



House of Commons
Welsh Affairs Committee

Pre-legislative scrutiny of the draft Wales Bill

First Report of Session 2015–16



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*Report, together with formal minutes relating
to the report*

*Ordered by the House of Commons to be printed
24 February 2016*

HC 449

Published on 28 February 2016
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Welsh Affairs Committee

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1 Introduction

Devolution in Wales: the background to the draft Wales Bill

1. The story of devolution in Wales is a story of constitutional fluidity. Since 1997, there have been three pieces of devolution legislation, a move from secondary legislative to primary legislative powers (and within that, a move from one model of primary legislative powers to another). In the space of sixteen years since the first Assembly election, the National Assembly for Wales has been transformed from a body corporate, tasked with passing secondary legislation, to a legislature which, from 2018 onwards, will have the power to levy Stamp duty land tax, landfill tax and the aggregates levy.

2. It is also a story of Commissions. Since the National Assembly began its proceedings in 1999, the governance of Wales has been examined by the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (Richard Commission)¹, the Independent Commission on Funding and Finance for Wales (Holtham Commission)², the All Wales Convention³, and most recently, the Commission on Devolution in Wales (the Silk Commission)⁴.

3. The Silk Commission, established by the UK Government in 2011, was tasked with a two-part remit that included reviewing the potential for fiscal devolution to Wales and the broader powers of the National Assembly.⁵ Its first report, on fiscal devolution, was published in 2012 and led to the Wales Act 2014.⁶ In March 2014, the second report was published. This proposed moving the basis of the Welsh devolution settlement from a conferred to a reserved powers model and the devolution of further powers to the National Assembly.⁷ The decision to examine the further devolution of powers, as identified by both the Silk Commission reports, was generally supported by all political parties.

4. On 19 September 2014, the day after the Scottish independence referendum, the Prime Minister announced that, as part of an attempt to arrive at a fair settlement for all four of the UK's constituent nations, the Government would take forward plans for further devolution in Wales.⁸ That November the Secretary of State for Wales launched a cross-party process aimed at producing, by St David's Day 2015, "a set of commitments, agreed by the four main political parties in Wales, on the way forward for Welsh devolution".⁹ According to the Secretary of State, these commitments "would form a basis ... for taking

1 Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, [Report of the Richard Commission](#) (March 2004)

2 Welsh Government, ['Holtham Commission reports'](#), accessed 5 January 2016

3 All Wales Convention, [Report](#) (November 2009)

4 Commission on Devolution in Wales, ['Welcome to our Website'](#), accessed 5 January 2015

5 Sir Paul Silk was named as chair of the Commission. He is a former Clerk to the National Assembly for Wales (NAW), serving from March 2001 until December 2006. The other members of the Commission were Helen Molyneux, Jane Davidson, Trefor Glyn Jones, Esq. CVO CBE, Prof Noel Lloyd CBE, Lord Bourne, Rob Humphreys, Dr Eurfyl ap Gwilym, and for Part 1 only, Sue Essex and Dyfrig John CBE

6 Commission on Devolution in Wales, [Empowerment and Responsibility: Financial Powers to Strengthen Wales](#) (November 2012). The Wales Act 2014 devolved responsibility for minor taxes, such as stamp-duty land tax and the landfill tax, and, subject to a referendum, enabled the partial devolution of income tax.

7 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014

8 Prime Minister's Office, [Scottish independence referendum: statement by the Prime Minister](#), 19th September 2014, accessed 15 December 2015

9 Wales Office, [Secretary of State for Wales sets out long-term vision on devolution](#), 17 November 2014, accessed 15 December 2015

forward Welsh devolution after the General Election next May”. At the heart of this process was a goal for a “clear, robust and lasting devolution settlement for Wales”.¹⁰

5. In February 2015, the fruits of this process were revealed with the publication of the UK Government’s command paper, *Powers for a Purpose*. The command paper reported a consensus on the Silk Commission’s recommendation that Wales should move from a conferred to a reserved powers model of devolution. In addition, there was consensus on the devolution of the Assembly’s internal procedures, electoral arrangements, energy consents up to 350 MW, and bus and taxi regulation and a range of other recommendations proposed by the Silk Commission. The UK Government also committed itself “to introduce a floor in the level of relative funding it provides to the Welsh Government”. This was “in the expectation” that the Welsh Government and the National Assembly would call a referendum on the partial devolution of income tax.¹¹

6. As intimated by *Powers for a Purpose*, a key factor in the UK Government’s desire to establish a reserved powers model for Wales has been the impact of the Supreme Court’s ruling on the Agricultural Sector (Wales) Bill.¹² The UK Government argued that that ruling undermined the continued operation of the conferred powers model, a model that “was not designed to deliver this level of uncertainty in the devolution boundary”.¹³ We examine the implications of the Supreme Court decision in more detail in Chapter 2.

7. The Conservative Party’s 2015 General Election Manifesto pledged that, if elected, a Conservative Government would:

- devolve to the National Assembly control over its own affairs;
- implement other recommendations of the second Silk Report where there is all-party support as set out in the St David’s Day Agreement;
- introduce a new Wales Bill if these changes require legislation;
- continue to reserve policing and justice as matters for the UK Parliament;
- introduce a ‘funding floor’ to protect Welsh funding and provide certainty for the Welsh Government to plan for the future; and
- make the Welsh Government responsible for raising more of the money it spends.¹⁴

8. Following the return of a majority Conservative Government in the 2015 General Election, the Queen’s Speech on 27 May 2015 announced that a Wales Bill would be brought forward during this Parliamentary session. A draft Wales Bill was published for pre-legislative scrutiny on 20 October 2015.

10 Wales Office, [Secretary of State for Wales sets out long-term vision on devolution](#), 17 November 2014, accessed 15 December 2015

11 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, p.50

12 *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622

13 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, p.14

14 [The Conservative Party Manifesto 2015](#), pp.70-71

The Government's objectives

9. The Secretary of State's aim, at the outset of the St David's Day process, was to secure a "clear, robust and lasting devolution settlement for Wales".¹⁵ This draft Bill aims to create greater clarity as to where the devolution boundary lies, bringing to an end the current situation which, according to the Secretary of State, "is entirely silent on huge swathes of policy areas".¹⁶ In the foreword to the draft Bill, he argued that "for too long Welsh politics has been dominated by constitutional debates about what is and is not devolved".¹⁷ He wanted to move away from the "continuous, never-ending constitutional discussion"¹⁸, and "ensure that both the UK and Welsh Governments are focussed on delivering a stronger economy, creating jobs and providing the highest quality public services".¹⁹ Overall, the Government's objective has been to "craft a piece of legislation that is pragmatic, that moves devolution forward ... in line with the instincts and appetites of the Welsh people".²⁰

Our inquiry

10. On 17 September 2015, we announced that we would undertake pre-legislative scrutiny of the draft Wales Bill when it was produced. We invited written evidence in response to the following questions:

- (1) Are the Government's proposals, particularly in respect of the reserved powers model, sound? If not, how could the draft Bill be improved?
- (2) Do the provisions of the draft Wales Bill deliver the policy intentions of the UK Government? Could the wording of the draft Bill be improved or changed?²¹

11. The Government published the draft Wales Bill on 20 October 2015,²² and we began taking oral evidence the following week, hearing from the Secretary of State and Wales Office officials.²³ Since this first session, we have held six further evidence sessions on the draft Bill, one of which was a joint session with the National Assembly's Constitutional and Legislative Affairs Committee.²⁴ We are grateful to that Committee and its Chair, David Melding AM in particular, for agreeing to hold the joint session, and to all the Assembly staff who facilitated our meetings there. We are also grateful to all those who gave oral evidence and submitted written evidence. Our evidence-gathering concluded with a second session with the Secretary of State, on 9 December 2015.²⁵

12. We regret that due to the compressed nature of pre-legislative scrutiny, we were not able to cover all provisions in the draft Bill in detail. Our evidence covered a number of areas, but the three main aspects of the draft Bill that were raised, and on which this Report focuses, are:

15 Wales Office, [Secretary of State for Wales sets out long-term vision on devolution](#), 17 November 2014, accessed 15 December 2015

16 Q294

17 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, [Cm 9020](#), p.4

18 Q2

19 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, [Cm 9020](#), p.4

20 Q6

21 Welsh Affairs Select Committee, [Pre-legislative scrutiny of the draft Wales Bill](#), 17 September 2015

22 HM Government, Draft Wales Bill, [CM 9144](#), October 2015

23 Oral evidence taken on 26 October 2015, [HC 449](#)

24 Oral evidence taken on 9 November 2015, [HC 449](#)

25 Oral evidence taken on 9 December 2015, [HC 449](#)

- the transition to a reserved powers model;
- the reservation of criminal and private law and the necessity tests; and
- the consenting arrangements.

We deal with each of these three matters in turn in the next three chapters of this Report. In our final chapter we set out some observations on the approach of the Wales Office to the pre-legislative process. Of particular regret is the fact that we were unable to scrutinise the list of policy reservations adequately.

2 Moving to a reserved model

Reserved and conferred powers models

13. One of the signature features of the draft Bill is its proposal to move Welsh devolution from a conferred to a reserved powers model. Conventionally, a conferred powers model is a system that limits the competence of a devolved institution to those powers specifically granted to it in statute.²⁶ Under a reserved powers model of devolution, all areas that are not explicitly reserved to Westminster are within the general competence of a devolved body.²⁷ Both Scotland and Northern Ireland’s devolution arrangements operate under a reserved powers model. Calls for a reserved powers model for Wales have been present for the best part of the Assembly’s existence. This was a recommendation of both the Richard Commission in 2004²⁸ and the Silk Commission’s second report in 2014.²⁹

14. Moving from the current basis of devolution to a new model is not an entirely straightforward process. The Silk Commission’s second report suggested that changing models is “likely to require a good deal of discussion and to be a substantial drafting exercise”.³⁰ Silk, therefore, considered that “it would require a clear political commitment in order to ensure the necessary cross-Whitehall process of determining what should be reserved”.³¹ Importantly, said Silk, this should not be a process confined to Whitehall, but one that is undertaken in partnership with the Welsh Government. As Sir Paul Silk reflected, “goodwill and a willingness to collaborate will be necessary on both sides”.³²

15. The First Minister told us that the Welsh Government “offered to help with the drafting of the Bill” on a non-partisan basis, but that offer was not taken up.³³ The Secretary of State explained that over a period of six weeks leading up to the publication of the draft Bill there was “an opportunity for private discussions between ... the Wales Office and ... the Welsh Government officials” and that these discussions were continuing.³⁴

16. Whilst we welcome the discussions that are ongoing between the Wales Office and the Welsh Government on the draft Bill, these discussions should have concluded prior to the draft Bill being published. This dialogue would have aired some of the views that have been shared with us in this inquiry and would have informed the drafting of the Bill. However, the drafting of the Bill is the responsibility of the Secretary of State.

