HOUSE OF LORDS

Select Committee on the Constitution

5th Report of Session 2016–17

Wales Bill

Ordered to be printed 27 October 2016 and published 28 October 2016

Published by the Authority of the House of Lords

HL Paper 59

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CONTENTS

Wales Bill

CHAPTER 1: INTRODUCTION

Background

1. The Wales Bill was introduced into the House of Commons on 7 July 2016. It received its first reading in the House of Lords on 13 September and its second reading on 10 October. The committee stage is expected to commence on Monday 31 October.

2. The Bill is intended to reflect the St David's Day Agreement,[1] announced in February 2015 in the wake of the 'Silk II' report[2] on the Welsh devolution system. The Bill was prefigured by a Draft Wales Bill[3] that was published by the UK Government in October 2015.

3. The Draft Bill attracted criticism from committees in both the National Assembly for Wales and the House of Commons.[4] The Welsh Government said that a "fundamental rethink is needed if we are to create a coherent and lasting settlement for Wales"[5] and produced an alternative Government and Laws in Wales Bill in response.[6] Against this background, the then Secretary of State for Wales announced in February 2016 that the introduction of the Wales Bill would be deferred pending reconsideration of certain matters.[7]

4. The Wales Bill is a highly detailed and complex piece of constitutional legislation. This report summarises a number of constitutional issues raised by the Bill. Our report draws upon the Committee's recent reports on constitutional change,[8] the devolution of further powers to Scotland,[9] and the Union and devolution.[10] In addition, we make use of the Welsh Assembly's Constitutional and Legislative Affairs Committee's recent *Report on the UK*

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1 See HM Government, Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales, Cm 9020, February 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.pdf [accessed 25 October 2016]

2 Commission on Devolution in Wales, Empowerment and Responsibility: Legislative Powers to Strengthen Wales, March 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310571/CDW-Wales_Report-final_Full_WEB_310114.pdf [accessed 25 October 2016]

3 Wales Office, Draft Wales Bill, Cm 9144, October 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469392/Draft_Wales_Bill_Web__2_.pdf [accessed 25 October 2016]

4 See National Assembly for Wales Constitutional and Legislative Affairs Committee, *Report on the UK Government's Draft Wales Bill, December 2015:* http://www.assembly.wales/laid%20documents/cr-ld10468/cr-ld10468-e.pdf *[accessed 25 October 2016]* ; House of Commons Welsh Affairs Committee, *Pre-legislative scrutiny of the draft Wales Bill* (First Report , Session 2015–16, HC 449)

5 Welsh Government, *Government and Laws in Wales Draft Bill: Explanatory Summary*, March 2016: http://gov.wales/docs/cabinetstatements/2016/160311explanatorysummaryen.pdf [accessed 25 October 2016]

6 Government and Laws in Wales Bill: http://gov.wales/docs/cabinetstatements/2016/160307governmentlawsinwalesen1.pdf [accessed 25 October 2016]

7 See 'Wales Bill needs significant changes, Stephen Crabb says', *BBC News*, 29 February 2016: http://www.bbc.co.uk/news/uk-wales-politics-35685623 [accessed 26 October 2016]

8 Constitution Committee, *The process of constitutional change* (15th Report, Session 2010–12, HL Paper 177)

9 Constitution Committee, *Proposals for the devolution of further powers to Scotland* (10th Report, Session 2014–15, HL Paper 145); Constitution Committee, *Scotland Bill* (6th Report, Session 2015–16, HL Paper 59)

10 Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149)

Government's Wales Bill, and met in private with members of that committee to discuss their views.

The Wales Bill: An overview

5. The Wales Bill is an amending Bill. It primarily amends the Government of Wales Act 2006 ('GWA 2006') which, in its amended form, will remain the principal constitutional text concerning the Welsh devolution settlement. Among the most significant changes that will be made by the Wales Bill are the following.

- General constitutional matters: The Bill makes provision concerning the 'permanent' nature of the Welsh Assembly and the Welsh Government as elements of the UK's constitutional arrangements.[11] The Bill also 'recognises' that the UK Parliament will not normally legislate with regard to devolved matters absent the Assembly's consent.[12]

- 'Reserved powers' model: The Welsh devolution system will shift from a 'conferred powers' to a 'reserved powers' model. Under the present arrangements, the Welsh Assembly has legislative authority only in respect of those matters that are specifically devolved to it; anything that is not devolved is outside its competence.[13] Under the Wales Bill, the Assembly will enjoy general legislative competence subject to certain exceptions.[14]

- New areas of competence: The adoption of a reserved powers model does not necessarily yield an increase in legislative competence, and in certain respects (some of which are outlined below) the Assembly's competence will diminish. However, in several respects the Assembly's legislative powers will increase, either because non-devolved matters under the present model become non-reserved matters under the new model, or thanks to the lifting of certain prohibitions upon the amendment by the Assembly of particular legislative provisions. The result is that the Assembly will gain legislative competence in new areas, including its own affairs and elections to the Assembly. In parallel to these accretions of legislative power, the Welsh Ministers will acquire executive authority in further areas, both as a result of provisions found in the Bill itself and through the transfer of further functions by Order.[15]

6. **We welcome the decision to move the Welsh devolution settlement to a reserved powers model. This will place the Welsh settlement on the same footing as Scotland's devolution settlement, while allowing for variation which reflects the differing circumstances in each nation.**

7. **Setting up a reserved powers settlement and determining which powers should be devolved and which should be reserved to the centre is a complicated and challenging process. Unfortunately, as we discuss in the rest of this report, the current implementation of the reserved powers model in the Wales Bill undermines its key advantages: namely providing the devolved legislature with constitutional space**

11 Government of Wales Act 2006, new section A1, to be inserted by Wales Bill, clause 1
12 Government of Wales Act 2006, new section 107(6), to be inserted by Wales Bill, clause 2
13 Government of Wales Act 2006, section 108
14 Government of Wales Act 2006, new section 108A, to be inserted by Wales Bill, clause 3
15 Wales Bill, part 2

to legislate and allowing for a relatively clear and simple division of powers.

8. **Given the complexity of the law in this area, it is a pity that the opportunity was not taken to bring forward a consolidated bill to set out clearly the Welsh devolution settlement in a single Act of Parliament. We intend to return to the issue of consolidation bills in our forthcoming inquiry on the legislative process.**

CHAPTER 2: GENERAL CONSTITUTIONAL MATTERS

'Permanence'

9. Clause 1 of the Bill inserts a new section A1 into the GWA 2006. New section A1 provides that:

> "(1) The Assembly established by Part 1 and the Welsh Government established by Part 2 are a permanent part of the United Kingdom's constitutional arrangements.
>
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.
>
> (3) In view of that commitment it is declared that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum."

