Mr Paul Silk  
Chair of the Commission on Devolution  
1 Caspian Point  
Caspian Way  
CARDIFF  
CF10 4DQ

Your ref:  
Our ref: PO355/RB/AD

28 February 2013

Dear Paul

Evidence to the Commission on Devolution in Wales

I welcome the opportunity to contribute to the work of the Commission on Devolution in Wales. In my roles as Presiding Officer, Chair of the Assembly Commission and Chair of the Assembly’s Business Committee, my overarching aims are to make the Assembly a strong, accessible and forward-looking democratic institution and a legislature that delivers effectively for the people of Wales. Your Commission’s work is vital to the longer term delivery of those goals and I trust that this submission will assist you in your work. If you would like further input from the Assembly at a later stage, we would be very happy to give oral evidence.

The first Assembly in 1999 was a single corporate body, unique amongst the legislatures of the UK, with no primary law-making power. The Government of Wales Act 2006 separated the legislature and executive and gave the Assembly primary law-making responsibilities - at first exercised through the system of Legislative Competence Orders and Assembly Measures and now, since the referendum of 2010, by way of Acts of the Assembly. The pace of this constitutional change has been dramatic, and it is perhaps not surprising that the institution today is very different to the one envisaged by Parliament as recently as 2006.
The constitutional settlement set out in the 2006 Act reflects many of the debates and issues of the day, and many of its provisions are designed for the legislative process of the (pre-referendum) Assembly that ran from 2007 to 2011. For instance, the requirement that the Secretary of State comes before the Assembly in person to present the UK Government’s legislative programme may have been appropriate when the UK Parliament played a significant role in the Assembly’s ability to make laws – requiring its consent to the Assembly’s acquisition of legislative competence on a case-by-case basis – but, to me, it is anomalous today.

I believe that the time is right to review key elements of the Act to reflect an Assembly which is now a mature parliamentary body, accountable to, and supported by, the people of Wales. I include some specific suggestions in this regard in this submission. In more general terms, I would suggest that the Commission’s thinking on the modification of the settlement should be guided by a number of principles:

- that the institution should have sufficient capacity to fulfil its functions;
- that the boundaries of the Assembly’s powers should be clear and intelligible; and
- that an institution with overwhelming public support and legitimacy should have the maximum possible autonomy to act on matters affecting Wales.

I shall address each of these in turn.

**The capacity of the Assembly**

Given the weight of responsibility resting with the institution, and the unavoidable scale of the workload faced by Members, I am in no doubt that the number of Assembly Members should be increased from 60 to 80. Even then, we would still remain the smallest national legislature in the United Kingdom.

Nearly a decade ago, the Richard Commission on the Powers and Electoral Arrangements of the National Assembly made a similar recommendation. In a unicameral Assembly with primary legislative powers, Richard felt that such an increase was essential if the Assembly was to discharge its roles of holding the Government to account, representing the people of Wales and making laws for Wales effectively. The recommendations made by Richard in
relation to the Assembly’s powers have, of course, been largely implemented whereas those relating to its size have not. I believe that the expectations evident on Members today, let alone any extension of the institution’s powers and responsibilities, makes the case for more Members more compelling than ever.

Since the election of 2011, the Assembly has been able to exercise the full extent of the legislative powers catered for in the 2006 Act and so has legislative autonomy in 20 broad areas of public policy. The impact on Members of that legislative authority has been significant, not only in terms of workload, but also in the range and specialism of the skills and support they require. The responsibility for holding the Welsh Government to account, and for the detailed examination and amendment of a much wider and more significant programme of legislation than ever before, falls solely on the individual Members of the Assembly and, in particular, those who sit on the Assembly’s committees.

The work of the committees, most of which meet each week, is currently undertaken by 44 Members. Six of those Members sit on three committees, a further 24 on two, and the remainder on one. In this regard the pressure on Members of the Assembly is very different to those of its larger counterparts elsewhere in the UK. Necessarily, most Assembly committees have very broad remits, certainly stretching beyond the portfolio of a single Minister, and are responsible for the scrutiny of legislation, policy and finance within those remits.

