Dear Lord Lang

The Union and Devolution

I welcome the opportunity to contribute to your inquiry on the Union and devolution. As Presiding Officer, my views and priorities are not party political, but driven by the long term needs of the Assembly as a strong, accessible, forward-looking democratic institution and a legislature that delivers effectively for the people of Wales.

First of all I would like to express my wholehearted agreement with the view in your report on proposals for further devolution to Scotland,¹ that a stable constitutional basis for devolution requires a coherent vision for the future of the Union. I believe that the current proposals for further devolution across the UK do not offer a stable and sustainable settlement for all parts of the Union, or for the Union itself as an entity.

Our constitution is developing in a piecemeal fashion and the approach to devolution to date involves "looking through the wrong end of the telescope"². The focus has been on what the devolved institutions can be permitted to do, rather than considering the wider impact on, and purpose of, the Union.

Our national governance should be, above all, clear and understandable – not just for politicians, civil servants and the legal profession – but for the people. This is a fundamental principle of democracy – the people should be able to understand easily who makes the laws by which they live. Yet the asymmetry of the devolution settlements across the UK leaves me concerned about the clarity, transparency and understanding of the nature of the different settlements, the role of Parliament and the purpose of the Union.

The forthcoming Wales Bill provides an immediate focus for those issues in terms of devolution in Wales. However, there also needs to be much wider debate and consultation so that all parts of the UK have an opportunity to shape a stable and sustainable constitutional arrangement that works for all parts of the Union, and for the Union itself.

Is the UK’s current constitutional and legal framework able to provide a stable foundation for the devolution settlement?

² As stated by Emyr Lewis in evidence to Constitutional And Legislative Affairs Committee, RoP 22 June 2015
I have significant concerns about the piecemeal fashion in which our constitution is developing.

New devolution and constitutional arrangements for Scotland are being negotiated in parallel to future devolution for Wales. A form of devolution in England is happening at a remarkable rate. Given this state of flux, and without a clear constitutional framework encompassing all the constituent nations of the Union, it is impossible to determine what the overall outcome, or impact on the wider Union will be. This is not a satisfactory way of proceeding and is unlikely to leave a stable or sustainable foundation.

I am also concerned that the provisions in the Scotland Bill currently going through Parliament are likely to set a precedent for the Wales Bill, which is expected to be published in draft in the next few weeks. Although there are some areas of commonality, I do not consider this appropriate as a general approach. The Assembly has not been consulted on these provisions and was not involved in developing them.

The Scotland Bill contains two provisions which highlight the difficulty of entrenching significant constitutional change in an individual Act of Parliament, rather than a broader settlement. The provisions I have in mind relate to the permanence of the Scottish Parliament and the provision of a statutory footing for the legislative consent process. As your Committee identified in its previous report, 3 such clauses are of little or no value legally, even if the political signal is worthy, because of the overriding doctrine of the sovereignty of the UK Parliament.

I also have a particular concern about proposals to move the Welsh settlement to a reserved powers model in the forthcoming Wales Bill. I have long been an advocate of such a move. The current Welsh settlement is unclear and gives rise to a democratic deficit, as the population struggle to understand who to hold accountable, and who to lobby for change – the Assembly and Welsh Government, or Parliament and the UK Government. It also causes problems in terms of lack of stability and workability. As you will be well aware, Assembly Bills have been referred three times to the Supreme Court by the UK Government or Counsel General, in only four years of the current settlement. In itself, this is evidence of the weakness of our constitutional framework. We need a settlement that does not rely frequently on the courts for interpretation.

A move to reserved powers will improve the Welsh settlement only if it achieves three objectives: clarity, workability and no roll-back of the current competence. The forthcoming Bill presents a prime opportunity to achieve those goals by considering what should fundamentally be reserved to the centre and what, therefore, should be devolved. That opportunity should not be missed.

---

However, if there is no fundamental organising principle to the design of the reserved powers model, then these criteria are unlikely to be achieved. This position was echoed by the Assembly’s Constitutional and Legislative Affairs Committee during their recent consideration of the proposals for further devolution.  

If, instead, the approach taken is a piecemeal consideration of what powers Whitehall departments consider to be appropriate for devolution then the resulting settlement would be a backward step for the Assembly and would undoubtedly need revisiting in the near future. It would not provide the ‘clear devolution settlement for Wales which stands the test of time’ referred to in the Secretary of State’s foreword to the Powers for a Purpose Command Paper.  

The efforts of the Secretary of State for Wales to gain consensus on the recommendations for devolution through the St David’s Day process, and the forthcoming Wales Bill, were laudable. However, I fear that a pragmatic approach to achieving political support in the short-term will come at the cost of a principled approach to considering further devolution more widely.  

The creation of a reserved powers model for Wales may at first appear to be straightforward, as the devolution settlements for Scotland and Northern Ireland have been operating on such a model since 1999. However, unlike Scotland and Northern Ireland, Wales forms a single legal jurisdiction with England. This engenders different and complex challenges in creating a workable settlement, in which both of the legislatures operating in the territory can pass holistic, effective, enforceable legislation, without having inappropriate effects on people or institutions across the border. Creation of a separate Welsh jurisdiction could remove, at a stroke, much of this complexity. Independent legal experts have shown how this could be achieved without the expense and red tape of separate court systems, separate legal qualifications, or devolution of policing, prisons, etc. I would urge the Committee to look at this work. The jurisdiction is not a sacred cow, to be kept alive at any cost in terms of legal complexity and uncertainty, with their attendant burdens on individuals, public authorities and business.  