10. The language of new section A1 precisely mirrors that of section 63A of the Scotland Act 1998, as inserted by section 1 of the Scotland Act 2016. In our report on what was then the Scotland Bill, we expressed concern about the possibility of this provision giving rise to uncertainty or confusion regarding the status of the Scottish Parliament, and the potential for legal friction that might thereby be created.[16] In particular, we noted that:

> "Parliament is explicitly seeking to limit its own competence by way of an external procedural limitation (a referendum in Scotland) and were it ever to be tested, it is by no means clear what view the Supreme Court would take."[17]

11. We concluded:

> "It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. There is now a strong argument that Parliament is seeking to limit its own competence in a way that the courts may seek to uphold in future given that it rests on a requirement for popular consent. While we recognise that it is extremely unlikely that this will ever be tested in the courts, it is nonetheless symbolically important and we are concerned that these provisions, as currently worded, risk introducing uncertainty concerning the absolute nature of parliamentary sovereignty where there should be none."[18]

12. In its response to our report, the Government said that the intention of the 'permanence' provision was to reflect the current "political understanding" without changing the "constitutional position". The Government also said that "the principle of parliamentary sovereignty remains" and asserted that "the UK Parliament cannot bind a successive Parliament".[19] It nevertheless remains our view that the provisions concerning the 'permanence' of the Welsh Assembly and the Welsh Government—like those provisions in the

16 Constitution Committee, Scotland Bill (6th Report, Session 2015–16, HL Paper 59), para 29
17 *Ibid.*, para 34
18 *Ibid.*, para 36
19 Government response to the report on the Scotland Bill, 11 January 2016: http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/Scotland-Bill-Government-response-110116.pdf

Scotland Act 2016 concerning the Scottish Parliament and the Scottish Government—risk introducing uncertainty in this area.

13. **This provision simply echoes an identical provision that Parliament has but recently chosen to enact in relation to Scotland. On that basis, this clause has the merit of bringing the Welsh devolution settlement into line with Scotland's and bringing a degree of consistency to the otherwise disparate and asymmetrical approaches taken to date.**

14. **However, in our report, *The Union and devolution*, we concluded that the devolution settlements should be designed with a clear eye to their implications for the coherence and stability of the Union itself. Against this background, legislation which creates uncertainty about the lynchpin principle of parliamentary sovereignty could be considered unhelpful and damaging to the stability of the constitution of the Union as a whole.**

The Sewel Convention

15. Section 107(5) of the GWA 2006 provides (and will continue to provide) that Part 4 of the Act—which confers legislative powers upon the Welsh Assembly—"does not affect the power of the Parliament of the United Kingdom to make laws for Wales". However, clause 3 of the Wales Bill inserts a new section 107(6) into the 2006 Act, adding that:

> " … it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly."

16. This wording precisely mirrors the wording of section 28(8) of the Scotland Act 1998, as inserted by section 2 of the Scotland Act 2016.

17. In our report on the Scotland Bill, we raised a number of concerns in relation to the relevant provision in that Bill which also apply to the Wales Bill.[20] In particular, we noted that:

- There were important differences between the Sewel Convention as referred to in the Bill and the Sewel Convention as understood in practice. The Bill framed the Convention in terms narrower than those in which it is usually understood, by failing to refer to that limb of the Convention that is concerned with UK legislation that adjusts the scope of devolved competence.[21]

- In combination with the 'permanence' provision, the provision concerning the Sewel Convention risked "creating a route through which the courts might be drawn inappropriately into an area that has previously been within the jurisdiction of [the UK] Parliament alone, namely its competence to make law".[22]

18. The Government's response did not address our concern relating to the discrepancy between the scope of the Sewel Convention reflected in the Scotland Bill (and now the Scotland Act and the Wales Bill) and the commonly understood breadth of the Convention. On the second point, it

20 Constitution Committee, *Scotland Bill* (6th Report, Session 2015–16, HL Paper 59), paras 37–41
21 Constitution Committee, *Scotland Bill*, para 38
22 Constitution Committee, *Scotland Bill*, para 39

noted that "The Sewel Convention is a political convention which does not give rise to justiciable rights."[23]

19. **In our previous report on the Scotland Bill, we asked the Government about the disparity between the scope of the Sewel Convention in the Bill and how the Convention is commonly understood. We did not receive a clear answer. We ask the Government again to address this question in relation to the Wales Bill.**

20. **We recognise that identical provisions have already been passed by Parliament in relation to Scotland. Nonetheless, we draw to the attention of the House once again our concern that setting the Sewel Convention in statute risks inappropriately drawing the courts into areas which have previously been within the jurisdiction of Parliament alone, namely its competence to make law.**

23 Government response to the report on the Scotland Bill, 11 January 2016: http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/Scotland-Bill-Government-response-110116.pdf

CHAPTER 3: THE SCOPE OF THE ASSEMBLY'S LEGISLATIVE AUTHORITY

Overview

21. The switch from a 'conferred powers' to a 'reserved powers' model is perhaps the most notable aspect of the Wales Bill. As a result, the National Assembly for Wales will gain a general legislative power subject to certain limits. Under the new model, two sets of criteria are central to determining the scope and limits of the Assembly's competence:

    - 'Reserved matters' and the things that the Assembly is not allowed to do in respect of such matters
    - Other things that the Assembly is not allowed to do

22. The Bill sets out 195 reserved matters.[24] In respect of reserved matters, the Assembly does not have legislative authority to enact legislation that:

    - Relates to reserved matters[25]
    - Modifies the law on reserved matters (unless the provision is ancillary to a provision that does not relate to reserved matters and has no greater effect on reserved matters than is necessary to give effect to the purpose of the provision)[26]

23. In addition, the Assembly does not have legislative competence to enact legislation that:

    - Has a territorial extent that goes beyond England and Wales[27]
    - Applies other than in relation to Wales (unless it is ancillary to a relevant legislative provision and has no greater effect outside Wales than is necessary to give effect to the purpose of the provision)[28]
    - Is incompatible with the ECHR rights given effect by the Human Rights Act 1998[29]
    - Is incompatible with EU law[30]
    - Modifies 'private law' (unless the modification has a purpose, other than modification of the private law, that does not relate to a reserved matter)[31]
    - Modifies criminal offences in certain categories[32]
    - Modifies the law about certain criminal law-related matters[33]