17. The Wales Governance Centre at Cardiff University and the Constitution Unit at University College London have undertaken work exploring how to deliver a reserved

26 Trench, A. (2010). Wales and the Westminster Model, *Parliamentary Affairs*, 63(1), p.128

27 Tierney, S. (2007). Giving with one hand: Scottish devolution within a unitary state, *International Journal of Constitutional Law*, 5(4), p. 740

28 Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, [Report of the Richard Commission](#) (March 2004), p.250

29 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014, p.185

30 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014, p.36

31 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014, p.38

32 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014, p.38

33 Q143

34 Q10

powers model for Wales (the Cardiff-UCL report). They have identified problems with the current Welsh settlement, indicated by a sequence of references of Welsh legislation to the Supreme Court. Furthermore, they emphasised that the varied arguments and reasoning in such cases, and the rulings of the Court “make it extremely difficult to say with any certainty what is likely to be within devolved competence”.³⁵ In terms of the transition to a reserved powers model, the Cardiff-UCL report highlighted that “much depends on ... how it is drafted, the scope of the matters reserved to Westminster, and how these impinge on the powers of the National Assembly and Welsh Government”.³⁶ The way in which a reserved powers model is crafted, and the extent of the reservations, are therefore matters of key significance for the competence of the National Assembly.

Identification of reservations by Whitehall

18. The reservations listed in the new Schedule 7A to be inserted into the Government of Wales Act 2006 (GOWA) by the draft Bill are the product of a multi-layered process that involved the Silk Commission’s recommendations, the cross-party St David’s Day negotiations that resulted in *Powers for a Purpose*, and a Whitehall exercise in which UK Government departments were tasked with identifying where the devolution boundary should lie in their respective ministries.³⁷

The St David’s Day Process

19. Established by the Secretary of State in late 2014, the St David’s Day process involved cross-party negotiations involving representatives from each of the four Welsh Westminster parties, and at a later stage, Assembly party leaders. These negotiations were based on the recommendations of the second Silk Commission report, alongside the work of the Smith Commission in Scotland.³⁸ The process sought to reach a “political consensus on further devolution to Wales”. As a result, *Powers for a Purpose* does not “discuss those [Silk Commission] recommendations where there is no consensus”.³⁹

20. Professor Richard Wyn Jones told us that the St David’s Day process was focused on achieving consensus, rather than providing a “cohesive, clear devolution settlement for Wales”.⁴⁰ As a result, he argued:

What happened was they sat down, they looked at what was proposed by Silk and by [the Smith Commission] ... and then the parties could say ‘I agree or disagree with that’. The parties didn’t have to explain why they took those positions. They didn’t have to explain how what they suggested was going to lead to a settlement that would appear to be permanent and provided clarity, and so on. It was a lowest common denominator approach.⁴¹

35 Wales Governance Centre, Cardiff University, and The Constitution Unit, University College London, [Delivering a Reserved Powers Model of Devolution for Wales](#), September 2015, p.8

36 Wales Governance Centre, Cardiff University, and The Constitution Unit, University College London, [Delivering a Reserved Powers Model of Devolution for Wales](#), September 2015, p.31

37 Q314, Q325

38 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, p.6

39 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, p.12

40 National Assembly for Wales (NAW) Constitutional and Legislative Affairs Committee (CLAC) [Record of Proceedings](#) paragraph 173, 9 November 2015

41 National Assembly for Wales (NAW) Constitutional and Legislative Affairs Committee (CLAC) [Record of Proceedings](#) paragraph 173, 9 November 2015

21. Sir Paul Silk told us that, while he could “completely understand” why the Secretary of State sought to “come up with something that all parties at Westminster were prepared to go along with”, the outcome was “obviously a lower bar than [the Silk Commission] thought was the right bar”.⁴²

22. **We agree with these analyses, and note that the desire for political consensus was the overwhelming driver of this settlement.**

Getting the Whitehall machine thinking about Wales

23. The St David’s Day process can be seen as an attempt to harvest the areas of Silk where a political consensus existed at that time, resulting in the illustrative list of reservations provided in Annex B of *Powers for a Purpose*.⁴³ However, the substance of Schedule 7A is the product of Whitehall departments being tasked with identifying where they consider the devolution boundary to lie. As the Secretary of State explained:

Whitehall has been engaged for the best part of a year in identifying those reservations and trying to get ... Departments all across Whitehall to sit down and try to spell out where they consider the devolution boundary [should] fall.⁴⁴

This exercise was unique and “required a lot of muscle to get the Whitehall machine thinking about Wales in a way that it has not done ever before”.⁴⁵

24. However, some witnesses have cast doubt on the process and the relative clout of the Wales Office vis-à-vis other Whitehall departments. For example, the First Minister of Wales claimed that the danger of a “write-around in Whitehall, asking what should be devolved and what should not” is that Whitehall “will err on the side of what it wants”. He argued that this was a real danger because the Wales Office “has very little influence in Whitehall; it is a very small fish in a very big pond”.⁴⁶ As a result, the First Minister claimed that the ‘write-around’ was less the Wales Office telling other departments “this is what we want”, than “Whitehall Departments telling the Wales Office what the Welsh people should have”.⁴⁷

25. When the Secretary of State appeared before us on 26 October, he disputed this interpretation of the ‘write-around’. He maintained that he had not allowed other Whitehall departments a free rein, and stated that there “has been plenty of pushback from myself and my officials when we felt that that is necessary and where we have challenged them on their view on the interpretation of the [devolution] boundary”.⁴⁸

26. **There is a range of ways in which Government departments could have gathered views on where the devolution boundary should lie. One end of the spectrum would include an approach similar to that adopted for the Government’s work on the balance of competences between the UK and the EU, whereby Government departments would consult widely and look in depth at each subject area. The results of the write-around suggest that the Whitehall departments replied with a list that maps out the existing**

42 Q114

43 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, pp.57-58

44 Q8

45 Q325

46 Q148

47 Q165

48 Q20

legislative competence. We note the Secretary of State’s comments that there has been pushback from the Wales Office with regard to the list of reservations, and we would welcome examples of where this has happened, and how Westminster departments responded.

27. It is in the interests of everyone that this settlement is long lasting and we are concerned that the approach to drawing up the reservations could undermine this. We conclude that a more hands-on approach from the Wales Office would have been preferable, whereby each department was asked to consult widely and was then challenged as to what they were and were not proposing should go on the list of reservations.

The proposed Reserved Powers Model

28. Clause 3 and Schedules 1 and 2 of the draft Bill replace section 108 and Schedule 7 of GOWA with a new section 108A and new Schedules 7A and 7B. Part 1 of Schedule 7A would reserve a number of general topics, such as aspects of the constitution, foreign affairs, defence, and the single legal jurisdiction of Wales and England. Part 2 of the Schedule reserves specific policy areas by descriptions grouped under broad “Heads”, subdivided into “Sections”.

29. Our inquiry highlighted three areas of interest in relation to the reserved powers model proposed by the draft Bill:

- a) the number of reservations, and the nature of some of those reservations;
- b) the principles underlying the identification, and coherence, of reservations; and
- c) the treatment of “silent” subjects in the existing legislation.

Number of reservations

30. Schedule 1 to the draft Bill contains a range of express reservations, from the Crown and the union of Wales and England, to hovercraft and activities connected with outer space. The cumulative effect is that the draft Bill contains over two hundred reserved matters, a scale that the National Assembly’s Director of Legal Services, Elisabeth Jones, told us would impact on the Assembly’s legislative competence:

although detail in the reservations may appear to offer clarity ... trying to legislate coherently when you have a very large number of holes ... in your competence described in detail is a very difficult thing to do.⁴⁹

Additionally, Professor Richard Wyn Jones warned that the scale of the envisaged reservations could spark future legal challenges. He explained that the draft Bill had imported the words “relates to” from the Scottish reserved powers model in its definition of reserved powers. He believed that whilst this might be appropriate in the Scottish context, where the list of reserved powers is much shorter, “in the context of 260 or so [reservations], that opens the door to all sorts of challenges that could quite easily end up in the Supreme Court”.⁵⁰

49 Q187

50 NAW CLAC [Record of Proceedings](#) paragraph 179, 9 November 2015

31. On the other hand, True Wales told us the movement of power has been “a one-way street ... from Westminster to Cardiff Bay”.⁵¹ They said Wales had “a different tradition from Scotland” and it was a sensible time “to think about what kind of devolution we want in Wales”.⁵² They argued this “ought to be ... about devolving power closer to the people, rather than a more nationalist form of devolution to Cardiff Bay, which is centralist”,⁵³ and that if devolution is to a local level, “there should not be so much for the Welsh Assembly to do if they trust the people of Wales”.⁵⁴ They called for “a root and branch re-examination of how power is devolved in England and Wales”, particularly in relation to the devolution of power to Manchester, which they said was often considered more meaningful than the National Assembly by those in North East Wales.⁵⁵

32. The Secretary of State has himself acknowledged some inadequacies with the list of reservations found in Schedule 7A to the draft Bill. He told us that when he reads through the list “there are items there - and I am not going to share them with you now - where I am not sure that would work”.⁵⁶ He also told the National Assembly’s Constitutional and Legislative Affairs Committee that when he read through the list of reservations he saw things “where I think, you know, ‘For goodness’ sake, why is that being held back as reserved;’ street-pedlars [and hovercraft], and there are other examples as well”.⁵⁷ Furthermore, he has conceded that “the list of reservations is too long” and has promised that the final Bill will have a list of reservations considerably shorter than the one found in the draft Bill.⁵⁸

33. We acknowledge that the Secretary of State has sought to refine the list of reservations in the draft Bill. However, the process of moving from a conferred powers model to a reserved powers model means it was always likely to produce a list of reservations, as mapped out by Whitehall departments.

Principles for identifying reservations

34. Previous work undertaken on a reserved powers model for Wales has emphasized the importance of anchoring a reformed Welsh devolution settlement in key principles. The Silk Commission, for example, identified eight principles that underpinned the second part of their remit.⁵⁹ The Secretary of State has identified three principles that have informed the draft Bill and the Government’s broader agenda on devolution in Wales. These are “strengthening the devolution settlement, clarifying it and making it fairer, which is where the fiscal side and the funding side comes in”.⁶⁰ Nevertheless, a common theme in the evidence we received has been the concern at a perceived lack of principle

51 Q260 (Banner)

52 Q260 (Banner)

53 Q260 (Banner)

54 Q267

55 Q272

56 Q13

57 NAW CLAC [Record of Proceedings](#) paragraph 114, 23 November 2015

58 NAW CLAC [Record of Proceedings](#) paragraphs 14 and 114, 23 November 2015; Q311

59 These were: accountability, clarity, coherence, collaboration, efficiency, equity, stability and subsidiarity and localism. Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, March 2014, p. 28. See also National Assembly for Wales Constitutional and Legislative Affairs Committee, [The UK Government’s proposals for Further Devolution to Wales](#), July 2015 Para 22, and Wales Governance Centre, Cardiff University, and The Constitution Unit, University College London, [Delivering a Reserved Powers Model of Devolution for Wales](#), September 2015

60 Q319

underpinning the draft Bill, and in particular the lack of clarity underpinning the process of making reservations.