In addition to these high committee demands, the majority of Members will be active every week in plenary – again, in contrast to larger parliaments where the opportunity to question or participate in statements or debate will come along less frequently.

The multiple roles, as office holders and party spokespeople, which many Members must inevitably assume within a small legislature, add to the pressure on Member capacity and bring distinct institutional challenges.

As a result, most Assembly Members find themselves in a weekly cycle of committee work, demanding a high level of specialised policy, legislative, financial and procedural expertise, timetabled around two plenary sessions where a high level of attendance and participation is the norm.

While the Assembly Commission and the independent Remuneration Board seek to provide Members with support to enable them to be as effective as
possible in their role, there is a limit to what we can expect of such a small institution.

Clarity of the Assembly's legislative competence

Part of your remit now is to review the powers of the Assembly in light of experience. I should like to share with you my experience as Presiding Officer in the Fourth Assembly, to illustrate the unclear and uncertain nature of the boundaries of the Assembly's legislative competence, as set out in section 108 of, and Schedule 7 to, the Government of Wales Act 2005.

As Chair of the Assembly Commission, I am always mindful of our strategic goals for the Fourth Assembly, one of which is to engage with the people of Wales by encouraging interest in the work of the Assembly and facilitating involvement with our legislative work. What is evident from our experience in this field is how challenging it is to explain the nature of the legislative competence of the Assembly in simple terms, particularly given the extraordinary pace of change through three different systems of governance in fourteen years. This is a barrier to public understanding that is not helpful. A clear constitutional settlement would, I believe, ease our task and strengthen people's engagement in the democratic process.

And yet this is far from the only or most significant implication of the uncertainty around the Assembly's legislative competence. The full extent of the weakness of the current settlement can be seen through our experience of operating as a legislature since 2011.

Since their establishment in 1999, there has been no referral of a Scottish or Northern Irish Bill to the Supreme Court by a UK Law Officer.

In the Fourth Assembly, two Bills have received Royal Assent to date. One of those Bills – now the Local Government Byelaws (Wales) Act 2012 - was referred to the Supreme Court by the Attorney General, on the grounds that two of its provisions were outside the Assembly's competence.

In the case of the other Bill – now the National Assembly for Wales (Official Languages) Act 2012 - the Secretary of State for Wales asked the Attorney General to consider making a referral to the Supreme Court. In that case, the legislative competence point at issue went to the very heart of the Bill. Ultimately no reference was made, but, clearly, uncertainty about competence for the Bill existed at a very high level.
At present, the Assembly is considering a Private Members’ Bill, the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2012*. As Presiding Officer, I am required to give my opinion before each Bill is introduced whether or not it would be within the legislative competence of the Assembly. In considering the legislative competence for the Bill, my view was that a number of issues were finely-balanced and I have brought this fact to the attention of the Chairs of the two committees scrutinising the Bill.

In assessing whether a Bill is within our legislative competence, I am often required to check that the necessary Secretary of State consent to one or more provisions is in place (usually these relate to minor issues rather than significant matters of policy). This is a frequent occurrence because the devolution of executive powers in Wales and the devolution of legislative competence are not fully aligned. From a purely practical point of view, if the consents are not in place at the time of introduction, but are subsequently received, amendments will have to be tabled to introduce the relevant provisions. This is not an efficient way to legislate. More importantly, this adds a layer of complexity to the devolution settlement and I would question the appropriateness of numerous piecemeal functions relating to Wales remaining in the hands of the UK Government, some 13 years after devolution.

A further illustration of the difficulty of defining the Assembly's legislative competence can be seen in the operation of the legislative consent motion (LCM) procedure. In the case of the provisions of the *Enterprise and Regulatory Reform Bill 2012-13*, relating to the Agricultural Wages Board, the Welsh Government and UK Government disagreed over the fundamental question of whether an LCM was required at all, i.e. whether the matter fell within the legislative competence of the Assembly. As a result, the Assembly has now passed a resolution indicating that it does not give its consent to the UK Parliament legislating in this area (29 January 2013). My understanding of the position of the UK Government is that it does not believe it necessary to obtain the Assembly's consent.

