



Constitutional and Legislative  
Affairs Committee  
**Report on the UK Government's  
Wales Bill**

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October 2016



**National Assembly for Wales**  
Constitutional and Legislative Affairs Committee

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**National Assembly for Wales**  
Constitutional and Legislative Affairs Committee

# Constitutional and Legislative Affairs Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

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## Current Committee membership:



**Huw Irranca-Davies AM (Chair)**  
Welsh Labour  
Ogmore



**Dafydd Elis-Thomas AM**  
Plaid Cymru  
Dwyfor Meirionnydd



**Nathan Gill AM**  
Independent  
North Wales



**David Melding AM**  
Welsh Conservative  
South Wales Central

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## The following Member was also a member of the Committee during this inquiry:



**Michelle Brown AM**  
UKIP Wales  
North Wales

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# 01. Background

- 1.** The Interim Constitutional and Legislative Affairs Committee was established on 15 June 2016. The Business Committee remitted the UK Government’s Wales Bill (‘the Bill’)<sup>1</sup> to us for scrutiny. Our name was changed on 28 June 2016 to the Constitutional and Legislative Affairs Committee (‘CLA Committee’).
- 2.** We launched a written consultation on 27 June 2016, which closed on 26 September 2016. Full details of the written responses are available [online](#).
- 3.** We took oral evidence from:

  - Professor Thomas Glyn Watkin, [22 June 2016](#)
  - Emyr Lewis and David Hughes, [30 June 2016](#)
  - Professor Richard Rawlings, Professor Laura McAllister and Dr Diana Stirbu, [30 June 2016](#)
  - First Minister, Rt Hon Carwyn Jones AM, [4 July 2016](#)
  - The Llywydd (Presiding Officer), Elin Jones AM, [6 July 2016](#)
- 4.** We held a stakeholder event on 11 July 2016 bringing together legal practitioners, academics and representatives from across the devolved policy areas to discuss the Bill and its implications for Wales. The event took the form of a parliamentary debate, enabling stakeholders to discuss, debate and share views both with us and each other.
- 5.** We also used the Loomio online platform to continue the debate with stakeholders over the summer. This platform was an opportunity to gather the Committee and stakeholders together to discuss and share ideas on the Bill as it progressed through the UK Parliament. We will keep this platform live to enable stakeholders the opportunity to comment on our findings and the Bill as it progresses through the final stages of its UK parliamentary scrutiny.
- 6.** We would like to thank all those who have contributed to our work, including other National Assembly committees.

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<sup>1</sup> Wales Office, [Wales Bill](#), June 2016

## 02. General Observations

### Introduction

7. The Bill is important because it sets the framework within which the National Assembly can make Welsh law in areas such as health and education to improve the lives of, and opportunities for, citizens. The clearer and more workable that piece of constitutional law is, the easier it will be for the process of government and scrutiny to be delivered effectively and successfully.

8. The UK Government's draft Wales Bill<sup>2</sup> received widespread criticism. Many people with direct experience of working with the existing devolution settlement made constructive suggestions to improve the proposed legislation and expressed a willingness to work with the UK Government for the benefit of citizens in Wales.

9. Our predecessor Committee in the Fourth Assembly reported<sup>3</sup> on the draft Wales Bill and set out six key areas that needed improving. It is against these that we have conducted our technical scrutiny of the Bill. The six areas were:

- the removal of the necessity test or its replacement by a test based on appropriateness;
- a system for requiring Minister of the Crown consents that reflects the model in the *Scotland Act 1998*;
- a significant reduction in the number and extent of specific reservations and restrictions consistent with a mature, effective and accountable legislature;
- a distinct jurisdiction in which Welsh Acts extend only to Wales;
- a system in which Welsh Acts modify England and Wales law as appropriate for reasonable enforcement; and
- a clear commitment that a bilingual consolidation be carried out during the current Parliament.

10. We also considered the extent to which the proposed reserved powers model of legislative competence provided by the Bill is clear, coherent and workable, and will provide a durable framework within which the National Assembly can legislate.

### Assessment of the existing Bill

11. 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.

12. However, the Bill contains elements that we welcome:

- the declaration about the permanence of the National Assembly for Wales and the Welsh Government;
- the move from a conferred powers to a reserved powers model;

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<sup>2</sup> Wales Office, [Draft Wales Bill](#), October 2015

<sup>3</sup> Constitutional and Legislative Affairs Committee, [Report on the UK Government's Draft Wales Bill](#), December 2015

- the removal of limitations on the way the National Assembly operates (or the power to do so by virtue of paragraph 7 of the proposed Schedule 7B to the *Government of Wales Act 2006*);
- the granting of competence in relation to National Assembly elections, including the franchise and the electoral system;
- the specific powers to be conferred upon the Welsh Ministers by Part 2 of the Bill; and
- the provision of a comprehensive list of joint and concurrent functions in the proposed Schedule 3A to the 2006 Act which will aid clarity.

**13.** We also welcome many of the changes made in response to scrutiny of the draft Bill, including for example:

- the removal of the necessity test in relation to private and criminal law, giving the National Assembly greater freedom to legislate;
- the ability to remove or modify some UK Minister functions without consent, with specific bodies also having been carved out from the consent requirements (e.g. Food Standards Agency, Electoral Commission, Ofwat);
- the listing of all the main Welsh Public Authorities in the Bill, removing any doubt that these bodies are within the National Assembly’s legislative competence;
- the addition of the social care profession as an exception to reservation 138, as without it significant parts of the *Regulation and Inspection of Social Care (Wales) Act 2016* would have been outside competence under the reserved powers model; and
- the devolution of powers relating to Assembly Member disqualification.

**14.** However, in our view, significant improvements needed to be made to the Bill as it proceeded through the House of Commons Committee and Report Stages, which were completed on 12 September 2016. These essential improvements were needed to reflect authoritative criticism including that presented in evidence to us before and during the summer, constructive amendments and recommendations suggested by the Presiding Officer and the First Minister amongst others, and actual amendments to the Bill proposed by Members of Parliament and shadow Ministers. Regrettably, necessary improvements were largely not accepted by the UK Government.<sup>4</sup>

**15.** This means that the House of Lords now carries an added burden of responsibility for effective scrutiny before this Bill can be passed as “fit for purpose”.

### Comparing the Bill with the existing settlement

**16.** Expert witnesses have told us<sup>5</sup> that it is not sufficient to simply judge the current Wales Bill against the previous draft Wales Bill, albeit with the improvements that we have welcomed above. The Bill must be judged against the existing devolution settlement and the aspirations set out in the St David’s Day Agreement<sup>6</sup> for a durable and lasting settlement.

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<sup>4</sup> During Committee and Report stages in the House of Commons, some 70 UK Government amendments were agreed to, while some 180 opposition amendments were either negatived (voted down) on division or not called.

<sup>5</sup> For example, CLA Committee, 22 June 2016, RoP [4]

<sup>6</sup> Wales Office, *Powers for a Purpose*, February 2015

- 17.** We consider it imperative to consider the extent of any potential rolling-back of the current devolution settlement. Such roll-back could arise intentionally or through the unintended consequences of poorly drafted, rushed, or inadequately scrutinised legislation.
- 18.** We consider that, while there are some positives in the Bill (as we highlight above), overall the UK Government has missed an opportunity to introduce a long-term and durable constitutional settlement for Wales and its citizens. We also strongly believe that the Bill does not reflect the democratic will of the people of Wales as expressed in the referendum held in 2011. We do not believe it meets the further aspirations of the people of Wales or its elected government.
- 19.** The UK Government has missed this opportunity despite pre-legislative scrutiny providing ample evidence in favour of changes that would have created a clearer and lasting devolution settlement. There was also strong evidence during pre-legislative scrutiny calling on the UK Government to provide a settlement that has far greater parity if not absolute symmetry with devolution settlements in Scotland and Northern Ireland.<sup>7</sup> For the record, we concur with this evidence.
- 20.** We have considered the arguments of the UK Government in opposing a more ambitious Bill (and in opposing corresponding amendments) during the Bill's passage through the House of Commons. It is our unanimous view that these arguments are not convincing. The unwillingness of the UK Government and Whitehall Departments to deliver a settlement that matches the clarity and accessibility of other devolution settlements is a matter of considerable disappointment.
- 21.** We are also frustrated that a constitutional Bill of such importance—having received constructive criticism during pre-legislative scrutiny—has then been rushed through the formal legislative process in House of Commons at the expense of making sound, coherent and accessible constitutional law. The reasons for this haste remain unclear and we do not believe that the approach taken is consistent with the collaborative working emphasised by the former Secretary of State and referred to in our predecessor Committee's report.<sup>8 9</sup>
- 22.** The Bill we are left with provides a restrictive settlement that over-complicates rather than simplifies and fails to fully empower the National Assembly as a modern legislature. There is a danger that the Bill without significant further amendment will make the translation of creative and innovative policies into effective, well-constructed and accessible law harder than it should be. In turn, this could stifle opportunities, not only to develop the best possible public services that the Welsh people would like but also to take co-ordinated action in many important policy areas that could improve the quality of life and prosperity of Welsh citizens.

- 23.** We share the view of Dr Diana Stirbu, who told us:

"... a constitutional settlement should be also aspirational. And I think what we fail to see is a clear ambition and aspiration for the constitutional status of Wales and for how Wales will be constitutionally repositioned within the UK...

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<sup>7</sup> Constitutional and Legislative Affairs Committee, [Report on the UK Government's Draft Wales Bill](#), December 2015, paragraphs 106, 161

<sup>8</sup> CLA Committee, [Report on the UK Government's Draft Wales Bill](#), December 2015, paragraphs 41, 49, 177-178

<sup>9</sup> Regrettably, and in contrast to his predecessor, the Secretary of State for Wales, the Rt. Hon Alun Cairns MP, declined our repeated invitations to appear publically before us. He also declined an invitation to appear in private. He did offer a private meeting with the Chair only, which the Chair considered to be inappropriate. His refusal to engage with us and to argue for the Bill as drafted is in our view significant. We consider it to be an acknowledgement that the Bill is flawed and unlikely to be the stronger, clearer and fairer devolution settlement that his predecessor argued would stand the test of time.

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I think constitutions send messages about what kind of politics you are conducting in a country, what kind of society you want to live in, what kind of aspirations you have for your future generations. And all these messages, symbolic or not, at a declarative level or at a very technical level—I think the constitution should go further than just technical and legalistic expressions of political reality."<sup>10</sup>

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**24.** We would have preferred to have been applauding a progressive piece of law that achieved consensus across Wales and introduced greater parity with devolution settlements in Scotland and Northern Ireland; a settlement that provided the National Assembly with similar tools for legislating as other devolved bodies in the United Kingdom.

**25.** In our view, this Bill is a long way from achieving greater parity with Scotland and Northern Ireland. In addition, we note that each piece of legislation on Welsh devolution since 1997 has delivered improvements to the settlement to varying degrees. While this Bill does have some improvements, it is notable for being the first piece of devolution legislation that takes backwards steps and that is a matter of considerable concern.

**26.** In reluctantly reaching our overall conclusions on the Bill, we have also taken account of the UK Government's decisions on four important matters, namely:

- the failure to incorporate any firm constitutional principles within the Bill, a point raised by Professor Laura McAllister;<sup>11</sup>
- the retention of a single England and Wales jurisdiction, which appears to have been a key driver in shaping the Bill;
- the way in which the legislative competence of the National Assembly is expressed, which despite moving to a reserved-powers model is complex and in places impenetrable; and
- the failure to align executive functions of the Welsh Ministers in devolved areas with the legislative competence of the National Assembly.

**27.** The comments of Professor Thomas Glyn Watkin resonate here:

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"My position has been, throughout, that, really, it is not the form of the settlement that has caused difficulties with regard to the exercise of legislative competence, but the space that there is available within which to legislate...

... in the draft Bill, there were a very large number of reservations; the reserved matters were very considerable. But, somehow, from left field, there came other issues—the necessity tests, the problems with Minister of the Crown consents—that attracted a lot of criticism and, in attracting criticism, got the focus of the debate to at least broaden, if not shift. Again, I think I have expressed here before my worry that the next stage would be giving ground on those matters that we never thought we would be discussing, but not achieving very much with regard to the extra space that would be accorded to legislate

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<sup>10</sup> CLA Committee, 30 June 2016, RoP [170-172]

<sup>11</sup> CLA Committee, 30 June 2016, RoP [165]

freely. My biggest worry about the new Bill, as it appears, is that actually there's not been much progress with regard to creating that extra space."<sup>12</sup>

## The issue of jurisdiction

**28.** We have heard that an underlying principle of the Bill is to preserve the existing single jurisdiction for England and Wales, at the expense of creating a separate or distinct Welsh legal jurisdiction.<sup>13</sup> It is clear to us that the UK Government's policy to preserve the single jurisdiction has resulted in much of the complexity within the Bill.