24 Government of Wales Act 2006, new schedule 7A (to be inserted by Wales Bill, schedule 1)
25 Government of Wales Act 2006, new section 108A(2)(c) (to be inserted by Wales Bill, clause 3)
26 Government of Wales Act 2006, new schedule 7B, paras 1–2 (to be inserted by Wales Bill, schedule 2)
27 Government of Wales Act 2006, new section 108A(2)(a) (to be inserted by Wales Bill, clause 3)
28 Government of Wales Act 2006, new section 108A(2)(d) and (3) (to be inserted by Wales Bill, clause 3)
29 Government of Wales Act 2006, new section 108A(2)(e) (to be inserted by Wales Bill, clause 3)
30 Government of Wales Act 2006, new section 108A(2)(e) (to be inserted by Wales Bill, clause 3)
31 Government of Wales Act 2006, new schedule 7B, para 3 (to be inserted by Wales Bill, schedule 2)
32 Government of Wales Act 2006, new schedule 7B, para 4(1)–(2) (to be inserted by Wales Bill, schedule 2)
33 Government of Wales Act 2006, new schedule 7B, para 4(3) (to be inserted by Wales Bill, schedule 2)

- Modifies certain legislation, including certain parts of the GWA 2006[34]
- Does any of the following things without having secured UK ministerial consent:
  - Confers or imposes functions on a 'reserved authority' (i.e. a UK Minister or a public authority that is not a Wales public authority)[35]
  - Modifies the constitution of a reserved authority[36]
  - Confers, imposes, modifies or removes functions specifically exercisable in relation to reserved authorities[37]
  - Removes or modifies any function of a public authority other than a Wales public authority[38]
  - Removes or modifies a function that is exercisable jointly or concurrently by UK and Welsh Ministers[39]
  - Removes or modifies any of certain specified UK Ministerial functions[40]
- Removes or modifies any function that is not a joint or concurrent function or a specified UK ministerial function without prior consultation of the relevant UK Minister by the Welsh Ministers[41]

24. We set out these restrictions in full to demonstrate that the limits on the Assembly's legislative competence are both considerable and complex. The reserved powers settlement set out in the Bill raises a number of issues which we address below.

The principles underlying the devolution settlement for Wales

25. These provisions raise a question of constitutional principle regarding the differential treatment of Wales compared to Scotland and Northern Ireland. This point was raised by the Welsh Assembly's Constitutional and Legislative Affairs Committee, which concluded in its report on the Draft Wales Bill that "it is not entirely clear why Wales still merits a lesser, and much more complex, form of devolution than Scotland and Northern Ireland".[42] Although the Bill differs in some significant respects from the Draft Bill, this point remains pertinent.

26. In our previous report, *The Union and devolution*, we concluded that:

> "There is no evidence of strategic thinking in the past about the development of devolution. There has been no guiding strategy or

34 Government of Wales Act 2006, new schedule 7B, paras 5–7 (to be inserted by Wales Bill, schedule 2)
35 Government of Wales Act 2006, new schedule 7B, para 8(1)(a) (to be inserted by Wales Bill, schedule 2)
36 Government of Wales Act 2006, new schedule 7B, para 8(1)(b) (to be inserted by Wales Bill, schedule 2)
37 Government of Wales Act 2006, new schedule 7B, para 8(1)(c) (to be inserted by Wales Bill, schedule 2)
38 Government of Wales Act 2006, new schedule 7B, para 10 (to be inserted by Wales Bill, schedule 2)
39 Government of Wales Act 2006, new schedule 7B, para 11(1)(a) (to be inserted by Wales Bill, schedule 2)
40 Government of Wales Act 2006, new schedule 7B, para 11(1)(b)–(e) (to be inserted by Wales Bill, schedule 2)
41 Government of Wales Act 2006, new schedule 7B, para 11(2) (to be inserted by Wales Bill, schedule 2)
42 National Assembly for Wales Constitutional and Legislative Affairs Committee, Report on the UK Government's Draft Wales Bill, December 2015, para 172: http://www.assembly.wales/laid%20documents/cr-ld10468/cr-ld10468-e.pdf [accessed 25 October 2016]

framework of principles to ensure that devolution develops in a coherent or consistent manner and in ways which do not harm the Union. Instead, successive Governments have responded individually to demands from each nation. Devolution has thus developed in an ad hoc fashion, with different constitutional conversations taking place separately in different parts of the country."[43]

27. It has been argued that the process for developing the Wales Bill prized the need for consensus within the negotiations that culminated in the St David's Day Agreement above the need to arrive at sensible, principled conclusions. Professor Richard Wyn Jones told the Welsh Assembly's Constitutional and Legislative Affairs Committee 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. So, the aim of the process was consensus rather than a sensible approach."[44]

28. Similar concerns were expressed by the House of Commons Welsh Affairs Committee, which concluded that "the desire for political consensus was the overwhelming driver of this settlement".[45]

29. The then Secretary of State for Wales told the Assembly's Constitutional and Legislative Affairs Committee that the process of determining the list of reserved matters was begun by the Wales Office asking UK departments what they believed to be reserved:

> "In terms of the specifics of the reservations, it was an iterative process right across Whitehall; the first time, actually, that every single Government department across Whitehall has been engaged in an exercise thinking about devolution in a structured and coherent way. The request that we put out to our colleagues in Whitehall was, 'What is your interpretation of the current devolution boundary in your departmental areas given the existing legislation?' Now, some of information we had back—I took a decision to push back on them, saying, 'Do you really think that's reserved?' So, there was a bit of, you know, to-ing and fro-ing. So, the list that has been arrived at is not a fresh draft list, it has been worked through a bit, but I accept that there's probably quite a lot of scope for looking at that again and simplifying it …"[46]

30. The House of Commons Welsh Affairs Committee has expressed concern about this process. It noted that "a common theme in the evidence we received has been the concern at a perceived lack of principle"[47] and concluded on this point that:

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43 Constitution Committee, *The Union and devolution* (10th Report , 2015–16, HL Paper 149), para 99
44 National Assembly for Wales Constitutional and Legislative Affairs Committee, Report on the UK Government's Draft Wales Bill, December 2015, para 22
45 Welsh Affairs Committee, *Pre-legislative scrutiny of the draft Wales Bill* (First Report, Session 2015–16, HC 449), para 22
46 National Assembly for Wales Constitutional and Legislative Affairs Committee, Report on the UK Government's Draft Wales Bill, December 2015, para 15
47 Welsh Affairs Committee, *Pre-legislative scrutiny of the draft Wales Bill* (First Report, Session 2015–16, HC 449), para 34