35. The Presiding Officer of the National Assembly criticised what she saw as an absence of the principle of subsidiarity from the draft Bill.⁶¹ This point was further highlighted by the Constitutional and Legislative Affairs Committee's critique of the draft Bill in their pre-legislative scrutiny report.⁶² Professor Laura McAllister and Dr. Diana Stirbu's written evidence stated that "rather than [there being] a clear, strategic overview and rationalisation of competences at each level", the list of reservations "resembles more a collation of specific reservations requested by individual Whitehall departments".⁶³

36. The Secretary of State has himself admitted that if "we were starting from a blank sheet of paper ... then maybe you would approach some of the questions in a different way".⁶⁴ However, he emphasised that the UK Government was "dealing with the world as it is [in] a pragmatic and practical way, taking an existing settlement and trying to improve it and make it better and strengthen it".⁶⁵ In his letter to the Committee, dated 5 November 2015, he explained:

Departments were asked initially to map out the existing legislative competence. ... Then, considering appropriate reservations to capture this within the model, departments were also invited to consider issues such as the terms of any equivalent reservation in the Scotland Act 1998, whether the Assembly has legislated in a subject area in which Departments were considering reservations, whether the UK Government has transferred powers to Welsh Ministers via a Transfer of Functions or Designation Order, and any Legislative Consent Motions tabled in the Assembly. This formed a starting point for an iterative process between the Wales Office, government departments and Parliamentary Counsel to develop the reservations.⁶⁶

37. The UK Government did not set out to change the principles underpinning the delineation of the devolution boundary but accepted the current settlement as its starting point. Departments were then asked to consider a number of additional factors when considering reservations. However, we are not clear about what guidance Departments were given. Furthermore, it is not clear to us what the process was that then resulted in the final list.

"Silent subjects"

38. The Secretary of State's approach has been to take the existing devolution settlement, alongside the commitments made in *Powers for a Purpose* and "transpose it into a reserved powers model".⁶⁷ In doing so, the Government's principle of clarifying the devolution settlement can be seen as an attempt to eliminate the "silent subjects" which, according to the Secretary of State, were never intended to be devolved to the Assembly.⁶⁸

61 Q181

62 NAW CLAC, [Report on the UK Government's Draft Wales Bill](#), December 2015, p.43

63 Professor Laura McAllister and Dr. Diana Stirbu ([DWB 05](#))

64 Q319

65 Q319

66 DWB 25

67 Q20

68 Q324

39. As a conferred powers model, GOWA identifies 20 subject areas as devolved. However, the Supreme Court ruling, in the Agricultural Sector (Wales) Bill case,⁶⁹ broadened the competence of the Assembly to include “silent subjects”⁷⁰ when legislation also relates to a devolved area. This ruling followed the abolition of the Agricultural Wages Board in 2013, and the introduction of National Assembly legislation to retain a system of agricultural wage regulation in Wales. The Bill was referred to the Supreme Court by the Attorney General under section 112(1) of GOWA.⁷¹ The Welsh Government argued that it had legislative competence to establish such a regulatory regime as it related to a devolved matter (agriculture). The Attorney General disagreed, submitting that the real purpose and effect of the Bill related to employment and industrial relations (areas that had not been listed as devolved to the Assembly). However, employment and industrial relations were not the subject of general exceptions in GOWA.⁷² The Supreme Court found for the Welsh Government, ruling that provided that a Bill:

fairly and realistically satisfies the test set out in section 108(4) and (7) and is not within an exception, it does not matter whether in principle it might also be capable of being classified as relating to a subject which has not been devolved.⁷³

40. According to the UK Government, the ability of the Assembly to legislate on “silent subjects” undermines the continued operation of the conferred powers model, a model that “was not designed to deliver this level of uncertainty in the devolution boundary”.⁷⁴ As a consequence, *Powers for a Purpose* stated it was time to develop a new model on the basis of reserved powers, which would “bring clarity and consistency to the Welsh settlement, make future referrals to the Supreme Court less likely and so help consolidate a more stable settlement for the longer-term”.⁷⁵

41. It has been claimed that the effect of the draft Bill would be to reverse the agricultural wages case,⁷⁶ but the Secretary of State has said that the UK Government recognises that agricultural wages are a devolved matter. Nevertheless, the Secretary of State did stress that accepting this particular ruling does not mean that “silent subjects are now the other side of the devolution line”.⁷⁷ Given the Government’s focus, on identifying the boundaries of the current devolution settlement⁷⁸ and on reducing the scope for “silent subjects”, it is not surprising that, as Huw Williams noted:

69 See *Agricultural Sector (Wales) Bill—Reference by the Attorney General for England and Wales* [2014] UKSC 43; [2014] 1 WLR 2622.

70 Qq 8, 12, 21

71 [2014] UKSC 43. Section 112(1) states “The Counsel General or the Attorney General may refer the question whether a Bill, or any provision of a Bill, would be within the Assembly’s legislative competence to the Supreme Court for decision.” In this case, the Attorney General submitted “that in reality the Bill does not relate to agriculture but to employment and industrial relations, which have not been devolved”.

72 [2014] UKSC 43

73 [2014] UKSC 43 at [67]

74 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, p.14

75 Wales Office, *Powers for a Purpose: Towards a lasting devolution settlement in Wales*, Cm 9020, p.14

76 Thomas, R. “*The Draft Wales Bill 2015—Part 2*”, UK Constitutional Law Blog (3 December 2015), accessed 11 December 2015; The National Assembly for Wales’ Constitutional and Legislative Affairs Committee called for it to be expressly stated, in the interests of openness and transparency, if the intention in the draft Bill is to reverse the effects of the Supreme Court decisions (NAW CLAC, *Report on the UK Government’s Draft Wales Bill* (December 2015), para 164).

77 Q324

78 Q12

the Bill does give the impression that the exceptions that previously existed have simply been converted into reservations, and that some of the silent subjects have now found a place in the reservations.⁷⁹

42. Under the draft Bill, many previously “silent subjects” will now be reserved. Some of these, for example international relations, are uncontroversial. There are strong opinions about others, and about whether this constitutes a reversal of the Supreme Court’s decision in relation to “silent subjects” in the agricultural wages case. This will be an area of contention in the final Bill, so it is important that the Government does the hard work now to ensure that the list of reservations is justifiable as a whole. This will be necessary to satisfy the National Assembly of Wales, which will be asked to pass a Legislative Consent Motion for the Bill. Each subject will also have to be individually justifiable as they will be scrutinised during the Bill’s passage. This is a large task, and requires collaboration and discussion with other key stakeholders. This pre-legislative process will have kick-started that process, which should help overcome these future challenges.

43. *In this Chapter, we have identified a number of criticisms concerning the reservations in the draft Bill. We recommend that Whitehall be given a second attempt to come up with a list of the powers to be reserved. However, departments must be given clear guidance about the questions they should ask themselves before deciding whether or not to reserve a power. This guidance should make clear that UK Government departments should be considering what they need to reserve or devolve. It must be published prior to the publication of the Bill, so that the final list of reservations can be assessed against the criteria given. We further recommend that, at the same time, the UK Government carries out a consultation exercise with the Welsh Government regarding their expectations. This exercise should both make the final list of reservations more coherent, and also provide a defensible justification for each decision, which will have to be expressed when the final Bill is debated.*

3 Reservation of civil and criminal law and the necessity tests

44. The reservation that has absorbed most of our attention during this inquiry has been the restriction on the modification of criminal law and private law⁸⁰ which is set out in paragraphs 3 and 4 of new Schedule 7B. The UK Government indicates that the purpose of the restriction is to protect the unified legal system of Wales and England.⁸¹ Modification is allowed only where the “necessity tests” (see paragraph 53 below) are satisfied. The Secretary of State explained that the emergence of the “necessity tests” was a result of “real deep, dark complexity around how you reserve civil and criminal law while at the same time not impeding Welsh Government from making law fully and effectively in those areas that are devolved”.⁸²

45. The complexities that the Wales Office face were highlighted in the National Assembly’s observation that “provisions that could be said to modify private law or criminal law arise in every Assembly Bill that modifies the rights or obligations of individuals or private bodies”.⁸³ One witness commented that civil and criminal law, “what a lot of people think of as being ‘the law’”, is reserved but “there has to be a margin within which the Assembly can encroach into that to make its laws work”.⁸⁴

46. The Silk Commission reported that fundamental principles of civil law, and criminal law in its broadest sense, were matters regarded as better exercised on a non-devolved basis,⁸⁵ and that the “necessary wide public debate” on the desirability of full devolution of criminal and civil law had not yet taken place.⁸⁶ We received evidence disputing the rationale for reservation: the debate is clearly ongoing.⁸⁷

Separate or distinct legal jurisdiction

47. A number of witnesses felt creation or formal recognition of a Welsh legal jurisdiction might reduce the complexity required in the draft Bill arising from the restrictions on modifying the criminal and private law.⁸⁸ In particular, witnesses discussed the possibility of a “distinct” rather than a “separate” jurisdiction.⁸⁹ We heard this might consist of a unified court system encompassing Wales and England but applying two distinct bodies of law: the law of Wales and the law of England.⁹⁰ Professor Richard Wyn Jones told us

80 Private law is defined as a combination of civil law subjects. Paragraph 3(2) of new Schedule 7B states ““The private law” means the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession”.