**29.** While we note the UK Government's policy, we also acknowledge the comments of the First Minister:

"There has never been an example anywhere, to my knowledge, in history of a common-law jurisdiction where there are two Parliaments within it that are passing laws in the same areas of policy, if I can put it that way. It naturally follows: when the Northern Ireland Parliament was established in 1920, the jurisdiction followed it. The Isle of Man is a jurisdiction, Jersey's a jurisdiction, Guernsey's a jurisdiction. The United States has at least 50—well, at least 51—jurisdictions within it. This is not the radical step that people think it is. It's the normal development that occurs when a law-making parliament is established."<sup>14</sup>

**30.** He also highlighted some of the practical issues that would be faced with retention of the single England and Wales jurisdiction:

"... for example, it's the case now that judges who want to sit on cases in Wales that involve Welsh law need to be trained. That's increasingly going to be the case in the future. In a single jurisdiction, it's assumed that any judge can sit anywhere; that's just not going to be correct. That would need to be dealt with. We already have examples, and I've heard examples being given to me by the Lord Chief Justice, of counsel from London particularly coming to Wales and arguing the wrong law before the courts."<sup>15</sup>

**31.** We do not accept the view of the UK Government that there is no need to change the single jurisdiction because it has served Wales well.<sup>16</sup> That is to miss the point. As Professor Thomas Glyn Watkin told us:

"My own view is that there is now within the legal system of England and Wales three bodies of law that can be recognised: a body of law that applies only in Wales, a body of law that applies only in England and a body of law that applies in both countries. I think the legal system needs to adapt itself to that

<sup>12</sup> CLA Committee, 22 June 2016, RoP [5-6]

<sup>13</sup> CLA Committee, Stakeholder Event, 11 July 2016

<sup>14</sup> CLA Committee, 4 July 2016, RoP [64]

<sup>15</sup> CLA Committee, 4 July 2016, RoP [47].

<sup>16</sup> House of Commons, 5 July 2016, Col [780] and 12 September 2016, Col [651]

new reality, a reality that is growing as the body of law that applies only in Wales and the body of law that applies only in England increase in size.”<sup>17</sup>

**32.** During our stakeholder event it was noted that arguments have been made in the past that Wales could not have a reserved powers model of legislative competence (or for that matter a Secretary of State) because it didn’t have a separate jurisdiction.<sup>18</sup> It has not been adequately explained why a reserved powers model has now been adopted without a separate or distinct jurisdiction.

**33.** The failure on the part of the UK Government to acknowledge the difficulties of two legislatures operating within the same jurisdiction has led some witnesses to question the durability of the new devolution settlement. Professor Richard Rawlings told us:

“I don’t think the Wales Bill is durable, because of the signal failure to deal with the key infrastructure foundational question of jurisdiction.”<sup>19</sup>

**34.** In our view the Bill’s failure to make provision for, at the very least, a distinct jurisdiction for Wales is one of the factors that casts significant doubt on the durability of the settlement, a matter we discuss in more detail later in this report (see paragraphs 53 to 58).

### Tests of legislative competence and reservations

**35.** The complexity of the various tests<sup>20</sup> that would apply to the reserved powers model introduced by the Bill in our view is significant. This complexity raises concerns that the National Assembly’s competence could in practice be rolled back in significant areas, particularly as a consequence of the “relates to” test,<sup>21</sup> which, in a reserved powers model, has the effect of narrowing competence.<sup>22</sup>

**36.** In our view it is also the extent of the reservations contained in the Bill that make the tests so significant. Similar tests have led to far fewer problems in Scotland than is feared in Wales; this is because of the much more limited number of reservations there and the nature of the reservations themselves.

**37.** In its report on the draft Wales Bill, our predecessor Committee expressed concern about the substantial volume of reservations.<sup>23</sup> Whilst the number has been reduced, specific reservations still number some 200, and much of that reduction has been achieved by merging more than one reservation from the draft Bill. Professor Thomas Glyn Watkin provided an example of where reservations had been merged in order to reduce their number:

“I think the best example of this, perhaps, is section G, where there were five sections, but now there is just one, but those sections were, ‘G1 Architects’, ‘G2 Health Professions’, ‘G3 Auditors’; you now only have G1, and G1 is

<sup>17</sup> CLA Committee, 22 June 2016 [PM], RoP [24]

<sup>18</sup> CLA Committee Stakeholder Event, 11 July 2016

<sup>19</sup> CLA Committee, 30 June 2016, RoP [265]

<sup>20</sup> The Wales Bill proposes 10 tests of competence (as opposed to 9 currently). The tests are set out in Chapter 6. Some of them are the same as current tests (e.g. compatibility with the European Convention on Human Rights and EU law). Some are new, but flow inevitably from the change to a reserved powers model.

<sup>21</sup> National Assembly for Wales, [The Wales Bill: Reserved matters and their effect on the Assembly's legislative competence](#), September 2016

<sup>22</sup> CLA Committee, [Report on the UK Government's Draft Wales Bill](#), December 2015, paragraphs 125

<sup>23</sup> CLA Committee, [Report on the UK Government's Draft Wales Bill](#), December 2015, paragraphs 130-131, 181

‘Architects, auditors, health professionals’. They’re all included under the same heading. So, you haven’t enhanced your powers at all, all they’ve done is to reduce the number of reservations on the list—and that happens on a number of occasions.”<sup>24</sup>

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**38.** When suggesting that the number of reservations has been reduced,<sup>25</sup> this naturally implies that such reductions have been accompanied by a corresponding increase in the legislative competence of the National Assembly. Given the merger of so many reservations, we believe the claim of a reduction is somewhat disingenuous.

**39.** Equally, as Professor Laura McAllister highlighted:

“... we have to be really clear that reducing the list of reservations does not necessarily create more clarity or space for legislative competence ... because unless there is absolute tightness around the reservations that generates clarity, in essence, they can make the whole settlement more opaque, rather than less.”<sup>26</sup>

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**40.** On that particular point, our predecessor Committee’s report observed<sup>27</sup> that many reservations in the draft Bill have been drafted by reference to ‘the subject matter of’ existing Acts<sup>28</sup> and this remains the case in the Bill. In our view a simpler, more workable and helpful system is needed. While such an approach may take time, the Welsh Government published an alternative Bill that did so, demonstrating that legislative and constitutional clarity and simplicity can be achieved if there is a will to do so.<sup>29</sup>

**41.** There is also strong evidence to suggest that the National Assembly will lose competence because of the wording of individual reservations.<sup>30</sup>

**42.** Some reservations highlight and illustrate concerns that we have about the approach the UK Government has adopted in relation to the Bill. For example, we consider it somewhat ironic that the UK Government is reserving the ‘sale and supply of alcohol’ given that the *Sunday Closing (Wales) Act 1881* was the first piece of specifically Welsh legislation since Cromwell and that as a consequence, licensing law in Wales remained different from that in England for most of the twentieth century. This reservation was highlighted by the Health, Social Care and Sport Committee<sup>31</sup> and the Welsh Government.<sup>32</sup>

**43.** We refer to some of the specific reservations in chapter 7.

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<sup>24</sup> CLA Committee, 22 June 2016, RoP [52]

<sup>25</sup> House of Commons, 14 June 2016, Col [1649]

<sup>26</sup> CLA Committee, 30 June 2016, RoP [219] and **letters from National Assembly committees**

<sup>27</sup> CLA Committee **Report on the UK Government’s Draft Wales Bill**, December 2015, paragraphs 122-124, 136-137

<sup>28</sup> The Bill makes reference to ‘the subject matter of’ Acts of Parliament on some 40 occasions.

<sup>29</sup> Welsh Government, **Government and Laws in Wales Bill**, March 2016

<sup>30</sup> CLA Committee, 30 June 2016, RoP [65]

<sup>31</sup> WB15: **Health, Social Care and Sport Committee**, September 2016

<sup>32</sup> Welsh Government, **Correspondence to CLA Committee on Inquiry into the UK Government Wales Bill**, 27 September 2016

## Increased bureaucracy and reduced transparency

44. We believe that the inclusion of a larger number of reservations than we would have expected, coupled with their corresponding intricacy and the tests for legislative competence, will require even greater and more effective inter-governmental working.

45. Such working arrangements will also need to apply in relation to identifying and seeking UK Ministerial consents where they are required.

46. Co-operative inter-governmental working will therefore be imperative to ensure that the settlement is workable.<sup>33</sup>

47. While co-operation will be needed in relation to any devolution settlement, we nevertheless consider that the complexity and nature of this Bill is likely to create an unnecessary and inefficient bureaucracy within Welsh Government and Whitehall departments (potentially adding to administrative costs). For example, we believe that the UK Government is creating work for itself by preferring to prepare a Transfer of Functions Order (and adding to it in future),<sup>34</sup> rather than effect a general transfer of executive functions to the Welsh Ministers through the Bill.

48. This bureaucracy and lack of transparency could have been avoided if the UK Government had given the National Assembly greater responsibility and created a simpler, more workable and durable settlement.

49. The approach of the UK Government is particularly surprising given its initiative on Cutting Red Tape<sup>35</sup> and the work of its Efficiency and Reform Group,<sup>36</sup> as well as the views of the former Secretary of State for Wales. When he announced a pause to work on the Wales Bill in February 2016, he acknowledged the need to cut constitutional red tape:

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"Given that a key aim is to reduce complexity, removing the "necessity test" will cut the constitutional red tape which risks fettering the ability of the Assembly to modify the law to enforce its legislation for which it is responsible."<sup>37</sup>

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50. The additional bureaucracy created by the UK Government could also impact on the National Assembly for Wales Commission. Under section 110 of the *Government of Wales Act 2006*, the Presiding Officer must on or before introduction of the Bill give a view on whether the Bill is within competence. The Presiding Officer told us that:

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"... it will be a pretty complex task, especially in first legislating within this new framework. I think that the biggest concern is the way in which the Assembly competence will be restricted ... The fact that there is a prohibition from legislating in any way that relates to a reserved matter, and that is an aspect of this Bill that causes us considerable concern in our ability to judge on

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<sup>33</sup> It should be remembered that the settlement applies not just to the formulation of primary legislation but to secondary legislation as well.

<sup>34</sup> Welsh Affairs Committee, [Special Report: Pre-legislative scrutiny of the draft Wales Bill: Government response](#) June 2016

<sup>35</sup> UK Government, [Cutting Red Tape](#) [accessed 29 September 2016]

<sup>36</sup> UK Government, [Efficiency and Reform Group](#) [accessed 29 September 2016]

<sup>37</sup> Wales Office, [Press release: Amended Wales Bill will deliver a stronger devolution settlement](#), 29 February 2016

competence but also to be able to allow legislation that touches both on a reserved and a non-reserved purpose to be within competence in this place."<sup>38</sup>

**51.** Our role is also to report on subordinate legislation in accordance with Standing Order 21. This will include an assessment of legislative competence that we believe will take longer as a consequence; given that we examine between 600 and 700 pieces of secondary legislation in each Assembly, this equates to a significant additional burden of scrutiny, time allocated to that scrutiny, and a corresponding increase in demand on resources.

## Durability

**52.** As we have already indicated above, the reluctance to accept the need for a distinct or separate jurisdiction for Wales in response to devolution is a significant failing in the Bill and one that calls into question the durability of the settlement. As we were told in our stakeholder event by legal practitioners and advisors, practical pressures will inevitably arise for those practising law or giving advice on the law in Wales, so that the case for a distinct or separate jurisdiction will continue to arise.

