



Canolfan Llywodraethiant Cymru

Wales Governance Centre

Policy Response to: House of Commons Welsh Affairs Select Committee on the Draft Wales Bill

Date: February 2014

Main contact:

Name: Professor Richard Wyn Jones

Address: Wales Governance Centre at Cardiff University, Pierhead Building, Cardiff Bay, CF99 1NA

Email: WynJonesR@cardiff.ac.uk

Contact number: 02920 688056



Canolfan Llywodraethiant Cymru

Wales Governance Centre



About the Wales Governance Centre

The Wales Governance Centre is a Cardiff University research centre undertaking innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance. A key objective of the WGC is to facilitate and encourage informed public debate of key developments in Welsh governance not only through its research, but also through events and postgraduate teaching. The Centre is sponsored and supported by Cardiff University's Law School and School of European Studies, while also collaborating with scholars from across the University. The WGC enjoys formal ties with both WISERD and the Institute of Welsh Affairs while also maintaining close cooperative relationships with colleagues in other institutions across Wales, the UK, Europe and beyond.



Canolfan Llywodraethiant Cymru
Wales Governance Centre



Introduction

Following closely in this regard the recommendations of the first report of the Commission on Devolution in Wales (the Silk Commission), the Bill envisages that the devolution of shared responsibility over income tax rates should take place only after an affirmative vote in a referendum. As I have been one of only a relatively small group who has publicly dissented from this proposition, I shall use this note to seek to explain to Committee members why this view is mistaken.¹

The case for a referendum

First, let us consider the case for holding a referendum. For the most part, proponents of a referendum have simply assumed or asserted that such plebiscite would be necessary. There have been relatively few attempts to argue the case. But to the extent that a case is ever made, it seems to rest on one of the following assumptions.

The 'Scottish precedent'

It is asserted that because the income tax powers of the Scottish parliament were subject to a separate referendum question in 1997, then shared responsibility over income tax rates should not be devolved to the National Assembly for Wales without the issue being put to the Welsh public in a referendum.

The problem with this argument is that, absent any rules to determine which issues should or should not be separated out and placed before the electorate in a referendum, we can find a precedent for almost anything in the UK constitution. And the fact of the matter is that Scotland offers two very different precedents on this issue: the most recent and most obviously relevant one pointing in the opposite direction to the one seized upon by proponents of a referendum.

Members of the Committee will recall that, following the Yes vote on that 'second question' in 1997, the Scottish parliament had the **option** to vary the basic level of income tax in Scotland by plus or minus 3 pence in the pound. They will also be aware that this option was never exercised. The argument of the Calman Commission, however, and premise of the subsequent 2012 Scotland Act, is that the Scottish parliament should be **forced** to make an annual decision on the rate of income tax in Scotland: this, of course, in the name of 'financial accountability'. No referendum was required before the provisions of the 2012 Scotland Act came into force. The arguments underpinning the current Wales Bill are functionally identical to those heard

¹ See <http://www.walesonline.co.uk/news/wales-news/richard-wyn-jones-silk-commissions-2017943>



from Calman and from all of the main political parties during the parliamentary passage of the 2012 Act. Indeed, some of the language is more or less identical. It is, therefore, far from obvious why we should privilege the 1997 precedent over that from 2012?

The Welsh public require it

There is an assumption that the Welsh public require or expect a vote on this subject. Even if we accept the premise that there should be a referendum on every issue on which a majority of the public believe it appropriate to hold a plebiscite – a position that runs directly counter to the principles and practice of Westminster-model democracy, as well as the dictates of common sense – it is far from clear that shared responsibility over income tax is a matter on which the Welsh public expect to be directly consulted. We have two sources of evidence on this matter.

First, we have the public attitudes work conducted for the Silk Commission itself.² On the face of it this seems unambiguous in as much as 81% supported the following (notably wide ranging) proposition:

Say it was proposed that the Welsh Government should be given powers to set and collect income tax in Wales. Do you think this should happen.....