81 HM Government, Draft Wales Bill, [CM 9144](#), p 86 (Explanatory Notes para 32)

82 Q343

83 Dame Rosemary Butler ([DWB 01](#)), p 12

84 Q221

85 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#) (March 2014) paras 4.6.3–4.6.4

86 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#) (March 2014) para 4.6.6

87 See, for example, the evidence of Professor Richard Wyn Jones: NAW CLAC, [Record of Proceedings](#) (9 November 2015), paras [175] and [201]

88 Qq170, 246–247; NAW CLAC, [Record of Proceedings](#) (9 November 2015), paras [132], [146] and [184]

89 Q127; NAW CLAC, [Record of Proceedings](#) (9 November 2015), paras [243]–[244], [254]

90 Q223; NAW CLAC, [Record of Proceedings](#) (9 November 2015), paras [131] and [133]; similarly Q194. See Cardiff University’s Welsh Governance Centre and University College London’s Constitution Unit, [Delivering a Reserved Powers Model of Devolution for Wales](#) (September 2015), p 25

“this is a matter of acknowledging that Welsh law does exist”;⁹¹ he described a Welsh jurisdiction as “the constitution catching up with the legislative reality”.⁹²

48. Sir Stephen Laws QC, former First Parliamentary Counsel and a project leader of the Cardiff-UCL report, told the Silk Commission that a separate “extent” of law for Wales (separate bodies of law for Wales and for England) would “tend to suggest the need for separate court systems”, and if not, “one court with two jurisdictions” with “its own added complexity and inefficiencies”.⁹³ Leanne Wood suggested a distinct jurisdiction would lead to “a separate jurisdiction over [a] period of time”.⁹⁴ The Secretary of State’s view was that “[w]e can have the discussion, and I am, about how we strengthen the delivery of a specific justice function within Wales, taking account of some of the distinctiveness that is emerging with divergence of Welsh law in a number of key areas”.⁹⁵ The Secretary of State described a distinct jurisdiction as a “red herring” and did not accept that it was “the logical next step” in Welsh devolution.⁹⁶ He said that starting again with a single jurisdiction for Wales would be to “build in a pretty hard and deep Offa’s Dyke because then you say that Welsh law ends on the border”.⁹⁷

49. The Silk Commission did not think a separate jurisdiction was a necessary consequence of moving to a reserved powers model: it could be avoided by careful drafting.⁹⁸ However the Silk Commission did recommend that the Welsh and UK Governments review the case for this within the next ten years.⁹⁹ We were told that the draft Bill could be workable even without a separate or distinct jurisdiction.¹⁰⁰ Comparing the jurisdictions labelled “distinct” and “separate”, Professor Richard Wyn Jones told us there was no cross-party desire to devolve justice “and therefore the concept of creating a *separate* jurisdiction is a non-starter”, but that he hoped there would be a cross-party desire to look at a *distinct* jurisdiction as a means of helping to deal with the effect of reserving criminal law and private law.¹⁰¹ The Secretary of State was also of the view that there is no cross-party desire to devolve justice. He told us “the view of the Government is that a single joint jurisdiction across England and Wales, which has served the people of Wales and England very well for centuries, is still the right framework”.¹⁰² Furthermore, he said “that in all of the discussions that we had that led up to the St David’s Day announcement, the official Opposition at the time, the Labour Party, was not calling for a separate jurisdiction either”.¹⁰³ However, he did believe there was a need to discuss how to strengthen the delivery of a specific justice function within Wales, and he told us that discussions with the Lord Chief Justice and the Lord Chancellor had taken place.¹⁰⁴

91 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [244]

92 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [247]

93 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#) (March 2014) p 113 and Sir Stephen Laws, [Identifying the Law of Wales](#) (evidence to the Silk Commission), para 44.

94 Q73

95 Q217

96 Q44

97 Q295

98 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#) (March 2014) paras 4.4.10 and 4.6.4

99 Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#) (March 2014) para 10.3.36

100 Qq169, 173, 215

101 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [254], emphasis added

102 Q317

103 Q318

104 Q317

50. An inevitable consequence of the Assembly’s primary legislative powers is that the laws that apply in Wales, and those that apply in England, are diverging. The divergence will increase.¹⁰⁵ Hefin Rees QC described a “huge body of law that is developing” and suggested to us that once the Assembly was given primary legislative powers, “the genie was out of the bottle”.¹⁰⁶ The Secretary of State too acknowledged there was a growing volume of Welsh-specific law, which in some areas was starting to diverge quite significantly from English law. However, he contended that “the volume of that specific and different law is tiny compared to the overwhelming volume of legislation that caters for England and Wales on a joint basis”.¹⁰⁷

51. We recognise that there is a growing body of Welsh law differing from that which applies in England, and that the requirement of the draft Bill to maintain the unified legal jurisdiction of England and Wales has raised a number of complex supplementary issues.

52. Witnesses discussed the advantages of both separate and distinct jurisdictions. The majority of witnesses recommended the creation of a distinct legal jurisdiction, and it is recognised that this would provide a solution to issues associated with the reservation of civil and criminal law and necessity clauses. This proposal has been unanimously supported by the National Assembly of Wales.

53. The term ‘distinct legal jurisdiction’ need not entail establishing a separate legal jurisdiction with a separate system of courts and separate legal professions.

The necessity tests

54. There are four circumstances in the draft Bill where the National Assembly may legislate if it is “necessary” to give effect to the purpose of a competent provision. As a result, the ‘necessity test’ occurs four times, each in a slightly different context and form, permitting the Assembly to legislate:

- a) otherwise than in relation to Wales;¹⁰⁸
- b) to modify the law on reserved matters;¹⁰⁹
- c) to modify private law;¹¹⁰ or
- d) to modify criminal law.¹¹¹

In each case (except that relating to private law) the Assembly provision must both be ancillary to another—broadly speaking, “competent”—provision, and have no greater effect “than [is] necessary to give effect to” the purpose of the competent provision. The *private* law can also be modified if “necessary for a devolved purpose” (and of no greater

105 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [130]; Q228; Professor Laura McAllister and Dr Diana Stirbu (DWB 005) p 4; Learned Society of Wales ([DWB 007](#)) p 2. See also Q318.

106 Q227; echoed by Huw Williams: Q228

107 Q318

108 New section 108A(3)

109 Paras 1 and 2 of new Schedule 7B

110 New Schedule 7B para 3(4))

111 New Schedule 7B para 4(2)

effect than necessary for that purpose) without the modification needing to be ancillary to a competent provision.

The ‘necessity tests’ as applied to modification of criminal law and private law

55. Unease about the necessity tests was widely voiced by witnesses.¹¹² Specific criticisms included that the test to be applied before modifying the criminal law or the private law¹¹³ would or could:

- a) reduce the Assembly’s legislative zone of competence (criminal and private law are subjects about which GOWA is “silent”);
- b) create complexity and/or uncertainty;
- c) give ordinary citizens a means by which they might challenge Assembly Acts in everyday court cases; and
- d) have a chilling effect on policy development.

56. The Assembly’s Presiding Officer told us the “severe constraints which the draft Bill would place on the Assembly’s use of these key levers [criminal and private law] is a very significant backward step in our status and powers as a legislature”.¹¹⁴ The First Minister told us that the test seemed to imply that the law in devolved areas should only be changed “exceptionally”,¹¹⁵ and that the test ran “the risk of every single bill ending up in the Supreme Court”.¹¹⁶ Additionally, Professor Thomas Glyn Watkin thought the “restrictions that are now being added about private law and criminal law, [are] a further erosion of the [freedom to legislate]”,¹¹⁷ comments which Emyr Lewis echoed.¹¹⁸

57. The Secretary of State disputed the assertion that the necessity test would restrict the Assembly’s competence. He told us that “[t]he idea that somehow the Bill prevents Welsh Government from bringing forward measures to enforce their own legislation and create penalties to enforce their legislation is just not true at all”.¹¹⁹ However, Sue Olley, Legal Adviser, Wales Office, acknowledged that “no greater effect than necessary” was additional to the existing “test of ancillary”.¹²⁰

58. The Secretary of State explained that the necessity test exists in the Scotland Act 1998¹²¹ but accepted “that the application of a necessity test in this draft Bill is different from the Scottish context because as well as applying to reserved areas, it now applies to civil law, criminal law and matters relating to England”.¹²² Others told us the position in Scotland

112 Qq 60, 65, 142, 149; NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [180]; Dame Rosemary Butler (DWB 01) pp 2 and 12.

113 Adopting the definition of “private law” in the draft Bill.

114 Dame Rosemary Butler ([DWB 01](#)), p 2, emphasis in original removed.

115 Q174

116 Q149

117 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [89]

118 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [94]; see also at para [71]

119 Q27

120 Q327

121 Q49

122 Q329

was different to that envisaged in Wales by the draft Bill.¹²³ Emyr Lewis explained that paragraphs 2 and 3 of Schedule 4 of the Scotland Act 1998 contained similar provision but only in relation to reserved matters, and that the necessity test “operated in Scotland in a very limited context”.¹²⁴ Sir Paul Silk explained that in Scotland the necessity test was not so important “because the whole area of private law and criminal law is devolved in Scotland ... so the necessity test isn’t going to bite in the same way”.¹²⁵ Professor Thomas Glyn Watkin also noted the chances of encountering the test would be greater in Wales than in Scotland as a result of the greater number of reservations.¹²⁶

59. We were told by Emyr Lewis that the necessity test itself was “complex”.¹²⁷ Furthermore, Professor Thomas Glyn Watkin predicted the necessity test “may end up producing ... laws that have to steer very carefully around all these restrictions ... with the result that complex competence results in highly complex legislation”.¹²⁸ We were also told that “necessary” was an ambiguous term, and one that was not well understood by lawyers, which is a possible cause for concern.¹²⁹

60. Some witnesses referred to the possibility of competence being raised as a defence in criminal proceedings.¹³⁰ Sue Olley suggested such a legal challenge is available now to those charged with a criminal offence and she did not think the risk was any higher with the draft Bill.¹³¹ Huw Williams thought there should be a limit on challenges to within “a sensible period”,¹³² whilst Professor Thomas Glyn Watkin questioned why the citizen should have the right to challenge legislative competence.¹³³ He thought any challenge ought to be “prior to enactment if those who have responsibility for the jurisdiction wish to do so”.¹³⁴ However, the Secretary of State did not think reducing the ability of citizens to bring a legal challenge to the executive would work, and that the purpose of the Bill was not to eliminate the risk of legal challenge to Welsh policymaking.¹³⁵

61. A final criticism of the necessity tests was that they set too high a threshold.¹³⁶ Professor Thomas Glyn Watkin suggested this could result in a possible chilling effect on policy development, as there would almost always be an alternative to modification of the law. Whilst amending the law might be the better choice, it would not be possible to say it was ‘necessary’.¹³⁷ The Secretary of State did not accept the test could lead to timidity

123 Q215; Dame Rosemary Butler (DWB 001) p 15;

124 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [36], and NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [32]

125 Q126

126 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [39]

127 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [32]

128 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [90]

129 Q219 [Williams]; NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [30]; Dame Rosemary Butler (DWB 001) p 12; see also Robert Thomas, “[The Draft Wales Bill 2015—Part 2](#)”, UK Const L Blog (3 December 2015), accessed 11 December 2015

130 Q125, NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [31]

131 Q331

132 Q219

133 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [82]

134 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [82]

135 Q332

136 Qq216, 221; Robert Thomas, “[The Draft Wales Bill 2015—Part 2](#)”, UK Const L Blog (3 December 2015), accessed 11 December 2015

137 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [40]

in legislating.¹³⁸ He questioned how the necessity test could be “both ambiguous and too high”, but said he was “happy to look again at that”.¹³⁹

62. We challenged our witnesses to provide a more suitable term than “necessary”. Alan Trench did not believe there was an easy substitute for “necessary” which would make the test simpler.¹⁴⁰ Huw Williams thought concepts such as “ancillary” and “reasonable” were better understood by lawyers,¹⁴¹ though Emyr Lewis considered “ancillary” to be ambiguous.¹⁴² Additionally, the Assembly has produced its own drafting suggestions, which offer a range of options from, at one end, maintaining the current scope of Assembly competence to, at the other, sticking closest to the intention of the draft Bill, but introducing greater clarity.¹⁴³

63. We note the difficulties caused by the inclusion of “necessity” in the test for legislating to modify criminal or private law, to modify the law on reserved matters or so as to apply beyond Wales. The comparison with Scotland is not sound. In Scotland, “necessity” is used in the context of consequential or incidental modifications of the law on reserved matters but those reserved matters do not include criminal or private law.

