

The UK Government's Wales Bill
Statement by Welsh Government, First Minister, Carwyn Jones AM,
20th October 2015

In his oral statement of 20th October, following the publication of the UK Government's draft Wales Bill, the First Minister made reference to correspondence with the Secretary of State for Wales.

The relevant letters, from the First Minister to the Secretary of State on matters relating to the Wales Bill, from June to September 2015, are attached.

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The UK Government's Wales Bill
Statement by Welsh Government, First Minister, Carwyn Jones AM,
20th October 2015

Date	Description	Ref
22-Sep-15	Wales Bill: Proposals for Devolution enclosing policy papers on:	By date
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	<ul style="list-style-type: none">• Civil Contingencies	22-Sep. 9
	<ul style="list-style-type: none">• Extension of Welsh Ministers' powers to the Welsh offshore region	22-Sep. 13
	<ul style="list-style-type: none">• Welsh Ministers' powers in relation to the licensing of Welsh fishing vessels outside Wales and the Welsh Zone	22-Sep. 18
	<ul style="list-style-type: none">• Accounting Regimes	22-Sep. 20

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/FM/572/15

Rt Hon Stephen Crabb MP
Secretary of State for Wales
Gwydyr House
London
SW1A 2NP
privateoffice@walesoffice.gsi.gov.uk

11th June 2015

Dear Stephen

Wales Bill

While I was pleased to see that the Wales Bill had been included in the recent Queen's Speech, we have not really had an opportunity since your reappointment for a substantive discussion on the content of the Bill. I hope we may be able to have such a discussion before the summer break. In the meantime, I would welcome some further information about your plans, particularly, but not only, about the reservations to the Assembly's legislative competence that you propose to include in the Bill

First of all, on timing, and on engagement with the Welsh Government, in a speech in London last Friday I said this:

"As of today, neither I nor my officials have had sight of any draft clauses, and there has been no substantive discussion between the UK and Welsh Governments on the detail of the reservations to be included in the Bill. I accept that time is needed to get the details right, and that applies particularly to the reservations. But I do want to see detailed work by both Governments over the coming months to develop a strong set of proposals that will fairly meet the needs of the people of Wales."

I hope you would agree that engagement with the Welsh Government will be important as we go forward, and I would be grateful to know when I might expect to see draft clauses, particularly in relation to the reservations but also on the other matters to be covered in the Bill. It would also be helpful if you could confirm your anticipated timetable for developing the full Bill, including whether you envisage a pre-legislative scrutiny process being required and when you are planning for the Bill's formal Introduction into Parliament.

Secondly, while I appreciate that your St David's Day announcement and associated Command Paper will largely determine the content of the Bill, that Paper leaves some questions open. The Command Paper records "No consensus" in respect of several Silk Commission recommendations, but it is not clear to me whether or not that means that the UK Government has rejected those recommendations. For example, there is a "No consensus" response to the recommendation for transfer of responsibility on Teachers' Pay

This was a proposal originally advanced by the UK Government, and on the basis of this the Welsh Government put some preliminary work in hand, but I am not clear whether you now regard it as no longer on the table. For this recommendation, and the various other matters recorded as "No consensus", it would be helpful to have from you a formal statement of the UK Government's view of the issues, including, where relevant, your arguments for reservation. In the same way, I would like to know what is the UK Government's position on recommendations recorded as "being considered as part of the review of inter-governmental machinery". I am for example advised that the UK Government's attitude to the recommendation on establishing Welsh Intergovernmental Committee remains wholly obscure; I would be grateful for clarification.

Thirdly, there are particular matters in the Welsh Government's original evidence to the Silk Commission which the Commission did not get around to addressing, and which I would wish to pursue. Examples are the Community Infrastructure Levy and alcohol licensing, where, given that we are seeking to develop a settlement for the long term and that both local government planning and health responsibilities are already fully devolved, arguments for reservation are not obvious. I would be grateful to know how such matters can be taken forward.

Fourth, you will be aware of my position that what is on offer to Scotland following the Smith Commission recommendations, and now the Scotland Bill, should also be offered to Wales. Devolution of Air Passenger Duty (APD) to Scotland is included in the Scotland Bill, along with devolution of Aggregates Levy. I would expect devolution of APD, at least, to be included in the next Wales Bill but I would be grateful for confirmation of this. Paragraph 5.4 of the Command Paper suggests however that you want to pursue a considerably more restrictive approach generally to the applicability of Smith recommendations to Wales, requiring an analysis of "whether there is a strong case for implementing any of [the recommendations] for Wales". I should be glad to know how that analysis is to be undertaken, what role you envisage the Welsh Government playing in it, and how you intend to incorporate into the Wales Bill provisions giving effect to relevant Smith recommendations.

Finally, as you know, the Welsh Government has argued for some transfers of Ministerial functions going beyond the legislative competence of the Assembly. I attach particular importance in this context to powers relating to civil contingencies. I know that a Transfer of Functions Order is in preparation to transfer Ministerial functions in connection with rail franchising. It would be helpful to know whether you envisage using the same mechanism to transfer Ministerial functions to implement relevant parts of the St David's Day announcement, or whether all such transfers will be covered in the Wales Bill, alongside the provisions enhancing the Assembly's legislative competence.

I look forward to hearing from you. It would be helpful to have your reply before you address the Assembly in our debate on the Queen's Speech on 24 June.

Yours sincerely



CARWYN JONES

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/FM/0617/15

Rt Hon Stephen Crabb MP
Secretary of State for Wales
Gwydyr House
London
SW1

23rd June 2015

Dear Stephen

Wales Bill: Ministers' Powers

In my letter to you of 11 June, I asked you to clarify the UK Government's position in respect of the "no consensus" matters in the Command Paper published alongside your St David's Day announcement. One of the Silk recommendations for which no consensus was recorded was that there should be a general transfer to the Welsh Ministers of pre-devolution Minister of the Crown powers, subject to any necessary exceptions. The purpose of this letter is to explain at fuller length the issues as I see them, and to seek your agreement that appropriate provision be made in the Wales Bill

From my perspective, there are three separate, but related, issues.

First, I believe that Minister of the Crown functions on matters within the Assembly's devolved legislative competence (as to be expanded by other proposals in the Command Paper) should be exercisable by the Welsh Ministers, notwithstanding that they may derive from pre-1999 legislation. In my view, it makes little sense to enable the Assembly to legislate on a broad range of issues (for example, under your new proposals, in relation to elections), while leaving stray functions within the scope of that legislative competence still exercisable by UK Government Ministers and so beyond the executive competence of the Welsh Ministers. What is therefore needed is a general transfer to the Welsh Ministers of statutory Ministerial responsibilities on matters within the Assembly's devolved legislative competence, so that those functions become exercisable by the Welsh Ministers. Section 53 of the Scotland Act provides a model of the sort of provision I have in mind. I accept, of course, that, as in the Scotland Act, there may need to be specific exceptions to this principle, but the general proposition is one that follows the logic of the move to full legislative competence for the Assembly, and I would be grateful if appropriate provision could be made in the Wales Bill

If that is done, it would also address my second issue, which is Ministerial responsibility for implementing European Directives. At present, even if a Directive deals with a policy area for which responsibility in Wales is devolved, it remains necessary for a specific "designation" to be secured for the Welsh Ministers to implement it if they do not already

have the executive competence to do so. As the recent example of the Procurement Directives illustrates, this process, which seems to require detailed negotiation between the Welsh Government and the UK Government, can potentially be time-consuming and frustrating, and it cannot serve the purposes of either of our governments to retain these inefficient arrangements. So, in my view, the Welsh Ministers should no longer be required to secure specific designation to implement European Directives falling within devolved competence (and provision equivalent to s 53 and following sections of the Scotland Act 1998 would enable that to be achieved).

Finally, it is my view that, under a reserved powers model, the Assembly should be able without the need for consent, to remove or modify UK Ministers' powers in areas of devolved competence where those powers derive from pre-1999 statutes. At present, paragraph 1 of Part 2 of Schedule 7 to GoWA 2006 provides a blanket restriction on the Assembly's powers in this respect (although the Supreme Court's judgement in the Bylaws case admittedly provides some easement of the position). These powers are scattered across the statute book, including in devolved areas, so that the restriction has the potential to continue to be a stumbling block for even the most straightforward legislation on matters which clearly should be for the Assembly to legislate about. You have rightly stressed the need for the new devolution settlement to be clear, and in that context it is worth reminding ourselves of what the All-Wales Convention had to say about this in 2009:

"The problem with this general restriction is that it seems to introduce an element of uncertainty into the scope of [the Assembly's] law-making powers. There is no composite list of relevant Minister of the Crown functions, therefore how can there be clarity on the extent of [the Assembly's] law-making powers...?"

So, to secure the necessary clarity, the general restriction on the Assembly's ability to modify or remove Minister of the Crown functions in respect of devolved matters deriving from pre-devolution statutes should be removed. If and insofar the UK Government can reasonably argue for particular powers to be retained for its own Ministers to exercise, these could be made the subject of reservations from the Assembly's legislative competence.

To conclude, I believe that the arguments for the changes I propose follow logically from the adoption of a reserved powers model of legislative competence for the Assembly. I would welcome your agreement that the Wales Bill should make appropriate provision accordingly.

As this letter touches on issues affecting the legislative competence of the Assembly, I am copying to the Presiding Officer.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales



Llywodraeth Cymru
Welsh Government

The Rt Hon Stephen Crabb MP
Secretary State of Wales
Wales Office
Gwyder House
Whitehall
London
SW1A 2NP

24th June 2015

Dear Stephen

We met this morning to discuss the Wales Bill. You explained that preparations for the Bill are not being rushed to meet an artificial timetable of the "first 100 days". You are concerned, rather, that enough time is allowed for diligent work around Whitehall and for proper negotiation with the Welsh Government.

I was pleased to hear your view and I concur with it very readily. It is especially important that there is full and proper consultation between the Wales Office and the Welsh Government on the draft Reservations Schedule. This is a fundamentally important piece of work and any mistakes, omissions or problematic inclusions could have damaging consequences for devolution in Wales for years to come. As you know, my ambition is that Wales' constitutional settlement should be robust and durable for the long term.

Given the importance of this work I should be grateful if, as discussed, you would write back to me setting out your proposed timetable for consultation and negotiation between the Wales Office and Welsh Government on the Reservations Schedule. I can assure you that I and my officials are very ready to work with you to produce a sound and sustainable document. I look forward to hearing from you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones'.

CARWYN JONES



Ein cyf/Our ref LF/FM-0745/15

Rt Hon Stephen Crabb, MP,
Secretary of State for Wales,
Gwydyr House,
London SW1.

7 August 2015

Dear Stephen,

Wales Bill: Smith Commission Recommendations

This letter responds to that part of yours of 2 July touching on Smith Commission issues. I have written separately on other matters in your letters of 2 and 13 July.

First, I confirm we are agreed there is no case for taking forward devolution of responsibilities for pensions or further welfare programmes. And there is nothing in Smith about tax devolution which is of interest to the Welsh Government: the cases for devolution of APD and Aggregates Levy had already been made by Silk (and of course we wish to pursue them), if there is to be devolution of Income Tax, it should be along the lines already legislated for in the Wales Act 2014 rather than the Smith version; and we are not looking for assignment of any share of VAT revenues. However I understand that talks are underway on Scotland's borrowing powers, so should progress be made on that front, the new Wales Bill would provide a good opportunity to reconsider the borrowing powers for Welsh Ministers.

As I noted in my other letter, I will in September be sending you a paper arguing for devolution of Employment Support programmes (as one of a number of similar papers). The remainder of this letter proposes a number of other matters arising from Smith recommendations which I believe should be taken forward for Wales in the Wales Bill. The arguments are set out below.

1. Public sector bodies should be able to operate rail franchises in Wales

Further powers over rail transport will ensure decision making is fully aligned with local needs and priorities in Wales. To maximise the effectiveness and efficiency of the public transport network in Wales, we must ensure alternative models are fully considered and opportunities are taken advantage of as they arise. Furthermore, it has long been the ambition of the Welsh Government for the Wales and Borders franchise to operate under a not for dividend model.

Allowing public sector bodies to bid for the franchise contracts, something which is currently not possible within the provisions of the Railways Act 1993, would enhance the Welsh Government's ability to deliver on these objectives. Additional powers for

Scotland suggested by the Smith Commission, agreed by the UK Government and now to be found in cl.49 of the Scotland Bill provide a mechanism to address this and we wish to see equivalent provision for Wales.

2. Devolution of responsibility for Road Signs

The Welsh Government presently has executive functions to authorise Welsh language and non-prescribed variants of UK road signs. In practice, the current arrangement is both time and resource intensive and does not easily enable the support of policy priorities, such as development of signs which encourage and increase public confidence in active travel. I would therefore like the Assembly to have legislative power over road traffic signs. Following the development of traffic sign legislation for Wales, the administrative burden in meeting Welsh language standards and the process for authorising bilingual signs will be reduced, and give Welsh Government greater flexibility in answering local needs.

3. Welsh Ministers to be consulted on relevant activities of Maritime and Coastguard Agency and Northern Lighthouse Board

The UK Government has accepted the Smith Commission recommendations for a formal consultative role for the Scottish Government and Scottish Parliament in setting strategic priorities for the Marine and Coastguard Agency, and the Northern Lighthouse Board.

In Wales, powers around fisheries, marine planning and (for the inshore area) marine licensing and conservation are already devolved. Furthermore, agreement has been reached for ports to be devolved and for further devolution in respect of marine licensing and conservation and energy consenting, including energy developments in the marine area. There is therefore an opportunity to promote joined-up and cross-government engagement at an early stage by ensuring Wales is also placed on this formal, consultative footing. This will help keep relevant bodies informed of the issues on a devolved, national and international scale.

4. Energy Efficiency powers; & Welsh Ministers to be consulted re renewables incentives and Energy Strategy

With further devolution of energy powers it is increasingly important that the energy regulator delivers for Wales and Welsh Government has an opportunity to inform the Strategy and Policy Statement to which OFGEM must have due regard. This can be achieved through granting Welsh Government a formal consultative role in designing renewables incentives and the strategic priorities set out in the Energy Strategy and Policy Statement. To support this development and increase accountability to Wales, OFGEM should also be required to lay its annual report and accounts before Welsh Ministers and submit reports to, and be available to appear before, Committees of the National Assembly.

A proportionate and workable method of formally consulting with Welsh Government on the strategic priorities set out in the Energy Strategy and Policy statement (SPS) will need to be devised with UK Government. Once this is in place, it will enable

more detailed and timely consideration of devolved issues, allowing devolution to function properly within the UK-wide energy market

5. Power to request investigation by Competition and Markets Authority

Devolution of power, along the lines provided for in cl.55 of the Scotland Bill, to require the Competition and Markets Authority to carry out a full second phase investigation, after an initial study is completed, would allow the Welsh Government to address competition issues such as fuel poverty and communications infrastructure that have a disproportionate impact on Wales because of its' particular geographic and demographic characteristics. The power will also support the Welsh Government's ability to influence matters such as energy policy and transport policy. This policy lever would help to increase prosperity in Wales by stimulating innovation, raising productivity and increasing consumer welfare.

6. A Welsh member of OFCOM; Welsh Ministers to be consulted on strategic priorities; & Welsh Ministers to be consulted through the process of BBC Charter renewal; Assembly to receive BBC Annual Reports, etc.

The Welsh Government wishes to improve the accountability of broadcasters as well as Ofcom to the National Assembly and to Welsh viewers and listeners. In the St David's Day Command Paper the UK Government agreed that this should be done by conferring a power on Welsh Ministers to appoint one member of the Ofcom board who is capable of representing the interests of Wales. The Welsh Ministers would be required to consult the Secretary of State before making the appointment.

A requirement on Ofcom and the BBC to lay their annual report and accounts before the National Assembly, as well as submit reports to, and appear before, Committees of the Assembly, would further improve accountability of both OFCOM and the BBC to the people of Wales. It would also enable specific Welsh broadcasting issues such as the Welsh language to be more easily considered by these bodies. This position was supported by the UK Government in the St David's Day command paper, following the Silk Commission's recommendation to this effect in relation to public service broadcasters such as the BBC.

The Smith Commission called for a formal consultative role for the Scottish Government and the Scottish Parliament in the process of reviewing the BBC's Royal Charter and for the BBC to have greater accountability to Scotland thereafter. This has subsequently been agreed via a Memorandum of Understanding for Scotland. Welsh Government and DCMS officials are currently working to develop an equivalent Memorandum of Understanding for Wales. Giving the Welsh Government a voice in Charter Renewal negotiations will help ensure that the BBC is better able to meet the needs of Welsh viewers and listeners. Should the UK Government fully involve the devolved administrations in Charter renewal discussions from the outset, it is more likely that the new Charter will properly reflect the current and changing devolution settlement. This will lead to a more robust and workable Charter, as specific local issues and matters stemming from devolution are considered fully from the earliest stages.