But note also that 62% also supported this proposition:

If the Welsh Government were given powers to set and collect so-called ‘minor’ taxes in Wales, like taxes on rubbish sent to landfill or alcohol. Do you think this should happen...

These latter figure, in particular, illustrates a key problem with basing an argument for a referendum on the Silk public opinion research: we would expect that the default position of a relatively large proportion of the electorate would be to say ‘Yes’ to any survey question that asked whether or not they favoured a referendum, and this no matter what the issue at hand. Given that we do not live in a ‘plebiscitary democracy’, what we surely should be more interested in is whether there is a particular strength of feeling around a particular issue that

² Full disclosure: I was an academic advisor for this work. The final decisions over questionnaire design and question wording, however, remained with the Commission on Devolution to Wales.

may be the subject of a referendum as compared to others; a strength of feeling such that a failure to consult would lead to real questions of public legitimacy.

How, therefore, do attitudes towards a referendum on the issue of shared responsibility over income tax rates (a narrower proposition than the most expansive one used in the Silk research) compare to attitudes on other issues that might be put to a vote?

Table 1: referendum/elected politicians to decide (%)

ITEM	DECIDE BY REFERENDUM	DECIDE BY POLITICIANS	NET DECIDE BY REFERENDUM
Borrowing	37	48	-11
Carrier bags	31	56	-25
Landfill Tax / APD	27	56	-29
Income Tax 3p in £	41	44	-3
Devolution of all taxes	53	32	+21
Welsh Independence	80	8	+72
Abolition of Monarchy	70	12	+58

Question: See Appendix

The only evidence we have on this issue is from a YouGov survey conducted for Cardiff University's Wales Governance Centre in fieldwork conducted in April 2012. This deliberately sought to compare attitudes towards a referendum on income tax powers against views on other possible referendums whose subject matters ranged from the profound to the mundane. It should be noted that the 'income tax' option included in this battery was not identical to the Silk recommendation. That recommendation was not available when the fieldwork was undertaken and so the survey utilised a form of words that sought to capture the post-1998 position in Scotland. It should be underlined once again, however, that the wording used with regards income tax in the research commissioned the Silk Commission was very much wider than the Commission's eventual recommendation on this issue. None of these data is without its limitations.

What is striking is that, even in a context in which a substantial minority support a referendum on the most trivial of matters (31% favoured a referendum on the 5 pence levy on plastic bags), support for a referendum on shared responsibility for income tax rates was very far from overwhelming. Indeed, it did not even enjoy plurality support. While it may be argued that the slightly more ambitious proposals of the current Wales Bill might lead to more fulsome support for a referendum before they can be implemented, that case remains unproven. As does the case that the strength of support among the Welsh public for a referendum on shared responsibility for income tax powers is such that to introduce such a change without a plebiscite would lead to real problems of legitimacy.

A major constitutional Rubicon is being crossed

Since the publication of the report of the Lords Select Committee on the Constitution on referendums in 2009, there has been widespread acceptance (at least notionally) of its recommendation that referendums should be confined to 'fundamental constitutional issues'. The deeply unsatisfactory experience of the March 2011 referendum in Wales serves as an illustration of what happens when this principle is breached.³ The question, of course, is what constitutes a 'fundamental constitutional issue'? Is shared responsibility for setting income tax rates one such example (as implied by the Bill)? Indeed, is shared responsibility over income tax rates a fundamental constitutional issue but not powers over minor taxes (as also implied by the Bill)?

Much depends on what we understand to be the purpose of the Wales Bill. All parties have argued (in the context of Calman, the subsequent 2012 Scotland Act as well as Silk) that the aim of devolving some powers over taxation is to ensure that devolved government is more

³ This referendum has been discussed in detail in Richard Wyn Jones and Roger Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press, 2012).

properly 'accountable' and 'responsible'. If so then it is hard to know what fundamental constitutional issue is at stake here? Accountability and responsibility are basic principles of good governance rather than some radical new constitutional departure.