> "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."[48]

31. Elsewhere, the National Assembly for Wales Legal Service has concluded that:

> "The application of a principle of subsidiarity would lead to the reservation of those matters that are essential to the constitutional and economic functioning of the UK as a whole. The short list of excepted matters under the Northern Ireland Act (the equivalent of our proposed reserved matters) shows clearly what really needs to be reserved to the centre. The UK Government's commitment to the England and Wales jurisdiction could justify some further reservations. However, there are numerous reservations for which no rationale is apparent."[49]

32. **In our report, *The Union and devolution*, we concluded that any further devolution should take place on the basis of appropriate principles, to ensure that the devolution settlements evolve "in a coherent manner", rather than "in the reactive, ad hoc manner in which devolution has been managed to date".**[50]

33. **There is no evidence of a clear rationale underlying the scope of the powers devolved by the Wales Bill. We would welcome an explanation from the Government as to the principles that underpin the devolution settlement set out in the Wales Bill.**

The complexity of the devolution settlement for Wales

34. One of the concerns that has often been raised in respect of the existing 'conferred powers' model is that it invites so many questions about the precise boundaries of the Welsh Assembly's legislative competence. An attraction of the 'reserved powers' model is that it is potentially more straightforward. The reserved powers regime in the Wales Bill is, however, far from straightforward. Part of its complexity derives from the number of matters that are reserved (and from the exceptions to such matters).

35. However, the system's complexity is also attributable two further factors:

    - The number of legal tests that fall to be applied in determining whether the Welsh Assembly has exceeded its powers is considerable (see paragraphs 22 and 23 above). The Welsh Assembly Legal Service argues that the tests' "cumulative effect" is "very significant", and that it raises "concerns that the Assembly's competence is being rolled back

48 *Ibid.*, para 37

49 Unpublished briefing for the National Assembly for Wales Constitutional and Legislative Affairs Committee, *Legal Advice Note: The Wales Bill—Reserved Powers*, prepared by the Assembly's Legal Service and quoted by permission.

50 Constitution Committee, *The Union and devolution* (10th Report , 2015–16, HL Paper 149), para 160

in significant areas".[51] We discuss this issue below in more detail (see paragraphs 41–60)

- Some of those tests are themselves likely to prove far from straightforward in their application, and raise the prospect—if applied broadly—of further enhancing the scope of the already substantial category of matters that are outside the Assembly's competence.

36. A related difficulty is that some of the legal tests that limit the Welsh Assembly's authority by reference to reserved matters overlap with one another. For instance:

- New section 108A(2)(c) of the GWA 2006 precludes legislation that "relates to reserved matters".

- New Schedule 7A, paragraph 1(1) prevents the Assembly from modifying "the law on reserved matters".[52]

37. As the Welsh Assembly Legal Service has pointed out, there is a "very fine distinction" between the two tests.[53] For instance, legislation might pass the "relates to" test because its purpose and effect are principally concerned with non-reserved matters. It might, however, fail the "modifies" test because it makes some alteration to a law on a reserved matter. In those circumstances, the legislation would be within devolved competence only if it modified the law on a reserved matter in an ancillary way and had no greater effect on the reserved matter than was necessary in order to achieve the non-reserved purpose in question.

38. The Welsh Assembly's Constitutional and Legislative Affairs Committee has raised further serious concerns about the complexity of the Wales Bill. It states bluntly that: "Our overall assessment of the Bill is that it is a complex and inaccessible piece of constitutional law that will not deliver the lasting, durable settlement that people in Wales had expected".

39. It is worth noting in this regard that the devolution settlement set out in the Government of Wales Act 2006 has generated litigation on several occasions.[54] Despite the move from a conferred powers model to a reserved powers model, the Wales Bill does not simplify the Welsh devolution settlement—indeed, if anything complicates it.

40. **We believe that there is a strong constitutional interest in legislation—particularly constitutional legislation such as the Wales Bill—being as clear as possible. The lack of clarity in the Wales Bill increases the likelihood of demarcation disputes regarding the extent of the Welsh**

51 Unpublished briefing for the National Assembly for Wales Constitutional and Legislative Affairs Committee, *Legal Advice Note: The Wales Bill—Competence Tests*, prepared by the Assembly's Legal Service and quoted by permission.

52 Similar provision is made in the Scotland Act 1998. However, the scope of reserved matters in the Wales Bill arguably makes the issues raised by these two interlocking restrictions upon the Assembly's competence more acute than the corresponding restrictions upon the Scottish Parliament's law-making authority.

53 Unpublished briefing for the National Assembly for Wales Constitutional and Legislative Affairs Committee, *Legal Advice Note: The Wales Bill—Competence Tests*, prepared by the Assembly's Legal Service and quoted by permission.

54 Three bills have been referred to the Supreme Court since the Welsh Assembly was granted primary legislative powers in 2011. Two bills, the Local Government Byelaws (Wales) Bill 2012 and the Agricultural Sector (Wales) Bill, were referred by the Attorney-General. One, the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, was referred by the Counsel General for Wales.

Assembly's powers, and thus risks not only future litigation but the need for further legislation to clarify the Welsh devolution settlement.

The scope of Assembly's legislative competence

41. While the Wales Bill extends the Assembly's legislative competence in some areas, it potentially circumscribes its scope in others. This led one member of the Welsh Assembly's Constitutional and Legislative Affairs Committee to tell us that they had expected the Wales Bill to introduce "a reserved powers, not a reversed powers, model".

42. Our attention was drawn in this regard to the prohibition from enacting legislation that relates to reserved matters, the necessity test for the modification of the law on reserved matters, and the inclusion on the list of reserved matters of previously 'silent subjects' on which, following a Supreme Court case in 2014, the Welsh Assembly had been able to legislate so long the legislation also related to matters of devolved competence.

'Silent subjects' and legislating in relation to reserved matters

43. The schedule setting out reserved matters runs to approximately 35 pages and sets out some 195 reserved matters. This represents a reduction on the number of such matters in the Draft Wales Bill. However, part of the reduction in the number of reserved matters is explicable by the fact that some separate reserved matters in the Draft Bill have been turned into single, compendious reserved matters in the Bill itself.