64. We conclude that “necessary” is the wrong test. Its application is uncertain but it risks creating too high a threshold for the Assembly to reach before it can legislate.

65. We recommend that the test of “necessity” is replaced. A number of alternatives have been provided to us, including proposals put forward by the Assembly. We recommend that, in response to this Report, the Wales Office provides an assessment of the suitability of these options.

138 Q330

139 Q306

140 Q240

141 Q219

142 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [30]

143 Dame Rosemary Butler ([DWB 001](#)), pp 23 ff

4 Ministerial consent

66. UK Government Ministers exercise many functions conferred by legislation affecting the law of England and Wales. Some of the ministerial functions previously held by UK Ministers have been devolved to the Welsh Ministers. But Assembly Acts cannot *remove or modify* functions a UK Minister had before 5 May 2011¹⁴⁴ unless the Secretary of State consents or the provision is “incidental to, or consequential on,” another provision of the same Assembly Act (the “incidental/consequential exception”).¹⁴⁵ Assembly Acts cannot *confer or impose* functions on a UK Minister unless the Secretary of State consents.¹⁴⁶ The UK Government says the Secretary of State’s consent should be given before legislation is introduced in the National Assembly.¹⁴⁷

67. The draft Bill would mean the Assembly would need the consent of a UK Minister to remove or modify functions of, or confer or impose functions on, a “reserved authority”; or to confer, impose, modify or remove functions specifically exercisable in relation to such an authority or change such an authority’s constitution.¹⁴⁸ As a result, we were told that the draft Bill reduced the Assembly’s competence and was complex and unclear. Furthermore, we were told that the process of obtaining Ministerial consent caused delay.

Reduced competence

68. The National Assembly argued that the draft Bill extended the requirement for Ministerial consent by:¹⁴⁹

- extending it to authorities other than UK Ministers;
- extending it to the removal or modification of UK Ministerial functions arising after 4 May 2011;
- including functions “specifically exercisable in relation to” reserved authorities;
- including modification of the constitution of reserved authorities; and
- removing the incidental/consequential exception.¹⁵⁰

Some of these effects were echoed in an article by Professor Robert Thomas,¹⁵¹ and in evidence by Professor Thomas Glyn Watkin.¹⁵²

144 The date on which the “Assembly Act” provisions came into force: Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011 (SI 2011 No 1011) art 3.

145 Schedule 7, paras 1(1) and 6(1)

146 Schedule 7, paras 1(2) and 6(2)

147 UK Government, [Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales](#), para 66

148 Schedule 2, inserting into GOWA new Schedule 7B, paragraph 8. In this paragraph, a “reserved authority” is defined as: (a) a Minister of the Crown or government department; and (b) any other public authority, apart from a Welsh public authority.

149 Dame Rosemary Butler ([DWB 01](#)), p 19

150 The UK Government challenged the effect of the incidental/consequential exception in *the Local Government (Byelaws) Bill case (Local Government Byelaws (Wales) Bill 2012—Reference by the Attorney General for England and Wales [2012] UKSC 53; [2013] 1 AC 792)*. The Supreme Court decided that the Bill’s removal of a UK Ministerial function (the Secretary of State’s concurrent role in deciding whether to confirm particular byelaws) was “incidental to, or consequential on,” a principal purpose of the Bill, namely removal of the function from the Welsh Ministers.

151 Robert Thomas, [“The Draft Wales Bill 2015—Part 1”](#), UK Const L Blog (2 December 2015), accessed 11 December 2015

152 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [100]

69. The UK Government acknowledges that competence is reduced. The Wales Office accepts that five existing Assembly provisions could not have been passed in the same manner under the provisions in the draft Bill. Each would have required Ministerial consent, albeit in three cases the Wales Office says consent would be likely to have been given.¹⁵³ While this UK Government might say consent would have been likely, as Kirsty Williams AM, Welsh Liberal Democrats, argued “it is important that [the Secretary of State] remembers that he needs to legislate not only for this Government or for this set of Ministers, but for future Governments and Ministers”.¹⁵⁴ The Secretary of State agreed the need for consent was extended in that “reserved bodies” were now included.¹⁵⁵ He later accepted there might be five consents required that had not been previously, but said there was not an “unacceptably large new requirement of consents”.¹⁵⁶

70. The effect of extending the need for consent and of retaining it in devolved areas was described to us as a “recipe for conflict”.¹⁵⁷ The Institute of Welsh Affairs observed that additional instances needing consent would mean “the relationship between the two governments will surely be tested to breaking point”.¹⁵⁸

71. The Secretary of State explained he would regard as “lawless” the idea that the Welsh Government might be allowed to make legislation that affects England (in relation to functions of UK Ministers or reserved bodies) without regard for the views of the UK Government.¹⁵⁹ He thought:

if Welsh Government are making legislation that as a result impinges on the functions of a UK Minister or a UK reserved body, it is only reasonable that, as is already currently the case, the Welsh Government seek the consent of the UK Minister for that change. ... You need devolution with rules; you need a rules-based approach to this to get clarity and that is what I want this legislation to provide.¹⁶⁰

Complexity and clarity

72. The consenting regime was described by Huw Williams as “a recipe for continuing potential confusion”.¹⁶¹ Professor Richard Wyn Jones found it the “most complex and abstruse” part of the draft Bill.¹⁶² On the other hand, Professor Thomas Glyn Watkin said, “there is no doubt in my mind that the change that is proposed in the Bill increases clarity”,¹⁶³ in the sense that it was clear when consent was required, albeit at the cost of clarity as to when the Assembly could legislate. As Professor Robert Thomas put it:

the Assembly’s competence to modify such powers would be dependent upon the discretion of a Minister of the Crown. Such Ministers will, of course, vary

¹⁵³ Wales Office, *Assembly Acts the Welsh Government Claim Could Not Be Made Under the New Reserved Powers Model: UK Government Analysis* (November 2005) pp 8–11

¹⁵⁴ Q74

¹⁵⁵ Q335

¹⁵⁶ Q337

¹⁵⁷ Q149; see also NAW CLAC, *Record of Proceedings* (9 November 2015), para [207]

¹⁵⁸ Institute of Welsh Affairs ([DWB 09](#)) p 5

¹⁵⁹ Q30; see also Q307.

¹⁶⁰ Q30; see also Q307.

¹⁶¹ Q231

¹⁶² NAW CLAC, *Record of Proceedings* (9 November 2015), para [206]

¹⁶³ NAW CLAC, *Record of Proceedings* (9 November 2015), para [101]

over time. Different Ministers will reach different decisions concerning the modification of their powers. This further undermines the claim that the Bill will provide a clear and certain devolution settlement.¹⁶⁴

73. The Secretary of State told us he did not consider the Bill less clear than existing legislation but that he was happy to look at “whether the mechanisms in the Bill could be clearer, simpler, more straightforward”¹⁶⁵ and that Ministerial consents was an issue he was happy to look at again.¹⁶⁶

Reserved authorities

74. A particular area identified as complex was the definition of “reserved authorities”.¹⁶⁷ Professor Thomas Glyn Watkin said “you either need a list of what the reserved authorities are, or you need a test that will give us what ... is called conceptual certainty. ... If you have any room for doubt, the test doesn’t work”.¹⁶⁸ He also pointed out that the test relies on the concept of an office or holder of an office which has functions of a public nature, and said that this was a difficult area of the law.¹⁶⁹

75. At the outset, the Wales Office made it clear the intention was not to have a list of reserved authorities because of the risks of omitting a relevant body.¹⁷⁰ The Secretary of State indicated he was happy to look at the definition, but observed:

The alternative is creating and defining a list of what those bodies are and then you are back in the position of lists again ... if we did not go down the road of trying to craft some definition on the face of the Bill, the alternative is to itemise all of the bodies.¹⁷¹

76. The National Assembly needs clarity about which bodies it can legislate for. The only alternative we heard to the proposed test was a list of bodies. A list of bodies in respect of which the Assembly can legislate could lack flexibility and would be suggestive of a conferred powers approach. A list of reserved bodies would doubtless be a long one, and even if it is meticulously produced, bodies might inadvertently be missed from it. However, there are plenty of examples of legislation which contain comparable lists, for example, the Freedom of Information Act 2000. That Act includes the power to add bodies to or remove them from the list through secondary legislation, so that any difficulties can be resolved.

77. We recommend that the respective Governments offer indicative lists of bodies which they consider fall on either side of the proposed test. Through negotiation the aim should be to produce an agreed list alongside the Bill, which can be used as a guide. Whilst this would not be binding on successor administrations (or the National Assembly) it could help to establish the parameters of the definition, and therefore avoid disagreement.