7. Powers to regulate Gaming Machines

I refer you to the Debate in the Assembly on 18 March this year, on a backbench motion brought forward by Members from all four parties represented in the Assembly. The motion, which was approved nem con, noted the growth of gambling in Wales, expressed concern about the social consequences of this, and called on the Welsh Government to "engage with the UK Government to discuss the devolution of greater powers over the licensing of gaming machines".

Following a Smith Commission recommendation, cl.45 of the Scotland Bill will provide legislative competence for the Parliament, and executive powers for the Scottish Ministers, to regulate the number of gaming machines authorised by a betting premises licence. I would wish the same powers to be devolved to Wales. For the avoidance of doubt, I am not seeking general legislative competence in respect of the subject-matter of the Gambling Act 2005, but as the Assembly itself recognised in its Debate, there are strong policy grounds for the devolved institutions in Wales being able to address this particular social problem, in the same terms as will be open to the Scottish institutions when the Scotland Bill becomes law.

I would be grateful if you would give these various matters careful consideration as the Wales Bill continues to be developed. I look forward to your reply in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES



Ein cyf/Our ref: LF/FM-0745/15

Rt Hon Stephen Crabb MP
Secretary of State for Wales
Gwydyr House
London SW1

7 August 2015

Dear Stephen

Wales Bill

I am replying to your letters of 2 and 13 July. In the meantime of course we have had a useful discussion with the Prime Minister and I received the draft new model for the National Assembly's legislative competence covered by your letter of 31 July.

Thank you for setting out the timetable you envisage for taking the Bill forward and for your confirmation that we are able to discuss the draft Bill during the summer before you publish it in the autumn for Pre-Legislative Scrutiny. It was very useful that your officials were able to meet with their Welsh Government and Assembly Commission colleagues on 4 August to discuss the proposed content of the draft model.

I will provide you with detailed comments on the draft early in September once we have properly digested the model you have shared with us. I thought it important however to offer some early views on the draft provisions, as I have been surprised by the differences that have seemingly developed between the reassurances you provide in your covering letter and my interpretation of the document attached to it. My starting point, as you know, must be that there is no rowing back from the National Assembly's existing legislative competence.

There are three particular aspects where I would be grateful for a clearer understanding of your intention before I respond with a more detailed position. I have kept all of these points to a minimum and offer the assistance of Welsh Government lawyers and officials to discuss with yours if further clarification is required.

- i) Paragraph 1 of the proposed Schedule 7B introduces a new restriction preventing the National Assembly from modifying the law on reserved matters unless the provision in question is 'ancillary' – a concept which incorporates a new test restricting the provision to doing no more than is 'necessary'. Your officials have explained that this restriction is designed to protect the law within reserved areas but that is also the purpose of the 'relates to' test as it is used in the Scotland Act 1998 and in connection with Schedule 7A. These provisions appear to rob the 'relates to' test of its flexibility and add a

'double-lock' on reserved matters in relation to the National Assembly's competence. I do not understand why this is apparently required under a reserved powers model when it does not appear under the conferred powers model.

There is inevitably a balance that needs to be struck when trying to safeguard both UK Government and Welsh Government interests. I am concerned that the introduction of this double-lock severely undermines this balance, tipping it heavily away from the National Assembly and creating new complexity of a type that I had anticipated would be removed by the introduction of the reserved powers model.

- ii) We have previously corresponded on my view that the restriction on the National Assembly which requires it to obtain Secretary of State consent to modify or remove 'pre-commencement' Minister of the Crown powers should be removed. You are already aware that this requirement for the Secretary of State consent is not found in the Scottish legislation. The intellectual rationale for your position was unclear to me even before I looked at the draft model proposed for the Wales Bill.

Unfortunately, having looked at these draft provisions, I find that there are now three significant extensions to it. The inevitable consequence of these, intended or otherwise, will be to reverse the decision of the Supreme Court in relation to the Byelaws Act and to introduce a 'triple-lock' on the National Assembly's competence. This seems to undermine the clear principle set out in the St David's Day Command Paper – to create a lasting devolution settlement for Wales – and continues the unsustainable position of laws that should be decided in Wales instead being decided by the UK Government or the Supreme Court.

- iii) Finally, I appreciate your desire to draw whenever possible on the Scotland framework. However, the imposition of a test of necessity rather than the existing appropriateness test in connection with the National Assembly's ability to provide for the enforcement of its legislation (and in other contexts), results in a significantly narrower competence for the Assembly. This test may work in the Scottish context where the settlement is significantly more generous (because the Parliament can legislate on Scottish private and criminal law) but the Assembly is in a quite different position. Borrowings from the Scottish settlement should not result in additional curtailments to either the competence of the National Assembly or to the clarity of the overall settlement.

We noted during our meeting with the Prime Minister that the National Assembly will in due course need to give its Legislative Consent to the Bill, and that its approach to the issues will be influenced by the recent report from the Constitutional and Legislative Affairs Committee which you will have seen. I will continue to be guided in my approach by the Committee's advocacy of subsidiarity, clarity, simplicity and workability as the appropriate tests for assessment of your proposals.

I would be grateful if you would give further consideration to these proposals, which in my view not only involve a backward step from the existing settlement but also add considerable complexity. It would be extremely useful to have your thoughts on this by 28 August so that my detailed reply in early September can be informed by your response.

Other matters

It was helpful that you confirmed that inter-governmental discussions on the content of the Bill could continue in parallel with the pre-legislative scrutiny process. I intend in September to send you some papers making cases for devolution of responsibilities on a number of matters, including Employment Support programmes, on which Welsh Government officials are already in discussion with DWP officials.

I note from your letter of 2 July that you have no plans to include in the Bill those Silk Commission recommendations which your St David's Day Command Paper identified as enjoying 'no consensus'. I have no wish generally to re-open those matters, although Edwina Hart will be writing separately on the issue of devolving further powers on rail infrastructure and I invite you to re-consider the matter of Teachers' Pay and Conditions. This is not something which the Welsh Government initially envisaged for devolution, but the UK Government requested that Silk considered the devolution of these responsibilities; on further reflection the Welsh Government sees good arguments for this, and we want to take it forward. We have no reason to believe that the Department for Education in the UK Government will wish to retain these responsibilities, and so I hope you will feel able to depart from the full rigour of the position set out in your letter and agree that this hitherto 'no consensus' issue can proceed.

So far as work on the Memorandum of Understanding is concerned, it is certainly true that revision of this is under consideration by the four UK administrations, and my officials are playing an active part in that at a senior level. But I am afraid it is simply not the case that consideration is being given in that context to establishing a Welsh Intergovernmental Committee, because UK Government officials do not appear to have been given a political steer on whether UK Ministers are willing for the issue to be explored further. If you are not persuaded of the case in principle, so be it, but in the absence of any expression of Ministerial view one way or the other, officials will not be able either to take the proposal forward or set it aside.

Finally, on fiscal devolution, you will have seen my letter of 27 July to the Prime Minister on APD. On Income Tax, your letter of 13 July repeated earlier statements about the UK Government's expectation that a referendum should be held, given the commitment relating to establishing a funding floor. We discussed these issues further with the Prime Minister on 21 July, when I again underlined the importance of the UK Government defining precisely what it means by a funding floor. I have noted the Prime Minister's subsequent comments on an income tax referendum at the Royal Welsh on 23 July. It is a matter for the UK Government whether a referendum is required; however I acknowledge that there may be other appropriate ways of initiating the partial devolution of income tax.

I am writing to you separately about Smith recommendations which might be applied in Wales.

Yours sincerely,



CARWYN JONES



Ein cyf/Our ref: LF/FM/822/15

Rt Hon Stephen Crabb MP
Secretary of State for Wales
Wales Office
Gwydyr House
London
SW1A 2NP

7 September 2015

Dear Stephen

Draft Wales Bill: Proposed Reserved Powers Model

I am replying to your letter of 31 July, with which you also sent your working drafts of a new section 108A of GoWA 2006, together with two Schedules setting out proposed reservations to and restrictions on the National Assembly's legislative competence. You invited my comments on these proposals. I have focused on those proposed legislative competence provisions; we can return later to the clause you also enclosed about functions of Welsh Ministers.

I have just seen your letter of 3 September which arrived after this one was finalised. The content of paragraphs 5-7 of your letter forms part of the issues addressed in this letter and its attachments. I will respond on the other matters separately.

I set out my views below, and am also enclosing five documents which address some important issues of detail or illustrate some of the issues I mention. But there are two fundamentally important points to make at the outset.

First, it should be common ground between us that the Wales Bill will be one of great constitutional significance; it will redefine the role of the Welsh devolved institutions in the governance of the United Kingdom. It should therefore be approached from the standpoint of constitutional principle.

You will have seen the report of the National Assembly's Constitutional and Legislative Affairs Committee (CLAC) on the UK Government's proposals as set out in the St David's Day Command Paper. The Committee concluded that reservations to the Assembly's legislative competence should be drafted in accordance with the principle of subsidiarity; in other words, that responsibility for decisions should lie at the lowest possible level consistent with their effective implementation, or closest to where they will have their effect. As I noted in my letter of 7 August, I agree with that conclusion; it is indeed one of the fundamental reasons, along with the need for clarity, simplicity and certainty, for establishing devolution on the basis of a reserved powers model. I therefore approach your drafts on that basis.

Secondly, I have to return once again to the matter of Ministerial or other consents to Assembly legislation. We need to be quite clear about this: not only have you not accepted the reasoned case set out in my letter of 23 June for removing the existing requirements (for which there is no equivalent in the Scottish settlement), as I noted in my letter of 7 August you have in these new proposals significantly extended the circumstances in which consents will be required before the Assembly is to be permitted to legislate. In effect, your proposals introduce a new set of restrictions which could be characterised as a Whitehall, or indeed English, veto on Welsh laws. These proposals are entirely at odds both with the subsidiarity principle and with constitutional understandings about the proper relationship between executives and legislatures; to that extent they are inconsistent with your expressed objective of the National Assembly becoming a genuine Welsh Parliament. We are going to find it difficult to reach agreement on a way forward while these proposals continue to feature in your plans.

The Model: General Comments

You appear to have used as your starting-point Schedules 4 and 5 to the Scotland Act 1998. This presumably explains why the "connector provision" in the proposed new clause 108A(2)(c) is expressed as 'relates to' rather than 'falls within' as is used in the current section 108(4) of GoWA for Exceptions in Schedule 7 to the 2006 Act. However, as I pointed out in my letter of 7 August, borrowings from the Scottish settlement should not result in additional curtailments to either the competence of the National Assembly or to the clarity of the overall settlement. I would ask you to look again at the appropriateness of lifting material from the Scottish legislation, because applying such provisions in the – currently very different - context of the Welsh settlement results in effects that cut back the Assembly's powers and run counter to the principles against which such a model will need to be tested. I look forward to receiving your comments on the points I made in that letter.

Secondly, while I welcome the fact that my officials have been advised by yours that there is no intention to add to the list of reservations, I understand that in the proposed new Schedule 7A several of the entries are only 'marker provisions', which Parliamentary Counsel will need to develop at fuller length in due course. I do need to reserve my position in respect of these until I have seen the final detail.

Reductions in the National Assembly's Existing Legislative Competence

As I said in my letter of 7 August, my starting point in assessing the draft provisions must be one of no rowing back from the Assembly's existing competence. I find however that, had the reservations and restrictions you propose been in force at the relevant time, the Assembly would have been unable to legislate in the way it has; and this despite the fact that no-one has questioned the appropriateness of the Assembly being able to legislate on these matters.

I draw to your attention accompanying document B (4 tables), which set out a list of proposed reservations and restrictions which would serve to reduce the Assembly's existing legislative competence. Document C contains a table of Acts and Measures which have been passed by the Assembly under the existing settlement but which (in whole or in part) could not have been passed under the new proposed settlement; and another table of Assembly Bills which have either been introduced or proposed, and which do or will contain provision which could be passed under the current settlement but which would be outside competence under the new proposed settlement.

The way in which the draft provisions strike the balance on matters such as private law and criminal law is highly likely - so long as Wales and England form part of a joint legal jurisdiction - to be a significant impediment to the coherence and workability of the proposed settlement. This, coupled with the considerable limitations on the Assembly's 'ancillary'

powers and the proposed extension of the circumstances when the UK Government's consent will be required to the primary laws passed in the Assembly, represents an unprecedented reigning back of the Assembly's current powers. The underpinning assumptions and logic of some of the provisions that would cause those effects remain unexplained and elusive. As I said in my letter of the 7 August, for example, it is not clear why it is felt necessary to establish a system that would require the UK Government's consent to the sort of provision made in what is now the Local Government Byelaws (Wales) Act 2012. Does the Secretary of State really need to have a veto on the Assembly's power to legislate about local byelaws in relation to such matters as the regulation of sanitary conveniences in Wales?

These examples are additional to the concerns I have already expressed in my letter of 7 August. Taking all these together, the position is very far from how you described in your letter to me of 31 July: it is simply not the case that your proposals reflect the current devolution boundary. I cannot accept that this is the right way forward.

Subsidiarity

I set out above the importance which I believe should be attached to the subsidiarity principle in the drafting of reservations to the National Assembly's competence. Unfortunately, I can find no evidence that this has been recognised in the drafting of the proposed Schedule 7A. I assume it is only by mistake that the Assembly's legislative competence in respect of the Welsh language could be thrown into question by the wording of the Equal Opportunities reservation (on this, please see section 8 of document A), but the proposed new Schedule contains a number of other reservations which could not easily be reconciled with the subsidiarity principle or with the constitutional nature and importance of this Bill. I would ask you to look again at the Schedule from this perspective. Is it for example really necessary, in a Parliamentary Bill which the Speaker will no doubt classify as a first-class constitutional measure, to make specific reserving provision about such matters as "Pedlars and street trading", and "The Pubs Code"?

Conversely, there are some matters which I would have expected to see in the Schedule, but which do not appear. For example, in the Broadcasting section, there is specific reference to the BBC but not to S4C, which might lead one to think that competence in respect of the latter is to be devolved (whereas it is both governments' position that it should not). And the omission of any reference to the Census could result in arguments that new legislative competence on that matter has been devolved, something which the Welsh Government is not seeking.

Clarity, Simplicity and Workability

I agree with CLAC that these principles of 'clarity, simplicity and workability', together with certainty, are appropriate tests for assessing your proposals, but the Schedules as drafted do not satisfy these criteria.

The repeated use (I am told there are over 70 such examples) in the Schedule of reservations described as "the subject matter of" particular Acts of Parliament or subordinate legislation does nothing to make clear exactly what is being reserved. Furthermore, it is not always clear why particular Acts have been included in this way; for example, the list of such Acts in the 'Employment and Industrial Relations' field is considerably longer than the equivalent for Scotland; why is that?

Many of the reservations are described insufficiently precisely for anyone to know their precise scope. I refer you to table 2 of document B, which sets out a list of reservations and restrictions requiring clarification. To take one example, I am particularly concerned about the reservation of 'Anti-social behaviour'. In the past, your officials have argued that anti-

social behaviour should be regarded as a subset of the maintenance of public order, but both now appear as separate reservations, with the potential for the former to range across and effectively limit the Assembly's legislative competence in a wide range of devolved fields; this does not reflect the current position and cannot satisfy the tests of subsidiarity, clarity or of workability.

So far as complexity is concerned, I invite you to look at attached documents D and E. The tests for determining whether a proposed provision is within existing legislative competence have their own complexities (documents D(i) and E(i)); the tests in your proposals add layers of complexity (documents D(ii) and E(ii)). In this respect, the proposals take us backwards, and go directly against your own stated desire for a more simple and straightforward settlement.

Conclusion


I understand you are aiming to publish a full draft of the Bill, including (I assume) a revised version of the reservations and restrictions Schedules with the 'marker' provisions fleshed out, soon after Parliament resumes in October. It would be helpful if I could have sight of that draft as soon as possible, and at least a few days ahead of its publication, and would be grateful if you can confirm that that will be possible. You will however understand from my comments that, in my view, the approach you have proposed needs considerably more work before the provisions could possibly be regarded as fit for their fundamental constitutional purpose. The offer for my officials to assist yours in this work still stands. I have also asked my officials to prepare redrafted versions of the material you have sent me and these are to be prepared in line with the general approach I have recommended in this letter. Officials are aiming to complete this work by the end of September, and I will share it with you at the earliest opportunity.

As you note in your letter of 28 August, we will have an opportunity to discuss these matters further on 16 September. Going forward, I think it will be important that, rather than the Welsh Government simply being in the position of responding to drafts prepared by the Wales Office, our respective teams of officials should meet regularly and frequently to discuss the drafting of the Bill. That will, among other things, enable matters of political significance more easily to be identified for subsequent discussion between you and me, and help take us forward to the agreed outcome which the UK Government called for in the St David's Day Command Paper.

Finally, and as foreshadowed in my letter of 7 August, I will be writing again later this month with some papers setting out proposals for policy areas where I consider there are good grounds for devolution of responsibility to the Assembly and/or the Welsh Ministers.

I am copying this letter, with enclosures, to the Presiding Officer. I have just now seen a copy of her letter to you of 2 September. Given that she and I are in substantive agreement, it is perhaps important to state that we have reached this common position independently of each other, and that there has been no substantive collaboration between her officials and mine in the analysis of your proposals; but our concerns are obviously very similar, and I hope you will give them your most careful consideration.

