

The development of devolution in Wales and its impact on healthcare

Manon Chirgwin

This article will look primarily at the development of devolution in Wales from 1998 until 2011 and how it has differed from the devolution in Northern Ireland and Scotland. This will be done by looking at the Government of Wales Act 1998 and comparing it to the Devolution Acts at the time for Northern Ireland and Scotland. The article will move on to look at the Government of Wales Act 2006 as enacted and after the 2011 referendum. Further, it will be discovered whether there are still differences to how powers have been devolved between all three countries. The article will then go on to discuss healthcare and how devolution has had an impact on the way the healthcare system is structured in Wales, Northern Ireland, Scotland and England.

Devolution “...involves the transfer of power from the Westminster Parliament to a subordinate legislature”¹ and this is what has happened with Wales, Scotland and Northern Ireland. However, in order to devolve we must first have a union. In 1536 the Act of Union between Wales and England was passed by the English Government. This meant that any law passed in Westminster now became law in Wales. This was very different to the 1707 Act of Union with Scotland which was passed by both governments and allowed Scotland to keep its own legal system. The union with Ireland² was a little different. The Act of Union was passed in 1800 but in the 1920s, the Government of Ireland Act was passed which proposed home rule for the whole of Ireland.

¹ Pargworth, Neil (2012) *Constitutional & Administrative Law* (7th Ed.) (Oxford University Press), p. 160.

² At the time of the union the Ireland was a single entity.

Calls for devolution grew over time and by 1973 the Royal Commission on the Constitution³ was set up and their subsequent report on devolution led to the 1974 White Paper 'Democracy and Devolution: Proposals for Scotland and Wales'. In 1978 the Wales Act and the Scotland Act were passed by the Labour government with the hope of devolving powers to Wales and Scotland. It was said that: *"...the Scotland Act 1978 and Wales Act 1978 were presented to the Commons...as: 'a great constitutional change...There will be a new settlement among the nations that constitute the United Kingdom. We shall be moving away from the highly centralised state that has characterised our system for over two and a half centuries.'"*⁴ Nevertheless, both Acts needed to be approved by a referendum and neither gathered the majority that was needed, leading to the Acts being repealed by the incoming Conservative government. Devolution was not part of the political agenda again until the next Labour government.

Devolution in 1998

The Government of Wales Act 1998 was the first Act to devolve powers to Wales.⁵ It created the Welsh Assembly, with Schedule 2 of the Act designating powers as 'fields' of authority to the Assembly, including powers for the provision of health services. However these were not legislative powers, but a power to enact policy through transfers of authority from the Secretary of State, meaning that the Assembly could only make subordinate legislation. Thus

³ Also known as the Kilbrandon Committee.

⁴ Loveland, Ian (2012) *Constitutional law, Administrative law, and Human Rights a Critical Introduction* (6th Ed.) (Oxford University Press), p. 422.

⁵ The Government of Wales Act 1998 is now revoked.

the Assembly could only use powers that were previously exercised by the Secretary of State and, if they wanted to acquire more powers, Parliament would have to enact new legislation.

Under this Act there was no separate executive for Wales. The powers that Parliament granted went to the Assembly as an institution and it was then an internal matter for the Assembly to decide what to do with those powers. What would usually happen is that they would be given to the First Minister, who would then give the powers to the cabinet.

Devolution was granted to Scotland through the Scotland Act 1998. This was very different to the Government of Wales Act 1998 as it created a legislature and a separate executive.

Section 28 of the Act granted legislative powers to the Scottish Parliament. This gave the Parliament the power to make any laws except on matters that are reserved under schedule 5. A reserved matter means that only Westminster can legislate in that area. When passed, legislation of the Scottish Parliament is known as Acts of the Scottish Parliament, but they still require royal assent to become legislation. Whilst the Scottish Parliament has wide discretionary powers to enact legislation, section 28 (7) states that the UK Parliament still has the power to legislate over Scotland, but Devolution Guidance Note 10 states that, if they were to do this, they are required to ask for the consent of the Scottish Parliament.

Section 44 of the 1998 Act established the Scottish Government, referred to as the Scottish Executive in the Act. The Scottish Government is responsible for most of the day-to-day issues concerning the people of Scotland, much like the responsibilities of the UK government.

Devolution in Northern Ireland has also been different to that which has happened in Wales and Scotland, caused by the ethno-nationalist *conflict* in Northern Ireland to which legislation has responded. After the Good Friday Agreement in 1998, powers were devolved to Northern Ireland under the Northern Ireland Act 1998 which created a legislature and an executive. Since this time the Northern Ireland Assembly has been suspended and reinstated many times. The Assembly term that ended in 2011 was the first to run its full course without being suspended. The Assembly created under the Act is a large one so as to allow smaller political parties an opportunity of gaining seats and be involved, thereby ensuring varied representation in the Assembly. This is one of the measures created as a response to the conflict.