164 Robert Thomas, “[The Draft Wales Bill 2015—Part 1](#)”, UK Const L Blog (2 December 2015), accessed 11 December 2015

165 Q294

166 Q307

167 Q195

168 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [113]

169 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [113]

170 Q59

171 Q340

Alignment of executive and legislative devolution

78. The current division of executive devolution has been described as “a haphazard arrangement whereby UK Ministers retain powers on areas devolved to Wales” with the result that “executive and legislative responsibilities do not neatly map onto each other”.¹⁷² The draft Bill transfers specific executive functions to the Welsh Ministers, including in some quite general terms (the transfer of common law powers in clause 25), but in contrast with section 53 of the Scotland Act 1998 it does not effect any general transfer of executive functions.¹⁷³

79. The Silk Commission recommended that “to reduce complexity and increase clarity” there should be a general transfer to the Welsh Ministers of Minister of Crown functions in non-reserved areas,¹⁷⁴ and we heard other calls for such a transfer, which would more closely align legislative and executive competence.¹⁷⁵ Emyr Lewis observed that he understood why power over some cross-border authorities ought to be reserved, but that the consenting regime created “some sort of middle ground”.¹⁷⁶ He told us:

In Scotland, there is a transfer of executive powers of Ministers of the Crown in their entirety to the Scottish Government and to Scottish Ministers. ... They all transfer unless they are specifically exempted. That hasn't happened in this draft, so we have this concept that any function, even if it is within the legislative scope of the Assembly and isn't reserved, any power that power lies in London ... it is not possible to legislate on that without the consent of London.¹⁷⁷

80. Alignment seems to be the ultimate aim of the UK Government. The Secretary of State said he thought there was “an issue around ... pre-commencement Minister of the Crown functions” that he was “happy to go away and look at”.¹⁷⁸ Sue Olley told us the Wales Office was reviewing pre-commencement Ministerial functions, and that:

we hope to arrive at a position where we are talking about Ministers of the Crown exercising functions in reserved areas and Welsh Ministers exercising functions in devolved areas.¹⁷⁹

81. The Secretary of State acknowledged some of the evidence strongly suggested that the “reach” of UK Government Ministers should recede but observed that “if you follow the logic of some of the rhetoric ... you get to a place where you would believe that the reach of UK Ministers should stop at Offa's Dyke”.¹⁸⁰ His position was that there should be an efficient way for each government to “make legislation fully that may for legitimate reasons need to cross into each other's devolved competence”.¹⁸¹

172 Robert Thomas, “*The Draft Wales Bill 2015—Part 1*”, UK Const L Blog (2 December 2015), accessed 11 December 2015; see also Q231

173 NAW CLAC, *Record of Proceedings* (9 November 2015), para [104]

174 Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (March 2014) para 4.7.3 and R.2

175 Q151; Professor Laura McAllister and Dr Diana Stirbu (DWB 05)

176 NAW CLAC, *Record of Proceedings* (9 November 2015), para [107]

177 NAW CLAC, *Record of Proceedings* (9 November 2015), para [104]

178 Q337

179 Q338

180 Q293

181 Q293

82. **Greater alignment of executive and legislative powers would reduce complexity and increase clarity.** We welcome the UK Government’s aim to align those powers and its review of pre-commencement functions, but are disappointed this review had not been completed before the draft Bill was presented to us for scrutiny.

83. *We recommend that wherever possible the UK Government transfers to the Welsh Ministers, through revision to the draft Bill, all Ministerial functions in areas of devolved legislative competence.*

Delays in obtaining Ministerial consent

84. We heard that the process of obtaining Ministerial consent can cause delay.¹⁸² The First Minister told us it took 16 months to obtain some of the consents for the Social Services and Well-being (Wales) Act 2014, and “many months” to get consents for the Public Health (Wales) Bill.¹⁸³ His view was that granting consents to Wales was “not a priority” for Whitehall departments.

85. The Secretary of State told us the time taken to give consent varied. He acknowledged “[s]ometimes it is the fault of the UK Government machine ... and there are specific examples where the turnaround has not been timely enough”.¹⁸⁴ He added that sometimes further information had to be sought from the Welsh Government before being able to make a decision and that might contribute to delay.

86. One proposal we raised with the Secretary of State was that there should be a deadline for provision of consent. The Secretary of State thought this was “a really good suggestion” and considered “some kind of concordat around ministerial consents” to be “definitely something worth pursuing”.¹⁸⁵

87. **There will continue to be occasions when it is appropriate for the National Assembly to legislate in respect of bodies not operating solely in Wales, as the Wales Office acknowledges. A process which streamlines consideration of Ministerial consent would be welcome.**

88. *We recommend that the Government includes in the final Bill a procedure for the granting of Ministerial consent whereby it must be granted or refused within 60 days, in default of which consent would be deemed given. Such a procedure should also include the possibility of an extension to the time period where one was reasonably required, for example to obtain further information from the Welsh Ministers.*

182 Learned Society of Wales (DWB 07) p 2

183 Q149

184 Q336

185 Q308 and Q323

5 The approach of the Wales Office to the “pre-legislative process”

89. The previous chapters have focused on the three main criticisms of the draft Bill that have been raised during our inquiry. We have also received comments that have been critical of the overall pre-legislative process and the approach taken within Whitehall, which we consider in this chapter.

Preparing the draft Bill

90. When the Secretary of State appeared before us on 26 October, he told us that the draft Bill gave a relatively straightforward and simple architecture within which future Governments could “tweak the devolution boundary”.¹⁸⁶ He explained that the appropriate amount of time had been taken “to work up a model that we believe is workable in terms of the advice that we get from parliamentary counsel on giving it practical legal effect” and that now he was to “open the books and invite people to comment, cross-question and scrutinise that draft legislation”.¹⁸⁷

91. One criticism of the draft Bill was that it is a bill to amend, rather than replace, GOWA. Professor Richard Wyn Jones provided a summary of the effect of this approach:

to read this, you have to have a copy of the 2006 Act, and a towel doused in cold water wrapped around your head, and you have to compare the two pieces of legislation. As a constitution for Wales, this isn’t user friendly.¹⁸⁸

We were told by others that a replacement for GOWA would be preferable,¹⁸⁹ and the Constitutional and Legislative Affairs Committee concluded in their report that a consolidating Bill “would help deal with some of the issues of accessibility and complexity”.¹⁹⁰

92. Another criticism concerned the extent of communications between Whitehall and Cardiff. The Secretary of State explained that over a period of six weeks leading up to the publication of the draft Bill there was “an opportunity for private discussions between ... the Wales Office and ... the Welsh Government officials” and that these discussions would “carry on in parallel with the open period of pre-legislative scrutiny and consultation that the publication started”. However, the Constitutional and Legislative Affairs Committee criticised this approach, and said “the Welsh Government and Assembly, who will have to work with the model on a daily basis, have been brought into the process too late”.

93. When the Secretary of State appeared before us for the second time, on 9 December, he explained that the pre-legislative scrutiny phase had done what the Government had intended it to do. He said that the draft Bill was “put out into the marketplace and that provides an opportunity to hear evidence ... [and] in a sense it has flushed out positions of a lot of groups and individuals” and that there would be changes to the legislation from the draft when the Bill was introduced.¹⁹¹

186 Q55

187 Q40

188 Q192

189 Q216 and Q234

190 NAW CLAC, [Report on the UK Government’s Draft Wales Bill](#), December 2015, p.41

191 Q293 and Q306

94. We have heard that some of the decisions taken in the preparation of the draft Bill may hinder its workability. For example, the decision to amend the Government of Wales Act 2006, rather than replace it, means that the proposed legislation is not freestanding. Additionally, whilst we welcome the discussions that are ongoing between the Wales Office and the Welsh Government, more extensive discussions could have taken place prior to the draft Bill being published.

95. Whilst this pre-legislative process has flushed out views, it has also made it apparent that the final Bill will be significantly different to that which we have been scrutinising. That is wrong. Whilst changes and improvements are what this process seeks to provide, the weight of the evidence we received has meant we have had to focus on fundamental principles of the draft Bill rather than the specifics of the text. The Government should have focused its effort on resolving these matters of principle, before proceeding with a draft Bill. This could have been achieved through a consultation on its proposals which would also have aired these issues.

Timing

96. At the outset of our inquiry, the Secretary of State told us “There will not be another Wales devolution piece of legislation in this Parliament under this Government”. However, some witnesses have argued that the Government’s timetable for introducing this important piece of legislation, expected to be in early 2016,¹⁹² was not appropriate for practical and process reasons. Sir Paul Silk told us “because this Bill is an important constitutional Bill ... do it right. There is no need to rush things”.¹⁹³ Dame Rosemary Butler also felt that the draft Bill was being rushed, and there was a need to get it right the first time. This view was shared by Hefin Rees QC, who also told us “Wales ... deserves a devolution settlement that will be long lasting, and will have durability and clarity” but that the speed of the process was “not the way to get to grips with a detailed, complicated piece of legislation”.¹⁹⁴ Furthermore, Alan Trench thought that if the Bill had to be fundamentally reworked “it would be very hard to comply with the proposed timetable”.¹⁹⁵

97. Additionally, we heard that the timetable for the Bill was ill-conceived for political reasons. Andrew RT Davies AM, Leader of the Welsh Conservatives, argued “We are going into a politically charged couple of months ... We have the Assembly election coming up, and it is probably difficult to find consensus on this type of legislation just before a Welsh general election”.¹⁹⁶ The First Minister was concerned that the Bill could “turn into some kind of political football” and thought it “might be worth taking a couple of months to get this right” whilst Dame Rosemary Butler felt that the draft Bill should be left for the new Assembly to discuss.¹⁹⁷

98. We have also heard that the swift pace with which the Wales Office has sought to proceed has crowded out contributions from civic society to this stage in the legislation’s formulation.¹⁹⁸ Professor Richard Wyn Jones told us:

192 Q40

193 Q132

194 Q218

195 Q238

196 Q64

197 Q182

198 Professor Laura McAllister and Dr. Diana Stirbu ([DWB 05](#)); NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [153]

the timetable set out for this process does make it extremely difficult for civic society organisations such as universities to make a sensible response to what is going on. The timetable is so challenging. ... As the Lord Chief Justice has said, this is the most complex devolution settlement of them all, and we are dealing with it in great haste, and that does make things very difficult.¹⁹⁹

He added “If we want this debate to move beyond an argument between governments, then we have to delay the process”.²⁰⁰

99. At the start of this inquiry, the Secretary of State said “I think I have struck the right balance. ... I do not think I can win either way on satisfying people on the timetable”.²⁰¹ Indeed, some witnesses empathised with the situation he was in. Sir Paul Silk told us “I can understand that there may not be another slot for another Wales Bill in the future, so you are a little bit between the devil and the deep blue sea”.²⁰² Hefin Rees QC emphasised that this was a draft Bill and there were further opportunities for improvement, but added “I would certainly hope to see some evidence that some of this detailed work is now being done”.²⁰³ Furthermore, Andrew RT Davies AM and Kirsty Williams AM, from a political perspective, both felt that it would be possible to find a way forward.²⁰⁴

100. When the Secretary of State appeared before us on 9 December, he reiterated:

there will be no appetite on the part of the UK Government for quite some considerable time to do another major piece of Welsh legislation, so we need to do the work to get the legislation as fit and proper as we can so that it will last.²⁰⁵

However, he disputed that the pace of the process had been rushed, arguing that it had been ongoing for over a year already.²⁰⁶ In addition there was “pretty much all of next year while this Bill will be going through the parliamentary process to reflect and make changes”.²⁰⁷ He added that “through this pre-legislative scrutiny phase we are getting a clear idea of where the areas of change need to be”.

101. The timetable that the Secretary of State has set is challenging, but it can be done. However, the Secretary of State should not be overly committed to his stated timetable.

102. We recommend that he take this opportunity to reflect fully on the pre-legislative process. He should also be open to the possibility of introducing a Bill later in this Session if, in his consideration, the current timetable becomes too challenging.