Yours sincerely



CARWYN JONES

WELSH GOVERNMENT

Initial Assessment of Significant Cross Cutting Issues and Significant Reservations arising from Wales Bill Proposals

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Welsh Government
28 August 2015

Initial Detailed Assessment of proposed clause 108A and new Schedules 7A and 7B to the proposed Wales Bill

1. Overview

1.1 Welsh Government officials have considered new clause 108A and new Schedules 7A and 7B to the proposed Wales Bill.

1.2 In the timescale available Welsh Government officials have analysed the draft provisions and are able to provide an initial detailed assessment. Given the short timescale available to undertake this work this assessment does not purport to be comprehensive. There are some provisions where the intention and effect is not clear, and gives rise to questions. There are bound to be additional matters which emerge on further reflection as part of ongoing work.

1.3 Firstly, some of the reservations are clearly “place markers” and will require further work by UK Government (including Parliamentary Counsel) in addition to our own contribution. At a meeting between Welsh Government and Wales Office officials on the 4th August, the Wales Office confirmed that some of the reservations are “place markers”, which are acknowledged to be incomplete. No definitive list of these “place markers” were provided at the meeting, but we assume on the basis of their considerable breadth and generality that they include at least the following reservations: the prevention, detection and investigation of crime (reservation 33); the maintenance of public order (34); anti-social behaviour (36); private security (46); sale and supply of alcohol (49); charities (58); raising funds for charitable, benevolent or philanthropic purposes (59), broadcasting and other media (173); arbitration (184); the protection of personal data (186); family law (193); student loans (214). Detailed work on these reservations cannot be finalised until these reservations have been made more precise. Wales Office officials at the 4th August meeting indicated that there would be no additional reservations beyond those stated in the current draft.

1.4 In addition to these “place markers”, it is noted that there are over seventy references to the “subject-matter of...” as a means of delineating matters reserved to the UK Government in Schedule 7A. For example, reservation number 38 is formulated as “the subject-matter of the Modern Slavery Act 2015”. The Welsh Government would note that relying on this formulation (as opposed to spelling out what that subject matter is) introduces inherent ambiguity into the process of interpreting the boundaries of the Assembly’s legislative competence, bringing with it scope for disagreement and recourse to the Supreme Court.

1.5 Secondly, reservations relating to St David’s Day “consensus matters” remain in the drafts and it is unclear what will remain in the drafts after further work by Parliamentary Counsel in this regard. Wales Office officials at the 4th August meeting indicated that the reservations in square brackets (which relate to St David’s Day matters) will either be removed or adapted to meet the consensus. As a result, the extent of the reservation cannot be ascertained with any accuracy if Parliamentary Counsel can redraft as well as remove the wording in square brackets.

1.6 Thirdly, some reservations need further work. Wales Office officials indicated at the 4th August meeting that certain reservations, for example those relating to Assembly and local government elections, are a work in progress. This has become clear from an analysis of these provisions.

1.7 The Wales Office proposals attempt to “preserve” the existing settlement in a reserved matters form, subject only to the further devolution of the St David’s Day “consensus matters”. There is an inherent flaw in this approach in that it does not recognise the conceptual difference between a reserved powers settlement, where everything is devolved subject to those matters which need (for policy or practical purposes) to be retained at the centre, and the current conferred powers model where the Assembly only has power to legislate to the extent that is explicitly stated. Seeking to preserve the intricacies of the current settlement, in a reserved powers form, inevitably leads to layers of complexity and runs contrary to the stable, coherent and, importantly, workable settlement that the reserved matters model is intended to create. Reservations and restrictions become numerous and extensive, with quite intricate exceptions. Seeking to constrain legislative powers by reference to the current model, rather than approaching the balance of competencies from a principled perspective, also leads to the inclusion of reserved matters which might be thought surprising in a constitutional document.

1.8 These difficulties are compounded by the fact that the Wales Office are seeking to cut back the current settlement by representing it in terms of how UK Government consider it was “intended” to operate rather than recognising its full legal effect. In combination these factors create new complexity (and thus undermine the objective of seeking a clearer, simpler, coherent and more accessible settlement) whilst in a number of areas significantly reducing the Assembly’s current legislative competence. It is also questionable whether the proposed settlement is workable in its current form. For example, significant delay is already being experienced in UK Government Ministers granting consent to Assembly Bill provisions. That problem will be significantly exacerbated because of the very extensive expansion of the circumstances when Minister of the Crown consent will be required and because the current draft removes the Assembly’s ability currently to modify or remove Minister of the Crown functions without consent if to do so is consequential or incidental.

1.9 Subject to the above caveats and observations this response sets out our current views insofar as it has been possible to carry out an analysis of the drafts

1.10 This assessment is supplemented by the following information:

- (A) Table of provisions of Assembly Acts and Measures which have already been passed and which could not be made under the draft provisions;
- (B) Table of provisions in introduced or proposed Assembly Bills which could not be made under the draft provisions;
- (C) Table of reservations and restrictions which reduce the Assembly’s existing legislative competence;
- (D) Table of reservations and restrictions which require clarification,

(E) Table of reservations and restrictions which contain restrictions to legislative competence over and above the restrictions which apply to the Scottish Parliament; and

(F) Table of reservations and restrictions which are unworkable as presently drafted.

1.11 In summary, the findings of our initial assessment reveal the following issues:

1.11.1 A number of the reservations will result in a reduction in the Assembly's competence from the position in the current settlement;

1.11.2 The absence of a provision like section 108(5) GOWA 2006 so far as non-devolved matters are concerned is a significant impediment;

1.11.3 The restrictions in Schedule 7B substantially increase the control of the UK Government over the Assembly's competence, which is significantly reduced as a result when compared with the current settlement;

1.11.4 The Assembly has passed, either in Measures or Acts, a range of provisions which would either no longer be possible under the new proposed settlement or would raise substantial legal questions about competence that could only be resolved by the Supreme Court or would require Minister of the Crown consent where none was previously required. Notably, the Assembly would under the new proposed settlement be unable to pass the Byelaws Act without Minister of the Crown consent and might arguably have been unable to pass the NHS Redress (Wales) Measure 2008 at all;

1.11.5 The Assembly's competence to legislate in relation to the Welsh language has either been significantly reduced or removed;

1.11.6 The Assembly's existing equal opportunities competence is significantly reduced (broadly speaking reversed) by the new equal opportunities reservation.

1.11.7 The definition of "Welsh public authority" in the reservation at paragraph 215(4)(a) of Part 2 of Schedule 7A and the restriction at paragraph 8(3)(a) of Part 1 of Schedule 7B is particularly problematic. It is possible that Welsh local authorities, the Wales Audit Office and or/ the Auditor General for Wales, the Public Services Ombudsman for Wales and Natural Resources Wales, to name but a few may all fall outside the scope of this definition and will, therefore, either be reserved or beyond the scope of the Assembly's powers in the absence of consent from a UK Government Minister. This is because they exercise some functions otherwise than only in relation to Wales and/or have a number of functions which relate to reserved matters.

A. Cross-Cutting Issues

2. Minister of the Crown consent (paragraph 8 of Schedule 7B)

2.1 The current position – Minister of the Crown Consent

2.1.1 Under the existing settlement a provision of an Act of the Assembly is outside the Assembly's legislative competence if it breaches any of the restrictions in Part 2 of Schedule 7 to GOWA, having regard to any exception in part 3 of that Schedule from those restrictions (section 108(6)(a) GOWA). One such restriction is that contained at paragraph 1 of part 2 of the Schedule relating to "functions of a Minister of the Crown". By virtue of section 158 of GOWA "Minister of the Crown" includes the Treasury. In essence, a provision of an Act of the Assembly:

- cannot *remove or modify* any *pre-commencement function* of a Minister of the Crown [ie a function which *was exercisable* by a Minister of the Crown prior to 5 May 2011] UNLESS EITHER the Secretary of State consents to the provision OR the provision is incidental to or consequential on, any other provision contained in the Act of the Assembly;
- cannot *confer or impose* any [new] function on a Minister of the crown UNLESS the Secretary of State consents to the provision.

2.2 The proposed replacement provisions

2.2.1 Section 108A provides that a Bill provision will be outside the Assembly's legislative competence if it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions.

2.2.2 One such restriction is that contained at paragraph 8 of Part 1 of the Schedule relating to Ministers of the Crown, Government Departments and other reserved authorities. In essence a provision of an Act of the Assembly cannot:

- *remove or modify any function of a reserved authority; or*
- *confer or impose any function on a reserved authority; or*
- *confer, impose, modify or remove functions specifically exercisable in relation to a reserved authority; or*
- *make modifications of the constitution of a reserved authority*

UNLESS [in any such case] the appropriate Minister consents to the provision.

2.2.3 A "reserved authority" means a Minister of the Crown or Government Department and any other public authority apart from a Welsh public authority (defined to mean a public authority whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters). This paragraph contains further provisions which seek to define public authorities caught by the restriction, what constitutes a modification of the constitution of an authority and who is the appropriate Minister able to consent to the provision. A Welsh public authority is determined as at the date of the introduction of the Bill for the Act.

2.3 Narrowing of the Assembly's current competence

2.3.1 These restrictions significantly expand the circumstances where a Minister of the Crown consent will be required and thus significantly narrow the existing legislative competence of the Assembly. The restriction is expanded in the following ways:

2.3.1.1 At present, the Assembly cannot modify “pre-commencement” Minister of the Crown functions. These are Minister of the Crown functions which were exercisable before 5th May 2011. Under the existing settlement the number of these functions will fall away over time as they are repealed and/or substituted by later legislation. The new restriction would apply to **all** functions of reserved authorities (including Minister of the Crown functions) whenever created: pre-commencement functions; functions which have been created since 05 May 2011; and any functions which may be created going forward;

2.3.1.2 At present a Minister of the Crown consent is not needed if a removal or modification of a Minister of the Crown function is incidental to or consequential on any other provision in the Act. Under this new provision the Assembly would require express consent even if the Bill provision is incidental to or consequential on any other provision contained in an Act of the Assembly. This change reverses the effect of the decision in the Byelaws Supreme Court case;

2.3.1.3 The requirement for consent is significantly extended to also cover functions of Government Departments (e.g. departments of government that are not headed by a Minister) ¹ and of other “reserved authorities”. The impact of this change is considered below; and

2.3.1.4 The types of provision that trigger the restriction have been expanded so that they cover not only modifications and removals of functions or the conferral or imposition of functions but now also provisions that confer or impose functions that are specifically exercisable by others in relation to such bodies and provisions that modify the constitutions of such bodies.

2.4 The meaning of “reserved authority”

2.4.1 There is no requirement under the existing settlement to obtain Minister of the Crown consent where the Assembly is legislating in relation to a “reserved authority” that is not a Minister of the Crown or the Treasury. The new requirement for consent is thus an extension of Whitehall control over devolution and a corresponding reduction in the legislative competence of the Assembly. The reserved authority is a new concept, with a complex definition which appears to capture a very large number of public bodies discharging functions in Wales.

2.4.2 The definition of “reserved authority” is complex. The meaning of “Government Department” has been explained above. It seeks to also capture **any** public authority other than a “Welsh public authority” which is narrowly defined at paragraph 8(4). To qualify as a Welsh public authority the authority must have functions which are exercisable **only** in relation to Wales, and have functions which wholly or mainly do not relate to reserved matters. For example, it is not clear whether local authorities, the

¹ The Prime Minister’s website lists 22 non-ministerial government departments: Charity Commission, Competition and Markets Authority, Crown Prosecution Service, Food Standards Agency, Forestry Commission, Government Actuary’s Department, Government Legal Department, HM Revenue and Customs, Land Registry, National Savings and Investment, National Archives, National Crime Agency, Office of Rail and Road, Office of Gas and Electricity Markets (Ofgem), Office of Qualifications and Examinations Regulations (Ofqual), Office of Standards in Education, Children’s Services and Skills (Ofsted), Ordnance Survey, Serious Fraud Office, Supreme Court, UK Statistics Authority, UK Trade and Investments and Water Services Regulation Authority.

Wales Audit Office and/or the Auditor General for Wales, the Public Services Ombudsman for Wales and certain Welsh Charter bodies such as the National Library of Wales are reserved authorities. As noted, these exercise some functions which could be argued to be exercisable otherwise than only in relation to Wales and/or have a number of functions which relate to reserved matters. In addition, particularly in the case of local authorities, listing all of their functions in order to make an assessment of whether they "wholly or mainly" relate to devolved matters is complex and will change over time as the UK Parliament adds to their functions (which detracts from the stability of the settlement).

2.4.3 At a practical level these issues also make it difficult to establish which is the appropriate Secretary of State from whom consent should be obtained and of course, constitutionally, it would be entirely inappropriate for a UK Secretary of State to give consent to the conferral etc. of devolved functions on Welsh local authorities etc.

2.4.4 Quite apart from whether particular public authorities should be regarded as devolved, this expansion of the consent requirement to a whole range of public bodies which may interface with devolved activities marks a significant extension of Whitehall control over the Assembly and overlaps areas which purport to be addressed by the list of reserved matters. One such example would be rights of appeal and sanctions (there will be many others). Courts and most tribunals are almost certainly a "reserved authority". Creating new rights of appeal into their jurisdiction (with potential requirements for judicial training, new forms, bilingual provision, perhaps amendments to procedural rules etc) will arguably modify their functions, or confer new functions upon them necessitating Secretary of State consent.

2.5 What is a modification of a function?

2.5.1 Under the existing settlement different views have been taken, as between the Welsh Government and the UK Government, about whether a function of a Minister of the Crown can be said to be modified (and thus require consent) where the relevant conferral of a function or amendment to an existing function is in relation to a relevant public authority not a Minister of the Crown. In particular, there has been disagreement concerning whether supervisory functions of a Minister of the Crown can be said to be indirectly modified as a result of the creation of new or changed functions of public authorities which the Minister oversees, funds and/or in relation to which the Minister may have powers of intervention. The Welsh Government has taken the position that where the relevant provision is within legislative competence it is open to the Assembly to confer new functions on, or modify existing functions of, public authorities. These do not, as such, change the nature of any supervisory function held by the Minister of the Crown. To the extent that there may be an impact on the supervisory power (by increasing or reducing the burden or extent of the matters being supervised) such that the interests of the Minister of the Crown might be said to be adversely affected, it is considered that the interests of the United Kingdom Government are protected by section 114 GOWA (power of intervention) or, so far as funding issues are concerned, by the Treasury's ability to affect the block grant.

2.5.2 The expansion of the Secretary of State consent provisions to public authorities (other than the narrowly defined Welsh public authorities) would introduce an explicit requirement for Secretary of State consent (or where the reserved authority in question is HMRC, the Treasury) to be obtained. This requirement for consent would be absolute, it would be needed whenever any new power was conferred on any public authority or any existing power of such a public authority was amended and in addition whenever its constitution was modified or any function of a person that is exercisable specifically in relation to that authority is conferred, imposed, modified or removed. These provisions on their clear interpretation have the effect of extensively reducing the legislative competence of the Assembly. There is no precedent for such provisions which can be drawn from either the settlement in Scotland or the settlement in Northern Ireland. It effectively means that the Assembly as the democratically elected devolved legislature in Wales could not modify the process by which, for example, byelaws about the regulation of public toilets and swimming baths in Wales are made, without the consent of the Secretary of State. It is difficult to ascertain why, under a reserved powers model that ostensibly is designed to confer on the devolved legislature the freedom to legislate within obviously devolved areas, such a level of central government control is considered necessary or desirable.

2.5.3 In extending the Minister of the Crown consent requirement to wider public authorities it is unclear whether the UK Government would maintain its previous position and would seek to argue that functions are modified not only where there is a specific new function, or amendment to an existing function, but also where there might be said to be an increase in the burden or responsibilities being discharged by such public authorities or those (usually Ministers of the Crown) who superintend or sponsor them. So, in the context of the criminal justice system, if new criminal offences (or civil sanctions) are created by Assembly legislation might this be said to modify the functions of the Police, the courts, the Crown Prosecution Service, and prison and probation services and/or the Home Office or the Ministry of Justice? Whilst the Welsh Government would maintain its argument that such indirect effects do not constitute modification of functions, the legal position has not been tested. The impact of what is already a reduction in the Assembly's legislative competence would be amplified considerably if the Minister of the Crown consent requirements were to be interpreted in this way.

2.5.4 Some new criminal offences will replace like with like (and arguably will not add to the "burden" on the courts and police etc, but some criminal offences (such as those to be created in the Tax Collection and Management Bill) will be specific Welsh offences and will inevitably increase the number of offences that might in practice become the subject of investigation and prosecution.

2.6 Other adverse effects

2.6.1 Paragraph 8(1)(c) introduces the concept of a function that is "specifically exercisable" in relation to a reserved authority. This formulation appears in the Scotland Act 1998 also. No assistance is given in the Scotland Act 1998, its explanatory notes or the draft Wales Bill provisions as to what this means. It appears not to mean a function that is *only* exercisable in relation to such an authority and neither does it appear to mean *any* function that is capable of being exercised in relation to the authority. If that had been the intention the drafter could have made the position clearer. There is some finer meaning to those words which, as far as we are aware, have never received judicial treatment as they appear in the Scotland Act 1998. A possible (but not necessarily the only) meaning is where a function is exercisable in relation to **named bodies or classes**

of bodies. This introduces a further layer of complexity and ambiguity which will probably only be resolved after consideration by the Supreme Court.