The Act created three types of matters: excepted⁶, reserved⁷ and devolved. Excepted matters are the issues that only UK Parliament can legislate upon, the same as reserved matters in Scotland. Reserved matters in this Act however are matters that the Northern Ireland Assembly needs the consent of the Secretary of State to legislate on. All other matters are devolved. Legislation passed by the Assembly is known as Acts of the Northern

⁶ Northern Ireland Act 1998, Schedule 2.

⁷ Northern Ireland Act 1998, Schedule 3.

Ireland Assembly and requires Royal Assent to become legislation. Whilst the Northern Ireland Assembly also has wide discretionary powers to enact legislation, section 5 (6) of the 1998 Act states that the UK Parliament still has the power to legislate over Scotland. Nonetheless, Devolution Guidance Note 8 states that to do this the consent of the Northern Ireland Assembly is required.

The Act further created the Northern Ireland Executive which is led by a First Minister and a Deputy First Minister. This is another arrangement that demonstrates how the terms of the Act are influenced by the conflict as the First Minister is chosen by the largest party of the Assembly and the deputy First Minister is chosen by the second largest party of the Assembly.

In 2002 the National Assembly for Wales established the Richard Commission to examine the powers of the Welsh Assembly. In 2004 the Commission produced a report with recommendations for the future of the Assembly. One of the recommendations was a *“transformation of the National Assembly into a full-fledged legislative assembly with primary legislative powers on all matters not explicitly reserved to Westminster.”*⁸ The proposals were mostly welcomed by the UK government, leading to the White Paper ‘Better Governance for Wales’ in 2005. It set out proposals to create a separate legislature and executive, and sets out three stages for the process of additional devolution to Wales. Firstly, that without any change, the UK government could adopt an approach that was more positive.

⁸ “The Report of the Richard Commission: An Evaluation”, Briefing No.12 June 2004.

Secondly, they could enhance the legislative powers of the Welsh Assembly.

And lastly, they could grant the Assembly with a greater level of legislative devolution. This later stage would only take place after a referendum of the people of Wales. These recommendations then in turn led to the Government of Wales Act 2006 which fulfilled the second stage of the process.

The Government of Wales Act 2006

The Government of Wales Act 2006 was a step forward in devolution for Wales as it granted further legislature powers and created a separate executive. When the Act was enacted, part 3 gave the Assembly the power to make Assembly Measures, and schedule 5 listed the issues that could be legislated upon.

To legislate, the Assembly had to have competence in an area, and to have competence, they had to be able to point to a 'matter' in the Act. Schedule 5 of the Act was shared into 'fields' and within these fields is the 'matters' that gives the Assembly competence⁹.

Therefore it was not possible for the Assembly to legislate on an issue unless there was a matter in the relevant field.

When the Government of Wales Act was originally enacted, schedule 5 only featured powers to do with the National Assembly for Wales¹⁰. The only way to acquire further matters was to amend schedule 5. Amendments could only be achieved by an Act of Parliament, or by an Order in Council, known as a Legislative Consent Order. There was a

⁹ For instance, field 5 concerns education and training, and matter 5.1 is "*provision about the categories of school that may be maintained by [local authorities]*"; Government of Wales Act 2006, Schedule 5, Field 5, Matter 5.1.

¹⁰ Government of Wales Act 2006, Schedule 5, Field 13.

preference to Acts of Parliament as the Secretary of State could refuse to put a Legislative Consent Order before Parliament. This arrangement meant that passing legislation was a lengthy process for Wales, and still very different to Scotland and Northern Ireland.

The other development in this Act was the creation of a separate executive by Section 45.

The executive is known as the Welsh Assembly Government. The role of the Welsh Assembly Government is to make decisions, develop and implement policy, exercise executive functions and make secondary legislation, much like the UK government.

In 2011 a referendum was held regarding extending the legislative powers of the Welsh Assembly. The referendum was successful in getting a 'Yes' vote and therefore, part 3 and schedule 5 of the Act ceased to have effect while part 4 and schedule 7 came into effect. This meant that the Welsh Assembly could now make Acts of the Assembly and the third stage of the devolution process, as set out by the Richard Commission, was completed. The difference between part 3 and 4 is which issues can be legislated upon. Previously, measures were restricted because of the limited matters and, as seen above, an Act of Parliament had to be passed to insert a new matter into schedule 5. However, under schedule 7 all the matters were filled within the fields and the Assembly had full competence. Acts of the Assembly still require Royal Assent to become legislation and section 107 (5) states that the UK Parliament can still make laws for Wales.

One difference that still exists between devolution for Wales and devolution for Scotland and Northern Ireland is the competence of the UK Parliament to legislate over the country. As mentioned above, the Scottish Parliament and the Northern Ireland Assembly must give consent for the UK Parliament to legislate for them. Nevertheless, Devolution Guidance Note 9 states that the UK Parliament would not legislate for Wales without at least the consent of Welsh Ministers, but there is no mention of needing the Welsh Assembly to consent. The referendum had no effect on the executive.