Moreover, proponents of a referendum for shared responsibility for setting income tax rates but not for 'minor taxes', end up relying on arguments that, whilst perhaps ingenious, appear essentially scholastic. The Silk Commission, for example, argued that the key point of constitutional principle differentiating income tax from minor taxes is that the latter "has always been a 'temporary' tax that expires each year on 5 April. The UK Parliament has then to reapply it by an annual Finance Act." From the perspective of the individual taxpayer, however, it makes no difference that, say, Stamp Duty is administered in a different way to Income tax. Liability requires payment, come what may. The claim that the devolution of Stamp Duty does not require a referendum but that the devolution of shared responsibility over income tax does, lacks credibility.

The case against a referendum

None of the arguments for a referendum are persuasive. Indeed, it is worth pointing out that any decision to hold a referendum on this issue would be highly anomalous in international, comparative terms. Despite extensive consultation with political scientists worldwide, my colleague Professor Roger Scully has thus far been unable to identify a single example of a referendum being required before tax powers are transferred to a pre-existing layer of 'regional' government.

Should 'accountability' be optional?

In my view, however, insisting that a referendum be held on this issue would be more than anomalous. If we take seriously the rhetoric of all parties in the context of Calman, the 2012 Scotland Act, and the first report of the Silk Commission, to insist on a referendum before shared responsibility over income tax rates is transferred to Wales would be wrong in principle.

If we believe that the devolution of tax powers is essential to ensure properly accountable and responsible government (or 'mature democracy' in Silk's phraseology) then the question must be asked: should accountability and responsibility be optional? To insist on a referendum before such a step is taken is surely to imply that this indeed the case. I would disagree fundamentally with that proposition.



Canolfan Llywodraethiant Cymru
Wales Governance Centre



If, on other hand, even at this late stage, some wish to argue that arguments for 'fiscal accountability' do not apply in the Welsh context then it is incumbent on them to explain why Wales is different in this regard from Scotland? This applies with particular force, of course, to those who supported or otherwise assented to the parliamentary passage of the 2012 Scotland Act.

The impact of the referendum provision

In the Welsh case there are very few incentives to hold a referendum. The income tax powers envisaged by the Bill do not provide any meaningful flexibility in terms of the shaping of public policy. As both Holtham and Silk have pointed out, given the structure of the tax base in Wales, a 'lock-step' arrangements means that there is no incentive to vary rates from those in England. Given this, it is impossible to envisage a referendum being held to 'unlock' these unusable powers. Indeed, the only possible incentive is to increase the size of the borrowing envelope that is will be linked to developed tax powers. But to hold a referendum that is, in effect, about the size of a borrowing envelope essentially would surely be utterly perverse?

In a context in which all parties have agreed that properly accountable, responsible government at the devolved level requires the devolution of meaningful tax powers, to insist on a referendum before shared responsibility for income tax is transferred to the National Assembly is wrong in principle. Not only that, but its practical effect will be to ensure that devolved government in Wales remains unaccountable and – to again appropriate Silk's phraseology – immature.



Canolfan Llywodraethiant Cymru
Wales Governance Centre



Appendix 1: Question wording for Table 1

“Some people think that it is a good idea to give people the chance to decide important political issues themselves by a vote in a referendum. Other people think that it is the job of the politicians we elect to decide major political issues. Holding a referendum takes more time and costs more money. But those in favour of referendums believe that it is important for people to have a direct say.

If decisions had to be made about each of the following issues, please indicate whether you think that those decisions should be made by elected politicians, or by the people in a referendum.”

- Whether or not the Welsh Government should be given the power to borrow money to spend on capital projects such as building roads and hospitals

- Whether or not shops should be required to charge 5p for carrier bags

- Whether or not the Welsh Government should be given the power to change levels of landfill tax and air passenger duty in Wales

- Whether or not the Welsh Government should be given the power to raise or lower the basic rate of income tax in Wales by up to 3p in the £

- Whether or not the Welsh Government should be given complete control over all taxes paid in Wales

- Whether or not Wales should become an independent country



Canolfan Llywodraethiant Cymru
Wales Governance Centre

