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By Fax & Post

Sir Emyr Jones Parry
Chair
All Wales Convention
C/o National Assembly for Wales
Cardiff Bay
Cardiff
CF 99 1 NA

July 31 2009.

Dear Sir Emyr,

I enclose a short submission on behalf of Bangor University's Law School Devolution Studies Research Group.

I hope it will assist the Convention in its deliberations and would welcome a suitable initiative by the Convention to foster deeper co-operation between the Law Schools in Wales on Devolution-related issues.

Section I of our submission details the academic programmes we run in Bangor University law School that are specifically Devolution-focused.

Against that backdrop I trust that you will find Section II of our submission, on the current complexities with the Assembly law making-process, as one that is based on sound authority and sober observation.

Section III is devoted to some issues which arise from the Referendum aspects of things, and again I hope that it will crystallize some complex issues, without being overly detailed, in illustrating the underlying problem of public perception of the current Devolution model's complexities and whether it will inevitably lead directly to a separate jurisdiction emerging.

If we can be of any further assistance, please do not hesitate to get in contact.

Yours sincerely,

Dermot Cahill

Professor Dermot Cahill
Head, Bangor University Law School

Bangor Law School Submission to All Wales Convention

I. Contribution of Bangor University Law School to education of the lawyers of the future in the legal aspects of Devolution

1. In September 2008, Bangor Law School admitted the first students on to the LLM *Master of Laws in Law & Devolved Governments* degree. The scheme provides a unique opportunity for interested graduates or relevant professionals to acquire specialist knowledge and understanding of the mechanics of devolution in Wales and further afield. Such knowledge and skills will be especially valuable to those who work, or wish to work, within the public sector in Wales, or those who work in the private sector who have contact with Public Law or the public sector.

2. The scheme's modules include:

    - Legal Research Methods
    - Law and Devolution in Wales and Europe
    - Public Law in Wales
    - The Legal Regulation of Health and Social Care in England and Wales
    - Bilingualism in Wales and Europe
    - Dissertation on any aspect of the Law of Devolution

3. Bangor Law School also offers an undergraduate *LLB degree in Law & Welsh.* The scheme combines the study of the core law subjects (those necessary to obtain a Qualifying Law Degree) with relevant modules from the University's School of Welsh. These modules include Polisi a Chynllunio Ieithyddol (*Language Planning and Policy*) and Medrau Cyfieithu (*Translation Skills*). On the legal side, the modules also include Cymru'r Gyfraith (*Legal Wales*), a specialist module which provides an opportunity for the students to develop an expertise in the law of Welsh devolution. It should also be noted that Welsh-medium tutorials are offered in all the aforementioned core law modules.

4. The overriding objective of the scheme is to provide its graduates with the skills necessary to function as truly bilingual lawyers in today's post-devolution Wales. Both the public and private legal sectors need lawyers who can not only speak Welsh, but who are equally competent and comfortable working in either language. Demand for such lawyers is increasing continuously, especially perhaps in the Welsh civil service. The Government of Wales Acts' commitment to bilingual legislation has led to an increase in the need for lawyers who can draft/apply the law bilingually and there is no doubt that the demands will only grow as the powers of the National Assembly continue to develop.

5. Seen against the above backdrop of academic activity, we would welcome further co-operation with the other Welsh Law Schools in the area of Devolution Studies, and also see scope for being a useful resource for the WAG and bodies such as the Convention deliberating Devolution-related matters.

6. We now make the following short submission to the Convention on the following matters and hope that this contribution will be of assistance to the Convention in its deliberations.

II. The difficulties with the current legislative procedure

7. Even before the provisions of Part III of the Government of Wales Act 2006 came into force in May 2007, various knowledgeable commentators on the Welsh Devolution process wrote of the very significant obstacles that would face the so-called LCO process. Alan Trench, for instance, wrote that the Order in Council approach that had been adopted, was a political compromise that would lead to 'an awkward confusion of accountability and of political and constitutional matters which may well prove unworkable in the longer term'.[1]

8. His reasoning in doing so was that the *pre-scrutiny* and *scrutiny* stages of the LCO process would allow Members of Parliament, and Welsh back-benchers (specifically), to have significant influence or control over the proposals made by the Assembly (or the Assembly Government). He noted that the Welsh Affairs Committee ('WAC') at Westminster would play a very active role in scrutinising the content of such proposed Orders in Council, and that there was a danger that WAC would go one step further by attempting to scrutinise the way in which the competencies in question would be used by the Assembly *after* they were conferred upon it. He stated that if this were to prove to be the case, 'it amounts to holding the Assembly directly accountable to Parliament rather than its own electorate'. Needless to say, this would add further complexity to an already convoluted situation.