Additional provisions to be added to the Bill

103. The provisions of the Wales Act 2014 confer on the National Assembly for Wales the power to set rates of income tax to be paid by Welsh taxpayers. However, this power is

199 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [178]

200 NAW CLAC, [Record of Proceedings](#) (9 November 2015), para [183]

201 Q40

202 Q132

203 Q217

204 Q79 (Davies) and Q79 (Williams)

205 Q305

206 Q314

207 Q345

subject to a referendum. On 25 November, in the Autumn Statement, the Chancellor of the Exchequer announced in the House of Commons:

My right hon. Friend the Secretary of State for Wales and I also confirm that we will legislate so that the devolution of income tax can take place without a referendum.²⁰⁸

This was shortly followed by a tweet from the Secretary of State, which stated “I will amend Wales Bill to remove referendum block on Welsh tax powers”.²⁰⁹

104. We considered that these statements amounted to the addition of an extra provision to the Bill. As such we were of the view that this was something that we should have had time to consider during our inquiry. Due to the timing of the announcement, we have not been able to take expert evidence on this matter, but we did raise it with the Secretary of State on 9 December. He told us that he did not consider the addition of this provision to be a key element of the Bill. He argued that the forthcoming Bill was “a convenient vehicle” and that “[i]t is the 2014 Act that really delivers the fiscal powers”.²¹⁰

105. In their report, the Constitutional and Legislative Affairs Committee welcomed the devolution of some income tax powers without the need for a referendum, but concluded that this “stands in contrast to the unnecessarily restrictive boundary of legislative competence currently delivered through the draft Bill”.²¹¹

106. We consider the announcement, that the power to set rates of income tax to be paid by Welsh taxpayers would be devolved without requiring a referendum, was a key change in policy. We regret the fact that the Committee did not have the opportunity to properly scrutinise this.

208 HC Deb, 25 November 2015, [col 1365](#) [Commons Chamber]

209 <https://twitter.com/scrabbmp/status/669512175413805057>

210 Q298

211 NAW CLAC, [Report on the UK Government’s Draft Wales Bill](#), December 2015, p.43

6 Concluding remarks

107. The majority of witnesses we heard from, and who have provided written evidence, have suggested improvements to the draft Bill. Some of these, such as replacing the “necessity” test with a test that is clearer and has a lower threshold, and that in relation to Ministerial consent, that the UK Government transfers to the Welsh Ministers all Ministerial functions in areas of devolved legislative competence, the Committee have been able to agree upon. Some of the evidence received raised other important and relevant issues; in particular many witnesses proposed a form of distinct legal jurisdiction. This issue may not have been apparent to all potential witnesses at the outset of the inquiry, so we cannot be confident we have received all relevant evidence on this important subject. Given the range of opinions on the Committee it is unlikely to be something on which we would have reached agreement. We thank all those who have contributed to this inquiry, the first for this new Welsh Affairs Committee.

108. There are a range of differing views amongst the Members of this new Committee, as would be expected, and the issue of a separate or distinct legal jurisdiction elicited strong views on all sides. There was a consensus that at some point this needs to be reviewed. However, it was not an issue that this Committee could agree upon now, but one we will have to return to. In terms of the broader picture, some Members are of the view that devolved powers in certain areas should be returned to Westminster. Furthermore, they strongly believe that a continual one-way transfer of powers from Westminster to Cardiff poses a threat to the unity and stability of the United Kingdom. Other Members take a different view, and would like to see more powers be devolved to the National Assembly. Furthermore, some Members thought there was a lack of underlying principles providing a basis for the draft Bill. The Committee could all agree that it is important that a new settlement needs to have greater clarity and workability for the future. This report has sought to find a balance between these views and to find some recommendations which, notwithstanding the wide range of views, all our Members can agree upon. Where the Committee has come to a conclusion, or made a recommendation, we have aimed to do so unanimously on a consensual basis. Our aim in this inquiry was to suggest improvements to the draft Bill, which are acceptable to all sides. We believe we have achieved this aim in this report.

109. We now ask the Secretary of State to pause, so that he can reflect on the recommendations we have made. These will require him to look again at the necessity tests, the list of reservations, the matter of ministerial consent and also to continue to review the issue of a separate or distinct Welsh jurisdiction. There is a growing body of Welsh law that differs from that which applies in England, but the implications of this requires careful scrutiny. We share the view of the Silk Commission, that the UK and Welsh governments will need to continue to review the issue of a separate or distinct Welsh jurisdiction.

Conclusions and recommendations

Reserved and conferred power models

1. Whilst we welcome the discussions that are ongoing between the Wales Office and the Welsh Government on the draft Bill, these discussions should have concluded prior to the draft Bill being published. This dialogue would have aired some of the views that have been shared with us in this inquiry and would have informed the drafting of the Bill. However, the drafting of the Bill is the responsibility of the Secretary of State. (Paragraph 16)

The St David's Day Process

2. We agree with these analyses, and note that the desire for political consensus was the overwhelming driver of this settlement. (Paragraph 22)

Getting the Whitehall machine thinking about Wales

3. There is a range of ways in which Government departments could have gathered views on where the devolution boundary should lie. One end of the spectrum would include an approach similar to that adopted for the Government's work on the balance of competences between the UK and the EU, whereby Government departments would consult widely and look in depth at each subject area. The results of the write-around suggest that the Whitehall departments replied with a list that maps out the existing legislative competence. We note the Secretary of State's comments that there has been pushback from the Wales Office with regard to the list of reservations, and we would welcome examples of where this has happened, and how Westminster departments responded. (Paragraph 26)
4. It is in the interests of everyone that this settlement is long lasting and we are concerned that the approach to drawing up the reservations could undermine this. We conclude that a more hands-on approach from the Wales Office would have been preferable, whereby each department was asked to consult widely and was then challenged as to what they were and were not proposing should go on the list of reservations. (Paragraph 27)

Number of reservations

5. We acknowledge that the Secretary of State has sought to refine the list of reservations in the draft Bill. However, the process of moving from a conferred powers model to a reserved powers model means it was always likely to produce a list of reservations, as mapped out by Whitehall departments. (Paragraph 33)

Principles for identifying reservations

6. The UK Government did not set out to change the principles underpinning the delineation of the devolution boundary but accepted the current settlement as its starting point. Departments were then asked to consider a number of additional

factors when considering reservations. However, we are not clear about what guidance Departments were given. Furthermore, it is not clear to us what the process was that then resulted in the final list. (Paragraph 37)

“Silent subjects”

7. Under the draft Bill, many previously “silent subjects” will now be reserved. Some of these, for example international relations, are uncontroversial. There are strong opinions about others, and about whether this constitutes a reversal of the Supreme Court’s decision in relation to “silent subjects” in the agricultural wages case. This will be an area of contention in the final Bill, so it is important that the Government does the hard work now to ensure that the list of reservations is justifiable as a whole. This will be necessary to satisfy the National Assembly of Wales, which will be asked to pass a Legislative Consent Motion for the Bill. Each subject will also have to be individually justifiable as they will be scrutinised during the Bill’s passage. This is a large task, and requires collaboration and discussion with other key stakeholders. This pre-legislative process will have kick-started that process, which should help overcome these future challenges. (Paragraph 42)
8. In this Chapter, we have identified a number of criticisms concerning the reservations in the draft Bill. We recommend that Whitehall be given a second attempt to come up with a list of the powers to be reserved. However, departments must be given clear guidance about the questions they should ask themselves before deciding whether or not to reserve a power. This guidance should make clear that UK Government departments should be considering what they need to reserve or devolve. It must be published prior to the publication of the Bill, so that the final list of reservations can be assessed against the criteria given. We further recommend that, at the same time, the UK Government carries out a consultation exercise with the Welsh Government regarding their expectations. This exercise should both make the final list of reservations more coherent, and also provide a defensible justification for each decision, which will have to be expressed when the final Bill is debated. (Paragraph 43)

Separate or distinct legal jurisdiction

9. We recognise that there is a growing body of Welsh law differing from that which applies in England, and that the requirement of the draft Bill to maintain the unified legal jurisdiction of England and Wales has raised a number of complex supplementary issues. (Paragraph 51)
10. Witnesses discussed the advantages of both separate and distinct jurisdictions. The majority of witnesses recommended the creation of a distinct legal jurisdiction, and it is recognised that this would provide a solution to issues associated with the reservation of civil and criminal law and necessity clauses. This proposal has been unanimously supported by the National Assembly of Wales. (Paragraph 52)
11. The term ‘distinct legal jurisdiction’ need not entail establishing a separate legal jurisdiction with a separate system of courts and separate legal professions. (Paragraph 53)

The ‘necessity tests’ as applied to modification of criminal law and private law

12. We note the difficulties caused by the inclusion of “necessity” in the test for legislating to modify criminal or private law, to modify the law on reserved matters or so as to apply beyond Wales. The comparison with Scotland is not sound. In Scotland, “necessity” is used in the context of consequential or incidental modifications of the law on reserved matters but those reserved matters do not include criminal or private law. (Paragraph 63)
13. We conclude that “necessary” is the wrong test. Its application is uncertain but it risks creating too high a threshold for the Assembly to reach before it can legislate. (Paragraph 64)
14. We recommend that the test of “necessity” is replaced. A number of alternatives have been provided to us, including proposals put forward by the Assembly. We recommend that, in response to this Report, the Wales Office provides an assessment of the suitability of these options. (Paragraph 65)

Reserved authorities

15. The National Assembly needs clarity about which bodies it can legislate for. The only alternative we heard to the proposed test was a list of bodies. A list of bodies in respect of which the Assembly can legislate could lack flexibility and would be suggestive of a conferred powers approach. A list of reserved bodies would doubtless be a long one, and even if it is meticulously produced, bodies might inadvertently be missed from it. However, there are plenty of examples of legislation which contain comparable lists, for example, the Freedom of Information Act 2000. That Act includes the power to add bodies to or remove them from the list through secondary legislation, so that any difficulties can be resolved. (Paragraph 76)
16. We recommend that the respective Governments offer indicative lists of bodies which they consider fall on either side of the proposed test. Through negotiation the aim should be to produce an agreed list alongside the Bill, which can be used as a guide. Whilst this would not be binding on successor administrations (or the National Assembly) it could help to establish the parameters of the definition, and therefore avoid disagreement. (Paragraph 77)

Alignment of executive and legislative devolution

17. Greater alignment of executive and legislative powers would reduce complexity and increase clarity. We welcome the UK Government’s aim to align those powers and its review of pre-commencement functions, but are disappointed this review had not been completed before the draft Bill was presented to us for scrutiny. (Paragraph 82)
18. We recommend that wherever possible the UK Government transfers to the Welsh Ministers, through revision to the draft Bill, all Ministerial functions in areas of devolved legislative competence. (Paragraph 83)

Delays in obtaining Ministerial consent

19. There will continue to be occasions when it is appropriate for the National Assembly to legislate in respect of bodies not operating solely in Wales, as the Wales Office acknowledges. A process which streamlines consideration of Ministerial consent would be welcome. (Paragraph 87)
20. We recommend that the Government includes in the final Bill a procedure for the granting of Ministerial consent whereby it must be granted or refused within 60 days, in default of which consent would be deemed given. Such a procedure should also include the possibility of an extension to the time period where one was reasonably required, for example to obtain further information from the Welsh Ministers. (Paragraph 88)