2.6.2 Paragraph 8(3)(b) introduces into these provisions the concept of “functions of a public nature”. This introduces a further layer of complexity and ambiguity for two principal reasons (a) wherever that formulation appears in statute its meaning must be determined according to its context and it will not necessarily always be interpreted in the same way as section 6(3)(b) of the Human Rights Act 1998 and (b) the application of the test in any given set of circumstances can be extremely difficult and very fact and context specific.

2.6.3 The interaction between proposed section 108A(2)(b)² on the one hand and paragraph 8(3)(a)(i) and (4) of Schedule 7B³ on the other is not helpful. There have been occasions when Welsh Government has had to consider the meaning of “otherwise than in relation to Wales” in section 108(4)(b) of GoWA and the arguments put forward that “otherwise than in relation to Wales” does not mean that the Assembly can only confer functions that are only exercisable in Wales. The juxtaposition in these provisions of the tests of “only in relation to Wales” and “otherwise than in relation to Wales” may not be helpful when seeking to run the same arguments in relation to, for example, proposed section 108A(2)(b).

2.6.4 Because the restriction will no longer apply only to pre-commencement functions as defined in GOWA odd results may occur. Assuming, for the sake of argument that in addition to repealing the Agricultural Wages Act 1948 the UK Government wished to transfer the functions of the Agricultural Wages Board in relation to agricultural workers’ terms and conditions and pay in Wales to the Secretary of State. The Welsh Government and the Assembly refuse consent as they consider the matter to be devolved. The UK Government considers the matter to be non-devolved. The UK Government proceeds and the functions are conferred by an Act of Parliament on the Secretary of State and the 1948 Act is repealed. If GOWA had contained the sort of provision now proposed in the Wales Bill in this respect and a Bill was passed in the Assembly to reverse the changes made, the Supreme Court would have found that agricultural workers’ terms and conditions and pay is within competence in the sense that it relates to a devolved Subject and does not fall within any exception mentioned in Schedule 7 to GOWA but would be outside competence because, in trespassing on the Assembly’s devolved competence, Parliament has installed UK Minister of the Crown functions which the Assembly could neither remove nor modify without the UK Government’s consent. That appears to be unconstitutional and does not make for a coherent, stable or workable settlement.

² See also proposed section 108A(3)(b)

³ See also paragraph 215(4)(a)(i) and 5 of Schedule 7A

2.7 Conclusion

2.7.1 The restriction at paragraph 8 of Schedule 7B significantly reduces the Assembly's competence.

2.7.2 The table attached contains reference to existing Acts and Measures which were passed without Secretary of State consent, but which would now require such consent. The primary example is of course the Local Government Byelaws (Wales) Act 2012 which was found by the Supreme Court to be within the Assembly's competence without the Minister of the Crown's consent.

3 Making Legislation Effective – Ancillary and necessity tests

3.1 Under the existing settlement there are a limited number of circumstances where an Act of the Assembly can include provisions which do not relate to a devolved subject and thus would normally be considered to be non devolved.

3.2 Section 108(5) of the Government of Wales Act 2006 ("GoWA") provides as follows:

*"(5) A provision of an Act of the Assembly falls within this subsection if—
(a) it provides for the enforcement of a provision (of that or any other Act of the Assembly) which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise appropriate for making such a provision effective, or
(b) it is otherwise incidental to, or consequential on, such a provision"*

3.3 This enables the Assembly to legislate in England or in a non-devolved area where a provision provides for enforcement or it is otherwise "appropriate". The incidental and consequential wording does not have any caveat.

(a) The legislative competence provisions

3.4 The first point to note is that there is no carve out from the "relates to a reserved matter" test in section 108A(2)(c) along the lines of the existing section 108(5) of GOWA. In addition to ancillary provision, which is arguably caught by the 'purpose test' in new section 108A(5), the existing section 108(5) enables provision to be made in respect of non-devolved matters where it provides for the enforcement of another provision or is necessary for making such a provision effective. These latter two options will not be open to the Assembly under the proposed new settlement.

3.5 Section 108(5) was included in GOWA due to particular concerns raised in respect of Wales' unique position within the constitutional structure of the United Kingdom. These concerns arose for three principal reasons: (a) because of the joint legal jurisdiction (including, but not limited to, the joint court system), (b) because of the permeability of the England/Wales border and (c) because the law that applies in Wales is often inextricably bound up with the law as it applies in England. This meant that relying solely on the "relates to" and "purpose" tests in what became section 108(4)(a) and (7) of GOWA 2006 would not be sufficient to do all that may need to be done by the Assembly to ensure that its legislation in devolved areas was enforced and made effective.

3.6 These concerns, which do not apply in Scotland, are still applicable under the proposed reserved powers model. Therefore, the fact that the “enforcement” and “effective” limbs of section 108(5) have not been carried over to new section 108A is likely to significantly narrow the scope of the Assembly’s competence.

3.7 New section 108A and Schedules 7A and 7B also contain a number of new constraints on legislative competence which significantly narrow the power to legislate in reserved or restricted areas in order to make legislation effective etc. The new constraints generally adopt the following formula:

*“But subsection xxx does not apply to a provision which—
(a) is ancillary to a provision which is within the Assembly’s legislative competence (or would be if it were included in an Act of the Assembly),
and
(b) has no greater effect [on non-devolved matters] than is necessary to give effect to the purpose of that provision.”*

3.8 This provision appears at: section 108A(3), and paragraphs 2(1), 3(4) and 4(2) of Schedule 7B.

(b) Narrowing of the Assembly’s current competence

3.9 This is a new concept for Wales although it appears in the Scotland Act 1998. Whilst “ancillary” is defined by use of the current wording at s108(5) of GOWA a second and more difficult test is added imposing a necessity requirement. This has the potential to significantly reduce the Assembly’s legislative competence and ability to make its legislation effective. We would question why the UK Government has departed from the existing position in this area, that being the test of appropriateness in section 108(5) of GoWA 2006.

3.10 This new test requires the same Assembly Bill provision to be BOTH (1) ancillary (which reflects s108(5) – see s108A(6) AND (2) to have no greater effect than is “necessary” to give effect to the purpose of that provision.

3.11 There is no explanation of why this additional constraint of necessity is required (other than it is in the Scotland Act 1998) given the strength of the existing powers in section 108(5) GOWA which have operated effectively in practice. There is a real concern over whether it is right for a court to consider whether the legislature has done more than is (objectively) necessary, given the autonomy which it would be expected that an elected legislature should enjoy. There is no rationale for why a second test is required, or if it is, why a test of “appropriate” could not work.

3.12 So, Assembly Bill provisions which (1) apply otherwise that in relation to Wales (2) modify “the law on reserved matters” (3) modify “the private law” and (4) modify “the criminal law”, must be both ancillary and have no greater effect than is necessary to give effect to the devolved purpose of that provision.

(c) Conclusion

3.13 The additional necessity test significantly reduces the Assembly’s competence and ignores the reasons why section 108(5) of GOWA was considered necessary in the first place. It is important to note also that if a provision of an Assembly Bill is not competent because it relates to a reserved matter (and because there is no equivalent of section

108(5) GOWA to save it) the provision will be outside competence even if it would otherwise fall within one of the ancillary tests in Schedule 7B.

4 Private law, criminal law and civil penalties restrictions

(a) The current position

4.1 Assembly legislation forms part of the law of England and Wales. Within its existing devolved competence the Assembly may make any provision that could be made by an Act of Parliament (section 108(1) GOWA (a provision that is not replicated in the draft Wales Bill provisions)): the creation of new legislation, the amendment of existing legislation and the modification or amendment of the common law. Where such legislation relates to a devolved purpose, then the Assembly may legislate in areas of private law and may legislate in relation to the criminal law, including the creation of criminal offences and the imposition of criminal and civil penalties (of which there are very many examples). The common law, separate and subsidiary to legislative provision, is made and developed through the courts and in this sense is neither devolved nor reserved in terms of legislative competence. The categories of private law do not follow the same pattern of the division of legislative competence and, as such, areas such as the law of contract and the law of tort will be (and remain) equally relevant and applicable to devolved and reserved areas. There is shared heritage in the common law between England and Wales.

4.2 Under the current settlement, if an Assembly Bill provision modifies, for example, tort or criminal law, that provision will be within competence as long as it either: (1) relates to a conferred subject or (2) comes within section 108(5).

4.3 No exceptions or restrictions exist under the current settlement dealing with private law, common law and equity, or the criminal law.

(b) The Bill proposals

4.4 Paragraphs 3 and 4 of Schedule 7B contain new restrictions on modifying what is called “the private law” and “the criminal law”.

4.5 Paragraph 3 of Schedule 7B provides that an Act of the Assembly cannot make modifications of the private law – defined broadly to mean the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession and the general principles of equity and the common law. This prohibition is subject to an exception at paragraph 3(4) to the effect that it does not apply to modification which:

(a) Is necessary for a devolved purpose or is ancillary to a provision made (by the Act or another enactment) which has a devolved purpose **and**

(b) has no greater effect on the general application of the private law than is necessary to give effect to that purpose.

4.6 Devolved purpose is defined to mean a purpose, other than modification of the private law, which does not relate to a reserved matter. It is not clear if the purpose test in section 108A(5) will apply to determine whether a purpose “relates to” a reserved matter. There are two reasons why section 108A(5) does not have an obvious

application: (a) section 108A(5) applies to determine whether a provision of an *Assembly Act* relates to a reserved matter. Whereas paragraph 3(4)(a) of Schedule 7B refers, in part, to whether a provision of an enactment (i.e. not necessarily an Assembly Act made under the provisions of the Wales Bill) has a devolved purpose/does not relate to a reserved matter, and (b) paragraph 3(4) of Schedule 7B refers not to a provision of the Bill/Act but to the modification which presumably means the modification brought about by a provision of the Bill/Act that would otherwise fall within paragraph 3(1) of that Schedule. This adds to the complexity and ambiguity of the proposed provisions.

4.7 Paragraph 4 of Schedule 7B makes similar provision in relation to the criminal law (which is very broadly defined and includes the creation or modification of criminal offences (see the implication from paragraph 4(3)) and civil penalties. A provision of an Act of the Assembly cannot make modifications of the criminal law. This is again subject to an exception drafted in different terms to that in paragraph 3 to the effect that the prohibition does not apply to a modification which is ancillary to a provision which has a devolved purpose **and** has no greater effect on the general application of the criminal law than is necessary to give effect to the purpose of that provision. "Devolved purpose" is drafted in similar terms to mean a purpose, other than modification of the criminal law, which does not relate to a reserved matter.

4.8 In determining what is necessary for the purposes of paragraphs 3 and 4, any power to make laws other than the power of the Assembly is to be disregarded. This ensures that in considering what is necessary for the Assembly to do, this is not skewed by arguments that, for example, it is not necessary for the Assembly to do the thing because Parliament or Ministers could do it.

4.9 These provisions introduce the concept of "the general application" of private law on the one hand and criminal law (and civil penalties) on the other. It is not clear what is meant by the "general application" of the law⁴. The criminal law *generally* provides, for instance, that it is for the prosecution to prove the case beyond reasonable doubt. Questions may arise, then, if the Assembly by Act wishes to reverse the burden of proof (as this has been done in many cases to date):

(a) is that a "modification" of the criminal law at all, or can it be argued that reversals of evidential and legal burdens of proof occur within the criminal law and this is a *specific* instance and so is not a modification?

(b) Does "criminal law" here include procedure and evidence etc. given that such matters fall within reservation 6 in Schedule 7A?

(c) What does "general application" of the criminal law mean? If a reversal of a burden of proof is a modification of the criminal law can the reverse of the argument at (a) be run? For example, can the argument that the specific modification of the criminal law entailed in a reversal of a burden of proof does not have an effect on the general application of the criminal law precisely because the effect is specific? Para 4(2) of Sch 7B assumes that a modification of the criminal law will have some effect on the general application of the criminal law and that might give a clue as to what the meaning of "general application" means. But in the context of the points set out above the argument would be that there is no effect on the general application of the criminal law but that (i.e. no effect) does not appear to be contemplated by the provisions – e.g para 4(2)(b)

⁴ A search of Acts and statutory instruments on Lexis produced no results for "general application of [the] [criminal] [private] law".

does not say “has no effect or no greater effect on the general application of the criminal law...”;

(d) What does “necessary” mean in this context? Would a provision which reverses the burden of proof amount to a necessary “modification” of the criminal law? Does “necessary” mean strictly required in order to make “that provision” work or does it have some looser meaning? If the former is too strict then is the latter problematic in terms of the sorts of value judgments that the courts will be asked to adjudicate on? For example, in the reversal of the burden of proof scenario is the reversal (especially placing an evidential burden on the defendant) strictly necessary or is there an element of expediency? There may be better examples to demonstrate the point. Is it appropriate for the court to adjudicate on such judgments made by the legislature? What is the position where the modification of the criminal law engages Convention Rights such as Art 6 where proportionality applies? If a provision would be a proportionate interference with a Convention Right (i.e. the legislature has judged the balance between the general interest and the interest of the individual correctly or that is within its margin of appreciation) is it appropriate to apply a strict necessity test such that the outcome might be that proportionality is met but the strict necessity test is not; and if the necessity test is a looser test what are its parameters?

(c) Narrowing of the Assembly’s current legislative competence

4.10 These provisions constitute a significant narrowing of the Assembly’s current legislative competence. Where the Assembly is currently legislating within a devolved subject it has the ability to make modifications of the private law and to make modifications of the criminal law. A legislature could not operate effectively if the ability to make such modifications was not available to it. The fact that Parliament intended the Assembly to have such power in relation to the criminal law at least is evidenced by the provisions of Part 3 of GOWA (Assembly Measures) compared with the provisions of Part 4 (Assembly Acts). See paragraph 2 of Part 2 of Schedule 5 to GOWA (read with paragraph 52 of Schedule 11 to that Act) compared to the absence of any restriction in respect of criminal penalties in Part 4 and Schedule 7 to GOWA.

4.11 Even if the principle of such restrictions were accepted as part of a reserved powers model, the terms in which the restrictions are being proposed encroach significantly on current legislative competence. Both restrictions take the form of a prohibition on the ability to make modifications to private law and criminal law respectively. This prohibition is then diluted by exceptions which frame the extent of the Assembly’s legislative competence. Two features give rise to particular concern:

- Necessity – in order to modify private law, it must be shown that this is “necessary for a devolved purpose” or is ancillary to a provision which has a devolved purpose, **and** has no greater effect on the general application of the private law than is *necessary to give effect to that purpose*. So far as modifications of the criminal law are concerned the ability to modify the criminal law is not even available where this is necessary for a devolved purpose and can only be exercised where such modification is ancillary to a provision which has a devolved purpose and (again) has no greater effect on the general application of the criminal law than is *necessary to give effect to the purpose of that provision*. It is not clear why the “necessary to give effect to that purpose” is missing from the criminal law restriction. The whole structure of these provisions appear to raise a **question over the ability to create an offence (eg an offence of dropping litter)**

where the prohibition is free standing and not simply ancillary to some other process or provision.

- “Devolved purpose” – the exceptions will only apply in circumstances where it can be shown that the modification is ancillary to a devolved purpose (or in the case of private law modifications the modification is necessary for a devolved purpose). In each case, however, devolved purpose is defined in circular terms. So, the Assembly is prohibited from modifying the private law unless this is for a devolved purpose. But a devolved purpose means a purpose other than modification of the private law, in addition to not relating to a reserved matter. The same formula applies to criminal law; the Assembly cannot modify the criminal law unless this is ancillary to a devolved purpose, but a devolved purpose means a purpose other than modification of the criminal law. This seems extraordinarily complex and unclear and would seem ripe for legal dispute. Moreover it would lead to some odd results that might put give presentation priority over substance. For example, if the Assembly wanted to legislate to ensure that parks are free of litter then if the Assembly simply created in a single provision an offence of dropping litter that may be outside competence as the single provision is all that would exist and it would not be ancillary to a *provision* that has a devolved purpose. But if the Assembly placed a duty on a person to pick up litter the person had dropped and/or place it in receptacles provided and then made it a criminal offence not to do so would, in principle, be within competence.

4.12 Taken together, it is difficult to see how these provisions could be made easily workable in practice.

4.13 In discussion with Wales Office officials the explanation provided was that the restrictions are intended to allow the Assembly to make modifications to private law in so far as private law forms part of a subject area where the Assembly has a clear ability to legislate, but not to allow a change to private law more generally and for its own sake. Thus, and by way of illustration, the Assembly would not be permitted to change the general law of contract (in the sense of changing the general rule that contracts are created where there is an offer, acceptance, consideration and an intention to form a legal relationship) but the Assembly can legislate in order to create rules for the formation of a tenancy agreement between a landlord and a tenant in a housing context. It is open to doubt whether the restriction as drafted actually gives effect to this intention, even in the case of operating within the limited context of housing landlord and tenant. It is not clear when the Assembly (or any legislature for that matter) would ever legislate to modify the ‘private law’ for its own sake. For this reason, there will remain an inherent uncertainty as to whether the purpose of a provision relates to a devolved purpose, notwithstanding an explicit modification of some aspect of the private law.