In assessing whether a Bill is within the Assembly’s legislative competence, we apply 9 tests under section 108 of, and Schedule 7 to, the 2006 Act. In Scotland, 7 tests are applied. The fact that there are two fewer tests for legislative competence is significant in itself. But a mere numerical comparison would disguise a number of aspects in which the Scottish settlement is significantly clearer, as well as wider, than the Welsh one. I include detail of why this is so in Annexe 1 to this submission.
The Supreme Court has said that it will seek to interpret the Scottish devolution settlement in such a way as to facilitate that settlement being “coherent, stable and workable” - because it sees that as being Parliament’s intention. There is no reason in the case-law to date to suggest that the courts will take a different approach to the Welsh settlement. That is positive but we should surely aspire to a settlement that does not rely frequently on the courts for interpretation. Legal certainty and predictability are generally recognised to be desirable characteristics of a democratic system and the delay and uncertainty inherent in legal challenges to legislation are bad for Wales as a maturing democracy.

I accept that no devolution settlement is ever crystal clear and 100% legally certain. But, currently the Welsh Settlement is particularly complex, and therefore especially prone to uncertainty as I have illustrated. The Assembly’s legislative competence should be defined in such a way as to give us greater legal certainty, allowing the Assembly to legislate effectively and with confidence in the broad policy fields devolved to it.

Institutional maturity

In considering how the devolution settlement could be improved, I believe that the Commission should take account of the Assembly’s growing institutional maturity. There should be a fundamental recognition that the Assembly, not the UK Parliament, is best placed to determine certain matters for itself and should not be subject to unnecessary procedural or statutory restriction. Symbolism is important too, and I would argue that there should be changes to statutory terminology to reflect our status as a fully-fledged parliamentary institution.

I would ask you to consider some specific changes to the Government of Wales Act 2006 in this regard:

- I believe that the institution should be described as a Parliament rather than an Assembly; the Welsh Assembly Government as the Welsh Government; and, in line with parliaments throughout the Commonwealth, the office of Presiding Officer as Speaker (retaining the Welsh title, Llywydd);

- Many of the functions of the Secretary of State for Wales in relation to the Assembly should be removed, in particular the entitlement of the

1 Imperial Tobacco v Lord Advocate, [2012] UKSC 61, per Lord Hope, at paragraph 14
Secretary of State to participate in proceedings of the Assembly and the duty to participate in Assembly proceedings as part of the consultation on the UK Government's legislative programme;

- The composition of committees is prescribed in the Act in great detail. These are matters which should be decided by the Assembly itself through its Standing Orders, as is the approach in Scotland;

- The Act provides for the appointment of four Assembly Members as Commissioners, other than the Presiding Officer. Again, the Assembly should be free to determine arrangements itself through its Standing Orders;

- The Act makes explicit provision governing the behaviour of regional and constituency Members. These are matters for the Assembly to determine itself;

- The Secretary of State currently has the power to vary the day of an ordinary general election by a month and the power to propose a day for the holding of a poll at an extraordinary general election if the Assembly resolves that it should be dissolved. This is a power which is more appropriately held by the Presiding Officer, as is the case for the Scottish Parliament;

- The Act requires the Assembly to meet and elect a Presiding Officer and Deputy within 7 days of a general election. The electoral arithmetic of the Assembly means that this short period may well create a practical difficulty during a period of intense political negotiation. I would like to see the maximum period before the Assembly must first meet, and elect a Presiding Officer, extended to 14 days;

- The Assembly Commission, as the representative of the Assembly, should have standing in any Supreme Court proceedings, concerning the legislative competence of the Assembly. You will be aware that the present position, as interpreted by the Supreme Court in the case concerning the Local Government Byelaws (Wales) Bill, is that the Government of Wales Act 2006 does not provide for the Commission to have standing in legal proceedings brought under section 112 or Schedule 9 of the Act. Instead, the role of defending the Assembly's competence is left to the Counsel General. The Commission can apply to intervene in such cases but has no guarantee that it will be allowed
to do so by the court. This is wholly unsatisfactory in the case of non-Government Bills (i.e. Bills put forward by a private Member, a Committee or the Commission itself), where the Counsel General may have no interest in defending the legislation. Similarly, one could conceive of situations relating to Government Bills, should the challenge arise out of an amendment carried against the wishes of the Government, which would mean that the Counsel General did not have a strong incentive to defend against it;

- Finally, Statutory Instruments which are made jointly or compositely by Ministers of the Crown and Welsh Ministers should be laid before the Assembly in English and Welsh. We expect all legislation to be laid before the Assembly in both languages, in order to respect the principle that the English and Welsh languages should be treated on a basis of equality, a matter on which the Constitutional and Legislative Affairs Committee reports to the Assembly each time a Joint SI is scrutinised.