Preparing the draft Bill

21. We have heard that some of the decisions taken in the preparation of the draft Bill may hinder its workability. For example, the decision to amend the Government of Wales Act 2006, rather than replace it, means that the proposed legislation is not freestanding. Additionally, whilst we welcome the discussions that are ongoing between the Wales Office and the Welsh Government, more extensive discussions could have taken place prior to the draft Bill being published. (Paragraph 94)
22. Whilst this pre-legislative process has flushed out views, it has also made it apparent that the final Bill will be significantly different to that which we have been scrutinising. That is wrong. Whilst changes and improvements are what this process seeks to provide, the weight of the evidence we received has meant we have had to focus on fundamental principles of the draft Bill rather than the specifics of the text. The Government should have focused its effort on resolving these matters of principle, before proceeding with a draft Bill. This could have been achieved through a consultation on its proposals which would also have aired these issues. (Paragraph 95)

Timing

23. The timetable that the Secretary of State has set is challenging, but it can be done. However, the Secretary of State should not be overly committed to his stated timetable. (Paragraph 101)
24. We recommend that he take this opportunity to reflect fully on the pre-legislative process. He should also be open to the possibility of introducing a Bill later in this Session if, in his consideration, the current timetable becomes too challenging. (Paragraph 102)

Additional provisions to be added to the Bill

25. We consider the announcement, that the power to set rates of income tax to be paid by Welsh taxpayers would be devolved without requiring a referendum, was

a key change in policy. We regret the fact that the Committee did not have the opportunity to properly scrutinise this. (Paragraph 106)

Concluding remarks

26. The majority of witnesses we heard from, and who have provided written evidence, have suggested improvements to the draft Bill. Some of these, such as replacing the “necessity” test with a test that is clearer and has a lower threshold, and that in relation to Ministerial consent, that the UK Government transfers to the Welsh Ministers all Ministerial functions in areas of devolved legislative competence, the Committee have been able to agree upon. Some of the evidence received raised other important and relevant issues; in particular many witnesses proposed a form of distinct legal jurisdiction. This issue may not have been apparent to all potential witnesses at the outset of the inquiry, so we cannot be confident we have received all relevant evidence on this important subject. Given the range of opinions on the Committee it is unlikely to be something on which we would have reached agreement. We thank all those who have contributed to this inquiry, the first for this new Welsh Affairs Committee. (Paragraph 107)
27. There are a range of differing views amongst the Members of this new Committee, as would be expected, and the issue of a separate or distinct legal jurisdiction elicited strong views on all sides. There was a consensus that at some point this needs to be reviewed. However, it was not an issue that this Committee could agree upon now, but one we will have to return to. In terms of the broader picture, some Members are of the view that devolved powers in certain areas should be returned to Westminster. Furthermore, they strongly believe that a continual one-way transfer of powers from Westminster to Cardiff poses a threat to the unity and stability of the United Kingdom. Other Members take a different view, and would like to see more powers be devolved to the National Assembly. Furthermore, some Members thought there was a lack of underlying principles providing a basis for the draft Bill. The Committee could all agree that it is important that a new settlement needs to have greater clarity and workability for the future. This report has sought to find a balance between these views and to find some recommendations which, notwithstanding the wide range of views, all our Members can agree upon. Where the Committee has come to a conclusion, or made a recommendation, we have aimed to do so unanimously on a consensual basis. Our aim in this inquiry was to suggest improvements to the draft Bill, which are acceptable to all sides. We believe we have achieved this aim in this report. (Paragraph 108)
28. We now ask the Secretary of State to pause, so that he can reflect on the recommendations we have made. These will require him to look again at the necessity tests, the list of reservations, the matter of ministerial consent and also to continue to review the issue of a separate or distinct Welsh jurisdiction. There is a growing body of Welsh law that differs from that which applies in England, but the implications of this requires careful scrutiny. We share the view of the Silk Commission, that the UK and Welsh governments will need to continue to review the issue of a separate or distinct Welsh jurisdiction. (Paragraph 109)

Formal Minutes

Wednesday 24 February 2016

Members present:

David T.C. Davies, in the Chair

Byron Davies

Stephen Kinnock

Chris Davies

Liz Saville Roberts

Dr James Davies

Mr Mark Williams

Gerald Jones

Draft Report (*Pre-legislative scrutiny of the draft Wales Bill*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 50 read and agreed to.

Paragraph 51 read, as follows:

“There is a growing body of Welsh law that differs from that which applies in England. This introduces complexity, but we understand the draft Bill could work without a Welsh legal jurisdiction. Any decision to modify the justice system, which has worked well for centuries, would need to be based on very sound foundations. Even the introduction or formal recognition of a more limited ‘distinct’ jurisdiction—seen by a number of witnesses as a solution to some complexity in the draft Bill—is something which would need careful scrutiny. We have not consulted about this idea, though given the range of our opinions (and lack of wider political consensus) it is unlikely to be something on which we would have reached agreement. As the Silk Commission recommended, the UK and Welsh governments will need to continue to review the issue of a separate or distinct Welsh jurisdiction.”

Motion made, to leave out paragraph 51 and insert the following new paragraphs:

“We recognise that there is a growing body of Welsh law differing from that which applies in England, and that the requirement of the draft Bill to maintain the unified legal jurisdiction of England and Wales has raised a number of complex supplementary issues.

Witnesses discussed the advantages of both separate and distinct jurisdictions. The majority of witnesses recommended the creation of a distinct legal jurisdiction, and it is recognised that this would provide a solution to issues associated with the reservation of civil and criminal law and necessity clauses. This proposal has been unanimously supported by the National Assembly of Wales.

The term ‘distinct legal jurisdiction’ need not entail establishing a separate legal jurisdiction with a separate system of courts and separate legal professions.” —(*Liz Saville Roberts*)

Question put, That paragraph 51 be disagreed to and the new paragraphs be read a second time.

The Committee divided:

Ayes, 4	Noes, 3
Gerald Jones	Byron Davies
Stephen Kinnock	Chris Davies
Liz Saville Roberts	Dr James Davies
Mr Mark Williams	

Question accordingly agreed to.

Paragraph 51 disagreed to and new paragraphs inserted (now paragraphs 51, 52 and 53).

Paragraph—(*Liz Saville Roberts*)—brought up and read as follows:

“We recommend that the UK and Welsh governments should work together to agree a mutually-acceptable definition of distinct legal jurisdiction, in accordance with Silk Commission recommendations, and adapt the final Bill accordingly.”

Question proposed, That the paragraph be read a second time.

The Committee divided:

Ayes, 3	Noes, 3
Gerald Jones	Byron Davies
Liz Saville Roberts	Chris Davies
Mr Mark Williams	Dr James Davies

Whereupon the Chair declared himself with the Noes.

Question accordingly negatived.

Paragraphs 52 to 107 (now paragraphs 54 to 109) read and agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Monday 29 February at 12.00 pm at the National Assembly for Wales

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at www.parliament.uk/welshcom.

Monday 26 October 2015

Question number

Rt Hon Stephen Crabb MP, Secretary of State, **Geth Williams**, Deputy Director, Constitution and Corporate Services and **Sue Olley**, Legal Adviser, Wales Office

[Q1-60](#)

Monday 9 November 2015, Morning session

Andrew R. T. Davies AM, Welsh Conservatives, **Leanne Wood AM**, Plaid Cymru, and **Kirsty Williams AM**, Welsh Liberal Democrats

[Q61-79](#)

William Graham AM, Chair of the Enterprise and Business Committee of the National Assembly for Wales

[Q80-141](#)

Monday 9 November 2015, Afternoon session (joint meeting with the Constitutional and Legal Affairs Committee, National Assembly for Wales)

Professor Thomas Glyn Watkin, and **Emyr Lewis**, Senior Partner, Blake Morgan LLP

[paras 8-167](#)

Professor Roger Scully, and **Richard Wyn Jones**, Director, Wales Governance Centre, Cardiff University

[paras 168-263](#)

Monday 9 November 2015, Afternoon session

Rt Hon Carwyn Jones AM, First Minister of Wales, and **Hugh Rawlings**, Director of Constitutional Affairs and Intergovernmental Relations

[Q142-177](#)

Monday 16 November 2015

Dame Rosemary Butler AM, Presiding Officer, **Elisabeth Jones**, Director of Legal Services and **Adrian Crompton**, Director of Assembly Business, National Assembly for Wales

[Q178-214](#)

Monday 23 November 2015

Hefin Rees QC, Chairman, Association of London Welsh Lawyers, **Kay Powell**, Policy Adviser, and **Huw Williams**, Law Society of England and Wales

[Q215-234](#)

Alan Trench

[Q235-259](#)

Rachel Banner, **Annie Mulholland**, and **Roger Cracknell**, True Wales

[Q260-274](#)

Monday 30 November 2015

Alun Ffred Jones AM, Chair of the Environment and Sustainability Committee, National Assembly for Wales

[Q276-293](#)

Wednesday 9 December 2015

Rt Hon Stephen Crabb MP, Secretary of State, **Geth Williams**, Deputy Director, Constitution and Corporate Services and **Sue Olley**, Legal Adviser, Wales Office

[Q294-348](#)

Published written evidence

The following written evidence was received and can be viewed on the Committee's inquiry web page at www.parliament.uk/welshcom. DWB numbers are generated by the evidence processing system and so may not be complete.

- 1 Community Housing Cymru Group ([DWB0018](#))
- 2 Cymdeithas Yr Iaith Gymraeg ([DWB0010](#))
- 3 Dame Rosemary Butler ([DWB0001](#))
- 4 Dr Elin Royles ([DWB0015](#))
- 5 Dwr Cymru / Welsh Water ([DWB0020](#))
- 6 Electoral Commission ([DWB0012](#))
- 7 Equality and Human Rights Commission ([DWB0019](#))
- 8 Gruffydd Meredith ([DWB0014](#))
- 9 Huw Williams ([DWB0013](#)); ([DWB0022](#))
- 10 Institute of Welsh Affairs ([DWB0009](#))
- 11 Learned Society of Wales ([DWB0007](#))
- 12 Marcus Edwards ([DWB0017](#))
- 13 National Grid Plc ([DWB0021](#))
- 14 Professor Laura McAllister and Dr Diana Stirbu ([DWB0005](#))
- 15 Rt Hon Carwyn Jones AM, First Minister of Wales ([DWB0026](#))
- 16 Rt Hon Stephen Crabb MP, Secretary of State for Wales ([DWB0025](#))
- 17 Undeb Cenedlaethol Athrawon Cymru (UCAC) ([DWB0016](#))
- 18 Welsh Language Commissioner ([DWB0011](#))
- 19 Yourlegaleyes ([DWB0006](#))