4.14 The restriction raises questions about whether the already enacted **NHS Redress (Wales) Measure 2008** could be enacted under the new settlement. The preamble to the Measure states that its purpose is: “*To make provision about arrangements for redress in relation to liability in tort in connection with services provided as part of the health service in Wales; and for connected purposes*”.

4.15 A potential problem has also been highlighted which concerns the new test in relation to Rent Stopping Orders (RSOs) which are unique to the Housing (Wales) Act 2014. In the absence of precedent elsewhere in UK primary legislation, the need for RSOs could (depending on the approach taken to interpretation of paragraph 4 of

Schedule 7B) have been called into account in meeting the second limb of the test in terms of the impact on the law of civil penalties.

4.16 The Renting Homes (Wales) Bill also provides a good example of the questions raised by Schedule 7B in the context of modification of the private law:

- The Bill defines the contractual relationship between landlords and contract-holders as parties to occupation contracts. The Bill may therefore modify “the law of contract”, the arguments could be raised that the Bill modifies contract law, by specifying terms to be included in occupation contracts. Currently this is not an issue, given the law of contract is not a specific exception to legislative competence under Schedule 7 and we consider that the subject matter of the Bill fairly and realistically relates to housing.
- Potentially this area of law may be modified on the basis that it is necessary for a devolved purpose or is ancillary to provision made which has a devolved purposes and which has no greater effect of the general application of the private law than is necessary to give effect to that purpose (paragraph 3(4)).

But given the whole scale changes to contractual relationships in relation to the occupation of residential rental property, it does beg the question whether this would amount to modification of the law of contract which goes beyond, simply housing, purely on the basis of the scope and extent of the subject matter of the Bill.

- Difficulties may arise given the Bill also modifies the law of property, glossing section 1 of the Law of Property Act 1925 for the purposes of enabling 16 and 17 year olds to be contract-holders. We would argue that this is entirely ancillary to the main provision which is enabling such persons to access housing in their own right, preventing existing difficulties and unintentional trust arrangements arising, but express reference to law of property as a reservation potentially complicates matters.

Law of Succession

- The Bill makes new provision in connection with succession to contracts upon the death of contract-holders. Given the wide reference to the law of succession, this area could be encompassed within that reservation. Similarly, we would argue that to the extent that there is a modification it is necessary or ancillary to a devolved provision (housing law). However, the proposals constitute an extension of existing succession provisions (including provision potentially entitling carers to succeed to occupation contracts) and this may give rise to questioning the extent to which such new provisions are necessary for the devolved purpose of housing, as opposed to constituting a pure widening of succession law.

Civil Penalties

- The Bill also imposes restrictions on landlords who are in breach of statutory obligations. This includes the requirement to pay compensation (equivalent to rent under a contract) where the landlord has failed to provide requisite information to contract-holders including failure to provide written statements of contract and failure to provide information about parties to the contract). In the absence of payment, a contract-holder may set off rent against such sum. Is it

intended that provisions such as this will amount to a civil penalty for the purposes of the new draft Schedules? If so, under paragraph 4(2) of Schedule 7B it would be necessary to consider whether there is no greater effect on the general application of civil penalties than is necessary to give effect to the purpose of the devolved provision (in this case ensuring compliance with the information requirements by the landlord).

(d) Conclusion

4.17 The private, criminal law and civil penalties restrictions significantly reduce and complicate the Assembly's competence.

4.18 In addition, we consider that there is some ambiguity in the term 'civil penalties'. We have taken the approach above that it refers to situations where is a financial penalty or other penalty over and above any requirement to carry out an action which otherwise should have been undertaken. It is not clear, however whether the phrase civil penalties could be interpreted more widely to include any civil sanction. In our view the phrase civil sanction, given its ordinary meaning covers orders and enforcement notices and a wide range of methods which control behaviour. For example, ASBOs are a good example of an order which restricted behaviour being considered a civil sanction, enforceable by a criminal offence. Could an ASBO be considered a civil penalty? If the wording of civil penalty is interpreted widely, this could potentially catch a number of other provisions in our existing legislation than we have currently identified.

4.19 The table attached contains reference to existing Acts and Measures which could not now be passed as a result of the private and criminal law restrictions.

5 Jurisdiction, the Legal System and Justice Issues

5.1 There are a number of overlapping provisions which seek as their objective to limit the legislative competence of the Assembly in relation to the legal system and aspects of the wider justice system. Individually and collectively these provisions place significant constraints and limitations on the Assembly's competence. The effect is a significant narrowing of the Assembly's current legislative competence and the creation of significant barriers to its ability to legislate coherently and effectively and significant additional complexity to an already complicated settlement.

5.2 These provisions comprise:-

From Schedule 7A

Reservation 6 (Single legal jurisdiction of England and Wales tribunals)

Reservation 33 (The prevention, detection and investigation of crime)

Reservation 184 (Arbitration)

Reservation 216 (Named Bodies)

From Schedule 7B

Restriction 2 (Private Law)

Restriction 3 (Criminal Law and Civil Penalties)

Restriction 8 (Ministers of the Crown, government departments and other reserved authorities)

Wider and separate commentary on Restrictions 2, 3 and 8 is made at paragraph 4 of this document.

(a) Existing Position

5.3 The Assembly currently has legislative competence to make provision concerning the courts and Tribunals, civil and criminal procedure, and institutions which support the justice system (subject to the existing Minister of the Crown restriction) where such provision relates to a devolved subject or falls within section 108(5) of GOWA. There are no relevant exceptions or restrictions (save for the Minister of the Crown restriction).

5.4 Whilst the legal and justice system, in particular the bodies and institutions which support and operate that system, are largely not generally devolved (save for a number of Welsh tribunals), the system itself supports devolved legislation in the same way that it supports non devolved legislation: it is the basis of the single joint legal jurisdiction of England and Wales which supports two legislatures. Access to and support from that system is as important for Assembly legislation as it is for legislation made by the UK Parliament. These issues were not overlooked in the creation of GOWA. Thus, under its existing legislative competence, the Assembly has (for example – this list is not intended to be exhaustive):-

- Made changes to the jurisdiction of the civil courts (by the creation of rights of appeal and powers of enforcement)
- Created criminal offences and imposed criminal penalties
- Created civil sanctions
- Made changes to the jurisdiction of non devolved Tribunals (typically by creating rights of appeal to the First Tier Tribunal)
- Created powers of investigation and enforcement to support legal requirements (including those with criminal sanctions)
- Directly or indirectly placed obligations on enforcement bodies or the institutions which administer the justice system.

5.5 In some circumstances the Assembly is effectively required to make provisions of this kind; it would be unable to comply with ECHR requirements (or create legislation compatible with core principles of the common law) if it were unable to create rights of appeal to a judicial institution.

(b) The Proposals

5.6 The proposals introduce new extensive constraints on legislative competence, a number of which overlap, and the full extent of which is still being evaluated. Some elements of the proposals remain unclear as to their potential effect. But some preliminary points can be made to draw attention to the effect of the provisions and to illustrate the unsatisfactory nature of what is being proposed.

5.7 Reservation 6 makes provision for a number of reserved matters. These include courts and tribunals (in particular their jurisdiction) civil proceedings (defined in wide terms) and criminal proceedings (also defined in wide terms). The effect of conferring a right of appeal to the court or a non devolved tribunal would expand or modify the jurisdiction of that court or non devolved tribunal and thus engage the reservation. Any legislation which sought to regulate the investigation or enforcement procedures in a devolved area would be likely to engage the civil proceedings or criminal proceedings reservations. The reservation also draws specific attention to paragraphs 3 and 4 of Schedule 7B (restrictions on modifying private law, criminal law and civil penalties) though it is assumed (if not entirely clear because, for example the creation of a new criminal offence expands or adds to the court's jurisdiction depending on how "jurisdiction" is to be interpreted) that the creation of criminal offences or civil penalties is intended to be regulated by the restriction rather than engaging this reservation.

5.8 Reservation 33 makes the prevention, detection and investigation of crime a reserved matter. It is not clear how that reservation is intended to operate in circumstances where the crime arises in the context of a devolved subject matter, and where for example legislative provision seeks to impose functions of this nature on the relevant Welsh enforcement body. This reservation overlaps the reservation for civil proceedings and criminal proceedings (as defined) under reservation 6. On the face of it it covers the prevention, detection and investigation by any person of any crime. Questions may arise as to the meaning of "crime" particularly where statutory, low-level regulatory offences are created that result in low-level fixed or even civil penalties. Are those "crimes" within the meaning of this reservation?

5.9 Reservation 184 makes arbitration a reserved matter. Without any further explanation as to the meaning of this reservation it would arguably extend to any form of dispute resolution mechanism which the Assembly might seek to create in a devolved area.

5.10 Reservation 216 creates a reservation for named bodies within the Schedule, with the effect of reserving the constitution of, and conferring or imposing of functions etc on or that are specifically exercisable in relation to any body which is named. It is assumed, though not entirely clear, that the courts and tribunals are not considered to be a named body for this purpose, though if they were this would provide a further constraint overlapping the controls over jurisdiction.

5.11 Paragraph 3 (private law) and 4 (criminal law and civil penalties) of Schedule 7B are considered at part 4 of this document and are specifically referred to at the end of reservation 6 (described above) which suggests that the draftsman considered there to be some linkage or similarity between the provisions in question that merited a specific sign-post provision.

5.12 Restriction 8 at Schedule 7B extends the reserved authority (e.g. Minister of the Crown) consent requirement (now an absolute requirement). Again, this is addressed elsewhere in this document, but the implications in a justice context should be recognised. Public bodies which have responsibility in both England and Wales will be caught by this restriction, notwithstanding that their activities would support legislation enacted by the Assembly (examples would include the Police, Crown Prosecution Service, Prison and Probation Services). The definition of a "reserved authority" would also include the courts and non devolved tribunals (i.e. tribunals that do not fall within the restrictive definition in restriction 8 (para 8) of Sch 7B of "Welsh public authority" (see comments elsewhere in this note on that)), extensively overlapping reservation 8 (described above).

(c) Effect of the new provisions

5.13 The cumulative effect of these provisions is to reduce the Assembly's legislative competence and to create significant barriers (and layers of additional complexity) to the ability of the Assembly to legislate coherently and effectively. These provisions attempt to separate and detach the legal system (in terms of its enforcement and adjudication systems and institutions) within which the Assembly's laws must operate, from the Assembly's legislative jurisdiction. The end result is novel, unique and arguably unworkable. To the extent that it can be made to work it would seem to be dependent upon the Assembly securing Minister of the Crown consent and/or securing agreement from Whitehall/Parliament to enact complementary legislation in order for Assembly legislation to be effective which is not a particularly stable basis for an enduring settlement. The extensive suite of Whitehall executive controls that this framework creates over the powers of the Welsh legislature represents a significant change to the current settlement and raises serious constitutional questions having regard to separation of powers and the evolving relationships of the Assembly to Parliament. The cumulative effect of these provisions would be to create barriers to each of the types of routine legislative provision outlined at paragraph 5.4 above concerning appeals, adjudication sanctions and enforcement.

Illustrative Example

5.14 The point can be illustrated by a hypothetical and non controversial example in an area of clearly devolved legislative competence.

5.15 Assume the Assembly proposes to legislate and reform the law on breaches of planning control. Significant breaches (as defined) are to be made criminal offences. All breaches are to be the subject of revised enforcement notice procedures. New powers of inspection and entry to land are to be conferred on local planning authorities to detect breaches of planning control. An expedited process for enforcement notices, with rights of appeal are proposed (maintaining the exclusion of appeals to the court on any ground of statutory appeal). Where activities continue to be undertaken following service of a notice a new power to seek an injunction from the court to restrain the ongoing activity pending the outcome of any appeal is proposed. As currently, the decision on the outcome of the appeal is to be final subject only to a right of challenge in the courts (with

leave of the court) on a point of law. Once an enforcement notice has become effective an expedited period for compliance is proposed. Failure to comply will be a criminal offence, in addition to powers to require and enforce the undertaking of remedial work. The power to prosecute for offences will be confined to the Welsh Ministers and Counsel General. The proposals are ECHR compliant. Whilst resembling provisions already on the statute book the modifications prevent any reliance on the restatement exception from the restriction at Part 2 of Schedule 7B (though this restatement power would not in any event avoid any difficulties arising from reservations which appear in Schedule 7A not 7B).

5.16 So far, so uncontroversial. All of these provisions would currently be within legislative competence. The following difficulties appear to arise from the new proposals.

- The criminal offence arising immediately upon the undertaking of significant works would engage restriction 4 as a modification of the criminal law. It might be said not to be ancillary to any other provision (save the implicit obligation not to undertake significant works without planning permission). Even if it was considered ancillary it would raise the question of whether the offence is necessary to give effect to the purpose of that provision (the provision not to undertake significant works without planning permission – which is not an offence at the present time).
- The new powers of entry and inspection to land would engage reservation 33 (prevention, detection and investigation of crime).
- The provision for the appointment of a (PINS) Planning Inspector to hear the appeal and determine or make recommendations would require Minister of the Crown consent under restriction 8 in Sch 7B.
- The provision preventing challenge to the validity of the enforcement notice other than by way of appeal would engage reservation 6(1)(f) [by preventing judicial review] [see s285 TCPA 1990].
- The right to appeal to the High Court on a point of law against the final determination of the enforcement notice appeal would engage reservation 6(a) [by conferring jurisdiction on the High Court] reservation 6(c) [by seeking to regulate procedural issues within the High Court (requirement for leave, powers on the court to regulate procedure)]. [See s289 TCPA 1990].
- The right to appeal to the High Court on a point of law against the decision would engage restriction 8 in Schedule 7B and require consent of the Minister of the Crown [on the basis that it would confer functions on the court as a public authority (other than a Welsh public authority).]
- The criminal offence for failure to comply with the enforcement notice would engage restriction 4 as a modification of the criminal law. This might be said to be ancillary to the obligation to comply with the enforcement notice within the expedited time period, though it may be open to question whether the requirement as framed has no greater effect than necessary to give effect to the purpose of the provision.
- The power to enter and inspect land to ascertain whether the enforcement notice has been complied with would engage reservation 33 (prevention, detection and investigation of crime).
- Confining the power to prosecute would engage reservation 6(d) [by stipulating the prosecutor to be the Welsh Ministers or Counsel General].
- It is not clear whether the creation of criminal offences would also engage reservation 6(1)(a) [in terms of affecting the jurisdiction of the criminal courts].
- It is not clear whether the creation of criminal offences would engage restriction 8 as conferring or modifying functions of the criminal courts as public authorities

(not being Welsh public authorities) and thus requiring the consent of the Minister of the Crown.

- The powers of entry onto land could arguably impact on private law, providing as they do a statutory authorisation which overrides property rights and various torts which would otherwise expose the LPA to liability. Such modification of the private law would no doubt support a devolved purpose, but might the terms on which these enhanced rights are created raise questions (and possible challenge) on whether they have no greater effect than necessary to give effect to the purpose (of ascertaining breach, establishing compliance or undertaking remedial works as relevant)? Conferring such rights of entry etc. may have an element of expediency as opposed to strict necessity – i.e. questions (ultimately, we say, for the legislature) as to what is the *best* way of enforcing or making effective any given policy.

5.17 Similar examples demonstrating the relationship between statutory provision, the criminal law and private law could be found across wide swathes of the Assembly's current legislative competence.

Further specific commentary on Criminal Offences, Tribunals and Family Proceedings

Criminal Offences

5.18 Schedule 7B, para. 4(1) prohibits the creation of criminal offences. Paragraph 4(3) seems to tell us that the creation of an offence is a 'modification of the criminal law' (the proviso re Road Traffic offences in para. 4(3) doesn't make sense unless that's the case). Paragraph 4(2) gives the Assembly a limited competence to create criminal offences. We are concerned about the ancillary requirement in para. 4(2)(a). It may well be the case that the Welsh Government produce an environmental provision for example which does no more than create a freestanding criminal offence (see e.g. Environment (Wales) Bill, s. 67 (which inserts provisions creating a new offence of disposal of food waste to a sewer)). In that case it's not quite obvious what is the provision to which the offence (the modification of the criminal law) is ancillary. It feels artificial to have to construct a provision.

Tribunals

5.19 Reservation 6 reserves courts and tribunals, excluding tribunals whose purpose is to make determinations in relations to matters that are not reserved matters (presumably devolved tribunals).

5.20 Under Schedule 7 GoWA 2006 the Assembly currently has the competence to be able to legislate to create a new right of appeal to the FTT without seeking Minister of the Crown consent.

