

WALES'S CONSTITUTION: WHAT NEXT AFTER A REFERENDUM?

The One Wales coalition agreement commits the Welsh Assembly Government to calling a referendum on 'primary legislative powers' for the National Assembly by 2011 at the latest. That will extend the powers of the National Assembly as far as the Government of Wales Act 2006 permits – but will that be the last word?

The problem with the 2006 Act is that it leaves a good deal of work undone. It did not implement many of the recommendations of the Richard Commission (*see Tomorrow's Wales Devolution Briefing Paper 1*) – but the Richard recommendations were designed as a package, to ensure stable government for Wales for a long time to come. While advocates of the 2006 Act have claimed it will settle Wales's constitution for a generation, in fact it leaves several major problems unresolved.

What changes will be needed, and why?

1) The number of Assembly Members

The 2006 Act leaves the number of Assembly Members at 60. The Richard Commission called for there to be 80, to ensure proper scrutiny of legislation and Ministers.

Having only 60 AMs means that only about 45 do not have front-bench responsibilities as ministers or opposition party leaders. That is a very small number to scrutinise legislation properly, or to ensure that the growing number of Assembly committees have enough members to do their work properly. Several committees at Westminster have already expressed their concern about the implications of such a small number of members for a proper legislature's ability to carry out its duties effectively.

2) The role of the Secretary of State

The Secretary of State has extensive powers under the 2006 Act. These include deciding whether to submit to the UK Parliament Assembly requests for legislative competence orders (LCOs). He or she also decides whether to submit a request for a referendum on primary legislative powers to Parliament. These powers will no longer be relevant if a referendum is passed – but the Secretary of State will keep the right to attend and participate in Assembly plenary sessions (but not vote), and to receive all Assembly papers and documents. The Secretary of State for Scotland has no such powers regarding the Scottish Parliament. There is no justification or need for these powers once the devolution of legislative powers has been achieved, and they could be used by a hostile UK Government to interfere in devolved affairs. To respect the autonomy that primary legislative powers implies, the Secretary of State should give up those rights legally.

3) The electoral system

The Richard report acknowledged that there were problems with having two classes of Assembly Member – some elected directly from a constituency, others from the regional lists. To get around this, it recommended using the single transferable vote instead. The 2006 Act aimed to stop list and constituency members competing with each other by allowing people to stand only under one heading, not both. This does not however solve the problem, and in some ways makes it worse.

Various electoral systems would deliver the key requirement – that they provide for a representative membership of the National Assembly, and that they put all AMs on the same footing. The Richard Commission's case for STV remains a strong one, and a review of the electoral system at some point seems inevitable.

4) Finance

The National Assembly's powers over finance remain limited. It has no responsibility for raising its own revenue, or the accountability to the electorate that raising its own revenue would bring. And it is questionable whether the existing block and formula arrangements that determine the level of funding passed to Wales from Westminster properly recognise Wales's level of spending need. The Welsh Assembly Government is to set up a commission to examine the Assembly's finances and financial powers. Parallel developments are underway in Scotland too. Sorting out territorial finance will be one of the big issues for the UK over the next decade.

5) A separate legal jurisdiction for Wales

There are serious technical problems with the existing legal arrangements – as Wales uses its powers to do different things compared to England and a body of distinctive Welsh law builds up, it is becoming increasingly difficult to make the single 'England and Wales' legal jurisdiction work. Creating a separate legal jurisdiction for Wales would resolve these problems. Indeed, it was done for Northern Ireland many years ago.

A separate legal jurisdiction would also mean a separate court system, which is already starting to develop for Wales as a consequence of the devolution process.

The existence of a separate court system or legal jurisdiction does not necessarily mean that this would have to be devolved as well; Westminster could remain in control, but the system in Wales would be separate from that in England in recognition of the differences that already exist between the two.

6) The overall model of legislative powers

The model used to define the legislative powers of the National Assembly limits these to areas where the Assembly is expressly allowed to legislate. This is unlike Scotland, where the Parliament has a general power to legislate subject only to reservations specifically set out in the Scotland Act 1998. Instead, the model applied to Wales permits the Assembly only to legislate for matters specifically devolved to it. This limits the scope of what the Assembly may do, and constrains its powers in a way that the Scottish Parliament or Northern Ireland Assembly are not. If there is doubt about where specific powers lie, the presumption is in favour of the devolved institution in Scotland or Northern Ireland, but against it in Wales.

It would be very hard to adopt a different approach while Wales remains part of a single legal jurisdiction, but much easier to do so if a separate Welsh jurisdiction has been established. Moving to putting Wales's law-making powers on the same footing as those of Scotland and Northern Ireland would be a logical step in 'balancing' the UK's constitution post-devolution.

A further problem is that the piecemeal acquisition of powers by the National Assembly while Part 3 of the 2006 Act is in effect may mean that it ends up, in some areas, with more extensive powers than the 'primary legislative powers' set out in Schedule 7 to be conferred after a referendum. There need to be safeguards to ensure that the Assembly does not in fact lose legislative powers when Part 4 comes into effect.