44. The list of reserved matters in the Bill has generated criticism because it incorporates a number of so-called 'silent subjects'. As things presently stand under the GWA 2006, the Assembly acts within devolved competence only if (among other things) the relevant legislative provision "relates to" one or more of the subjects set out in Schedule 7 to the GWA 2006.[55] In setting out the subjects on which the Assembly can legislate, Schedule 7 creates explicit exceptions. In this way, two categories of matters are explicitly found in Schedule 7:

    - Things the Assembly can do (explicitly devolved matters)
    - Things the Assembly cannot do (matters explicitly excepted from devolved matters)

45. However, on some matters, Schedule 7 is simply silent: for instance, immigration and employment are not mentioned either way. It is clear that under the present regime the Assembly cannot legislate exclusively on silent subjects, since its legislation must "relate to" one or more of the explicitly devolved subjects. (The "relates to" test is applied by reference to the purpose and effect of the provision.)[56] However, that left open the question as to whether Assembly legislation that does relate to a devolved subject but which also relates to a silent subject is within devolved competence.

46. That question was answered affirmatively by the Supreme Court in the context of litigation concerning the Agriculture Sector (Wales) Act 2014.[57] The Act relates to both agriculture (a devolved subject) and employment (a

55 Government of Wales Act 2006, section 108(4)(a)
56 Government of Wales Act 2006, section 108(7)
57 Attorney General for England and Wales v Counsel General for Wales [2014] UKSC 43, [2014] 1 WLR 2622

silent subject). The Court held that provided that the legislation related to a devolved subject (which it did), it did not matter that it could also be said to relate to a silent subject. In reaching this conclusion, the Court rejected the argument of the Attorney-General for England and Wales to the effect that legislation relating to silent (as well as devolved) subjects should be treated as being outside the Assembly's competence. Accepting that argument, said the Court, "would in practice restrict the powers of the Assembly to legislate on subjects which were intended to be devolved to it" and "give rise to an uncertain scheme that was neither stable nor workable".[58]

47. The Wales Bill in effect reverses this judgment because many presently silent subjects become reserved matters under the Bill, and the Assembly, under the new dispensation, will exceed devolved competence if its legislation "relates to" reserved matters (see paragraph 21).[59] This means that Assembly legislation that relates to reserved matters will be outside legislative competence even if it also relates to non-reserved matters. The upshot is that, in certain respects, the Assembly's legislative competence will be rolled back.

48. The Welsh Assembly Constitutional and Legislative Affairs Committee noted in their report that "the approach in converting silent matters into reservations will lead to roll-back of competence."[60] Their proposed solution is the removal of the "relates to" test in relation to provisions that are ancillary to legislation which is within the competence of the Welsh Assembly. They propose the following amendments:

> Page 2, line 33 leave out "subsection (2)(b) does" and insert "subsections (2)(b) and (2)(c) do"
>
> Page 2, line 34 leave out from "provision" to end of line 6 on page 3 and insert "which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly)."[61]

49. **The "relates to" test in Clause 3 of the Wales Bill mirrors an identical provision in section 29 of the Scotland Act 1998. However, the list of reserved matters set out in Schedule 1 of the Wales Bill is so broad, compared to the reservations contained in the Scotland Act, that the restrictions following from this test are far greater in the context of the Wales Bill.**

50. **As a result, we are concerned that this test may have the effect of reducing the scope of the Welsh Assembly's legislative competence, and perhaps lead to further referrals to the Supreme Court. We would welcome an explanation from the Government as to whether this was the intent of the legislation and, if not, what steps they intend to take to ensure that the competence of the Welsh Assembly is not inadvertently reduced.**

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58 Attorney General for England and Wales v Counsel General for Wales [2014] UKSC 43, [2014] 1 WLR 2622, para 68

59 Government of Wales Act 2006, new section 108A(2)(c) (to be inserted by Wales Bill, clause 3)

60 National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Report on the UK Government's Wales Bill*, October 2016, para 126: http://www.assembly.wales/laid%20documents/cr-ld10771/cr-ld10771-e.pdf [accessed 25 October 2016]

61 *Report on the UK Government's Wales Bill*, October 2016, p.38

51. **The House may also wish to note that the Welsh Assembly's Constitutional and Legislative Affairs Committee has proposed two amendments that would restore the existing limits on the Welsh Assembly's jurisdiction by allowing it to legislate in an ancillary way in relation to reserved matters. We have reproduced these amendments above in paragraph 48.**

The necessity test

52. Similar issues arise with respect to the 'necessity test' in the Wales Bill. The 'necessity test' is a requirement that the relevant provision has no greater effect on the matter in question than is necessary to give effect to the (non-reserved) purpose of the provision. This affects the Assembly's competence in relation to provisions affecting England and to the modification of the law on reserved matters.

53. The Scotland Act makes similar provision in respect of the modification of the law on reserved matters.[62] But, as with the "relates to" test, the large number of reserved matters in the Wales Bill means that the necessity test will bite on a far broader array of legislation than is the case in Scotland.

54. The Welsh Assembly Constitutional and Legislative Affairs Committee have argued that the necessity test for modification of the law on reserved matters "captures a vast amount of law, as it encompasses all of the law on all of the reservations provided for in the Bill."[63] They go on to add that:

> "This means that National Assembly legislation will only be able to modify that vast amount of law if it is doing so in an ancillary way and there is no greater effect than necessary to give effect to the purpose of the National Assembly legislation. Further, the question of whether something is 'necessary' is likely to be something that will have to be decided by the Supreme Court. The scope of this restriction could amount to considerable obstacles to the National Assembly legislating in a holistic and effective manner." [64]

55. In their report on the Wales Bill they propose amendments to remove the necessity test in relation to the law on reserved matters:

> Page 81, line 21, leave out from "matters" to end of line 26.[65]

56. **The 'necessity test' in relation to the modification of the law on reserved matters corresponds to a similar provision in the Scotland Act. As with the "relates to" test, it is likely to have a disproportionate effect on the legislative competence of the Welsh Assembly, given the lengthy list of reserved subjects set out in Schedule 7 of the Wales Bill. The House may wish to consider whether it is appropriate to include this provision, as it stands, in the Wales Bill, when its effect is likely to differ so widely from the equivalent provision in the Scotland Act.**

57. **We note that the Welsh Assembly Constitutional and Legislative Affairs Committee has proposed an amendment removing the**

62 Scotland Act 1996, schedule 4, paras 2 and 3
63 National Assembly for Wales Constitutional and Legislative Affairs Committee, *Report on the UK Government's Wales Bill*, para 143: http://www.assembly.wales/laid%20documents/cr-ld10771/cr-ld10771-e.pdf [accessed 25 October 2016]
64 *Report on the UK Government's Wales Bill*, para 144
65 *Report on the UK Government's Wales Bill*, para 148

necessity test in relation to the law on reserved matters, which we reproduce above for the convenience of the House.