**53.** Other factors impacting on the durability of the settlement also play a role, namely:

- the complex way in which the National Assembly’s legislative competence is expressed, including the number and extent of reservations and restrictions;
- the lack of a consolidating text to improve clarity and workability, which means that legislation on the Welsh constitution will be spread over four Acts of Parliament. In our view it is inconceivable that an unconsolidated constitutional text can meet the needs of legislators, legal practitioners or citizens;
- the many areas of policy which have been omitted entirely from the Bill, or which UK Ministers have argued against devolving in debate, such as policing, air passenger duty and the sale and supply of alcohol. The failure to devolve these policy areas could prevent the National Assembly making joined-up effective law; and
- the reversal of devolution and centralisation of some policy areas to the UK Government, for example in relation to adoption services under reservation 175.<sup>39</sup>

**54.** Another key factor that has arisen since June this year is the decision of UK citizens in a referendum to vote to leave the European Union. Given that EU legislation relates to so many areas of importance to Wales—for example in agriculture, fisheries and the environment—this has considerable implications for law-making in Wales. Any constitutional legislation from the UK Government that arises as a result of the referendum is likely to impact on the devolution settlement.

**55.** It is unfortunate that the voice of those with most practical experience of making and using laws in Wales over the three previous devolution settlements seems to have carried little weight with the UK Government.

**56.** Based on the evidence we have heard, there is a clear danger that the space provided by the Bill for the National Assembly to legislate is difficult to delineate and potentially more restrictive than at present. The Bill certainly does not offer the progressive, ambitious and aspirational settlement

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<sup>38</sup> CLA Committee, 4 July 2016, RoP [73]

<sup>39</sup> WB13, Children, Young People and Education Committee, September 2016

that many in Wales hoped for and believe is needed; neither does it befit a modern legislature and equal partner within the family of nations that make up the United Kingdom.

**57.** It is regrettable that the Bill is likely to perpetuate, rather than resolve, constitutional uncertainty.

### 03. Suggestions for amending the Wales Bill 2016

**58.** Chapters 4 to 11 look in detail at certain key clauses of the Bill and suggest possible amendments that we believe would improve it. References to clauses within the Bill (and any suggested amendments) relate to the Bill as introduced in the House of Lords.

**59.** We provide a short explanation on the purpose of the clause, followed by evidence we have taken and details of any relevant amendments tabled during scrutiny in the House of Commons. We then give our views and identify the amendments we support or wish to see tabled during the House of Lords' scrutiny.

**60.** We have focused our efforts on how improvements to the Bill can be delivered within the constraints of the UK Government's policy of maintaining the existing single England and Wales jurisdiction. We believe that to attempt to amend the Bill in such a significant way so as to make provision for a separate or distinct jurisdiction would be fraught with difficulty at this stage in the development of the Bill. Seeking to amend the Bill in this way now may fail to ensure the best and most accurate way of delivering a separate or distinct jurisdiction.

## 04. Clause 1: Permanence of the National Assembly for Wales and Welsh Government

**61.** Clause 1 amends the *Government of Wales Act 2006* to assert the permanence of the National Assembly and the Welsh Government by inserting a new section A1 (during the House of Commons scrutiny this was to be inserted as section 92A).

**62.** Subsection (3) of section A1 states that the National Assembly and the Welsh Government cannot be abolished except on the basis of a 'decision of the people of Wales voting in a referendum'. The draft Bill contained provisions which asserted the permanence of both institutions, but the provisions were drafted differently, and did not include any reference to abolition.

**63.** Section A1 replicates the provision within the *Scotland Act 2016*.

**64.** Clause 1 also inserts a new section A2 (during the House of Commons scrutiny this was to be inserted as section 92B). Section A2 recognises that there is a body of Welsh law made by the National Assembly and the Welsh Ministers, and the ability of both to make law which forms part of the law of England and Wales. This is a new section, which was not included in the draft Bill.

### Evidence

#### Section A1 - Permanence of the Assembly and Welsh Government

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**65.** While section A1 is declaratory in nature,<sup>40</sup> the First Minister said it was a 'hugely useful statement as far as Wales is concerned.'<sup>41</sup>

**66.** The symbolic nature of section A1 is evident because there are no details within the section about the process for a referendum. Stakeholders told us that it was difficult to see how section A1 provided any greater legal clarity to them.<sup>42</sup>

**67.** Professor Thomas Glyn Watkin noted that section A1 gave commitments to specific institutions as opposed to a broader commitment to the people of Wales:

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"I think what is really needed is a recognition of the right of the Welsh people to have a legislature and government of their own within the context of the devolved settlement. I therefore dislike the way that there seems to be an inter-institutional commitment rather than the commitment of the United Kingdom and the people of the United Kingdom to the people of Wales. I think it's that sort of constitutional statement that I would prefer to see rather than the recognition of institutional permanence."<sup>43</sup>

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<sup>40</sup> House of Commons, 5 July 2015, Col [783]

<sup>41</sup> CLA Committee, 4 July 2016, RoP [13]

<sup>42</sup> CLA Committee, Stakeholder Event, 11 July 2016

<sup>43</sup> CLA Committee, 22 June 2016, RoP [18]

## Section A2 - Recognition of Welsh law

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**68.** A number of witnesses expressed concerns about section A2. Professor Richard Rawlings called it 'a shocker', 'poorly drafted' and 'positively misleading'.<sup>44</sup> He told us:

"...it demonstrates the problems of trying to do something symbolic when you don't really want to do anything at all."<sup>45</sup>

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**69.** Professor Richard Rawlings was not alone in expressing strong views. David Hughes, a practising barrister, said:

"...92B, I think, is also a symbolic provision, but it's one that, speaking as a lawyer, I find slightly insulting...For a start, it's a statement the accuracy of which I would dispute. 'Welsh law' can't just mean the law made by you. Welsh law must mean law made by Westminster for Wales, must mean the common law as it applies in Wales, and until any changes happen, must mean European law as it applied in Wales. That's the inaccuracy."<sup>46</sup>

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**70.** Professor Richard Rawlings also noted that section A2:

"... appears as part of clause 1, but clause 1 is headed 'Permanence'. The heading of the clause does not actually refer to the idea of the recognition of Welsh law. One is driven to the conclusion that this provision was added so late in the day that they didn't even have enough time to renumber the clauses to give it a clause of its own."<sup>47</sup>

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**71.** He went on to say:

"...it is confusing, it is going to be difficult to explain to people in civic society and the people of Wales at large, and it simply doesn't capture the reality of the situation."<sup>48</sup>

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**72.** During our stakeholder event, we were told by legal practitioners that changing the Bill to include the full range of sources which make up Welsh law would be 'helpful'.<sup>49</sup>

## Plenary legislative competence

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**73.** We heard evidence from David Hughes that:

"A reserved-powers model would feature the words, 'The National Assembly for Wales has the power, subject to the provisions of this Act, to make laws for the peace, order and good governance of Wales.' That is a standard form of wording that has been used in overseas territory constitutions; it's one that the Privy Council has said confers a plenary legislative power. And that would mean that your political judgments are sufficient justification for the choices that you make. There would be no question of any court looking at why you

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<sup>44</sup> CLA Committee, 30 June 2016, RoP [189]

<sup>45</sup> CLA Committee, 30 June 2016, RoP [189]

<sup>46</sup> CLA Committee, 30 June 2016, RoP [46]

<sup>47</sup> CLA Committee, 30 June 2016, RoP [190]

<sup>48</sup> CLA Committee, 30 June 2016, RoP [191]

<sup>49</sup> CLA Committee, Stakeholder Event, 11 July 2016

have made your decisions. Your political judgment would be sufficient justification."<sup>50</sup>

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## Proposed amendments

**74.** The Llywydd published proposed amendments to section A1<sup>51</sup> (then known as 92A) while the Welsh Government published amendments to section A2<sup>52</sup> (then known as 92B).

### The Llywydd's amendments

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**75.** The Llywydd proposed a range of amendments to section 92A, all of which were tabled by Plaid Cymru as probing amendments at Committee stage.<sup>53</sup> These amendments included:

- inserting the section at the start of the *Government of Wales Act 2006*. This was accepted by the UK Government, and amendments were passed at Report stage. It was at this stage the proposed sections were renumbered A1 and A2; and
- separating out the provisions asserting permanence of the National Assembly and the Welsh Government. These amendments were debated but not called for a vote ('not called').

### Welsh Government amendments

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**76.** The Welsh Government published a substantial amendment which would establish a Justice in Wales Commission. The Commission would keep the functioning of the justice system under review, including the question of whether the existing single legal jurisdiction of England and Wales should be separated. However, the First Minister told us that this amendment was ruled 'out of order' because the amendment would impose financial requirements on UK Ministers. Provisions that incur a financial burden on government can only be moved by Ministers.<sup>54</sup>

**77.** The Labour Party tabled an amendment which was broadly the same, but removed the establishment of a Commission and gave responsibility for the work of the proposed Commission to the Lord Chancellor and the Welsh Ministers. This amendment was voted down on a division.

### Other amendments tabled

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**78.** Other amendments were tabled to section 92B, including a Plaid Cymru amendment which aimed to replace the provision recognising a Welsh body of law with separate jurisdictions for England and Wales. This amendment was voted down on a division.

## Our view and suggested amendments

**79.** We welcome the recognition of the permanence of the National Assembly and the Welsh Government. While we are sympathetic to Professor Thomas Glyn Watkin's comments that the commitment should be broader and not specific to individual institutions, we accept section A1 as it stands. We strongly welcome the moving of these sections to the start of the *Government of Wales Act 2006*.

**80.** However, we share stakeholders concerns about the confusion that section A2 could cause, especially when they told us it would directly impact on their understanding of Welsh law. This was of particular concern for those advising citizens on legal matters.

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<sup>50</sup> CLA Committee, 30 June 2016, RoP [25-27]

<sup>51</sup> The Llywydd, [Proposed amendments, Committee Stage, Day One](#), 30 June 2016

<sup>52</sup> Welsh Government, [Proposed amendments, Committee Stage, Day One](#), 29 June 2016

<sup>53</sup> Houses of Parliament, [Passage of a Bill](#) [accessed 29 September 2016]

<sup>54</sup> CLA Committee, 4 July, RoP [52-53]

**81.** The text of section A2 is factually correct – there is indeed a body of Welsh law made by the National Assembly and the Welsh Ministers. But Welsh law is also made by others, including the UK Parliament and Government, EU institutions and the courts. That is reflected in paragraph 23 of the Bill's Explanatory Notes<sup>55</sup>, but is not apparent from the text in the Bill. Declaratory provisions of this sort should be clear.

**82.** We are therefore publishing a potential amendment to more accurately reflect that Welsh law made by the National Assembly and the Welsh Ministers forms only a part of the body of Welsh law. We recognise that it does not fully meet the concerns of stakeholders but we believe there is a significant risk of challenge if a full and comprehensive list of sources of Welsh law is not included, with some areas inadvertently omitted. We believe that this matter would require further research.

**83.** We agree with the principles behind David Hughes' comments. If the *Government of Wales Act 2006* contained the words “Subject to this Act, the Assembly may make laws for the peace, order and good government of Wales” (as in other overseas territory constitutions such as Gibraltar and Bermuda), then this would confer plenary law-making authority on the National Assembly. The courts would not inquire into whether Assembly legislation was in fact for the “peace, order and good government” of Wales. It would not be open to the court to hold that National Assembly legislation enacted under those words did not in fact conduce to the peace, order and good government of Wales. This is simply because such a question is not justiciable. Such a question is for the determination of the National Assembly, not the courts.

**84.** The above principles have been confirmed on many occasions by the House of Lords and the Privy Council. This is encouraging, as it makes it quite clear that the words “make laws for the peace, order and good government” would confer plenary law-making authority on the National Assembly.

**85.** However, based on the words of Lord Reed in the Supreme Court case of *Axa General Insurance Ltd v the Lord Advocate*,<sup>56</sup> it is clear to us that the Scottish reserved powers model confers plenary law-making authority on the Scottish Parliament. If the Scottish reserved powers model confers plenary law-making authority, we cannot see why the National Assembly should be treated any differently. Therefore, we do not think that adding the words “make laws for the peace, order and good government” to the *Government of Wales Act 2006* would give the National Assembly any greater authority than it would have under the existing wording in the Bill.

**86.** In line with our views in paragraph 83, we suggest that the following amendment is tabled to the Bill during its passage through the House of Lords.

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<sup>55</sup> [HL Bill 63-EN](#)

<sup>56</sup> UK Supreme Court, [Judgement on AXA General Insurance v the Lord Advocate](#), 12 October 2011

## **COMMITTEE AMENDMENT**

### **Amendment 1**

Text of amendment to clause 1

Page 2, line 3, after “Ministers” insert “forming part of Welsh law”.