9. *More than three years on, there is no doubt that Trench's concerns have been proven to be extremely well founded.* The Welsh Assembly Government's policy officials, solicitors and draftsmen have faced continuous difficulties in having their LCO proposals approved, or even laid before Parliament in the first place (as is best shown by the *Affordable Housing* and *Welsh Language* LCOs). Whilst it is clear that the Order in Council procedure laid out by section 95 of GoWAct 2006 is relatively complex, especially for ordinary members of the public perhaps, the situation has been far worsened by WAC's intervention. *Their role should be limited to questions of whether competencies should be conferred on the Assembly in the first place, not to consider the uses that could or should be made of those competencies, once they have been conferred.* Such a role should be left exclusively to the directly elected representatives of the Welsh electorate in the National Assembly.

10. The transition from the pre to post GoWAct 2006 legislative powers was never going to be entirely smooth. Due to the need for increased resources, such a sudden increase in (theoretical) legislative power will always need a bedding down period. However, quite understandably perhaps, the Welsh general public

[1] Alan Trench, 'The Government of Wales Act 2006: the next steps on devolution for Wales' (2006) *Public Law* 687.

has failed to comprehend exactly why this has taken such a long period of time. Not only is the process laid out by GoWA 2006 cumbersome in the first place (through no fault of the Assembly or its Government), but the process has become even lengthier through the actions of WAC and various Whitehall Government Departments actions (e.g., the delays in the pre-legislative stages of the *Welsh Language LCO* for instance). Where the legislative process (or pre-legislative process as the case may be) is quite unintelligible to the average person in the first place, *it is perhaps quite natural that, in their eyes at least, the blame should lie with the institutions that wish to exercise power - the Assembly and WAG*. In most cases, this is probably unjustified when one examines the evidence and seeks to find the point at which the process grinds to a halt.

11. It is also important to note that, by today, this issue of the break-down of the Assembly's legislative procedure is of far greater importance than merely a topic for academic discussion alone. Since its inception a decade ago, the Assembly has been entrusted with a growing number of functions that affect all those who live or work within Wales. It has also, since 2007, been given far greater theoretical legislative power over the 20 fields listed in Schedule 5 to the 2006 Act. These powers, if used, can have a significant impact on private citizens, and can lead to real distinctions between the law of Wales and the law of England. However, the cumbersome nature of the process means that in many fields, those who live in Wales are detrimentally affected. Indeed, in some fields where England-only provisions have been enacted by Parliament, *such is the delay in the enactment of corresponding Welsh legislation that the citizen living in Wales is worse off than a corresponding citizen living in England*. There are particular problems in the field of Health and Social Care, for instance, where the implementation of Welsh policy appears to be lagging behind the implementation of corresponding policy in England.

12. Where the Welsh Assembly Government wishes to propose a Measure in a particular field, it can choose to request the competence to do so by means of LCO under section 95 of GoWA 2006, as has been discussed above. However, WAG can also choose to approach the central government to ask for competencies to be conferred through an Act of Parliament. Obviously, WAG can only do so, if and when, central government intends introducing a parliamentary measure on the same general topic. In theory, this is one way of circumventing the problems that have arisen with the LCO procedure. Indeed, by today, *there is evidence to suggest that certain departments within WAG prefer using the Act of Parliament route of competence conferral*. This is for the simple reason that this method of inserting matters into the fields of Schedule 5 can be far quicker. There is also evidence that some departments within WAG regret having opted for the LCO route, because it has become very likely that the competencies they seek would have been conferred far quicker if they had waited for a relevant public bill to be introduced in Parliament.