Private and criminal law

58. The Draft Bill included the application of the necessity test to the modification of private law and of criminal law. Following concerns that the Welsh Assembly's legislative competence would be unduly hobbled, the necessity test was dropped in respect of private and criminal law. The Bill now provides for:

- Private law to be modified provided that the modification is for a purpose (other than modifying private law) that does not relate to a reserved matter. This means that the Assembly can now carry out modifications to private law when it is legislating for a non-reserved purpose.
- The Assembly to modify criminal law without reference to any necessity test, albeit that the Assembly's capacity to legislate in relation to criminal law has been circumscribed by precluding legislation altogether in respect of certain types of offences and certain other criminal law-related matters.

59. The Welsh Assembly Constitutional and Legislative Affairs Committee state in their report that the restrictions still set out in relation to criminal law "would lead to a roll-back of the National Assembly's legislative competence,"[66] and propose harmonising the restrictions on modifying criminal law with the private law restriction.

60. **We would welcome a statement from Government as to whether the Wales Bill is intended to roll back the competence of the Welsh Assembly as regards certain matters relating to criminal law, and in particular the Welsh Assembly's current competence in relation to the protection and well-being of children and of young adults.**

Executive functions

61. The Scotland Act 1998 contains a general authorisation whereby the Scottish Ministers, instead of Ministers of the Crown, are permitted to exercise executive powers that fall within devolved competence.[67] Corresponding definitions of devolved competence apply to the Scottish Parliament and the Scottish Ministers.[68] In this way, the executive competence of the Scottish Ministers and the legislative competence of the Scottish Parliament are aligned. Among other things, this means that it is not necessary for the Scottish Parliament, in exercise of its devolved competence, to remove or modify UK Ministers' executive powers, because UK Ministers' executive powers relating to matters within Scottish devolved competence were transferred to the Scottish Ministers upon the entry into force of the Scotland Act 1998.

62. The position in Wales is different. Ever since the Assembly and the Welsh Ministers were rendered formally distinct by the GWA 2006,[69] the legislative

66 *Report on the UK Government's Wales Bill*, para 148
67 Scotland Act 1998, section 53
68 Scotland Act 1998, section 54
69 Prior to the Government of Wales Act 2006, no formal legal distinction existed between the Assembly and the *de facto* administration, the Assembly itself being in possession only of administrative authority.

authority of the Assembly and the executive authority of the Welsh Ministers have been misaligned. As a result, there are some matters upon which the Assembly has competence at the legislative level, but in relation to which functions may remain with UK Ministers at the executive level.

63. The Wales Bill does not attempt to remedy this situation. Instead, the UK Government has stated that it intends to align the legislative and executive powers of the Welsh institutions by transferring the necessary executive functions to the Welsh Government by Order. In its response to the Commons Welsh Affairs Committee's report on the Draft Wales Bill, the Government said:

> "The Bill lists those functions which will continue to be exercised concurrently or jointly between Welsh Ministers and Ministers of the Crown, and the few remaining functions which a Minister of the Crown will continue to exercise, and which cannot be modified by Assembly legislation without consent. All other functions in devolved areas will be transferred by Order to Welsh Ministers.[70]

64. **If the Government's intention is to align, as far as possible, the executive and legislative competence of the Welsh Assembly and Government, we question why it is doing so via secondary legislation rather than in primary legislation—as was the case in Scotland. We would welcome an explanation from Government as to why it intends to use a Transfer of Functions Order to pass executive competence to the Welsh Government, rather than simply amending the Wales Bill so as to transfer all functions currently exercisable by Ministers of the Crown within devolved competence to the Welsh Government (taking into account the exceptions it listed in its response to the Commons Welsh Affairs Committee).**

65. At present, the GWA 2006 precludes the Assembly from:

- Removing or modifying any 'precommencement function'[71] of a Minister of the Crown unless the Secretary of State consents to the provision, or unless the provision is merely incidental to or consequential on another provision[72]

- Conferring or imposing functions on a Minister of the Crown unless the Secretary of State consents[73]

66. The Draft Wales Bill would have enlarged the range of matters attracting the need for UK ministerial consent, extending it to functions other than precommencement functions, and beyond Minister of the Crown functions to functions of public authorities (other than Welsh public authorities). The Draft Bill would also have required UK ministerial consent in respect of the removal or modification of functions even if the provision was merely incidental or consequential on another provision.

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70 Government response to House of Commons Welsh Affairs Committee's report on the Draft Wales Bill, 7 June 2016: http://www.parliament.uk/documents/commons-committees/welsh-affairs/SOS-draft-Wales-Bill-Govt-response.pdf

71 A precommencement function is a function that was exercisable by a Minister of the Crown immediately prior to the entry into force of the provisions in the 2006 Act permitting the enactment of Assembly Acts.

72 Government of Wales Act 2006, schedule 7, paras 1 and 6

73 Government of Wales Act 2006, schedule 7, para 2

67. The difficulties raised by the Draft Bill were explained in the following terms by Professor Robert Thomas:

> "First, the need to obtain Minister of the Crown consents applies when the Assembly is legislating on devolved (non-reserved) matters—areas in which the UK Government has no interest or responsibility. Second, the notion that the draft Bill introduces a rules-based approach is immediately contradicted by the exercise of ministerial discretion whether or not to give consent. Third, there is the issue of accountability. When making such decisions UK ministers are accountable to the UK Parliament—yet the whole purpose of establishing the Welsh Assembly was to remedy the democratic deficit that existed in Wales."[74]

68. Against this background, the Bill improves upon the Draft Bill to some extent. For instance, the Bill contains a list of 'Wales public authorities',[75] making much clearer the range of public bodies in respect of which the Assembly can legislate within devolved competence without the need for UK ministerial consent. The Bill is clearer too in that it explicitly identifies the powers that remain exercisable at a UK level (to which the consent requirement applies) and those that are exercisable on a joint or concurrent basis (to which the consent requirement also applies). The Bill must also be read in the light of the UK Government's plan to transfer certain UK ministerial functions to the Welsh Ministers through a Transfer of Functions Order—although, as pointed out earlier, we would welcome an explanation from the Government as to why such transfers are not being made on the face of the Bill via a general transfer of competence in devolved areas subject to any pertinent exceptions.