### **Explanatory note**

The amendment makes clear that the body of Welsh law made by the National Assembly and the Welsh Ministers forms only part of Welsh law, and reflects the clarity in paragraph 23 of the Explanatory Notes.

## 05. Clause 2: Convention about Parliament legislating on devolved matters

**87.** Clause 2 amends the *Government of Wales Act 2006* to place on a statutory basis the convention that the UK Parliament will not 'normally legislate with regard to devolved matters without the consent of the Assembly'. The wording follows the similar section in the *Scotland Act 2016*.

### Evidence

**88.** The Llywydd had clear concerns about the drafting of the clause and published an amendment to address them:

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"...I think it's clearer, if we are to address this legislative consent clause with the ability of Parliament to only legislate in exceptional circumstances, and then we outline what those would be. As I said at the start, I am seeking greater clarity for the National Assembly from this legislation, and I believe that this amendment provides that greater clarity of what 'exceptional circumstances' would be rather than the use of 'normally', which is open to interpretation."<sup>57</sup>

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**89.** We asked the Llywydd whether the fact that clause 2 matches the provisions in the *Scotland Act 2016* should inform whether we should recommend changes. The National Assembly's Chief Legal Advisor made the point that:

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"...the fact that this is being used in legislation in relation to Scotland, in which neither the Llywydd nor the Welsh Government was at the negotiating table, shall we say, with the UK Government, should not in my view bind us in any way in seeking a more appropriate, equal-respect relationship with the UK Parliament."<sup>58</sup>

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**90.** We were also told that due to the 'less generous' nature of the devolution settlement in Wales there was 'more latitude' for the UK Parliament to consider legislating in circumstances that were either 'normal or not normal'.<sup>59</sup>

**91.** Concerns were raised at our stakeholder event about the use of the word 'normal', and in particular that the spirit of the clause could potentially be disregarded. We also heard that the lack of a definition of 'devolved matters' within the Bill adds to the ambiguity of the clause.<sup>60</sup>

### Proposed amendments

#### The Llywydd's amendments

**92.** The Llywydd published three amendments<sup>61</sup>, all of which addressed the concerns discussed above. The amendments deleted the use of the word 'normally'; defined devolved matters; and stated the conditions (all of which had to apply) when the UK Parliament could legislate without the National Assembly's consent.

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<sup>57</sup> CLA Committee, 4 July 2016, RoP [31]

<sup>58</sup> CLA Committee, 6 July 2016, RoP [36]

<sup>59</sup> CLA Committee, 6 July 2016, RoP [45]

<sup>60</sup> CLA Committee Stakeholder Event, 12 July 2016.

<sup>61</sup> The Llywydd, [Proposed amendments, Committee Stage, Day One](#), 30 June 2016

**93.** The conditions to apply were:

- (a) imminent risk of serious adverse impact on
  - (i) the national security of the UK, or
  - (ii) public safety, public, animal or plant health or economic stability in any part of the UK
- (b) the legislation specifically addresses that risk
- (c) imminence of the risk in relation to Wales makes it impractical to seek National Assembly consent.
- (d) no Bill has been passed under s110(1)(a) of Government of Wales Act 2006 (this section relates to the introduction of Bills to the National Assembly) to specifically address the risk; and
- (e) no subordinate legislation specifically to address the risk has been laid before the National Assembly and has come into force.

**94.** All three of the amendments were tabled during the Committee Stage in Westminster by Plaid Cymru. The amendments were not called. The UK Government made clear that it did not support the amendments:

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"We gave a commitment to put that convention on a statutory footing in the St David's day agreement, and that is what clause 2 does....to remove "normally" from the clause would fundamentally change the convention. The "not normally" element of both the convention and the clause is essential as it acknowledges parliamentary sovereignty and, within the clause, signals to the courts that this clause is not intended to be subject to adjudication.....

....

The convention deliberately does not define those circumstances. Parliament is sovereign, so both the Assembly and Parliament can legislate for devolved matters. Defining the instances in which Parliament can legislate for devolved areas would drive a coach and horses through this underpinning principle of devolution. We are talking about a measure that is devolving power, so that principle is important and needs to be retained."<sup>62</sup>

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### **Welsh Government amendments**

**95.** The Welsh Government proposed amendments<sup>63</sup> that would define devolved matters for the purpose of this clause. They were tabled by the Liberal Democrats as probing amendments, to clarify the circumstances in which proposed legislation would modify the legislative competence of the National Assembly.<sup>64</sup>

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<sup>62</sup> House of Commons, 5 July 2016 Col [784]

<sup>63</sup> Welsh Government, **Proposed amendments, Committee Stage, Day One**, 29 June 2016

<sup>64</sup> House of Commons, 5 July 2016 Col [773]

## Our view and suggested amendments

**96.** We acknowledge that this clause follows the similar provisions within the *Scotland Act 2016*. However, when seeking parity between the clarity of the devolution settlements across the United Kingdom, this does not mean that provisions should be the same.

**97.** The additional complexity of the Welsh devolution settlement leads us to conclude that clause 2 should be far more explicit about the circumstances in which Parliament would legislate on devolved matters on the face of the Bill. We do not agree with the UK Government view expressed above that this overrules parliamentary sovereignty; rather it merely provides assurance that consent will be sought by the UK Government when seeking to legislate on a devolved matter.

**98.** We support the Llywydd's and the Welsh Government amendments, and there is clearly a merit in both. We suggest that both would be worthy of tabling but our preference would be for the amendments tabled by the Llywydd.

### THE LLYWYDD'S AMENDMENTS

#### Amendment 2

##### Text of amendment to clause 2

Page 2, line 12, leave out “normally”.

##### Explanatory note

This amendment removes the word “normally”.

#### Amendment 3

##### Text of amendment to clause 2

Page 2, line 13, after “Assembly” insert –

“unless all of the following conditions apply—

(a) there is an imminent risk of serious adverse impact on—

(i) the national security of the United Kingdom, or

(ii) public safety, public, animal or plant health or economic stability in any part of the United Kingdom,

(b) the legislation specifically addresses that risk,

(c) the imminence of the risk in relation to Wales makes it impractical to seek the consent of the Assembly,

(d) no Bill has been passed under section 110(1)(a) specifically to address the risk, and

(e) no subordinate legislation specifically to address the risk has been laid before the Assembly and has come into force.”

### **Explanatory note**

The amendment specifies the circumstances in which Parliament can legislate on devolved matters on behalf of the National Assembly for Wales without its consent.

### **Amendment 4**

#### **Text of amendment to clause 2**

Page 2, line 13, at end insert –

“(7) In this section, “devolved matters” means matters that—

- (a) are within the legislative competence of the Assembly;
- (b) modify the legislative competence of the Assembly;
- (c) modify a function of the Assembly;
- (d) modify a function of a member of the Welsh Government exercisable within devolved competence (and “within devolved competence” is to be read in accordance with section 58A).”

### **Explanatory note**

The amendment defines devolved matters for the purposes of clause 2.

## **WELSH GOVERNMENT AMENDMENTS**

### **Amendment 5**

#### **Text of amendment to clause 2**

Page 2, line 13, at end insert—

“(7) For the purpose of subsection (6), a provision relates to a devolved matter if the provision—

- (a) applies in relation to Wales and does not relate to a reserved matter,
- (b) modifies the legislative competence of the Assembly, or
- (c) confers a function on, or removes or modifies a function of, any member of the Welsh Government.”

### **Explanatory note**

This amendment defines the meaning of “devolved matters” for the purpose of the statutory recognition of the convention about Parliament legislating on devolved matters proposed by clause 2.

**Amendment 6 (consequential amendment)****Text of amendment to clause 2**

Page 2, line 12, leave out “legislate with regard” and insert “enact provisions relating”.

**Explanatory note**

This amendment is a consequence of amendment 5 above, which defines the meaning of “devolved matters”.

## 06. The ten tests of legislative competence in the Wales Bill

**99.** Clause 3 replaces section 108 in the *Government of Wales Act 2006* with a new section 108A. This clause also substitutes Schedule 7 to the *Government of Wales Act 2006* with the new Schedules 7A and 7B (Schedules 1 and 2 in the Wales Bill). These provisions set out the boundaries of the National Assembly's legislative competence.

**100.** The provisions in the proposed new section 108A provide for ten tests that National Assembly legislation must pass to be within legislative competence. There are currently nine tests to assess competence. The table below outlines the ten tests, where they can be found within the Bill and their purpose. We have also numbered each of the tests, and will use these references within the report.

| Test number | Section / Schedule   | Purpose  |
|-------------|--|--|
| 1           | s108A(2)(a)  | Must not extend beyond the England and Wales jurisdiction  |
| 2           | s108A(2)(b)<br>s108A(3)(a)<br>s108A(3)(b)                          | Must not apply otherwise than in relation to Wales, unless <ul style="list-style-type: none"> <li>– the provision is ancillary to another provision of an Act of the National Assembly or a devolved provision in a UK Act of Parliament, and</li> <li>– it has no greater effect beyond Wales than is necessary to give effect to the purpose of that other provision.</li> </ul>   |
| 3           | s108A(2)(c)  | Must not relate to reserved matters listed in Schedule 7A.   |
| 4           | s108A(2)(d)<br>Sch 7B 2(1)(a)<br>Sch 7B 2(1)(b)                    | Must not modify the law on reserved matters, unless— <ul style="list-style-type: none"> <li>– the modification is ancillary to a provision which does not relate to a reserved matter, and</li> <li>– has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision.</li> </ul>  |
| 5           | s108A(2)(d)<br>Sch 7B 3(1)   | Must not modify the private law, unless the modification has a purpose which does not relate to a reserved matter.   |
| 6           | s108A(2)(d)<br>Sch 7B 4(1)(a)<br>Sch 7B 4(3) (a), (b), (c) and (d) | Must not modify or create a criminal offence in a “listed category”.<br><br>Also, a provision of an Act of the National Assembly cannot modify the law about— <ul style="list-style-type: none"> <li>– criminal responsibility and capacity (e.g. mental capacity to commit a crime, or the age at which a child can be prosecuted for an action),</li> <li>– the meaning of intention, recklessness, dishonesty and other mental elements of offences,</li> <li>– inchoate and secondary criminal liability (this covers</li> </ul> |

| Test number   | Section / Schedule  | Purpose   |
|---------------|---|---|
|               |   | <p>matters such as what constitutes an attempt, or a conspiracy, to commit an offence),</p> <ul style="list-style-type: none"> <li>– sentences and other orders in respect of criminal conduct, and their effect and operation.</li> </ul>  |
| 7             | s108A(2)(d)<br>Sch 7B 5   | Must not modify a protected enactment   |
| 8<br>(Part 1) | s108A(2)(d)<br>Sch 7B 8(1)(a)<br><br>Sch 7B 8(1)(b)<br><br>Sch 7B 8(1)(c) | <p>Must not confer or impose functions on a reserved authority without UK Government consent.</p> <p>It must not modify the constitution of a reserved authority without UK Government consent.</p> <p>It must not confer, impose, modify or remove functions specifically exercisable in relation to a reserved authority without UK Government consent.</p> |
| 8<br>(Part 2) | s108A(2)(d)<br>Sch 7B 8(10)(1)  | Must not remove or modify any function of a public authority without UK Government consent.   |
| 8 (Part 3)    | s108A(2)(d)<br>Sch 7B 8(11)(1)  | Must not remove or modify certain specified functions of a Minister of the Crown without UK Government consent.   |
| 8<br>(Part 4) | s108A(2)(d)<br>Sch 7B 8(11)(2)  | Must not remove or modify any other Minister of the Crown function (i.e. a function not covered by Part 3 of Test 8) without the Welsh Ministers having first consulted UK Government.  |
| 9             | s108A(2)(e)   | Must not be incompatible with the European Convention Human Rights (as incorporated into UK law by the Human Rights Act 1998)   |
| 10            | s108A(2)(e)   | Must not be incompatible with EU law.   |

**101.** It is clear that there have been some positive changes to some of the tests since the publication of the draft Bill (see paragraph 13). We strongly endorse these, and the work that has been done to take on board our views and those of stakeholders. However, it is clear that the changes do not go far enough. There are still concerns that the tests as they are currently drafted roll-back the National Assembly's current legislative competence. However, we believe that some of these issues can be rectified by amendment.

**102.** It should be noted that these tests on legislative competence will be relevant to both primary and secondary legislation considered by the National Assembly. This is important when considering the implications for law-making at the National Assembly and the subsequent impact that they will have on legislative scrutiny.