In relation to what further areas of responsibility should be devolved in relation to Wales, you may find it helpful to consider the relevant conclusions and recommendations recently made by Assembly committees, such as:

- Constitutional and Legislative Affairs Committee, *Inquiry into a separate jurisdiction*, December 2012;


There are other examples from the committees of the Third Assembly, for instance in relation to youth justice, railway infrastructure and planning. We would be happy to provide detailed references if that would be helpful.

**Legislature to legislature relations**

You asked for my views in particular on legislature to legislature relations, referring to the issues arising from the 2009 Commission on Scottish Devolution.
In the Third Assembly, dialogue between the UK Parliament, in particular the Welsh Affairs Committee, and the Assembly’s legislative committees developed constructively and aided our respective scrutiny of proposed Legislative Competence Orders. Now, in the Fourth Assembly, a key area is the process for consenting to provisions in UK Bills which fall within the legislative competence of the Assembly – legislative consent motions (LCMs). However, the lack of formal procedures through which to channel such dialogue means that we do not enjoy such effective communication with Members of both Houses of Parliament.

A total of 38 LCMs have been considered in relation to 28 UK Bills in the Assembly since 2007 (14 LCMs in the third Assembly and 24 in the fourth Assembly to date). The Assembly has refused to give its consent on two occasions: in relation to provisions in the Police Reform and Social Responsibility Act 2011 which related to Police and Crime Panels (8 February 2011); and as mentioned earlier, provisions in the Enterprise and Regulatory Reform Bill 2012-13 relating to the abolition of the Agricultural Wages Board (29 January 2013).

I would welcome a formalisation of what is currently an inter-governmental convention relating to LCMs. Although it is the means by which one legislature (the National Assembly) gives another (the UK Parliament) consent to legislate in areas where it has competence, we rely on the Welsh Government to negotiate with the UK Government what provisions should or should not find their way into UK Bills, to lay the Motion and related Memorandum on the UK Bill, and to communicate the consent (or lack of) granted to the UK Government.

Whilst our main focus should be on holding the Welsh Government to account on its actions in relation to LCMs, this should not preclude us from seeking better inter-parliamentary communication. For example, the effectiveness of our scrutiny would be strengthened through a formal inter-parliamentary agreement on the legislative consent convention and the EU Protocol on the application of the principles of subsidiarity and proportionality.

I understand that the Welsh Affairs Committee considered this matter in its Eleventh Report of Session 2009-10 (HC246), Wales and Whitehall, which recommended that "the National Assembly for Wales should have the opportunity to make observations on any proposal to legislate at Westminster in relation to devolved matters. [...] We recommend that the
Standing Orders of the House provide for the Speaker to lay before it any formal communication conveyed to him or her from the National Assembly for Wales."

A further, specific issue relating to LCMs arises because the circumstances in which the Assembly is asked to give its consent are significantly narrower at the moment than those which relate to the corresponding convention in Scotland (the Sewell Convention). In Wales, the LCM process currently covers only provisions in Westminster Bills that are within the legislative competence of the Assembly or which would have negative impact on its competence. There is no provision for gaining the Assembly’s consent to provisions in UK Parliament Bills that:

- have an impact on the Assembly’s competence, other than where it is a "negative impact";
- amend the functions of Welsh Ministers outside the Assembly’s legislative competence.

Neither is there provision in our Standing Orders for the Assembly to consent to subordinate legislation made by UK Ministers within the Assembly’s competence.

These matters were raised by the Assembly’s Constitutional and Legislative Affairs Committee in its Report on its *Inquiry into powers granted to Welsh Ministers in UK laws* and the Assembly’s Business Committee, which I chair, is reviewing our Standing Orders to address these weaknesses. We are, though, constrained by the need for any procedural change to be matched by alteration to the Memorandum of Understanding between the UK Government and the three devolved administrations (*Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales*).