13. <u>This is worrying in many respects</u>. First of all, the notion that competencies can be conferred more quickly through Acts of Parliament than through LCOs is disturbing because it implies that, for whatever reason, the relevant 'Welsh' clauses receive far less attention when contained in an Act of Parliament. At best, this is because more Parliamentary time is devoted to English issues. At worst, it

is because central government departments and WAC are overly concerned about the accumulation of Measure-making powers within the Assembly.

14. Second, it is worrying because if WAG departments become overly reliant upon the Parliamentary route of conferring competencies, LCOs will become under-used. This will prove to be a particular problem where no suitable Bills in Parliament can be found "to house" the 'Welsh' provisions.

15. Third, there is a significant symbolic implication (if the only plausible way of introducing matters to the fields of Schedule 5 is through Acts of Parliament). In one way, it worsens the 'cap in hand' argument that has been raised with regard to the LCOs: if the LCOs fail to work, the only way in which the cap will be filled is if central government introduces a Bill on the field in question.

16. Fourth, and most importantly perhaps, is the notion that matters will only be able to be introduced through inter-governmental negotiations behind closed doors. Whilst this is obviously the case to some extent during the pre-legislative scrutiny of LCOs, the situation would be worsened considerably if *all* negotiations were to happen in such a manner. If this were to become the preferred manner of requesting competencies, the proposed matters would not see the light of day until the Bill would be introduced to Parliament. Despite its many failings, one of the real advantages of the LCO procedures is that the public scrutiny stage encourages openness and accountability and brings the legislative process closer to the Welsh citizenry (albeit after the pre-legislative scrutiny stage is complete).

III. The legal implications of moving to Part IV

15. If a Referendum is passed, then Part IV of the GoWA will take effect, and the Assembly will have the power to pass Acts in relation to the subjects set out in Schedule 7 of the Act, which broadly correspond to the fields set out in Schedule 5. To all intents and purposes, Assembly Acts are identical to Assembly Measures in terms of effect, the key difference being that there will be no need to acquire legislative competence in relation to the subjects, as is currently the case with regard to the fields in Schedule 5.

16. An obvious point that can be deduced from this is that, potentially, the Assembly's law making powers under Part III could eventually be equal to, or indeed greater than, the 'default' Schedule 7 position without a Referendum being passed. *This serves to undermine arguments that moving to Act making powers would have immediate implications in terms of a Welsh jurisdiction, or that the Assembly would be overwhelmed by such a move.*

17. *As has been demonstrated above, the current provisions of the GoWA are proving cumbersome to the point that they are almost unworkable. This has led to disenchantment, and has undermined, at least insofar as public perceptions are concerned, the integrity of the Assembly, and the law making process in Wales.*

18. As also stated above, moving to Act-making powers does not in itself give rise to questions relating to a Welsh jurisdiction. However, irrespective of whether or not a Referendum is held, there are likely to be increasing divergences between

the law of Wales and the law of England in the future. In the light of these divergences, and in particular if matters such as the criminal law are devolved, there will eventually come a point where the question will have to be posed of whether an unified jurisdiction remains sustainable. A separate jurisdiction would have enormous implications, not least for the legal profession and the provision of legal education. For these reasons, even if the legislative competence of the Assembly is expanded considerably, it is unlikely that the issue will be addressed in the near future. As a result, this argument should not play a central role in the debate concerning the desirability or otherwise of a referendum.

19. *It should be emphasised that a Welsh jurisdiction is not an inevitable by-product of a Referendum and a move to Part IV powers.* A jurisdiction cannot simply emerge, and the matter is one that would have to be addressed by Parliament. This means that it is an entirely separate debate.

20. It is inevitable in any discussion of devolution that analogies will be drawn between Wales and Scotland. Some have suggested that one reason why the Welsh and the Scottish law making models are so different is because Scotland has its own jurisdiction. To argue on this basis that to provide the Assembly with Act making powers similar to the Scottish Parliament would necessitate a separate Welsh jurisdiction is a *non sequitur*. Scotland had its own jurisdiction far before the enactment of the Scotland Act 1998. This suggests that one factor does not necessitate the other.

We hope that the Convention finds this submission useful, and The Law School at Bangor University is available to make further submissions as may be required by the work of the Convention.

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July 31, 2009.