**103.** In Chapters 7, 8 and 9 we consider five tests in particular. In Chapter 7, we consider test 3 (the 'relates to' test). In Chapter 8, we consider test 4 (modifying the law on reserved matters), test 6

(criminal law) and test 8 (Minister of the Crown consent). In Chapter 9, we have also considered a narrower point in relation to test 2 (the 'in relation to Wales' test).

## 07. Clause 3: Legislative competence and Schedule 1 - New Schedule 7A to the Government of Wales Act 2006

**104.** Test 3 states that National Assembly legislation must not relate to reserved matters. Schedule 7A sets out the reserved matters, along with exceptions or carve outs to the reservations.<sup>65</sup> The matters reserved to the UK Parliament are therefore the reservations, less the exceptions, plus the carve outs.

### Evidence

**105.** Our predecessor Committee called for 'a significant reduction in the number and extent of specific reservations and restrictions consistent with a mature, effective and accountable legislature'.<sup>66</sup>

**106.** Professor Thomas Glyn Watkin opened our oral evidence sessions with a clear concern about the space provided for the National Assembly to legislate:

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"My biggest worry about the new Bill, as it appears, is that actually there's not been much progress with regard to creating that extra space. And it is there I would most want to have seen improvement, because I think it's because of the lack of space that the Assembly has been bumping up against the boundaries and having to ask the Supreme Court whether it has passed them. And until, I think, one has an idea of what the extent of the space is we can't really say that there is that much of an improvement, not so much upon the draft Bill, but upon the current settlement and the difficulties that have attended it."<sup>67</sup>

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**107.** There are a number of issues of concern about the reservations; one was on the likelihood of roll-back of the National Assembly's legislative competence. As Emyr Lewis told us:

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"But what I am concerned about are the minutiae. For example, I think it's quite clear now that the National Assembly has the power to abolish the defence of reasonable chastisement when a child is struck. Now, if this Bill were to become law, I do think that that would disappear, because of the changes in relation to criminal law. That's an obvious example in a way, but I wouldn't mind putting a few quid on the likelihood that there are many other examples because of the detailed way in which the reservations have been reserved."<sup>68</sup>

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**108.** The Llywydd explained that one of the factors causing roll-back was the approach taken with the 'silent subjects' in the current settlement:

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"The fact now that we have, within that reserved list, matters that were previously silent subjects....could be particularly problematic for legislation that Welsh Government or individual Members here may well have had an impression may have been within competence, and we will find, if the Bill goes through, as currently drafted, would probably not be within competence. The

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<sup>65</sup> **HL Bill 63-EN**, paragraph 39 provides definitions of the terms reservation, exception and carve out.

<sup>66</sup> CLA Committee, **Report on the UK Government's Draft Wales Bill**, December 2015, paragraph 181

<sup>67</sup> Interim Constitutional and Legislative Affairs Committee, 22 June 2016 [PM], RoP [6]

<sup>68</sup> CLA Committee, 30 June 2016, RoP [65]

obvious example that I can think of is that employment rights are now a reserved matter, and we would be prohibited from legislating in the Assembly on matters that relate to employment rights, and, therefore, if anybody is tempted to offer legislation on wages and holidays and terms for people working in the social care sector for example, that could well be now outside of competence because it relates to employment rights, and that certainly, to me, feels like a rollback of competence and powers.”<sup>69</sup>

**109.** Another factor was the lack of principles behind the list of reservations, as noted by Professor Laura McAllister:

“...I think what we all hoped for in this Bill would be a little bit more clarity, a little bit more principle, and a little bit more acceptance of the maturity of this institution to make policy for the people of Wales without being constrained by things that don’t seem to have any real powerful rationale.”<sup>70</sup>

**110.** Alongside this, there is also the significant issue that there is no explanation of the rationale behind the reservations. Professor Richard Rawlings challenged the UK Government's assertion<sup>71</sup> that the explanatory notes provide a clear rationale for each reservation:

“I have to say to colleagues that that is simply not true. The explanatory notes are classic explanatory notes. They say what the provision says; they do not tell you why the provision says what the provision says. So, one is forced to conclude that either that statement is deliberately misleading, or that the author of that response to the Welsh Affairs Committee had never actually seen the explanatory memorandum accompanying the Bill.”<sup>72</sup>

**111.** One area of concern, which was also highlighted by our predecessor Committee, was the drafting of the individual reservations, in particular the use of 'the subject matter of...' before detailing specific pieces of legislation, instead of using a description of the policy area being reserved.

**112.** The Welsh Government's official explained:

“...we argued from the outset that one particular drafting technique of the draft Bill, referring to ‘the subject-matter of’ other pieces of legislation as the way of expressing the reservation, was deeply unhelpful to the earnest seeker after truth, because they would then have to be referred on to very many other pieces of legislation. And you can see that classically if you look at reservation 139, which is the reservation about employment and industrial relations, where you have a proposition that employment rights and industrial relations are reserved; that is then said to include a list of legislation (a) to (g), but it only includes that list. So, there will, perhaps, be others that should be included in the list and, of course, the list will become out of date and so on.

<sup>69</sup> CLA Committee, 6 July 2016, RoP [73]

<sup>70</sup> CLA Committee, 30 June 2016, RoP [203]

<sup>71</sup> Welsh Affairs Committee, **Special Report: Pre-legislative scrutiny of the draft Wales Bill: Government response** June 2016 and House of Commons, 14 June 2016, Col [1649]

<sup>72</sup> CLA Committee, 30 June 2016, RoP [212-13]

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So we, in our discussions with the Wales Office, tried very hard to persuade them to get away from this reference in the reservations to existing legislation as defining the reservation, and in our draft Bill, our alternative, we provided alternative drafting. We've not, on the whole, been able to persuade them that that is the right way forward, although some of the 'subject-matter of' reservations have gone."<sup>73</sup>

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**113.** This was a point picked up during our stakeholder event. Stakeholders' highlighted particularly opaque reservations such as L8 (paragraph 170).<sup>74</sup> Stakeholders were also confused as to what such reservations actually reserved: for example did reserving the subject matter of a piece of legislation mean the same thing as reserving the individual provisions?<sup>75</sup>

**114.** We received written evidence on the reservations from:

- Wales TUC Cymru;
- Auditor General for Wales;
- Welsh Language Commissioner;
- Cytûn;
- Royal Town Planning Institute;
- Wales Council for Voluntary Action;
- Wales Environment Link Marine Working Group;
- Universities Wales; and
- The Learned Society of Wales.

**115.** All highlighted individual reservations which caused particular concern.

**116.** Building on the excellent work of the National Assembly committees in the Fourth Assembly, looking at the reservations in relation to their remit, we received detailed information on the reservations from the following committees:

- Children, Young People and Education Committee;
- Climate Change, Environment and Rural Affairs Committee;
- Culture, Welsh Language and Communications Committee;
- Equality, Local Government and Communities Committee;
- Economy, Infrastructure and Skills Committee;
- Finance Committee; and
- Health, Social Care and Sport Committee.

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<sup>73</sup> CLA Committee, 4 July 2016, RoP [27-8]

<sup>74</sup> The subject matter of (a) the INSPIRE Regulations 2009 (S.I. 2009/3157); (b) the Re-use of Public Sector Information Regulations 2015 (S.I. 2015/1415)

<sup>75</sup> CLA Committee, Stakeholder Event, 11 July 2016

117. We have collated and published the written evidence in a separate document.<sup>76</sup>

118. David Hughes summarised the concerns about the reservations neatly:

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"We have private security. Is the control of bouncers necessary for the preservation of the United Kingdom? Similarly with hovercraft. One struggles to see any principle there whatsoever. One needs to simply look through it. You can pick your own choice of ridiculous reservations. There is one for every taste."<sup>77</sup>

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## Proposed amendments

### The Llywydd's amendments

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119. The Llywydd proposed amendments to clause 3<sup>78</sup> to ensure that the National Assembly's current level of legislative competence is maintained. This included enabling the National Assembly to legislate in an ancillary way in relation to reserved matters.

120. All these amendments were tabled by Plaid Cymru at Committee stage but the amendments were not called.

### Welsh Government amendments

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121. The Welsh Government proposed amendments to restore the ancillary power.<sup>79</sup> These were tabled by the Labour Party at Committee stage but were withdrawn.

### Amendments on individual reservations

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122. There was a large number of amendments proposed in relation to the individual reservations. In the main these were removing individual reservations, but also included narrowing definitions, adding items to the National Assembly's competence, and in one instance removing competence and returning it to Westminster.

123. Due to the nature of our remit and the incredibly tight timeframe available for scrutiny, we have not considered the issue of individual reservations in detail. We do note that of all the amendments relating to reservations only two were voted upon during scrutiny in the House of Commons. This is disappointing.

## Our view and suggested amendments

124. We have not seen the significant reduction in the number and extent of the reservations and restrictions that was advocated by the former Secretary of State for Wales.<sup>80</sup>

125. It is also evident that the UK Government is not intending to publish an explanation of the reservations. The pause in the Bill which the former Secretary of State announced was welcomed by all. It is therefore of great disappointment that this pause has not led to the publication of clearly explained and principled reservations. It has proven very difficult for stakeholders to make assessments of the reservations without an understanding of why each one has been reserved.

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<sup>76</sup> Available from our [website](#)

<sup>77</sup> CLA Committee, 30 June 2016, RoP [84]

<sup>78</sup> The Llywydd, [Proposed amendments, Committee Stage, Day Two](#), 5 July 2016

<sup>79</sup> Welsh Government, [Proposed amendments, Committee Stage, Day Two](#), 5 July 2016

<sup>80</sup> Wales Office, [Press release](#), 29 February 2016; Constitutional and Legislative Affairs Committee, [Report on the draft Wales Bill](#) paragraph 177

**126.** We share the Llywydd's concerns that the approach in converting silent matters into reservations will lead to roll-back of competence. We note that this in effect reverses the Supreme Court's ruling on the Agricultural Sector (Wales) Bill.

**127.** With a limited amount of time available for detailed scrutiny, we remain unclear whether the practical impact of the extensive list of reservations will lead to significant roll-back of competence for the National Assembly. What is clear, however, is that it will certainly lead to some roll-back. We believe, that while it might be the UK Government's position to reclaim some powers, the UK Government needs to be open and transparent about its intentions and state its position publically.

**128.** The sheer number of reservations is only part of the problem. The drafting of the reservations adds to the complexity. We are unclear as to why the UK Government has continued to use 'the subject matter of...!' when this drafting technique came under such clear and wide criticism during the draft Bill scrutiny. We are puzzled as to why the UK Government remains so wedded to a technique that adds such complexity and confusion to the Bill, particularly when the Welsh Government was able to publish, in March 2016, a logical and coherent list of reservations in its 'Government and Laws in Wales Bill' without using such an opaque approach. We would hope that there is still the opportunity for this drafting approach to be removed entirely from the list of reservations by the UK Government.

**129.** This is another part of the Bill where simple changes could have helped enormously with the accessibility of the Bill. It remains unclear why these changes were not made given that they do not relate to a core point of principle.

**130.** We hope that if significant changes are not made to the list of reservations during the final stages of scrutiny, when the constitutional settlement is revisited, as it surely will, that the reservations are considered in detail and that all parties are involved and given adequate time to contribute to the process.

## **THE LLYWYDD'S AMENDMENTS**

### **Amendment 7**

#### **Text of amendment to clause 3**

Page 2, line 33 leave out “subsection (2)(b) does” and insert “subsections (2)(b) and (2)(c) do”

#### **Explanatory note**

The amendment restores the Assembly’s competence by enabling it to legislate in an ancillary way in relation to reserved matters.

### **Amendment 8**

#### **Text of amendment to clause 3**

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).”

#### **Explanatory note**

The amendment restores the Assembly’s competence by enabling it to legislate in an ancillary way in relation to reserved matters.

## 08. Clause 3: Legislative competence and Schedule 2 - New schedule 7B to the Government of Wales Act 2006

**131.** In this chapter, we look at Schedule 7B (Part 1 - General restrictions) as it relates to the tests of legislative competence introduced in by section 108A (tests 4, 6 and 8).