69. However, in spite of the differences in this area between the Draft Bill and the Bill, some concerns remain in relation to the latter:

- Unlike under the GWA 2006, the consent requirement in the Bill does not yield in relation to the removal or modification of relevant functions where that is merely incidental or consequential.
- The consent requirement renders the scope of the Assembly's legislative competence dependent in part upon the exercise of discretion by UK Ministers. It has been argued that this "undermines the claim that the Bill will provide a clear and certain devolution settlement".[76]
- The consent requirement, in certain respects, amounts to a rolling back of the Assembly's legislative competence, because it will have to seek UK ministerial consent in circumstances in which no such requirement presently applies.

70. The latter point is illustrated by the Welsh Assembly's Legal Service by reference to the Public Health (Wales) Bill.[77] The Bill was intended to prohibit the use of e-cigarettes in workplaces in Wales. To that end, it imposed certain duties upon workplace managers. The Legal Service state that this is currently within devolved competence and that no question of obtaining

74 Robert Thomas, "The Draft Wales Bill—Part 2", UK Constitutional Law Blog, 3 Dec 2015: https://ukconstitutionallaw.org/2015/12/03/robert-thomas-the-draft-wales-bill-2015-part-2/ [accessed 25 October 2016]

75 Government of Wales Act 2006, new schedule 9A (to be inserted by Wales Act, schedule 3)

76 Robert Thomas, "The Draft Wales Bill—Part 2", UK Constitutional Law Blog, 3 Dec 2015

77 Which, in the end, was not enacted.

UK Ministers' consent would arise (because the consent requirement presently extends only to UK ministerial functions, not to functions of public authorities). However, they goes on to say:

> "But under the Wales Bill, UKG consent would be needed to impose such duties on reserved authorities with workplaces in Wales (such as the DVLA, Crown Prosecution Service and Land Registry). This is because those duties would amount to imposing functions on reserved authorities, and paragraph 8 of new Schedule 7B makes it very clear that UKG consent is needed before the Assembly can impose functions on reserved authorities. If UKG consent was not given, the duty to take steps to stop persons using e-cigarettes and the duty to put up signs would not apply to reserved authorities. This would result in an inconsistent application of those duties across Wales."[78]

71. **The House may wish to consider whether the extension of the consent requirement beyond Ministers of the Crown to all 'reserved authorities' is appropriate, and whether it is appropriate to extend the consent requirement to merely incidental or consequential modifications or removals of relevant functions. In deciding this matter, the House may wish to consider the extent to which it is appropriate for the scope of a devolved assembly's legislative authority to be determined through the exercise of discretion by UK Ministers, albeit in respect of what is likely to be a relatively limited range of matters.**

78 Unpublished briefing for the National Assembly for Wales Constitutional and Legislative Affairs Committee, *Legal Advice Note: The Wales Bill—Competence Tests*, prepared by the Assembly's Legal Service and quoted by permission.

CHAPTER 4: OTHER MATTERS

Tax-varying power

72. The Wales Act 2014 made provision for the Assembly to set a Welsh rate of income tax for Welsh taxpayers.[79] However, the Act provided that the income tax provisions would enter into force only if a referendum was held and the implementation of the provisions was supported.[80] The Wales Bill removes that referendum requirement.[81]

73. The fact that a referendum requirement imposed only two years ago is now to be removed is arguably illustrative of the highly ad hoc manner in which referendums are (and are not) used in the UK. In our report, *Referendums in the United Kingdom*, we noted that:

> "Referendums may become a part of the UK's democratic and constitutional framework. There has been little consistency in their use. They have taken place on an ad hoc basis, frequently as a tactical device rather than on the basis of constitutional principle."[82]

74. **We have previously concluded that referendums are "most appropriately used in relation to fundamental constitutional issues" and that "the drawbacks and difficulties of their use are serious."[83] The imposition and removal of a referendum requirement in such rapid succession implies an unprincipled and tactical use of referendums which is inappropriate.**

Elections

75. The Wales Bill transfers control over a range of election-related matters from the UK Parliament to the Welsh Assembly. A number of these powers have a super-majority requirement attached. If the Presiding Officer of the Assembly determines that any provision of a Bill relates to a protected subject-matter, the Bill cannot validly be enacted unless the number of Assembly members voting in favour of it at the final stage of the legislative process is at least two-thirds of the total number of Assembly seats.[84] These super-majority requirements correspond to those found in the Scotland Act 2016.[85]

76. In its report on the Scotland Bill, the Committee expressed concern about the implications of authorising the Scottish Parliament to legislate in relation to the franchise, given the jurisprudence of the European Court of Human Rights on prisoner voting:

> "the Scottish Parliament's control over the franchise for its elections may cause problems regarding prisoner voting rights, as (unlike the UK Parliament) the Scottish Parliament cannot make laws that are incompatible with Convention rights under the European Convention on Human Rights. The UK's blanket ban on prisoners voting has been deemed incompatible, meaning that unless some prisoners were to be

79 Wales Act 2014, sections 8–11
80 Wales Act 2014, sections 12–14
81 Wales Bill, clause 17
82 Constitution Committee, *Referendums in the United Kingdom* (12th Report, Session 2009–10, HL Paper 99), para 205
83 *Ibid.*, paras 204 and 206
84 Government of Wales Act 2006, new section 111A(4) (to be inserted by Wales Bill, clause 9)
85 Scotland Act 1998, section 31 (as amended by Scotland Act 2016, section 11)

> enfranchised in Scotland, legislation on the franchise there might be invalid."[86]

77. We called on the Government to "set out its view of how these powers could be exercised within the Scottish Parliament's restricted competence." The Government's response to the Committee's report on the Scotland Bill did not directly address this matter, merely saying that "the franchise for elections within devolved competence will be a matter for the Scottish Parliament to decide". Nor does the documentation for the Wales Bill address this issue, meaning that the potential problem still remains.

78. **The House may wish to seek clarification from the Government as to whether they consider that, should the National Assembly for Wales wish to exercise its powers over the franchise, it will have to do so in a way that enfranchises some prisoners so as to ensure that the law is compatible with Convention rights.**

A distinct or separate Welsh jurisdiction

79. The law applicable in Wales increasingly diverges from the law applicable in England. This is so both because the Welsh Assembly and Government are building up bodies of distinct Welsh primary and secondary legislation, while, in the light of devolution, some primary and secondary legislation enacted by the UK Parliament and Government applies to England but not to Wales. Against this background—and in the light of the enhanced legislative powers to be conferred upon the Assembly by the Wales Bill—there have been calls for either a 'separate' or a 'distinct' Welsh jurisdiction. A 'separate' jurisdiction would involve the creation of wholly separate institutions. A more modest proposal would be a 'distinct' jurisdiction which would preserve the existing institutional architecture of the court system of England and Wales, whilst seeing those courts sitting as distinct courts of England and courts of Wales.