5.21 However, under the Wales Bill proposals if the Assembly is making, for example, a new right of appeal in relation to Welsh taxes and that appeal lies to the First Tier Tribunal (FTT), then arguably this is outside competence because the appeal 'relates to' reservation 6 (the FTT is a tribunal that will make determinations on devolved and non-devolved matters).

5.22 Even if reservation 6 is not engaged, it would appear necessary to obtain Minister of the Crown consent to the right of appeal. This is because paragraph 8 of Schedule 7B

prohibits the conferral or imposition of functions on a “reserved authority”. The FTT and the courts both appear to be a “reserved authority” – they are certainly not Welsh public authorities within the meaning of paragraph 8 of Schedule 7B. On this basis Assembly Acts that have done this could only be made now with Minister of the Crown consent.

5.23 Even where a right of appeal is created to a so-called devolved tribunal (which comes within the carve out of reservation 6(4)), then there will always be an onward appeal into the courts/tribunal system which have the same inherent problems.

5.24 The exception to the general Court/Tribunal Reservation at Reservation 6(4) needs further clarification. At the moment, it states that:

“‘Tribunal’ does not include a tribunal whose purpose is to make determinations in relation to matters that are not reserved matters’.

5.25 It is not clear whether this excepts tribunals whose purpose is solely to make determinations in relation to matters that are not reserved matters (such as the Special Educational Needs Tribunal for Wales) or could also include tribunals whose purpose is to make determinations in relation to matters that are not reserved matters as well as reserved matters (such as the First Tier Tribunal Care Standards Chambers, which can hear appeals from decisions of Care Council for Wales, for example, as well as cases stemming from Secretaries of State for Health and Education decisions).

5.26 Further concerns arise with the fact that the definition of ‘tribunal’ in sub-paragraph (4) of paragraph 6 of Schedule 7A does not refer to the geographical jurisdiction of a tribunal, but whether or not it’s purpose it to make determinations in relation to matters that are not *reserved matters*.

5.27 Without going through every function of, for example, the Residential Property Tribunal (RPT), Leasehold Valuation Tribunal (LVT) and Rent Assessment Committee (RAC) it is difficult to assess whether they determine matters which do not relate to reserved matters. We note the LVT deals with certain applications relating to enfranchisement, where a long leaseholder purchases the freehold from the freeholder. It also deals with other disputes around leases. There is a possibility that the restriction in paragraph 3 of Schedule 7B would have an impact on some of these areas. For example, it could be said that the law relating to enfranchisement related to the law of property, as it deals with the buying and selling of a house, we currently do not consider the buying and selling of a house to be a devolved matter as it does not sufficiently relate to ‘housing’.

Family proceedings

5.28 6(1) reserves civil proceedings and although that does explicitly state that it includes family proceedings, the fact that 6(3) carves out the exception in respect of family proceedings in relation to CAF/CASS Cymru functions, leads to the implication that family proceedings must be considered to be within the ambit of civil proceedings and is therefore reserved.

5.29 There is a concern that “provision of advisory and support functions” is much wider than the current exception to the exception. However, in contradiction to that, in one respect 6(3) also narrows competence in so far as it fails to mention “Welsh family proceedings officers” specifically referred to in paragraph (b) of the exception to the “family law and proceedings” Exception in Schedule 7 to GOWA 2006.

6 Welsh public authorities and named bodies

6.1 These elements of the proposed reservation Schedule 7A do not feature as Exceptions in Schedule 7 to GoWA 2006. Some aspects of these reservations are the same as or similar to the “Scottish public authority” and “reserved bodies” reservations in Part III of Schedule 5 to the Scotland Act 1998, but there are striking differences as detailed below.

Reservation 215 – Welsh public authorities

6.2 The reservation dealing with Welsh public authorities is set out in reservation 215. This can be contrasted with the equivalent Scottish public authorities reservation at paragraphs 1 and 2 of Part 3 of schedule 5 to the Scotland Act 1998.

6.3 The purpose of this reservation (and the equivalent reservation in Scotland) appears to be to ensure that reservations, such as employment rights and duties or occupational pensions, do not bite on the Assembly when legislating to establish, dissolve or re-structure Welsh public authorities.

6.4 However, there are number of key differences between the Welsh and Scottish provisions, as well as problems particular to Wales, which mean that reservation 215, in its current form, is not acceptable to the Welsh Government. They are:

6.4.1 Mixed functions test versus wholly or mainly test

The exception on Scottish public authorities appears to be wider than the equivalent exception in paragraph 215 of Schedule 7A to the Wales Bill. The Scottish exception applies to public authorities with mixed functions – i.e. those which have some functions relating to reserved matters and some which do not. The Welsh exception only applies to public authorities whose functions are ‘wholly or mainly functions that do not relate to reserved matters’. The ‘wholly or mainly’ test appears narrower than the mixed functions test which may lead to distinctly ‘Welsh’ public authorities falling outside the scope of this definition (discussed further below).

6.4.2 Meaning of Welsh public authority

The definition of ‘Welsh public authority’ is set out in paragraph 215(4)(a) of Schedule 7A (and is replicated in paragraph 8(3)(a) of Schedule 7B). We note that in order to determine whether a body is a Welsh public authority for the purposes of these provisions, consideration will need to be given to the entirety of a body’s functions. This will be required in order to determine whether the body’s functions are ‘exercisable only in relation to Wales’ and ‘are wholly or mainly functions’ that do not relate to reserved matters’. Such an exercise is considered to be unduly complex and in some instances unworkable. The approach in the Scotland Act 1998 in this respect is simpler.

Secondly, the definition of ‘Welsh public authority’ appears to be based on an assumption that devolved public bodies in Wales only have functions which are exercisable in relation to Wales (save for any functions which are exercisable otherwise than in relation to Wales and are capable of being conferred by an Assembly Act under the proposed reserved powers model). As the examples below show, this is not necessarily the case. Furthermore, it seems

disproportionate to take a Welsh body entirely outside the scope of the 'Welsh public authority' definition, and the protection afforded by paragraph 215 of Schedule 7A, merely because one of its functions is found to be exercisable otherwise than in relation to Wales.

Thirdly, there are difficulties around the requirement for a body's functions to be 'wholly or mainly functions that do not relate to reserved matters'. Along with the evidential burden referred to above, a number of bodies over which the Assembly currently has competence would seem to fall foul of this requirement. Furthermore, a body could conceivably fall in and out of this requirement and definition over time, as functions (both reserved and non-reserved) are conferred or removed via Assembly or Parliamentary Act. This does not seem to add clarity or certainty or stability to the new devolution settlement and again we would point to the differences with the equivalent provision in Scotland ("the mixed functions test").

The difficulties outlined above can be effectively illustrated by the example of Welsh local authorities. The Assembly currently has extensive legislative competence over local government matters by virtue of paragraph 12 of Schedule 7 to GoWA 2006. However, under the proposed reserved powers model the Assembly is likely to run into difficulties with local government matters, in relation to, amongst other things, the definition of 'Welsh public authority'.

Firstly, the evidential burden discussed above will be particularly problematic in relation to local authorities, which have a vast array of functions spread out across the statute book. Secondly, local authorities exercise some functions outside Wales (which is acknowledged expressly by reservation 53 on overseas activities). An example of this is set out in Part 2 of the Regulatory Enforcement and Sanctions Act 2008, which enables local authorities in England and Wales to work together and appoint 'lead authorities' to exercise particular regulatory and enforcement functions. These arrangements may result in Welsh local authorities directing English local authorities to carry out particular courses of action, or Welsh local authorities undertaking enforcement action in England. These functions would be examples of local authority functions which are exercisable otherwise than in relation to Wales, and which are unlikely to be saved by the exception to this requirement in reservation 215(5) of Schedule 7A (or paragraph 8(4) of Schedule 7B). Finally, local authorities in Wales exercise a number of functions which arguably relate to reserved matters, such as trading standards, entertainment licensing and sale and supply of alcohol. There is a risk that this may result in them failing to meet the requirement set out in reservation 215(4)(a)(ii) (and paragraph 8(3)(a)(ii) of Schedule 7B).

The difficulties outlined above are clearly of great concern to the Welsh Government. Local Government is an area which squarely fits within the devolved responsibility of both the Welsh Government and the National Assembly for Wales. Therefore, we consider it vital for local authorities in Wales to be afforded the protection provided by paragraph 215 of Schedule 7A, and indeed to not be subject to the restrictions set out in paragraph 8 of Schedule 7B.

6.4.3 Welsh public authorities exercising exclusively devolved functions

Unlike paragraph 2 of Part 3 of Schedule 5 to the SA 1998, the Wales Bill contains no carve out for crown matters in relation to Welsh public authorities

which exercise exclusively devolved functions (i.e. none of their functions relate to reserved matters).

6.4.4 Conferring functions on Welsh public authorities

Paragraph 215(2)(b) of Schedule 7A authorises the conferral, imposition, modification or removal of functions (or the giving of executive powers to do those things) specifically exercisable in relation to Welsh public authorities. However, it does not appear to authorise the Assembly to confer or impose on, modify or remove functions of a Welsh public authority. This can be contrasted with reservation 216(1) on named bodies, which prevents the Assembly from altering the functions of those bodies, as well as any functions specifically exercisable in relation to them.

In practical terms, this would mean that the Assembly could confer or remove Welsh Ministers functions specifically exercisable in relation to a Welsh public authority, but not functions which are exercisable by a Welsh public authority. This seems like a strange conclusion to reach.

On this point, we do note that equivalent provision is made in paragraph 1(2)(b) of Part 3 of Schedule 5 to the Scotland Act 1998. We also note the reference to 'the constitution' of a Welsh public authority in paragraph 215(2)(a) of Schedule 7A and wonder whether this is meant to catch functions of a Welsh public authority. However, given the existence of a different formulation in the neighbouring reservation 216(1), we think there is considerable room for doubt. We would be grateful for further clarification.

Reservation 216 – named bodies

6.5 This reservation can be contrasted with an equivalent reservation in paragraph 3 of Part 3 of Schedule 5 to the Scotland Act 1998 (reserved bodies). Both reservations seek to reserve the constitution and functions of certain 'named bodies' to the UK Government/UK Parliament. We have noted two key differences between the respective reservations, which result in the reservation for Wales having a much wider application than its counterpart in Scotland.

6.6 Firstly, the definition of 'named body' in reservation 216(2) appears to catch 30 bodies, compared with 16 bodies caught by the equivalent definition in Scotland⁵. Bodies named in Wales, but not in Scotland, include Post Offices, Her Majesty's Coastguard and Ordnance Survey. It is difficult to detect any point of principle which justifies nearly twice as many bodies being named in Wales when compared to Scotland, and we would be grateful for clarification of this issue.

6.7 Secondly, reservation 216(1)(c) and (d) prevents the Assembly from modifying any functions of a named body, or any functions specifically exercisable in relation to such a body. The modification of functions is not caught by paragraph 3(1) of Schedule 5 to the Scotland Act 1998, which only prevents the Scottish Parliament from conferring or

⁵ We note that the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission are caught by the definition of 'named body' in paragraph 3(2) of Part 3 of Schedule 5 to the Scotland Act 1998. However, as these bodies have been replaced by the Commission for Equality and Human Rights we have determined there to be 16 named bodies under the Scottish settlement, as opposed to 19.

removing functions on a named body, or functions specifically exercisable in relation to a named body. We would like clarification on why it was felt necessary to extend the application of the Welsh reservation in this way.

7. Law on reserved matters and comparison with Scotland

7.1 Paragraph 1 of the proposed Schedule 7B introduces a new restriction preventing the National Assembly from modifying the law on reserved matters unless the provision in question falls within the narrow exception in paragraph 2. At the meeting with Wales Office officials on 4th August, it was explained that this provision is designed to protect the law in reserved areas and is based on a broadly equivalent provision in the Scotland Act 1998.

7.2 The Welsh Government have a number concerns with this restriction. Firstly, it is difficult to see why this provision is required under a reserved powers model, when no equivalent provision is found in the existing conferred powers model. If the proposed model is designed to replicate the existing settlement (save for the additional matters set out in the St David's Day Command Paper) it is unclear why this additional layer of complexity and protection for the UK Government has been added. The position becomes even more unclear as this provision appears to duplicate the protection already afforded to the UK Government/UK Parliament by the reserved matters listed in Schedule 7A and the associated "relates to" test in section 108A(2)(c).

7.3 The reference to the equivalent provision in Scotland should also be treated with caution, particularly in view of the fundamental constitutional differences which exist between these two countries. Firstly, it should be noted that the Scottish Parliament enjoys much wider competence in the areas of criminal and private law, which means that their restriction on 'the law on reserved matters' is far less restrictive. In other words, the Welsh restriction will 'bite' on large elements of the statute book which will simply not be caught by the equivalent Scottish restriction. Secondly, it is important to note that the settlement set out in the Scotland Act 1998 is nearly 17 years old and should not be held up as the only example of a clear, workable and effective reserved powers model.

7.4 The observations above in relation to comparisons with the Scottish settlement will apply equally to other areas highlighted throughout this note.

B Significant Specific Reservations

8 Equal Opportunities and the Welsh Language

8.1 There is an argument that the Assembly's legislative competence in relation to the Welsh language (paragraph 20 of Schedule 7 to GoWA) has been lost or significantly reduced as a result of the "equality opportunities" reservation (reservation 202, Section N1).

8.2 Reservation 202 of Schedule 7A reserves 'Equal Opportunities'. This means that if a provision relates to Equal Opportunities then it is outside competence (s.108A(2)(c)). 8.3 Equal opportunities is defined in this reservation as meaning the 'prevention, elimination or regulation of discrimination between persons on grounds of....language....'. 8.4 The

reference to language is unusual given the link in reservation 202 to the Equality Act 2006 and 2010 which do not make reference to language so it is not clear to us why the reservation/reference has been expanded in this way. It is noted that this wording has been copied from the Scotland Act 1998 (see reservation L2 of that Act). Utilising precedents contained in the Scotland Act 1998 must, however, be sensitive to Welsh circumstances and reflect the differences which already exist as between the two settlements. The Assembly enjoys a very wide legislative competence in relation to the Welsh Language which must be fully protected in any change to a reserved powers model. *The Measure*

8.5 In terms of the Welsh Language (Wales) Measure 2011 ('the Measure') we are concerned that, as currently drafted, the crux of the Measure would be outside competence because of this reservation. It seems to us that the Measure does in fact relate to giving Welsh speakers the same rights and opportunities as non-Welsh speakers and that the promotion of the Welsh language is inherently part of this. The measure undoubtedly does more than encourage the Welsh language. It introduces a wide range of regulatory requirements including the imposition of duties which apply to a wider range of bodies than Welsh public authorities.

8.6 For example;

(i) In exercising the principal aim of promoting or facilitating the Welsh language, the Welsh Language Commissioner must have regard to the principle that in Wales the Welsh language should be treated no less favourably than the English language.

(ii) In the context of standards and service delivery standards in particular, they must have the objective of either promoting or facilitating the use of the Welsh language or work towards ensuring that the Welsh language activity is treated no less favourably than the English activity. The service delivery standards have to relate to a service delivery activity and therefore, inevitably we are in the realms of the public's use of services.

This has led to standards (Welsh Language Standards (No.1) Regulations 2015) for example which provide that a Welsh language version of a letter must not be treated any less favourably than the English language version of a letter (e.g. if the English version is signed or contains the contact details, the Welsh version must be treated in the same way). Another example is that if a body has performance indicators dealing with telephone calls, then those performance indicators must not treat the Welsh language calls any less favourably. In practice therefore, if the body had a performance indicator that stated that calls (or English calls) had to be answered after 5 rings, then the same indicator has to apply to the Welsh calls – it can't be longer.

(iii) The Commissioner regulates (and enforces) compliance with the duty to comply with standards.

(iv) In terms of the freedom to use Welsh, then the Measure provides that an individual may apply to the Commissioner for the Commissioner to determine whether a person has interfered with the individual's freedom to undertake a 'Welsh communication' with another individual. In the context of reservation 202, it seems to us that there is a high risk that these provisions would relate to the reservation and therefore be outside of competence for the purposes of s.108A(2)(c). This would be on the basis that the purpose of these provisions is to prevent, eliminate or regulate discrimination between the way in which Welsh and non-Welsh speakers are treated on the grounds of

language i.e. that Welsh speakers are treated no less favourably than non-Welsh speakers in terms of the services they receive or their rights.

8.7 It seems to us that there is more than a 'loose or consequential' connection between the provisions in the Measure and reservation 202 (in the context of *Martin v Most*).

The Act

8.8 The National Assembly for Wales (Official Language) Act 2012 ('the Act') is also relevant in the context of reservation 202.

8.9 The Act states that the English and Welsh languages are the official languages of the Assembly and provides that the official languages, in the conduct of Assembly proceedings must be treated on a basis of equality. It also provides that all persons have the right to use either official language when participating in Assembly proceedings, and makes provision that records of Assembly proceedings must be in both official languages. The Act also imposes duties on the Assembly Commission to ensure it treats the official languages of the Assembly on the basis of equality and to make arrangements for effect to be given to the principles above. It also requires the Commission to adopt a Welsh language scheme to set out how it proposes to comply with its duties.