### Evidence

**132.** Stakeholders welcomed the removal of the necessity test in relation to private law and the changes to the test in relation to criminal law.<sup>81</sup> The First Minister also welcomed the changes.<sup>82</sup>

**133.** However, David Hughes urged a note of caution:

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"...instead of a necessity test that tells you, 'You can't do it unless it's necessary', what you've got is a whole lorry-load of things that just mean you have to plough through such a lot of things to do that the practical difference may not be that great. It's an improvement, but let's not think it's that much of an improvement."<sup>83</sup>

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**134.** We heard that test four matches a similar provision within the *Scotland Act 1998*, and that this has not given rise to any inter-governmental difficulties.<sup>84</sup> However, it was also highlighted that the necessity test in Scotland operated against a much narrower list of reservations.<sup>85</sup> We were also reminded that if a question arose as to whether something was 'necessary', it would ultimately be a decision for the Supreme Court. Stakeholders told us that if we have concerns about test four then we should seek to replicate what is currently in s108(5) of *Government of Wales Act 2006*.<sup>86</sup>

**135.** Stakeholders had concerns that the cumulative effect of these tests would lead to a roll-back of legislative competence.<sup>87</sup> As far as we are aware, at no stage has the UK Government said that one of the policy intentions with this Bill is to roll-back competence. As Professor Thomas Glyn Watkin said to us:

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"...of course, it is open for Parliament to re-legislate if they are not content with past legislation, but if you do that, you have to be honest and say that you are taking back powers that had been conferred."<sup>88</sup>

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**136.** We have also heard concerns about the system of Minister of the Crown consents. Professor Thomas Glyn Watkin told us :

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"I think that there are clearly still some issues where there is roll-back on powers that the Assembly currently has. The one that really strikes me most in that regard on the face of this Bill, as on the draft Bill, is the lack of provision to allow the Assembly to make incidental and consequential changes to Minister

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<sup>81</sup> CLA Committee, 20 June 2016, RoP [223]

<sup>82</sup> CLA Committee, 4 July 2016, RoP [41]

<sup>83</sup> CLA Committee, 30 June 2016, RoP [88]

<sup>84</sup> CLA Committee Stakeholder Event, 11 July 2016

<sup>85</sup> CLA Committee Stakeholder Event, 11 July 2016

<sup>86</sup> CLA Committee, Stakeholder Event, 11 July 2016

<sup>87</sup> CLA Committee Stakeholder Event, 11 July 2016

<sup>88</sup> CLA Committee, 22 June 2016 [PM], RoP [41]

of the Crown functions. That was, of course, the basis of the challenge to the Local Government Byelaws (Wales) Bill. If one looks at the provisions of the current Bill as presented, it is quite clear that that would not have gone to the Supreme Court because there would not have been an issue to discuss.

...

The Secretary of State's refusal would have been a refusal and that would have been that. So, that is certainly a loss of competence—one that had been gained, or at least confirmed, at considerable expense and effort."<sup>89</sup>

**137.** Professor Laura McAllister told us:

"...it strikes me that a clearer model would still be the Scottish approach. I fail to see, again, the principles behind the eliminations from the complete Scottish model, and I just think that, in terms of clarity and intelligibility, again, a clearer cut model based on the Scotland Act would resonate better against all of those principles, really, than the one we see set out in this Bill."<sup>90</sup>

## Proposed amendments

### The Llywydd's amendments

**138.** The Llywydd proposed amendments to Schedule 2<sup>91</sup> to remove the necessity test in relation to test four and to change the criminal law restriction in relation to test six to bring it in line with the private law restriction.

**139.** All these amendments were tabled by Plaid Cymru at Committee stage but the amendments were not called.

### Our view and suggested amendments

**140.** We acknowledge that there will need to be some form of test for legislative competence in the devolution settlement. We also acknowledge that the unusual nature of the Welsh settlement (two law-making legislatures serving one single jurisdiction) will bring with it a level of complexity. However, we believe that the complexity within the settlement is not solely due to the single jurisdiction policy of the UK Government. As such, we believe there is still scope to reduce the complex nature of the tests.

**141.** New Schedule 7B sets out a number of restrictions on the National Assembly's legislative competence. These restrictions apply in addition to the test that National Assembly legislation must not relate to reserved matters (test three).

**142.** We refer to three of the restrictions that raise most concern below.

### Modifying the law on reserved matters (test four)

**143.** In addition to not 'relating to' a reserved matter, Assembly legislation under the Bill must not 'modify the law' on reserved matters. There is a very fine distinction between this test and the 'relates

<sup>89</sup> CLA Committee, 22 June 2016, RoP [8 and 10]

<sup>90</sup> CLA Committee, 30 June 2016, RoP [253]

<sup>91</sup> The Llywydd, Proposed amendments, Committee Stage, Day Two, 5 July 2016

to' test, but the distinction is important. This restriction captures a vast amount of law, as it encompasses all of the law on all of the reservations provided for in the Bill.

**144.** 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.

### **Criminal law (test six)**

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**145.** The restriction in paragraph 4 of proposed new Schedule 7B is an absolute prohibition on the National Assembly from creating or modifying specified categories of offences. The categories of offences includes two categories of particular concern. First, the inclusion of the more serious offences against the person, such as kidnap and serious assault. Second, and of greater concern, is the inclusion of any sexual offence. Given the National Assembly's current competence in relation to, for example, the protection and well-being of children and of young adults, this criminal law restriction represents a significant roll-back of the National Assembly's competence.

### **Minister of the Crown consents (test eight)**

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**146.** As noted in paragraph 13, we welcome the improvements made to the draft Bill with regard to the National Assembly's ability to remove or modify UK Minister functions without consent. However, the Bill still does not include a power for the National Assembly to remove or modify UK Minister functions in an incidental or consequential way. This power is available to the National Assembly under the current settlement and has been underlined by the Supreme Court in its judgment on the Local Government Byelaws (Wales) Bill.

**147.** With regard to affecting the functions of reserved authorities (other than UK Ministers and UK Government departments), the Bill represents a significant restraint on the National Assembly's ability to legislate without UK Government consent. Under the current settlement, there is no specific restriction on affecting the functions of such reserved authorities. However, under the Bill, the National Assembly would not be able to confer, impose, remove or modify the functions of such reserved authorities without UK Government consent.

### **Suggested amendments**

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**148.** As it currently stands, we believe that the tests proposed in these three restrictions would lead to a roll-back of the National Assembly's legislative competence. We strongly support the amendments proposed by the Llywydd<sup>92</sup>, as they amend tests four and six and restore the National Assembly's competence, at least in that respect, to that provided by the existing settlement.

**149.** We have received evidence<sup>93</sup> indicating that the Llywydd will be proposing amendments in relation to Minister of the Crown consents (test eight) and we hope they will address the issues raised above.

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<sup>92</sup> The Llywydd, [Proposed amendments, Committee Stage, Day Two](#), 5 July 2016

<sup>93</sup> The Llywydd, [Wales Bill 2016 - Minister of Crown consents](#), 30 September 2016

## **THE LLYWYDD'S AMENDMENTS**

### **Amendment 9**

#### **Text of amendment to Schedule 2**

Page 81, line 21, leave out from “matters” to end of line 26.

#### **Explanatory note**

The amendment removes the necessity test in relation to the law on reserved matters.

### **Amendment 10**

#### **Text of amendment to Schedule 2**

Page 82, line 82 leave out paragraph 4 and insert

“4 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the criminal law.

(See also paragraph 6 of Schedule 7A (single legal jurisdiction of England and Wales).)

(2) Sub-paragraph (1) does not apply to a modification that has a purpose (other than modification of the criminal law) which does not relate to a reserved matter.

(3) This paragraph applies to civil penalties as it applies to offences; and references in this paragraph to the criminal law are to be read accordingly.”

#### **Explanatory note**

The amendment inserts a restriction so that the National Assembly cannot modify criminal law unless it is for a purpose other than a reserved purpose. This would bring it into line with the private law restriction.

## 09. Clause 3: Legislative competence and section 108A(2)(b)

### Our view and suggested amendments

**150.** We are also publishing an amendment which would remove the necessity element of test two and in so doing, restore the National Assembly's current competence to legislate otherwise than in relation to Wales.

**151.** Currently, the National Assembly can use the 'ancillary' power in section 108(5) of the *Government of Wales Act 2006* without the necessity test. Therefore, the inclusion of the necessity test in respect of test two is a clear roll-back in the legislative competence of the National Assembly.

**152.** Further, there is no real guidance as to what 'necessary' means in this context. We are concerned therefore that deciding whether something is necessary is something that will have to be referred to the Supreme Court, probably on a regular basis.

#### COMMITTEE AMENDMENTS

##### Amendment 11

##### Text of amendment to clause 3

Page 2, leave out lines 37 to 40.

##### Amendment 12

##### Text of amendment to clause 3

Page 3, leave out lines 5 and 6.

##### Explanatory note (for amendments 11 and 12)

Proposed section 108A(2)(b) of the Wales Bill provides that a provision of an Assembly Act must not apply otherwise than in relation to Wales. But that restriction does not apply if the provision in question is: (1) ancillary, and (2) has no greater effect otherwise than in relation to Wales than is necessary to give effect to a devolved purpose (see proposed section 108A(3)).

This amendment removes the requirement that the National Assembly provision has no greater effect otherwise than in relation to Wales than is necessary. This amendment does not give the National Assembly any great freedom to legislate otherwise than in relation to Wales, because the power to legislate otherwise than in relation to Wales would still have to be "ancillary" (defined in proposed section 103A(7) as something which provides for enforcement (or is otherwise appropriate for making National Assembly legislation effective) or something which is incidental or consequential). In fact, the National Assembly already has an ancillary power to legislate otherwise than in relation to Wales under the current settlement, therefore the amendment would simply reflect the National Assembly's current competence in this area (see section 108(5) of the *Government of Wales Act 2006*).

The amendment would also remove any uncertainty around the meaning of “necessary”. There is no real guidance as to what necessary means in this context; it could amount to an unduly restrictive test that seriously prohibits the National Assembly from touching upon English matters in order to make National Assembly legislation effective.

These amendments together would restore the National Assembly's competence to its current level. These amendments effectively remove the necessity aspect of test two.

## 10. Clause 18 - Functions of Welsh Ministers and Clause 20 - Transfer of Ministerial functions

**153.** Clause 18 would insert a new section 58A into the *Government of Wales Act 2006*, and as it stands, would permit the Welsh Ministers to exercise executive ministerial functions, but excluding functions conferred or imposed by or by virtue of any legislation or the prerogative. The Explanatory Notes explain that the purpose is to confer 'common law type powers on Welsh Ministers.'<sup>94</sup> There is no explanation for the exclusion referred to above.

**154.** Clause 20 makes provision about transfer of Ministerial functions. Currently, the Bill does not align executive functions of the Welsh Ministers in devolved areas with the legislative competence of the National Assembly, unlike the settlement in Scotland.

### Evidence

**155.** Stakeholders expressed disappointment that the Bill had not aligned legislative and executive competence more closely, missing an opportunity to simplify the Bill in the process.<sup>95</sup>

**156.** The National Assembly's Chief Legal Adviser told us:

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"The former Presiding Officer put forward the position that the situation in Wales should be equivalent with Scotland; that is, that all ministerial functions, functions of Ministers of the Crown, exercisable within devolved areas, or what we must now learn to call 'non-reserved areas', should lie with Welsh Ministers. From a constitutional law point of view, that would be a very logical situation and would also increase the clarity of the settlement very considerably."<sup>96</sup>

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**157.** The First Minister said he would prefer using a Bill to subordinate legislation in order to achieve greater alignment of legislative and executive competence:

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"I'd rather do it via the Bill. I think it's clearer that way. Transfer of functions Orders do provide flexibility, especially where there are some areas that need further clarification in the future. Ideally, a Bill would align the two."<sup>97</sup>

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### Proposed amendments

#### Welsh Government amendments

**158.** The Welsh Government proposed amendments<sup>98</sup> to more closely align executive and legislative competence by inserting a new section 58B into the *Government of Wales Act 2006*. This new section would transfer all functions currently exercisable by Ministers of the Crown within devolved competence to the Welsh Ministers. These amendments were tabled by the Labour Party but not called.

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<sup>94</sup> **HL BILL 63-EN**, paragraph 518

<sup>95</sup> CLA Committee Stakeholder Event, 11 July 2016

<sup>96</sup> CLA Committee, 4 July 2016, RoP [107]

<sup>97</sup> CLA Committee, 4 July 2016, RoP [97]

<sup>98</sup> Welsh Government, **Proposed amendments, Committee Stage, Day One**, 29 June 2016

**159.** During the debate the UK Government said that they intend to transfer as many pre-commencement Ministerial functions in devolved powers as they can<sup>99</sup>, and that a draft Transfer of Functions Order would be brought forward during the later stages of the Bill. However, there does not appear to have been an explanation as to why the proposed amendment was not supported by the UK Government and why it objects to the approach adopted in the *Scotland Act 1998*.