The Government of Wales Act 2006 and subsequent reform has taken leaps in making devolution in Wales more equal to Northern Ireland and Scotland. In 1998 the biggest difference was how many powers had been devolved to Wales as compared to Northern Ireland and Scotland. Since the referendum, the only difference is how the powers have been devolved. Under the Scotland Act 1998 and Northern Ireland Act 1998, the reserved and excepted matters are listed and all other matters devolved. Under both Government of Wales Acts it was the opposite; the matters that Wales had competence to legislate on were listed and everything else reserved. However, one of the areas that Wales, Northern Ireland and Scotland do have competence to legislate upon is healthcare.

Healthcare

The National Health Service (NHS) was established in 1948 by Aneurin Bevan, and the idea behind it was to ensure that everybody could have equal access to healthcare. The power to legislate over healthcare has since devolved to Wales, Northern Ireland and Scotland.

In 1999 the National Assembly for Wales (Transfer of Functions) Order transferred power to the Assembly over Acts that affected Wales, including the National Health Service Act 1977. The first Welsh White Paper on health that the Assembly produced was 'NHS Wales: Putting Patients First' in 1998. This paper was the basis of the planned reforms and a 10 year plan which set out four new levels of care. The paper also set out three important themes for healthcare: that it would be people centred, based on partnerships, and concentrate on prevention. The Welsh Assembly based their decisions and arrangements on health on these themes, and in the end: *"Wales...bet on localism. This means integrating health and local government in order to coordinate care and focus on determinants of health rather than treating the sick. It tries to use localism as the lever to make the NHS into a national health service rather than a national sickness service."*¹¹

Further changes were seen when the Assembly produced the paper 'Improving Health in Wales – A Plan for the NHS with its Partners' in 2001. With this paper the Assembly disbanded the five health authorities that were in existence and built a new structure for the NHS which included 21 Local Health Boards.¹² These Local Health Boards include the Betsi Cadwaladr University Health Board that covers North Wales, and Hywel Dda Health Board that Aberystwyth is a part of. The purpose of the Local Health Boards is corporate and clinical governance, and providing all the health care services in that area.

¹¹ Greer, Scott L., "Four Way Bet: How Devolution Has Led to Four Different Models for the NHS", February 2004, *The Constitution Unit*, p. 4.

¹² Which has now decreased to 7.

Another level to the structure is the three NHS Trusts¹³: the Welsh Ambulance Services, Velindre NHS and Public Health Wales. The Assembly has continued to legislate with regards to the NHS but the themes remain the same.

The process of devolving powers on healthcare was much the same for Scotland and Northern Ireland, but the main difference is how they have used those powers. Whilst Wales concentrated on local services, Scotland has favoured professionalism, meaning the role of professionals has been increased in the allocation of rationing and resources.

Northern Ireland on the other hand has focused on permissive managerialism. This system focuses on making sure that services keep going in tough conditions, which produces little overall policy. This shows how Northern Ireland responds to the conflict, and is using its powers to make sure that basic services run no matter what. As a result of devolution, England also has a separate NHS structure, and has gone for a market based system where competition, management and regulation are key factors.

As we see in the news, none of the systems is perfect, all having their individual problems. One of the biggest problems is the so-called a 'postcode lottery'. That is where people in one part of the UK are more, or less, likely to get access to a drug than in another part of the UK. For example, where patients have a rare disease and patients in Scotland or Wales are more likely to get treatment than a patient in England.¹⁴

¹³ Originally 13.

¹⁴ [Campbell, Denis: "Patients with rare conditions face postcode lottery", *The Guardian*, 20 October 2012, at <http://www.guardian.co.uk/society/2012/oct/20/patients-rare-conditions-postcode-lottery> \[accessed 10-4-13\]](http://www.guardian.co.uk/society/2012/oct/20/patients-rare-conditions-postcode-lottery)

The development of devolution in Wales has been a long one compared to Scotland and Northern Ireland. It took until 2011 for the Assembly's legislative powers to catch up to what Scotland and Ireland were granted in 1998. Devolution may still develop in the future and it is impossible to know at the present moment what will happen, as is seen with Scotland's debate on becoming independent. However, devolution has not had an adverse impact on healthcare in any of the countries. It is true that there has been an impact in that there are four different NHS systems within the UK, but each country is able to cope with the demands of their system: "*Northern Ireland, Scotland and Wales proved more than able to make decisions that change life for their populations and more than willing to do so.*"¹⁵

Aberystwyth University Law and Criminology Student Journal (AULCSJ), 1st Edition published online by the Department of Law and Criminology, Aberystwyth University on behalf of the AULCSJ. August 2014. Article downloaded from <http://www.aber.ac.uk/en/law-criminology/informationforcurrentstudents/studentactivities/auslcj/>

¹⁵ Greer, Scott L., "Four Way Bet: How Devolution Has Led to Four Different Models for the NHS", February 2004, *The Constitution Unit*, p. 5.