor would it depend on the personal interest of e.g. one or two individuals to ensure that policy initiatives and legislation were properly scrutinised. AMs would, of course, be able to take advice from other experts as they do currently, should they not be content with the view/expertise of the relevant members of the panel, but this systemic approach would enable a corpus of expertise to be set up available to all. In scrutinising legislation or indeed carrying out committee work the same expertise is needed by all the politicians, but currently it is only the government which has adequate resources to shape legislation.

19. Such an approach might well be substantially superior to the current process in the UK Parliament. In their document 'Tax matters. Reforming the tax system', the Conservatives' review of the tax system, they quote an (unnamed) tax partner at PwC who has estimated that parliamentary time allocated to the 2003 Finance Bill required *"one line of legislation to be read, digested, debated, and agreed or amended every ten seconds of available parliamentary time"*. Another expert described the whole process as *"almost a complete waste of time"*. It is clear that the Parliamentary timetable is already extremely full, and in practice provides little scope for proper scrutiny of proposed legislation. It too would benefit from the simplified system of Welsh legislation after a successful referendum. The UK Parliament would also benefit from the fact there would be greater similarity between all the devolved settlements, thereby simplifying the system and making it more comprehensible.

20. It has been reported that the AWC has requested examples of the legislation that the Welsh Government might pass. This is to seriously miss the point. The Welsh Assembly already has the right to request primary law making powers; it is only the means by which it acquires them (piecemeal via the UK Parliament or through a referendum) that is in issue. It should only be asked if consultees are asked the same for the UK Parliament. It is comparable to asking whether Westminster should have law making powers based on the contents of the current Queen's Speech. If the AWC were to pursue this route it would open up to question the information that it was making available and requesting during its consultations, its expertise in carrying out its mission, the reliability of any analysis of responses and indeed whether it had kept within its terms of reference. If it wishes to look at the Scottish experience it might take note of the submission of the Royal Town Planning Institute in Scotland to the Calman Commission last year, where it commented:

> "Devolution has served the planning system well; the development of legislation by the Scottish Parliament has enabled the system to be more closely tailored to Scottish circumstances. The closer scrutiny of Scottish Planning Policy and Planning Advice Notes and the arrangements for scrutiny of the National Planning Framework by Scottish Parliamentary Committees are indicative of the higher profile given to planning matters by the Scottish Parliament."

21. The original devolution settlement for Wales has already shown itself unsatisfactory once, hence the Richard Commission and the 2006 Act. This latter is clearly flawed for the reasons outlined above, hence the establishment of the AWC. It is hoped that in carrying out its consultation and improving

understanding of Part 4 of the Act as required by its terms of reference the AWC will highlight the unique disadvantage the Welsh Assembly has compared to Scotland and Northern Ireland in carrying out its responsibilities, and the undemocratic and inefficient nature of the current law making procedure.

General Remarks

22. The first question asked on the website is misleading. It should read 'Should the National Assembly have the same powers to make laws in its areas of responsibility as Scotland and Northern Ireland?' Our response to this question is undoubtedly yes. We also believe that it is the right time to take the next steps towards full law making powers. We would urge you to revise the first question on your website to properly reflect your terms of reference.

23. It is to be regretted that questions such as asking members of the Convention what animal they would like to be, or which people they might to invite to dinner may well undermine the public's perception of the seriousness of the task with which the AWC has been entrusted. This is a matter of the utmost importance to the future governance of Wales, and questions of this nature have absolutely no relevance to the task in hand.

Summary

1. The current legislative procedure under the 2006 Act is not evidence based, but based on narrow party political interests, and flies in the face of the recommendations made by the wide-ranging and well regarded Richard Commission.
2. The current arrangements through which the Assembly acquires primary law making powers are undemocratic and unaccountable, and place the Welsh Assembly at a unique disadvantage in carrying out its responsibilities compared with the Scottish Parliament and the Northern Ireland Assembly.
3. The issue for the AWC to address and to explain to the Welsh public is not whether the Assembly needs more areas of competence, or what laws it might pass, but to explain the methods by which it can acquire the same primary law making powers available to all other UK legislatures – either piecemeal via the UK Parliament as at present or in one block through a referendum – to enable it to carry out the responsibilities it has already been given.
4. It is our view that the Welsh Assembly needs the same primary law making powers as the Scottish Parliament and the Northern Ireland Assembly, and that there should be a referendum on this issue as soon as possible, and in any event before the Assembly elections in 2011.

Plaid Cymru
Cangen Llundain/London Branch
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