With regard to any barriers to effective working between the committees of the two Houses of the UK Parliament and those of the Assembly, our Standing Orders provide for concurrent meetings to take place with "any committee or joint committee of other legislatures" (SO 17.54). We would welcome any move by the UK Parliament to similar effect. It would then be a matter for individual committees to consider whether to make use of this opportunity.

---

2 Constitutional and Legislative Affairs Committee, *Inquiry into powers granted to Welsh Ministers in UK laws*, March 2012
You asked also about facilitating the ability of UK and devolved parliamentarians to visit and interact with counterparts in other legislatures. The Presiding Officers and Speaker meet on a regular basis and I would certainly support the creation of a wider, structured forum for dialogue between the legislatures.

It seems to me that we could learn from the approach we take within the UK and devolved legislatures to engaging with the European Parliament and Institutions when it comes to inter-institutional dialogue. Legislature to legislature communication is a key feature of our approach to engaging in the EU decision making process on legislative proposals which complements our engagement in the EU early warning mechanism on subsidiarity. COSAC, the Conference for Parliamentary Committees for Union Affairs of Parliaments of the European Union, appears to be a good model for intra-parliamentary dialogue between Member State parliaments although the Assembly, as a devolved legislature does not enjoy membership of it. We are however, a member of CALRE, the Conference of European Regional Legislative Assemblies, which facilitates intra-parliamentary dialogue between European devolved assemblies and the EU institutions. It is counter-intuitive that we have to rely on less structured channels when it comes to our dialogue with the UK Parliament and other devolved administrations.

**Concluding Remarks**

I trust that you will find this evidence a useful contribution to your work. If you would like any further information on matters covered in this submission, or any other issues of interest to the Commission, we would be pleased to assist.

I look forward to considering your recommendations in due course. You have a vitally important task ahead of you to shape the future governance of Wales. It is a unique opportunity, which may not arise again in our generation, to make recommendations that will lead to a strong and clear constitutional settlement for the Assembly, and for the people of Wales we are here to serve.

*Rosemary Butler AM, Presiding Officer*
Tests for legislative competence

In the Welsh settlement, 9 tests are applied to check whether a provision of a Bill is within legislative competence under s.108 of, and Schedule 7 to, the Government of Wales Act 2006. These tests are (slightly simplified):

1) Subject-matter: the provision must relate to a subject in Schedule 7, and must not fall within an exception set out there (unless it is “saved” by s. 108(5) of the Government of Wales Act 2006);

2) Territory (a): the provision must not apply otherwise than in relation to Wales (with the same caveat);

3) Territory (b): the provision must not extend otherwise than to England and Wales;

4) Protected enactments: the provision must not repeal or modify the protected enactments set out in Schedule 7 to the Government of Wales Act 2006 (with some caveats);

5) Human Rights: the provision must not be incompatible with the Convention rights as set out in the Human Rights Act 1998;

6) EU law: the provision must not be incompatible with EU law;

7) Minister of the Crown functions: the provision must not have a prohibited effect on Minister of the Crown functions (with some caveats);

8) Welsh Consolidated Fund: the provision must not have a prohibited effect on the Welsh Consolidated Fund (with some caveats);

9) Comptroller and Auditor General: the provision must not modify functions of the C&AG (with some caveats).

Section 29 of the Scotland Act 1998 sets out the 7 tests to be applied in Scotland:

1) Subject-matter: the provision must not relate to reserved matters (reserved matters are set out in Schedule 5 to the Scotland Act);

2) Territory: the provision must not form part of the law of a country or territory other than Scotland;

3) Protected enactments and rules of Scots law: the provision must not breach any of the restrictions in Schedule 4 to the Act (which protects certain enactments and rules of law, such as certain provisions of the Act of Union of 1706 and the whole of the Human Rights Act 1998, from modification or repeal);
4) Human Rights: the provision must not be incompatible with any of the Convention rights;

5) EU law: the provision must not be incompatible with EU law;

6) Protection of position of Lord Advocate;

7) Protection of reserved matters from cross-cutting changes to Scots private law or Scots criminal law.