80. The Draft Wales Bill's omission of provisions establishing such a distinct jurisdiction attracted criticism from Professor Thomas Glyn Watkin, former First Welsh Legislative Counsel to the Welsh Assembly Government and former Head of Bangor Law School, who told the Assembly's Constitutional and Legislative Affairs Committee that while the administration of justice in Wales did not need to be entirely separate from that in England, "as the law is no longer completely unified, the legal system which administers it needs to develop so as to reflect that new reality not restrict it."[87] That Committee subsequently concluded that:

> "We believe there would be merit in exploring further the concept … of a distinct Welsh jurisdiction as a means of delivering a clearer, more workable settlement. Theory would then catch up with practice: the axiom that all law extends to England and Wales but Welsh law is only applied in Wales would be superseded. Indeed, distinct bodies of Welsh

86 Constitution Committee, *Proposals for the devolution of further powers to Scotland* (10th Report, Session 2014–15, HL Paper 145), para 43

87 Professor Thomas Glyn Watkin, evidence submitted to the Welsh Assembly's Constitutional and Legislative Affairs Committee inquiry on the Draft Wales Bill. See http://www.senedd.assembly.wales/documents/s45759/CLA4-27-15%20-%20Paper%203.pdf [accessed 26 October 2016]

and English laws would be administered within a unified court system in England and Wales."[88]

81. The UK Government, in its response to the House of Commons Welsh Affairs Committee's report on the Draft Wales Bill, rejected the case for a separate jurisdiction, citing "cost" and "disruption", and arguing that "the quantum of Assembly law is small, and will remain small, compared to the body of law that is common to England and Wales". The UK Government also rejected the case for a distinct jurisdiction, saying: "We consider the current, single legal jurisdiction to be fit for purpose."[89] The Wales Bill does acknowledge that there is "a body of Welsh law made by the Assembly and the Welsh Ministers", albeit that it goes on to say that the purpose of that statement is to "recognise the ability of the Assembly and the Welsh Ministers to make law forming part of the law of England and Wales".[90]

82. The UK Government acknowledges that: "Welsh laws should also feed through into efficient and effective arrangements for the administration of justice in Wales, from matters such as amending court rules to judicial training."[91] To that end, it has established a 'Justice in Wales' working group "to examine these arrangements in detail and recommend how we could improve them".[92] The working group is due to report by autumn 2016. Cardiff University's Wales Governance Centre argues—taking as a given that neither a separate nor a distinct jurisdiction is presently imminent—that the 'Justice in Wales' group should include the following among its recommendations:[93]

- Creating a Ministry of Justice 'Welsh Centre of Expertise'
- Establishing a Standing Commission on Justice in Wales
- Establishing a fully operational High Court Office in Wales
- Guaranteeing Welsh representation on justice institutions, including the UK Supreme Court
- Publishing separate data and performance indicators on the administration of justice in Wales

83. **The cases for and against a 'separate' or a 'distinct' Welsh jurisdiction are complex and we do not intend to express a view on them at this juncture. It is an issue that will grow in importance as the process of Welsh law-making becomes increasingly significant.**

84. **The reality of a growing body of distinct Welsh law should, however, be reflected in the operation of a single England and Wales jurisdiction. For that reason, we welcome the formation of a 'Justice in Wales' working group, and we trust that the Government will keep this issue**

88 National Assembly for Wales Constitutional and Legislative Affairs Committee, Report on the UK Government's Draft Wales Bill, December 2015, para 73

89 UK Government response to House of Commons Welsh Affairs Committee's report on the *Draft Wales Bill*

90 Government of Wales Act 2006, section A2 (to be inserted by Wales Bill, clause 1)

91 UK Government response to House of Commons Welsh Affairs Committee's report on the Draft Wales Bill

92 *Ibid.*

93 Wales Governance Centre, Justice in Wales: Principles, Progress and Next Steps (2016): http://sites.cardiff.ac.uk/wgc/files/2016/09/Justice-in-Wales-Sept-2016.pdf [accessed 27 October 2016]

under review to ensure that a single jurisdiction can continue to operate effectively in the light of the deepening of the Welsh devolution regime.

Henry VIII powers

85. Clause 53 of the Wales Bill authorises the Secretary of State by regulations to make "such consequential provision in connection with any provision of this Act as the Secretary of State considers appropriate". This is a Henry VIII power: it permits, among other things, the amendment, repeal and revocation of primary legislation. The power is exercisable by statutory instrument and subject to the affirmative procedure. The power applies both to Acts of the UK Parliament and Acts and Measures of the Welsh Assembly.

86. We have previously expressed our concern at the scope of similar Henry VIII powers,[94] and we note that the Delegated Powers and Regulatory Reform Committee has drawn this clause to the attention of the House in its report on the Wales Bill.[95]

87. In addition, the Delegated Powers and Regulatory Reform Committee has noted that "there is no requirement in clause 53 for the Secretary of State to consult or seek the approval of the Assembly or Welsh Ministers before making regulations which amend a Measure or Act of the Assembly".[96] The Welsh Assembly's Constitutional and Legislative Affairs Committee has consequently expressed concern:

> "Regulations which seek to change the law that only applies in Wales and was made by the National Assembly, must be approved by the National Assembly. This is basic matter of constitutional propriety."[97]

88. **Clause 53 would permit legislation passed by the National Assembly for Wales to be amended by statutory instrument at the behest of a UK Government minister without the consent, or indeed involvement, of the National Assembly or Welsh Government. The House may wish to consider whether it would be more appropriate for the consent of the National Assembly to be required—as, for example, is the case for certain statutory instruments made under the Legislative and Regulatory Reform Act 2006[98] and the Public Bodies Act 2011.[99]**

94 See, for example, Constitution Committee, *Scotland Bill* (6th Report, Session 2015–16, HL Paper 59), para 52

95 Delegated Powers and Regulatory Reform Committee, *Wales Bill* (5th Report, Session 2016–17, HL Paper 54), paras 38-41

96 *Ibid.*, para 43

97 National Assembly for Wales Constitutional and Legislative Affairs Committee, *Report on the UK Government's Wales Bill, October 2016*, para 178

98 Legislative and Regulatory Reform Act 2006, section 11

99 Public Bodies Act 2011, section 9(6)