8.10 In this context, it could be argued that the purpose of the Act is the Welsh language. However, it could be argued that it relates to equality of opportunity (reservation 202) on the basis that it purports to prevent or eliminate any discrimination in the Assembly - to ensure that Welsh speakers have the same rights as non-Welsh speakers. It seems to us that there is a high risk that the provisions of the Act could be deemed to relate to the reservation and therefore be outside of competence for the purpose of section 108A(2)(c).

8.11 It is noted that parts of the Act re-state the provisions of section 35 GOWA 2006 in that GOWA 2006 already provided that the Assembly, in the conduct, of Assembly proceedings give effect (so far as is reasonably practicable) to the principle that the English and Welsh languages should be treated on the basis of equality. It also provided that the Assembly must make appropriate arrangements with a view to securing that Assembly proceedings are conducted with due regard to the principle that there should be equality of opportunity for all people.

8.12 To the extent therefore that the Act is a restatement of the current law then paragraph 9 (restatement) of Schedule 7B would be relevant. However, it is our opinion that the Act exceeds a restatement of the law – for example, by imposing duties on the Commission to have a scheme and by creating a right for all persons to use either official language when participating in Assembly proceedings.

8.13 While it could be argued that the creation of such a right relates to the Welsh language, in our view there is a high risk that such a provision could relate to the equality of opportunity (as defined) on the basis that there is no question that Assembly members could use English in Assembly proceedings.

8.14 It seems to us that there is more than a 'loose or consequential' connection between the provisions in the Measure and reservation 202 (in the context of *Martin v Most*).

Promotion of equality of opportunity

8.15 Having considered the exceptions to the reservation, we do not think that these assist as they relate primarily to imposing duties to comply with equality legislation and encouraging 'equal opportunity'. We do not consider that the provisions of the Measure would fall within these exceptions.

8.16 In our opinion, if the word 'language' remained in the definition of 'Equal opportunity' then this would cast significant doubt on the ability of the NAW to legislate in relation to the Welsh language.

Restrictions on imposing functions on a Minister of the Crown, government department and reserved authority

8.17 The requirement to seek consent when conferring or imposing functions on Minister of the Crown, Government departments and other reserved authorities (paragraph 8 Schedule 7B). This constitutes a significant narrowing of the current competence of the NAW to impose Welsh language duties on persons.

Named Bodies

8.18 The named bodies reservation (reservation 216) prevents a number of bodies (currently within the Measure) from being subject to Welsh language duties

Welsh language and the courts

8.19 Uncertainty whether the reservation 'courts' includes 'the use of the Welsh language in the courts'. The 'use of the Welsh language in the courts' is currently an exception to the devolved matter of the 'Welsh language' (Schedule 7 GOWA 2006). If the 'courts' reservation includes the use of the Welsh language [in the courts], then this raises questions as to whether the other, many, reservations also implicitly reserve the Welsh language in relation to that matter.

Additional competence required to amend GOWA 2006

8.20 The NAW (Official Languages) Act 2012 amended section 35(1) and paragraph 8(3) of Schedule 2 to GOWA 2006 (regarding official language of the NAW and the NAW's Welsh language Scheme, respectively). Paragraph 7(2)(a) of Schedule 7B to the draft Bill only permits a modification of section 35(1) – we think that this should be expanded to refer to s.35(1) to 35(1D). We think that the drafters used an unamended version of GOWA 2006 as their reference as the NAW (Official Languages) Act 2012 has since amended section 35 GOWA 2006 so as to insert section 35(1A)-35(1D). Similarly we think that the reference to paragraph 8(3) in Schedule 2 should also be amended to refer to paragraph 8(3)-(12).

B Significant cross-cutting reservations (summaries)

9.1 Anti-social behaviour

9.1 The current exception in Schedule 7 of GoWA only relates to “orders to protect people from behaviour that causes or is likely to cause harassment, alarm or distress”. However, the reservation ties its definition to that in section 2 of the Anti-social Behaviour, Crime and Policing Act 2014 which relates to anti-social behaviour in general, not just to orders relating to anti-social behaviour as set out in the current exception in Schedule 7 GoWA.

9.2 This reservation far exceeds the extent of the current exception and reduces the Assembly’s competence significantly.

9.3 The wording currently in paragraph 12 of Schedule 7 GOWA relating to anti-social behaviour is to be interpreted by reference to a Written Ministerial Statement issued by the UK Government at the time of the passing the Anti-Social Behaviour, Crime and Policing Act 2014. This was to the effect that the words that were inserted into paragraph 12 of Schedule 7 GOWA were to be read narrowly to refer to anti-social behaviour orders under that Act. The statement said as follows: “In the Government’s evidence to the Silk Commission in March this year, we highlighted that there was some confusion as to how the current exception should be interpreted. Since submitting that evidence, the Welsh Government have concluded that the exception should be interpreted narrowly, to mean the subject matter of orders under the Crime and Disorder Act 1998. The amendment is designed to reflect that conclusion”.

9.4 For example, section 1 of the Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 provides that the purposes of the Act are to make provision about: (a) arrangements for the prevention of gender-based violence, domestic abuse and sexual violence; (b) arrangements for the protection of victims of gender-based violence, domestic abuse and sexual violence; and (c) support for people affected by gender-based violence, domestic abuse and sexual violence.

9.5 If the term anti-social behaviour was given a wide or even section 2 interpretation, it could call into doubt the Assembly’s competence to pass the same Act under the new proposed settlement. The fact that reservation 34 reserves specifically the maintenance of public order raises two issues in relation to the anti-social behaviour reservation: (a) is the latter really necessary (this depends on what the underlying basis is of the approach to what it is intended to catch by the anti-social behaviour reservation) and (b) the fact that the public order reservation deals with the ‘core’ aspects of anti-social behaviour the fact that there is an additional reservation for anti-social behaviour implies that the latter reservation is to be given a broader interpretation.

9.6 The wording of this reservation should exactly replicate that currently contained in the exception in Schedule 7 to GoWA.

10 Employment

10.1 Following the judgment in the Agricultural Sector reference to the Supreme Court the Assembly is currently able to make legislation in the area of employment law, which could include rights and duties and industrial relations if the purpose of the provision

fairly and realistically relates to a Subject in Schedule 7 GOWA. The proposed reservation is therefore a reduction in the Assembly's existing competence.

10.2 It is considered that there is an inherent ambiguity within this reservation. Should the reservation be interpreted as meaning employment rights and duties relating to those employment rights or should be it interpreted as meaning employment rights and any duties relating to employment? This phrase is key as if the latter interpretation is favoured this would mean that the reservation is very wide and that the Assembly could not legislate for any duties relating to employment matters. Even if the intended interpretation is narrower, the potential ambiguity is legally undesirable. Either way it is a significant reduction in the powers of the Assembly as interpreted by the Supreme Court.

10.3 The National Health Service Act 2006 makes provision about the National Health Service in Wales. Health is a devolved matter. Therefore in future, should the Welsh Government wish to reform the NHS in Wales it is likely that the 2006 Act would need to be amended or repealed and replaced with new legislation. It is essential that provisions of the kind relating to pay and conditions should not be caught by reservation 154 where they relate to devolved areas or bodies. Secondly it is inappropriate that school teachers pay and conditions are reserved. Under the current settlement teachers pay and conditions are within subject legislative competence. The reason that the Assembly cannot currently legislate in this area concerns the existence of Minister of the Crown functions. Even if the proposed reservation concerning teachers pay and conditions is removed, reservation 154 would need to be unambiguous so that there was no doubt that the Assembly could legislate for the pay and conditions of teachers. It is noted that the Reservation in Scotland has not prevented the Scottish Parliament enacting legislation dealing with terms and conditions of service, and wider employment issues, as noted in the Counsel General's case to the Supreme Court in the Agriculture case.

10.4 Further it is often difficult to distinguish a public body's workforce from the public body itself. The workforce is the means by which organisations carry out their functions. Therefore, whilst it is accepted that the Assembly has wide-ranging competence over certain public bodies now and that this competence will enable the Assembly to legislate in a manner that affects the relevant workforce of such bodies, the proposed reservation potentially restricts the ability to legislate in such a manner in future.

10.5 Given the position that the Attorney General took in the Agricultural Sector reference the Welsh Government are of the view that the current position of the UK Government on this point should be clarified. Paragraph 100 of the Attorney's case described the UK Government's understanding of the position in respect of the Scottish reservation for employment and industrial relations including employment rights and duties.

10.6 The list of Acts reserved to the UK Parliament is far greater in the proposed Wales Bill. The Welsh Government would like clarification as to why this is the case.

General points of concern in relation to section h1, employment and industrial relations in specific subject areas:

10.7 Officials are concerned about the inclusion of the Gangmasters (Licensing) Act 2004 in this reservation in the context of maintaining the Assembly's competence in relation to the regulation of shellfisheries in Wales.

10.8 Further, a broad interpretation of this reservation along the lines of the approach previously taken by the Attorney General could make it difficult to improve matters and appropriately govern in the social care sector and would impose a significant restriction on Welsh Ministers ability to fulfil their devolved functions in relation to health as set out in paragraph 9.3. Also the re-structuring of local authorities in Wales is a matter clearly within the legislative competence of the National Assembly for Wales. It is evident that consequential provision for the transfer of staff will be required to give effect to any proposals to re-structure local authorities by means of an Assembly Act. The Welsh Government is concerned that the proposed new reservation 154 (Employment rights and industrial relations) may limit the Assembly's ability to give effect to such proposals as the proposals could arguably relate to employment rights and duties by seeking to preserve entitlements of staff. If provision for the transfer of staff could not be dealt with in an Assembly Bill, this could prevent the substantive policy aim of local government reform being achieved.

11 Tax

11.1 The Schedule 7A reservations raise a number of significant questions in relation to the content of the **Tax Collection and Management (Wales) Bill (TCM Bill)**.

11.2 Welsh Government officials are cautious about reaching conclusions on competence regarding devolved taxation, as it is not known whether there will be any amendments to Part 4A GoWA, which defines devolved taxation. Amongst other things, Part 4A provides for the following:

- S116B GoWA currently allows NAW to legislate to allow the appointment of civil servants to a tax collection and management body (which would be relevant to **reservation 3 – the Civil Service of the State**).
- And S108(4A) – which provides that provision relating to a devolved tax is not outside the Assembly's legislative competence by reason only of the fact that it falls within an exception specified under another heading in Sch. 7. The Scotland Act does not include equivalent provision and if that is replicated in GoWA it would mean that the reservations set out in the new Schedule 7 would impact on the competence over devolved taxation.

11.3 On the face of it, however, the TCM bill contains a number of provisions that could potentially relate to reservations and these are set out in the Annex. Whether or not the reservation model would prevent the Assembly from legislating on these matters in relation to devolved taxes would depend on the interpretation of *relates to* in S108A(2)(c)

11.4 Welsh Government officials anticipate that each subsequent bill establishing a particular devolved tax will raise some of the same questions as above, because the provisions of TCM will apply to each tax. So whenever a new devolved tax is introduced, the TCM provisions concerning appeals and criminal enforcement (for example) will apply to that new tax.

11.5 Schedule 7B, para 7(2) includes in square brackets sections of GoWA 2006 that can currently be amended, including provisions in Part 5 (finance). If these provisions

were removed, the effect would be that those provisions in GoWA could not be amended and this would be a narrowing of existing competence.

11.6 The exception concerning devolved taxes is now expressed in the same way as in the Scotland Act i.e. devolved taxes, including their collection and management. In GoWA 2006 it is referred to simply as devolved taxes. Welsh Government Officials had correspondence with Wales Office and Parliamentary counsel on this during the preparation of the Wales Act 2014 as officials were concerned that the difference between the approach in Scotland and Wales could raise concerns about our own competence. Parliamentary counsel was adamant that there was no need to include the reference to collection and management in the definition of devolved taxes and suggested it was a mistake to do so in the Scotland Act. Presumably different counsel is now looking at this Bill or they have changed their mind. Either way, it appears inconsistent and once again raises potential questions about our competence.

12 Equal Opportunities

12.1 There is a reasonable argument that the Assembly currently has competence to legislate in relation to gender quotas on Welsh equal opportunity public authorities. This is based on the equal opportunities competence set out at paragraph 14 of Schedule 7 to GoWA. In order for the Assembly to legislate in relation to gender quotas on public boards, the Assembly's legislation would probably need to amend parts of the Equality Act 2010 in relation to Wales (including section 158 and 159).

12.2 In the Asbestos case, the Counsel General made the case that the Assembly's legislative competence in relation to equality was in fact more extensive than the Scottish Parliament's.

12.3 The proposed equal opportunities reservation (202) sweeps away the Assembly's current competence and replaces it with essentially the same reservation as set out in the Scotland Act 1998. This reservation prohibits amendments to the Equality Act 2010 (the subject-matter of the Act is reserved) and would make it difficult to argue that the Assembly has competence to legislate on gender quotas for public boards.

12.4 As part of the Smith agreement, Scotland will gain additional competence designed to enable the Scottish Parliament to legislate in relation to gender quotas on public boards, but this additional competence is not being offered to the Assembly. The Silk report considered that equality competence should be clarified. It said:

"106 Commission on a Bill of Rights (2012) A UK Bill of Rights? The Choice Before Us.

12.6.10 In addition we understand that there are concerns about under-representation of people from many of the protected groups in public appointments to the boards and governing bodies of devolved public sector organisations in Wales. The Equality Act 2010 allows positive action only in very limited circumstances. The Welsh Government is seeking legislative competence for the National Assembly over whether and to what extent positive action is permitted in public appointments to the boards or governing bodies of devolved public sector organisations in Wales. 140 | Empowerment and Responsibility

12.6.11 In the light of the above evidence, we support the principle that, while in general rights should apply throughout the United Kingdom, the Welsh

Government should have powers over rights in devolved areas of policy and we support the clarification of existing powers as sought by the Welsh Government.”

12.5 The St David's Day command paper does not reflect consensus on this issue.

12.6 Furthermore, the reservation grants legislative competence to encourage compliance rather than require compliance with equality legislation, is tied to a “due regard” rather than full competence and finally competence will be crystallised in the terms of the Equality Acts at a particular point in time (see reservation 217(1)).

12.7 As a result, the new reservation coupled with the absence of Scotland's additional Smith competence, means the Assembly's competence to legislate on gender quotas on boards and equality more generally is significantly reduced or eliminated. The reservation should reflect the current extensive equal opportunities competence in Schedule 7 GoWA.

**Welsh Government
28 August 2015**

Summary Tables

****These tables provide very brief summaries of issues relating to reservations of significance revealed by the analysis provided by Legal Services. The tables do not contain information about all reservations.*

*Reservations which do not appear in these tables may have competence implications, but these are likely to be minor (such as changes in terminology and relatively small variations in extent). A full list of all reservations can be found in the "List of Reservations" document.****

Table (1)
Reservations and restrictions which reduce the Assembly's existing legislative competence

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
3 – The Civil Service	Section 116B of the Government of Wales Act 2006 (GoWA 2006) provides the Assembly with competence to appoint civil servants to the new tax collection and management body. Depending on the interpretation of paragraph 215 (Welsh Public Authorities) this appears to be a loss of competence.
6 - Jurisdiction, courts and tribunals	The following action points will be needed to avoid reducing the Assembly's existing legislative competence: <ul style="list-style-type: none"> • Amend reservation 6 and paragraph 8 of Schedule 7B to allow the Assembly to legislate in relation to Courts and Tribunals without Minister of the Crown consents as it has been able to do under the conferred powers model of devolution. • Amend reservation 6(3) to include Welsh family proceedings officers to ensure these are within the competence of the Assembly. • Amend the definition of Tribunal in Paragraph 6(4) of Schedule 7A to address the concerns that the current definition may not sufficiently capture 'devolved Welsh Tribunals'.
8 - Defence	At present, section 235(1) of the Marine and Coastal Access Act 2009 provides that "marine enforcement officer" means (at paragraphs (c) and (d)) any person who is a commissioned officer of any of Her Majesty's ships and any person in command or charge of any aircraft or hovercraft of the Royal Navy, the Army or the Royal Airforce. Sections 236 and 237 of the MCAA provide that and MEO may enforce marine licensing and marine conservation legislation. If the Assembly wanted to amend or adjust such legislation (or make similar legislation) in the future, they could be prevented by the paragraph 8 reservation on the basis that such a provision would have more than a loose or consequential connection with naval, military or air forces (etc). At present, it is arguable that the Assembly would have competence in relation to such a matters on the basis that such enforcement was in relation to the marine environment pursuant to paragraph 6 of schedule 7 to GoWA. Accordingly, this reservation would appear to be a reduction in the legislative competence of the Assembly.
13 – Fiscal, economic and monetary policy (in relation to the reference to the National Audit	The current position is that there is a restriction in Schedule 7 in relation to the functions of the NAO and the Comptroller and Auditor General, (with an exception