The recent proposals to create a special Parliamentary process for English Votes for English Laws also demonstrate a lack of understanding, in Whitehall, of the complexities of the devolved settlements. As I highlighted in my recent correspondence to Speaker Bercow and  

---  

4 National Assembly for Wales, Constitutional and Legislative Affairs Committee, The UK Government’s Proposals for Further Devolution to Wales, July 2015  
5 Wales Office, Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales, February 2015  
6 As discussed in the recent report by Wales Governance Centre and UCL Constitution Unit, Delivering a Reserved Powers Model of Devolution for Wales, September 2015  
7 The complexities of creating a reserved powers model in a single jurisdiction have also been raised by Constitutional and Legislative Affairs Committee, The UK Government’s Proposals for Further Devolution to Wales, July 2015 and in the recent report by Wales Governance Centre and UCL constitution Unit, Delivering a Reserved Powers Model of Devolution for Wales, September 2015
in evidence to the House of Commons Procedure Committee, the proposals raise a number of concerns relating to the role of the Speaker and the relationship between the Assembly and the House of Commons. It is not clear how the “English Votes” process will relate to the well-recognised process for seeking legislative consent from the Assembly (and the other devolved legislatures) where Parliament is considering a Bill on a devolved matter. The proposals also fail to recognise the complexities of determining legislative competence under the Welsh settlement as it currently stands, let alone under the three different devolution settlements. In itself, this again illustrates the importance of clarifying the constitutional settlements in each of our constituent nations and across the Union as a whole.

**Principles underlying the Union and devolution**

In my view, the fundamental organising principle for the devolved settlements should be subsidiarity: the centre should reserve to itself only what cannot be effectively done at a devolved level. Too often our focus is on the principle of parliamentary sovereignty as our organising principle, a concept which will appear increasingly inappropriate in a devolved UK where devolved institutions enjoy equal standing and equivalent powers, albeit in more limited fields.

In evidence to the Assembly’s Constitutional and Legislative Affairs Committee, I have stressed that the absence of such an organising principle to justify reservations makes interpretation of the settlement problematic.

The Commission on Devolution in Wales (the *Silk Commission*), set up by the UK Government, spent much time and effort reviewing the powers of the National Assembly, and in their second report recommended modifications to the constitutional arrangements which would enable the UK Parliament and National Assembly to better serve the people of Wales.

In doing so, they developed a set of principles to be used to test any proposed changes to the devolution settlement – in contrast to the ‘reactive and piecemeal’ approach to devolution taken to date. Subsidiarity was one of those principles. The others – which I also applaud - were: accountability, clarity, coherence, collaboration, efficiency, equity, stability,

---

8 HoC, Procedure Committee, *Letter to the Chair and memorandum from the Presiding Officer of the National Assembly for Wales*, August 2015

9 National Assembly for Wales, Constitutional and legislative Affairs Committee, UK Government’s proposals for further devolution to Wales, *Evidence from the Presiding Officer of the Assembly*, June 2015

10 Commission on Devolution in Wales, Empowerment and Responsibility: Legislative powers to Strengthen Wales, March 2014
and localism. I believe that the UK Government should give serious consideration to those principles, with subsidiarity in prime position, in developing the Wales Bill.

In summary, I firmly believe that Wales, and indeed all the constituent nations, should be treated with parity of respect and consulted on an equal basis, allowing for the different requirements of each.

**Practical steps to strengthen the Union**

A coherent pan-UK approach is required. We must aim, therefore, for genuine joint discussion, to which all four nations of the Union contribute on an equal footing.

The existing devolution settlements for Northern Ireland, Scotland and Wales are very different, and it is not easy to see a rational basis for all of those differences. Although I would not expect full co-ordination of the devolution settlements, recognising that different nations move at different paces and the appetite for devolution within each may differ, I do believe that it would be appropriate, fair and clearer if the model for devolution had a degree of consistency. This could be achieved, as I have indicated, if the principle of subsidiarity was used to draw up a list of matters that should, fundamentally, be reserved to the Union, with other matters being regarded as “devolvable” subject to agreement between the centre and the devolved authorities. This is akin to the present model of devolution in Northern Ireland, albeit that I would argue that not all matters reserved in that settlement need to be so, applying the subsidiarity principle.

So, alongside the current proposals for constitutional change, I believe all constituent nations need to come to the table to develop an agreed constitutional framework. Such a framework could recognise areas of commonality and difference, and consider the impact of devolution on the Union as a whole. It would also enable us to move beyond the current focus on process and Whitehall-driven administrative preference to a more principled, stable solution.

Any debate on the future constitution of the UK should include representatives of the devolved legislatures, recognising the role their Speakers and Presiding Officers have as guardians of the institutions of democracy. Therefore, I believe that it is essential – and urgent – to agree a mechanism to enable inter-parliamentary, not merely inter-governmental, discussion and collaboration on constitutional matters.

Key issues that I would urge us as parliamentarians to address are:

- improved understanding and appreciation of the challenges of devolution and the role of parliaments/assemblies;

- greater engagement of the legislatures in constitutional matters;
• applying the subsidiarity principle;
• putting legislative consent procedures on a consistent and equal footing;
• the question of English devolution;
• the funding of constituent nations of the Union; and
• the consolidation of our statute books – to improve the accessibility of the law and understanding of the settlements and existing/future legislation in each nation.

And finally, I wish to reiterate that an immediate practical step for Wales would be a new Wales Act which delivers a clear, workable, principles-based approach to determining a reserved powers model for the Assembly in Wales. This should include addressing anomalies in the Welsh constitutional settlement such as general transfer, of all remaining UK Ministerial powers in areas of Assembly competence, to the Welsh Ministers.

I trust that you will find this a useful contribution to your work. If you require further information I would be pleased to assist.

Yours sincerely

Dame Rosemary Butler AM
Presiding Officer

2 October 2015