### Our view and suggested amendments

**160.** It would seem a logical step to align legislative and executive competence, especially when this can be done in a reasonably straightforward manner in the Bill. In our view, this is essential and the failure of the UK Government to adopt such an approach is a fundamental weakness in the Bill.

**161.** While we have acknowledged that there may be places where elements of the settlement are likely to be complex, it seems distinctly odd to make a provision complex and inaccessible when it would appear easier to make it clear.

**162.** While we welcome the UK Government's commitment on the floor of the House to publish a draft Transfer of Functions Order,<sup>100</sup> it does not go far enough. Having to refer to another piece of legislation in order to understand where responsibility resides is unnecessarily complex, opaque and makes the Welsh devolution settlement even more complex than that of the other devolved nations. This is particularly frustrating when there is a clear, simple way to resolve the issue.

**163.** One may be led to conclude that the UK Government wishes to retain some executive functions in devolved areas. Otherwise, it is unclear why it has not made this simple change that our predecessor Committee also called for.<sup>101</sup>

**164.** A good example which highlights the lack of alignment between the executive functions of the Welsh Ministers and the legislative competence of the National Assembly is the area of road traffic law. Currently, speed limits are an exception in Schedule 7 to the *Government of Wales Act 2006* so the National Assembly cannot currently pass primary legislation around speed limits. However, the Welsh Ministers can make subordinate legislation around speed limits because they have executive powers to do so under the *Road Traffic Regulation Act 1984*.

**165.** The Bill would have been the ideal vehicle to address such anomalies, but it does not do that. In fact, in relation to speed limits the Bill makes the situation even more bizarre. Under the Bill, while speed limits are not reserved, road traffic offences are reserved. This seems to mean that the National Assembly could pass legislation which sets the speed limit on a road, but it could not specify the road traffic offence for breaking that speed limit.

**166.** Aligning the executive functions of the Welsh Ministers with the legislative competence of the National Assembly would also address some of the complexity and bureaucracy that arises in relation to the Minister of the Crown consent regime. If there was such alignment, then UK Government consent would not be needed before the National Assembly could affect UK Minister functions in devolved areas because those functions would have been transferred to the Welsh Ministers

**167.** We have considered three possible options to increase the alignment of legislative and executive competence.

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<sup>99</sup> House of Commons, 5 July, Col [835]

<sup>100</sup> House of Commons, 5 July, Col [835]

<sup>101</sup> CLA Committee, [Report into the draft Wales Bill](#), December 2015, paragraph 181

**168.** The first would be to insert new clauses that are based on the *Scotland Act 1998*. While this would have the advantage of using text previously approved by the UK Parliament, it would not reflect the different legal system in England and Wales.

**169.** We have also considered the Welsh Government's proposed amendments and consider them to represent a sensible approach to delivering the necessary closer alignment.

**170.** However, if the UK Government remains opposed to this approach, we suggest an alternative, simpler way of delivering closer alignment of legislative and executive competence by amending clause 18.

## **WELSH GOVERNMENT AMENDMENTS**

### **Amendment 13**

#### **Text of amendment to clause 20**

Page 19, line 38, at end insert—

“(2) After section 58A of that Act (inserted by section 18(1) of this Act) insert—

“58AB Transfer of functions within devolved competence

(1) Functions conferred on a Minister of the Crown by virtue of any pre-commencement enactment or pre-commencement prerogative instrument, so far as they are exercisable within devolved competence by a Minister of the Crown, are to be exercisable by the Welsh Ministers instead of a Minister of the Crown.

(2) Provision for a Minister of the Crown to exercise a function with the agreement of, or after consultation with, any other Minister of the Crown ceases to have effect in relation to the exercise of the function by a member of the Welsh Government by virtue of subsection (1).

(3) In this section—

“pre-commencement enactment” means—

(a) an Act passed before or in the same session as this Act and any other enactment made before the passing of this Act;

(b) an enactment made, before the commencement of this section, under such an Act or such other enactment;

“pre-commencement prerogative instrument” means a prerogative instrument made before or during the session in which this Act was passed.”

### **Explanatory note**

Clause 20 makes provision about transfer of Ministerial functions. The amendment provides for the transfer of all functions currently exercisable by Ministers of the Crown within devolved competence to the Welsh Ministers.

### **Amendment 14 (consequential amendment)**

#### **Text of amendment to clause 18**

Page 17, leave out lines 40 to 42.

### **Explanatory note**

This amendment and the next amendment makes provision for the definition of devolved competence in clause 18 to be applied for the purpose of the amendments made to clause 20 by the principal amendment to clause 20.

### **Amendment 15 (consequential amendment)**

#### **Text of amendment to clause 18**

Page 18, line 4, at end insert—

"() In this section and section 58AB “within devolved competence” and “outside devolved competence” are to be read in accordance with subsections (7) and (8); but for the purposes of section 58AB no account is to be taken of the requirement to consult the appropriate Minister in paragraph 11(2) of Schedule 7B."

### **Explanatory note**

See the explanatory statement for amendment 14.

### **Amendment 16 (consequential amendment)**

#### **Text of amendment to clause 21**

Page 20, line 21, at end insert—

“(ab) section 58AB,”.

### **Explanatory note**

Clause 21 amends the power in section 58 of the Government of Wales Act 2006 to make provision by Order in Council for the transfer of functions to the Welsh Ministers to authorise provision to be made in respect of “previously transferred functions”. This amendment extends the definition of “previously transferred functions” to include functions transferred by the general transfer proposed by the amendment to clause 20.

## **COMMITTEE AMENDMENTS**

### **Amendment 17**

#### **Text of amendment to clause 18**

Page 17, line 38, leave out “but not” and insert “including”.

#### **Explanatory note**

This amendment extends the scope of the powers exercisable by the Welsh Ministers to include those derived from legislation and the prerogative.

### **Amendment 18 (consequential amendment)**

#### **Text of amendment to clause 18**

Page 17, line 33, at end insert –

“(e) those functions of a Minister of the Crown specified in paragraphs 11(1)(b) to (e) of Schedule 7B.”

#### **Explanatory note**

As the principal amendment would include statutory functions, this amendment retains the power of Ministers of the Crown to exercise functions specified in paragraphs 11(1)(b) to (e) of Schedule 7B.

### **Amendment 19 (consequential amendment)**

#### **Text of amendment to clause 21**

Page 20, line 21, at end insert—

“(ab) section 58A,”.

#### **Explanatory note**

Clause 21 amends the power in section 58 of the Government of Wales Act 2006 to make provision by Order in Council for the transfer of functions to the Welsh Ministers to authorise provision to be made in respect of “previously transferred functions”. This amendment extends the definition of “previously transferred functions” to include functions transferred by the general transfer proposed by the amendment to clause 18.

## 11. Clause 53 - Consequential provision

**171.** Clause 53 (on introduction to the House of Commons it was clause 51) incorporates Schedule 5 which makes minor and consequential amendments. It also gives the Secretary of State power to make regulations amending primary or secondary legislation which the Secretary of State considers appropriate in consequence of any provision of the Bill. Any such regulations which amend primary legislation must be passed by both Houses of Parliament (affirmative procedure), regulations which amend secondary legislation are subject to the negative procedure in both Houses of Parliament.

**172.** The Secretary of State could also potentially make regulations making modifications to the Acts of Parliament containing the Welsh devolution settlement without requiring the National Assembly's consent, even if the same modifications were contained in a Parliamentary Act where consent would be required.

### Evidence

**173.** Professor Thomas Glyn Watkin continued to be as concerned about this provision as he was when the draft Bill was published:

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"I did say that, in my view, this was not acceptable, if a UK Secretary of State were to change legislation made by the Assembly. The power should actually sit here, not in Westminster, to say whether that is acceptable or not, because, to some extent, this highlights the fact that the powers of Westminster—even in devolved areas—are still superior in terms of their voice."<sup>102</sup>

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**174.** Professor Richard Rawlings also shared this view, stating that the clause should be amended so that the consent of the National Assembly is required for the exercise of this power.<sup>103</sup>

### Proposed amendments

#### The Llywydd's amendments

**175.** The Llywydd proposed amendments<sup>104</sup> to ensure that any regulations which amend or repeal National Assembly primary legislation must be approved via the affirmative procedure in the National Assembly, as well as in the Houses of Parliament. The amendments also provided that changes to subordinate legislation would be subject to the negative procedure in the National Assembly. These amendments would not provide the National Assembly with any role that would amend or repeal an Act of Parliament or any non-Assembly subordinate legislation.

#### Welsh Government amendments

**176.** The Welsh Government's amendments<sup>105</sup> sought to address the same issue as the Llywydd's amendments, but in addition, one amendment sought to apply National Assembly procedures to any changes to the National Assembly's competence, or that which adjusted the Welsh devolution settlement as set out in either the *Government of Wales Act 2006* or the *Wales Act 2014*.

**177.** All of these amendments were tabled, but none were called. During the debate, the UK Government stated that giving the National Assembly a role in approving Secretary of State

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<sup>102</sup> CLA Committee, 22 June 2016 [PM] RoP [88]

<sup>103</sup> CLA Committee, 30 June 2016, RoP [258]

<sup>104</sup> The Llywydd, *Proposed amendments, Committee Stage, Day Two*, 5 July 2016

<sup>105</sup> Welsh Government, *Proposed amendments, Committee Stage, Day Two*, 5 July 2016

regulations made under this clause would be as 'unjustified as giving Parliament a role in approving Welsh Ministers' regulations made under Assembly Acts'. He went on to say it would make the process more complicated and time-consuming than it needed to be, and that in practice, there would be discussions with the Welsh Government on changes that impacted on the National Assembly's competence before regulations were laid.<sup>106</sup>

## Our view and suggested amendments

**178.** We welcome both the Llywydd's and the Welsh Government's amendments and would support amendments that address all the issues they cover. 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. Attempts by another legislature to change National Assembly law without consent would be constitutionally unsound and go against the principle set out in clause 2. Whilst consequential provisions under clause 53 would come within the scope of clause 2 of the Bill and the Assembly's Statutory Instrument Consent Memorandum procedure, a specific provision in this clause along the lines suggested by the Llywydd would be much clearer.

**179.** We note that this was an issue which was highlighted in our predecessor Committee's report, and yet again is one that could be easily resolved, if the UK Government wishes to do so.

**180.** We note the UK Government's comments referred to above and do not agree with them. They make an inaccurate comparison and if the changes are truly minor then the process will not be excessively lengthy. It is also not enough to say the Welsh Government would be consulted, as this does not provide a voice for the legislature. It is not constitutionally appropriate for proposed changes to a piece of law made by the National Assembly to be discussed with the Welsh Government rather than the National Assembly itself. We are therefore surprised that the UK Government put forward such arguments in the debate.

**181.** In relation to the Welsh Government amendments that regulations which change Parliamentary Acts which amend the Welsh devolution settlement, we agree that these should also require National Assembly consent.

### THE LLYWYDD'S AMENDMENTS

#### Amendment 20

#### Text of amendment to clause 53

Page 42, line 40, leave out "primary legislation" and insert "an Act of Parliament".

#### Explanatory note

The amendment introduces separate provisions for the use of the power in clause 53 in relation to an Act of Parliament.

<sup>106</sup> House of Commons, 11 July 2016, Col [124]

## **Amendment 21**

### **Text of amendment to clause 53**

Page 42, line 42, at end insert –

“(6A) A statutory instrument containing regulations under subsection (2) that includes provision amending or repealing any provision of a Measure or Act of the National Assembly for Wales may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament and the Assembly.”

### **Explanatory note**

The amendment provides that where the Secretary of State uses the power in clause 53 to make regulations that amend or repeal an Assembly Act or Assembly Measure, then the regulations must be approved by the Assembly and each House of Parliament.

## **Amendment 22**

### **Text of amendment to clause 53**

Page 43, line 1, at beginning insert “Subject to subsection (7A),”

### **Explanatory note**

The amendment is linked to the provision that where the Secretary of State uses the power in clause 53 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly, the regulations would be subject to annulment by the Assembly and each House of Parliament.