The fact that there are 2 fewer tests for legislative competence is significant in itself. But a mere numerical comparison would disguise a number of aspects in which the Scottish settlement is significantly clearer, as well as wider, than the Welsh one.

The first aspect is the subject-matter test. A provision of an Act of the Scottish Parliament will be within competence provided that it does not relate to an expressly reserved matter. Under the equivalent Welsh test it is necessary to consider whether the provision relates to an expressly-stated subject and, if it does, whether it also “falls within” an exception.

Not only is the Welsh test more complex and cumbersome, it also contains an inherent element of uncertainty as the definition of topics that are not included in Schedule 7 – neither as subjects nor as exceptions – is to some degree subjective.

For example, a provision about the Agricultural Wages Board can be said to “relate to” the subject of “agriculture” in Schedule 7. But it has been argued that this relationship is too tenuous to provide the basis for legislating, and that – applying the “purpose and effect” test set out in s. 108(7) of the Government of Wales Act – such a provision would actually “relate to” a topic that might be defined as “employment”, or “minimum wage levels” or “wages and salaries” or “protection of workers”. None of these topics are either subjects or exceptions in Schedule 7.

In this respect, somewhat counter-intuitively, it could be argued that the Welsh settlement does not sufficiently protect the interests of the UK Government – that it does not give “adequate safeguards for those matters that were intended to be reserved” (see the quotation below from Lord Hope in Imperial Tobacco v Lord Advocate, [2012] UKSC 61) – because it does not set out all of those “reserved” matters expressly.

“[t]he purpose of the Scottish settlement was that] the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved.”

So it could be said to be in the interests of the UK Government, as well as of the Assembly and Welsh Government, that the Welsh settlement should be restructured, and that the Scottish settlement would provide a sensible starting-point for that restructure.
The second aspect in which the Scotland Act tests are significantly clearer and easier to apply concerns the territorial test. This is a single test, rather than the double one that applies in the Welsh settlement, and is more clearly stated. This test is intrinsically linked to the existence of a separate Scots legal jurisdiction but, nevertheless, we consider that the Welsh territorial test could be simplified.

The third aspect in which the Scotland Act tests produce a significantly clearer settlement is an absence from those tests. There is no equivalent to the restriction concerning effect on Minister of the Crown functions set out in paragraph 1 of Part 2 to Schedule 7 to the Government of Wales Act. Given the piecemeal devolution of executive functions to Welsh Ministers, the continued existence of numerous, often minor, UK Ministerial functions relating to Wales is a significant brake on legislative competence.

The phrase “relates to”

The scope of current Assembly competence hangs on the meaning of the phrase ‘relates to’ in s.108 GOWA. There is a risk that the Welsh settlement may be interpreted narrowly because of the use of the same term in the Scottish settlement - where it is used as the test for whether a legislative provision is outside competence, i.e. whether it “relates to” a reserved matter.

Clearly, it is in the interests of the Scottish Government and Parliament to argue that “relates to” has a narrow meaning in the Scotland Act 1998. Whereas it is in the Welsh interest to argue that the same phrase, in another devolution statute, has a wide meaning. This creates a real difficulty for the courts and for legal certainty.

Purpose and effect

The Welsh Settlement also sets a double test in relation to the subject-matter of a provision: it is necessary to apply the purpose and effect test both to see if something relates to a subject and whether it falls within an exception.

If a provision has more than one purpose, and any one of them falls within an exception, then it would seem - on the basis of the case-law to date on the Scottish settlement - that the provision is outside competence. This is unless the provision can be saved by Section 108(5) GOWA - i.e. it is incidental or consequential, or enforces other provisions, or makes them effective.

By way of contrast, the purpose and effect test only has to be applied once under the Scotland Act 1998.

Carve-outs from exceptions

A further feature of the Welsh settlement that reduces legal certainty is the fact that Schedule 7 contains carve-outs from exceptions (which would also
have to have the purpose and effect test applied to them), and exceptions from carve-outs (ditto).

In the Scottish settlement, there is one fewer level of complexity. There are reservations, exceptions from reservations and derogations from exceptions.