## **Amendment 23**

### **Text of amendment to clause 53**

Page 43, line 4, at end insert –

“(7A) A statutory instrument containing regulations under subsection (2) that includes provision amending or revoking subordinate legislation made by—

(a) the Welsh Ministers, or

(b) the National Assembly for Wales as constituted by the Government of Wales Act 1998, if made without a draft having been approved by a resolution of each House of Parliament and the Assembly, is subject to annulment in pursuance of a resolution of either House of Parliament or the Assembly.”

### **Explanatory note**

The amendment provides that where the Secretary of State uses the power in clause 51 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly, the regulations would be subject to annulment by the Assembly and each House of Parliament

## **Amendment 24**

### **Text of amendment to clause 53**

Page 43, line 5, leave out subsection (8).

### **Explanatory note**

The amendment removes the definition of “primary legislation”.

## **WELSH GOVERNMENT AMENDMENTS**

## **Amendment 25**

### **Text of amendment to clause 53**

Page 42, line 38, at end insert—

“( ) If a statutory instrument containing regulations under subsection (2) includes provision within devolved competence or provision modifying a devolution enactment, the Secretary of State must send a copy of the instrument or, if subsection (7A) applies, a draft of the instrument to the First Minister for Wales and the First Minister must lay it before the Assembly.”

### **Explanatory note**

Clause 53 of the Bill introduces the minor and consequential amendments in Schedule 5 to the Bill and provides a power for the Secretary of State to make further consequential provision by regulations in connection with the Bill. This includes a power to amend Assembly Acts and Measures, which are usually enacted in Welsh and English with each language text having an equal legal status. This amendment and amendments 26, 27 and 28 are intended to apply appropriate Assembly procedures to regulations which make provision within the Assembly’s competence or which adjust the Welsh devolution settlement by modifying the Government of Wales Act 2006 or the Wales Act 2014.

The amendments provide for regulations containing provisions of this kind that amend primary legislation to be subject to an affirmative Assembly procedure. And they provide for regulations containing provisions of the same kind which modify subordinate legislation to be subject to a negative Assembly procedure.

## **Amendment 26**

### **Text of amendment to clause 53**

Page 43, line 4, at end insert—

“(7A) A statutory instrument containing regulations under subsection (2) that includes—

- (a) provision within devolved competence modifying any provision of primary legislation, or
- (b) provision modifying any devolution enactment in primary legislation,

may not be made unless a draft of the instrument has been laid before and approved by a resolution of the Assembly.”

### **Explanatory note**

See the statement for amendment 25.

### **Amendment 27**

#### **Text of amendment to clause 53**

Page 43, line 3, leave out from “Parliament” to end of line 7 and insert “or the Assembly, is subject to annulment in pursuance of a resolution of—

(a) either House of Parliament, and

(b) if it includes provision that would be within devolved competence or provision modifying a devolution enactment, the Assembly.”

### **Explanatory note**

See the statement for amendment 25.

### **Amendment 28**

#### **Text of amendment to clause 53**

Page 43, line 7, at end insert—

“( ) In this section “devolution enactment” means a provision contained in—

(a) the Government of Wales Act 2006 or an instrument made under or having effect by virtue of that Act;

(b) the Wales Act 2014 or an instrument made under or having effect by virtue of that Act.

( ) For the purposes of this section—

(a) “modifying” includes amending, repealing and revoking;

(b) “within devolved competence” is to be read in accordance with subsections (7) and (8) of section 58A, but no account is to be taken of the requirement to consult the appropriate Minister in paragraph 11(2) of Schedule 7B.”

### **Explanatory note**

See the statement for amendment 25.

## 12. Consolidation

### Our view and suggested amendments

**182.** We believe that some of the complexity of the Bill could have been reduced if the Bill had been consolidated, so that the Welsh constitution was accessible in a single piece of legislation.

**183.** This is in line with the views of our predecessor Committee. It recommended that a clear commitment should be given to consolidating the legislation in the current parliamentary term, and if this were not done, that the Bill should be amended to give the National Assembly competence to carry out such a consolidation.<sup>107</sup>

**184.** Plaid Cymru tabled an amendment which would have allowed the National Assembly to consolidate, in Welsh and English, legislation containing the current constitutional settlement for Wales. It was not called during Committee stage. However, in the debate the UK Government said it was 'not necessary' because the constitutional settlement for Wales is the *Government of Wales Act 2006* as amended.<sup>108 109</sup>

**185.** In light of the complex nature of the settlement, we do not think the UK Government's approach is adequate and we believe it to be out of touch with the views of stakeholders, practitioners and other citizens who will have cause to use the settlement on a regular basis.

**186.** In light of the UK Government's stubborn refusal to consolidate the Welsh devolution settlement into one authoritative piece of legislation, we suggest an amendment to give the National Assembly the power to consolidate in both English and Welsh the constitutional legislation affecting Wales. This would not give the National Assembly power to amend the legislation, merely to consolidate it.

**187.** The approach we suggest is different from that suggested by Plaid Cymru. We believe it should be a stand-alone provision rather than a single paragraph in a complex Schedule and that nothing in the Bill as a whole should prevent the National Assembly consolidating our constitutional legislation. Our suggested amendment would be consistent with paragraph 13 of the proposed Schedule 7B regarding restatement.

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<sup>107</sup> CLA Committee, [Report on the UK Government's Draft Wales Bill](#), December 2015, paragraphs 156 and 181

<sup>108</sup> House of Commons, 11 July 2016, Col [87],

<sup>109</sup> There are still provisions of the Government of Wales Act 1998 in force.

## **COMMITTEE AMENDMENT**

### **Amendment 29**

#### **Text of amendment to clause 3**

Page 3, after line 18 insert—

#### **"108B Consolidation**

(1) Nothing in this Act prevents the Assembly restating (without modification) the provisions of any enactment that provide for the government of Wales.

(2) The Secretary of State may by regulations repeal the provisions of any enactment, other than an Act of the Assembly or subordinate legislation made under an Act of the Assembly, restated by the Assembly in accordance with subsection (1).

(3) The power to make regulations under subsection (2) is exercisable by statutory instrument.

(4) A statutory instrument containing regulations under subsection (2) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."

#### **Explanatory note**

This new section would permit the National Assembly to consolidate the devolution statutes relating to Wales in both its languages. It would also permit the Secretary of State to repeal the original devolution legislation included in the consolidation using subordinate legislation subject to the affirmative procedure.

## 13. Future constitutional change

**188.** As we have set out in this report, we do not believe that the Bill is a lasting and durable settlement.

**189.** Professor Thomas Glyn Watkin suggested that it would last no more than four or five years:

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“I don’t see this settlement as being any more permanent than any of the others. . . .until we reach the point of having some sort of jurisdiction for Wales, then I don’t think the process of devolution will have been concluded. But, again, I do feel that the way in which the matters that are to be reserved are dealt with in this particular Bill is again something that can only be a temporary solution rather than a permanent one. It may quieten things down for a time, but I can’t see it remaining in place for more than four or five years.”<sup>110</sup>

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**190.** We share this view. We do not believe that the Bill’s proposed model of legislative competence is clear, coherent and workable, or will provide a durable framework within which the National Assembly can legislate. As a consequence, we consider legislators in the UK Parliament and in the National Assembly will need to return to address these matters sooner rather than later.

**191.** Further future debate on the principles underpinning the constitutional settlement could have been avoided if the UK Government had approached its task in a more open and transparent way; engaged more readily with the Welsh Government at an earlier stage in the process; and listened more to the views of practitioners with experience of using the devolution settlement. Our predecessor Committee also expressed concerns on the process followed in shaping the draft Bill.<sup>111</sup>

**192.** Putting in place a lasting, durable and workable settlement is crucial to the constitutional integrity of the UK as well as to Wales. But more than that, a sound constitutional settlement provides the foundations on which good policy and legislation is “Made in Wales”, and positive changes to the lives of the citizens of Wales can be delivered. Correspondingly, a weak or inappropriate constitutional settlement undermines the ability of democratically elected government and Assembly Members in Wales to deliver positive outcomes for the people of Wales.

**193.** We strongly believe that the process by which the Bill has been conceived, developed and subjected to scrutiny has been flawed. To be a success, constitutional reform by its very nature necessitates full and open engagement by the affected executive, legislative and scrutiny arms of both governments and parliaments. This builds a consensus across political parties and wider society which underpins a durable settlement. The Bill has been characterised instead by a Whitehall-driven process and tight control by the UK Government which has locked out any criticism – constructive or otherwise – which would have helped improve the Bill, and has lost the opportunity of wider support for this as a lasting settlement.

**194.** This cannot be allowed to happen again on a Bill of such constitutional importance. The people, parliament and government of Wales have to varying degrees been treated as secondary in a matter of significant constitutional reform which directly affects them. Moreover, it does not reflect past best practice observed in previous Bills affecting the governance of Wales where there was wider

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<sup>110</sup> CLA Committee, 22 June 2016, RoP [91]

<sup>111</sup> CLA Committee [Report on the UK Government's Draft Wales Bill](#) December 2015, paragraphs 11-19 and 173-174

engagement, and does not reflect the mutual respect and engagement we would expect between the governments and parliaments in Wales and Westminster.

**195.** As we mention in paragraph 55, the decision of the UK to leave the European Union will impact on the National Assembly's ability to make laws. Disengaging the application of EU law from Welsh law will be a significant task and will probably be delivered through UK-wide constitutional legislation. The ability of the National Assembly and Welsh Government to engage with the development and scrutiny of that legislation will be vital.

**196.** We believe that there needs to be a new approach to considering constitutional Bills that impact on the National Assembly, developed between the latter and the UK Parliament, and between the respective governments. Such an approach would involve:

- inter-governmental working on policy development and drafting of a Bill;
- all relevant National Assembly and UK Parliamentary committees considering the constitutional Bills either collectively or in joint sessions; and
- as appropriate, Ministers of the Crown, the Secretary of State and the First Minister to appear in public before all relevant parliamentary committees.

**197.** Fundamental to such an approach would be an agreed means of co-operating between two parliamentary bodies: between the National Assembly and its committees and Parliament and its two Houses and its committees.

**198.** We recommend the development of new ways of working together as a matter of urgency, ideally before other major constitutional legislation is brought forward. We stand ready as a Committee to contribute to this work.

## Annex 1 – List of oral evidence sessions

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed on the Committee’s website.

| Date         | Name and Organisation   |
|--------------|---|
| 22 June 2016 | Professor Thomas Glyn Watkin, Emeritus Professor of Law   |
| 30 June 2016 | Emyr Lewis, Blake Morgan Solicitors<br>David Hughes, 30 Park Place<br><br>Professor Rick Rawlings, University College London<br>Professor Laura McAllister, University of Liverpool<br>Dr. Diana Stirbu, London Metropolitan University |
| 4 July 2016  | Rt. Hon. Carwyn Jones AM, First Minister<br>Hugh Rawlings, Welsh Government   |
| 6 July 2016  | Elin Jones AM, Llywydd<br>Adrian Crompton, Assembly Commission<br>Elisabeth Jones, Assembly Commission  |

## Annex 2 – List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence, and correspondence referred to in this report, can be viewed in full on the [Committee's](#) webpages:

| Organisation   | Reference |
|--|-----------|
| Wales TUC Cymru  | WB 1      |
| Auditor General for Wales                                      | WB 2      |
| Welsh Language Commissioner - 7 July 2016                      | WB 3a     |
| Welsh Language Commissioner - 14 July 2016                     | WB 3b     |
| Chair, Finance Committee                                       | WB 4      |
| Cytûn - 15 August 2016   | WB 5a     |
| Cytûn - 23 September 2016                                      | WB 5b     |
| Royal Town Planning Institute Cymru                            | WB 6      |
| Chair, Equality, Local Government and Communities Committee    | WB 7      |
| Chair, Economy, Infrastructure and Skills Committee            | WB 8      |
| Wales Council for Voluntary Action                             | WB 9      |
| Wales Environment Link Marine Working Group                    | WB 10     |
| Universities Wales   | WB 11     |
| Chair, Culture, Welsh Language and Communications Committee    | WB 12     |
| Chair, Children, Young People and Education Committee          | WB 13     |
| Chair, Climate Change, Environment and Rural Affairs Committee | WB 14     |
| Chair, Health, Social Care and Sport Committee                 | WB 15     |
| The Learned Society of Wales                                   | WB 16     |