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
Office and the Comptroller and Auditor General)	<p>to that restriction where the Secretary of State consents to the provision).</p> <p>There is no equivalent exception to this reservation, and no reference to functions which arguably widens the scope of protection offered to the bodies. Therefore, there is a loss of competence.</p>
33 – The prevention, detection and investigation of crime	<ul style="list-style-type: none"> • This is a new reservation. • The proposed new settlement will enable the Assembly to create new criminal offences. The Assembly will need to make provision for investigation and enforcement of those offences. • For example, new investigation and detection powers are to be included in the proposed Tax Collection and Management Bill. • It is not just the police who investigate crime. Local authorities are responsible for investigating council tax, housing and environmental offences. This reservation erodes the existing local government competence. • It has implications for existing legislation. For example, the Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act could engage this reservation and be outside competence under the new proposed settlement. • EU obligations often require Member States to implement by way of measures which are effective, proportionate and dissuasive –not just in relation to penalties and could include enforcement powers. • A wide interpretation of this reservation will inevitably reduce legislative competence.
34 – The maintenance of public order	<p>It is not clear what this reservation relates to. The Assembly must be able to create criminal offences in order to enforce its legislation and a wide interpretation of this reservation will inevitably reduce legislative competence.</p>
35 - Policing	<ul style="list-style-type: none"> • The Assembly currently has legislative competence in relation to council tax. Reservation 13 makes this express. However, any changes to the existing statutory linkage between council tax raised for local authority expenditure and council tax for police expenditure are likely to relate to reservations in section B5. In addition, any changes to the existing revenue support grant mechanism are also likely to engage these reservations because the mechanism is linked to the funding of police and PCCs. • The Assembly currently has competence to invite

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence

Reservation or Restriction	Issue(s)
	<p>and place duties on the police either within conferred subjects or using s108(5). Examples include section 30 of the Well-being of Future Generations (Wales) Act 2015 and section 134 of the Social Services and Well-being (Wales) Act 2014.</p> <ul style="list-style-type: none"> • There needs to be a specific exception to deal with these issues.
36 – Anti-social behaviour	<p>This reservation is potentially wide-ranging. The current exception in Schedule 7 of GoWA only relates to "orders to protect people from behaviour that causes or is likely to cause harassment, alarm or distress." However, the reservation ties its definition to that in section 2 of the Anti-social Behaviour, Crime and Policing Act 2014 which relates to anti-social behaviour in general, not just to orders relating to anti-social behaviour as set out in the current exception in Schedule 7 GoWA.</p> <p>Currently the Assembly has competence in relation to environmental nuisance, but this reservation could reduce the Assembly's competence by preventing it from legislating on issues such as out of control Japanese knotweed. The Assembly cannot legislate in relation to the orders contained in the 2014 Act, but could make its own provision in relation to such behaviour.</p> <p>This reservation far exceeds the extent of the current exception and reduces the Assembly's competence significantly.</p> <p>May cause particular problems in the housing area as housing legislation currently sets out anti-social behaviour grounds for possession.</p>
39 – Emergency Powers	<p>This reservation is vague and uncertain (see below). This reservation if it remains as drafted will reduce competence. For example, at present the Assembly would using its fisheries competence be able to amend the NRW's emergency powers to make byelaws contained in the Water Resources Act 1991, but this reservation would probably prevent such legislation in the future. Similarly, the Welsh Ministers have powers under the Marine and Coastal Access Act 2009 to make emergency orders to protect marine conservation zones which are within competence now, but would be outside competence under the proposed new settlement.</p>
41 – Criminal records, including disclosure and barring	<p>This is a new reservation which does not apply in Scotland. The reservation could prevent the Assembly from, for example, making provision about fishing licences where an applicant has previous fishing-related convictions, whereas the Assembly could currently</p>

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	legislate in this regard using its fisheries competence and/or s108(5).
42 – Firearms, imitation firearms and ammunition	At present, the Assembly could legislate on firearms issues in relation to animal health, fisheries and environmental protection. For example, provision could be made about specified firearms and humane killing (such as in the Wildlife and Countryside Act 1981), lead shot use over the foreshore, detonating explosives to kill fish. Arguably such legislation would be prevented by this reservation.
45 – Misuse or dealing in drugs or psychoactive substances	This reservation is more restrictive than the current position in Subject 9 of Schedule 7 to GOWA 2006, by making express reference to psychoactive substances. There is no equivalent reservation in the Scotland Act 1998.
48(b) – Licensing of late night refreshment 49 – The sale and supply of alcohol	These reservations are far more restrictive than the current exception in Subject 12 of Schedule 7 to GOWA 2006 which is limited to the <i>"Licensing of sale and supply of alcohol, provision of entertainment and late night refreshment."</i> Numerous requests have been made to the UK Government (including in the Welsh Government Response to the Silk Commission Report) for the devolution of the licensing of the sale and supply of alcohol.
53 – Local government provision of advice and assistance overseas	This reservation potentially takes local authorities in Wales outside the definition of "Welsh public authority" (reservation 215 and para 8(3) of Schedule 7B) because it has functions that are not exercisable only in relation to Wales and which cannot be ignored by virtue of paragraph 8(3) because such powers could arguably not be conferred by the Assembly. For the avoidance of doubt, local authorities should be specifically named as Welsh public authorities
58-59 Charities and raising funds for charitable, benevolent or philanthropic purposes	The vagueness of this reservation casts doubt upon the Assembly's legislative competence in relation to Welsh bodies which have charitable status and in relation to legislation which confers confers/modifies/imposes functions on or in relation to bodies with such status.
67(a) – Regulation of the sale and supply of goods and services to consumers	There is currently no explicit reference to "services" being included within the current consumer protection exception within Schedule 7 to GoWA 2006 so it is arguably a narrowing of competence.
68 – Safety of, liability for, services supplied to consumers	Similarly, there is currently no explicit reference to this reservation and it is not clear that it would have been included within the current "consumer protection" exception in Schedule 7.

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
69(a) – The regulation of estate agents	This is a new reservation which results in a narrowing of the Assembly's legislative competence.
Absence of an exception to the reservations in Section C6 (consumer protection) in relation to agricultural and horticultural products, animals and animal products, seeds, fertilisers and pesticides (and things treated by virtue of any enactment as pesticides).	There is an absence of an exception to the consumer protection reservations in relation to these matters In Schedule 7, there is a carve out to the "consumer protection" exception in relation to these matters (thereby granting competence). This is therefore a narrowing of competence.
Exceptions to the reservations in Section C7 (product standards, safety and liability)	In Schedule 7, competence is currently given in relation to " <i>animals and animal products</i> ", whereas the new exception to the reservation in the draft Schedule 7A is in relation to " <i>animal feeding stuffs</i> ". On the face of it this would appear to be a narrowing of competence. This wording appears to have been taken from the Scotland Act provisions.
89 – The subject-matter of the Export and Investment Guarantees Act 1991	Some provisions of this Act are within the current competence of the Assembly. A blanket reservation is not appropriate and the reservation ought to be amended to exclude only those provisions which are currently outside competence.
90 – Appointment and regulation of a water undertaker whose area is not wholly or mainly in Wales	Whilst this reflects a current exception to the Assembly's competence it does not reflect the commitment given to align legislative competence for water with the national border within the St David's Day Command Paper Taken in conjunction with paragraph 215 -216 and paragraph 8 of Schedule 7B, it is also a reduction in the Assembly's competence. Whilst competence in respect of water has always been a difficult area, in particular for those areas in England that are operated by Welsh undertakers and for which the Welsh Ministers exercise executive functions the Welsh Government have maintained that as long as the "in relation to Wales" test is met the Assembly could (depending on the provision in question) legislate for the whole of the water companies areas (Chester for Dee Valley and Hereford for Dwr Cymru).
92 – Sewerage	If Sewerage is to be reserved (it is currently in square brackets), the exception reads "Consumer advocacy and advice in relation to sewerage services". However it is unclear how this is meant to operate alongside the reservation for arbitration (paragraph 184) given that there would undoubtedly be an element of mediation or

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	<p>dispute resolution as part of the provision of advocacy and advice.</p> <p>This would limit existing competence (provided by paragraphs 4 and 19 of Schedule 7).</p> <p>Even if sewerage is removed as a reserved matter, the regulatory drivers that the undertakers may wish to refer to in future business plans may not be recognised by the regulator if reservation 93 remains</p>
93 – The Water Services Regulation Authority	<p>Ofwat is not referred to in Schedule 7 and whilst there are certain elements of the economic regulator that the Assembly could not legislate for arguably it could currently establish a separate regulator for Wales as it would be a regulator for the purpose of regulating water supply and water resources management. Legislative competence is therefore reduced.</p> <p>As a result of appearing as a reservation, Ofwat will also be a named body and thus subject to additional reservations in Part 3 of Schedule 7A. Legislative competence is significantly diminished if the Assembly cannot confer, modify or remove Ofwat's functions; legislate about its constitution or confer, impose, modify or remove functions specifically exercisable in relation to it.</p>
94 – Non-energy minerals	<p>Mineral workings is a conferred subject in paragraph 18 of Schedule 7. This new reservation which does not apply in Scotland is a direct reduction in competence.</p>
100 – Coal	<p>The exception to this reservation is narrower than currently exists (as an exception to the exception there) in paragraph 4 of Schedule 7.</p> <p>Currently in Schedule 7, it reads "Coal, including mining and subsidence, apart from land restoration <u>and other environmental matters</u>". In the draft Schedule 7A, the exception to reservation 100 is in relation to "land restoration" only.</p>
108 – Driver Licensing (including training, testing and certification)	<p>The words (including training, testing and certification) do not appear in the exception from the "driver licensing" subject in GOWA 2006. There are concerns that the inclusion of "training" may affect the Assembly's ability to legislate in relation to the promotion of road safety, an aspiration which was referred in the Welsh Government's evidence to the Silk Commission</p> <p>Under Schedule 5 to the Scotland Act 1998, specific</p>

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	powers in the Road Traffic Act 1998 in relation to road safety information and training and road safety grants are excepted from the reservation of the subject matter of the Road Traffic Act 1998.
122 – Traffic commissioners	Traffic commissioners are not currently excepted in paragraph 10 of Schedule 7 to GOWA 2006. The inclusion of this reservation represents a reduction of the Assembly's competence in this area.
130 – Search and rescue services.	<p>As there is no equivalent exception to in Schedule 7 to GOWA 2006, this is considered to narrow the Assembly's competence.</p> <p>Under paragraph 7 of Schedule 7, the Assembly has competence to legislate in relation to, "Fire and rescue services", "Provision of automatic fire suppression systems in newly constructed and newly converted residential premises" and "Promotion of fire safety otherwise than by prohibition or regulation."</p> <p>Under the draft Schedule 7A, "Fire safety" is reserved (reservation 171). This is a particularly broad reservation and would include everything related to fire safety apart from those that are excepted (The exceptions are very specific "Provision of automatic fire suppression systems in newly constructed and newly converted residential premises. Promotion of fire safety otherwise than by prohibition or regulation".) We assume that "fire safety" would not reserve "fire and rescue services" which is currently a devolved subject</p> <p>Reservation 130 could mean that the Assembly has limited competence in relation to fire and rescue services. It is noted that there is no equivalent reservation for "search and rescue" in the Scotland Act 1998</p>
139 – 140 - Social security schemes	section 32 of the Housing (Wales) Act 2014 allows a residential property tribunal to make a rent repayment order which may require the re-payment of awards of universal credit or housing benefit The reservation appears to be wider than the current competence of the Assembly so that a provision such as section 32 may not be within competence.
143 – Occupational and personal pensions	The Assembly's competence is reduced because pensions regulation in respect of excepted schemes is now reserved
144 – Public sector compensation	The reservation is wider than the current exception under paragraph 4 of Schedule 7 GoWA The application of this reservation is wide (the definition of "public sector

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	worker”) and its extent is unclear. For example, does the reservation capture only legislation directly about the schemes, or does it extend to guidance issued by the Welsh Ministers?
145 – Public sector compensation	This reservation is new (there is no equivalent exception in Schedule 7 GoWA). It would prevent an Assembly Act placing limits on public sector pay in public bodies that are generally within competence
149 – Health Professions	This Reservation is more restrictive in relation to the regulation of health professionals than the current exception in Subject 9 of Schedule 7 to GOWA which is confined to the <i>Regulation of health professionals (including persons dispensing hearing aids)</i> . The proposed reservation is much broader because of paragraph (b) of the reservation which applies to “ <i>any other profession concerned with the physical or mental health of individuals.</i> ” In particular, paragraph (b) would appear to cover social care workers which do not fall within the exception relation to the social work profession. A Bill relating to the regulation of other social care professionals has recently been introduced into the Assembly.
154 – Employment and industrial relations	We are concerned about the inclusion of the Gangmasters (Licensing) Act 2004 in this reservation. The reservation should not prevent the Assembly from making legislation regulating shellfisheries in Wales. Under the current Schedule 7 the Assembly has the power to amend the shellfisheries aspects of the Gangmasters (Licensing) Act (on the basis that they relate to fisheries and fishing) This competence should not be lost.
156 – Arrangements for assisting persons to select, train for, obtain and retain employment and to obtain suitable employees.	This reservation narrows the Assembly's competence in the area of economic development. Exceptions call into question what reservation is intended to capture?
161 – Medicines, medical supplies, biological substances etc.	The Reservation is considered to be more restrictive to the Assembly's current competence. There is no exception for “other medical supplies” under Subject 9 of Schedule 7 to GOWA.
169- The rest of the subject – matter of Part 1 of the Health and Safety at Work Act 1974.	The reservation is broader than the current exception under Subject 9 of Schedule 7 to GOWA 2006 which is limited to “provision made by health and safety regulations ” The scope of this reservation cannot be ascertained without further clarification from the UK Government.
171 – Fire Safety	The Assembly currently has competence for “ fire and rescue services ” (para 7 of Schedule 7). We understand that to include the structure, composition and functions of fire and rescue authorities. Reservation 171

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	<p>reserves “fire safety” – there is no exception for “fire and rescue services”. The functions of fire and rescue authorities <i>relate to</i> fire safety. If “fire safety” is taken at its broadest, it could mean that the Assembly only has competence to legislate in relation to the things that are excepted from reservation 171—</p> <ul style="list-style-type: none"> • “Provision of automatic fire suppression systems in newly constructed or newly converted residential premises ” • “Promotion of fire safety otherwise than by prohibition or regulation.” <p>This would be a significant narrowing of the Assembly's competence.</p>
172 – Protection of the public from radiation	<p>Reservation 172 narrow's competence as protection of the public from radiation is not currently an exception in Schedule 7 to GOWA 2006.</p> <p>It is of note as well that the Welsh Ministers are <u>not currently</u> designated in relation to “<i>measures relating to the basic safety standards for health protection of the general public and workers against the dangers of ionising radiation</i>” and “<i>safety measures in regard to radioactive substances and the emission of ionising radiation</i>”.</p> <p>The Secretary of State is however designated in relation to these matters pursuant to EC (Designation) (No. 3) 1991 No 2289 and EC (Designation) Order 1977 No. 1718.</p> <p>Whilst the Welsh Ministers are not designated in relation to radiation, the Welsh Ministers could seek such a designation in relation to Wales. It is also noted that there is no equivalent reservation in the Scotland Act 1998.</p>
179, 18, 181- Legal profession, legal services & claims management services	<p>These reservations would result in a reduction in the legislative competence of the Assembly. They have potentially far-reaching consequences. Whilst justice may largely be non-devolved. Assembly legislation may include provision about the legal profession, legal services, claims management services and legal aid.</p> <p>The proposed reservation schedule does not define the legal profession, legal services, claims management services or legal aid. This will create uncertainty.</p> <p>We wish to retain powers to make appropriate legislation with regard to claims management services, e.g. clinical negligence claims management services in line with the</p>

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	NHS Redress (Wales) Measure 2008
183 – Inquiries under or by virtue of an enactment	Paragraph 14 of Schedule 7 to oWA provides competence to the Assembly to legislate on "Inquiries in respect of matters in relation to which the Welsh Ministers, the First Ministers or the Counsel General exercise functions". This new reservation which does not apply in Scotland removes that competence
184 – Arbitration	The extent of this vague reservation cannot be ascertained. At its worst, arbitration relates to dispute resolution by third parties and therefore dispute resolution provisions created by Assembly legislation could be outside competence as a result. This reservation does not appear in the Scottish settlement.
185 – Mental Capacity	Mental capacity is not currently listed as an exception to the Assembly's legislative competence in Schedule 7 to GoWA 2006. Therefore, the Assembly can currently legislate on issues which touch upon mental capacity, as long as the provision in question fairly and realistically relates to a conferred subject. An example of this would be section 44 of the Mental Capacity Act 2005 (now reserved) which creates an offence of ill treatment or neglect of persons who lack capacity. Such a provision would appear to currently fall within the Assembly's legislative competence as it relates to the care of vulnerable persons. Therefore, this reservation would appear to narrow the Assembly's existing competence.
186 – Protection of personal data	In Schedule 7 GOWA, only the Data Protection Act 1998 is restricted. This reservation appears to go further than this and is potentially a reduction in competence.
200 – Compulsory purchase of land	Welsh Ministers have executive powers under the Welsh Development Agency Act 1975 (WDA Act) to acquire land compulsorily and to 'cleanse' land. This reservation should be removed to allow the possibility for these powers to be repealed, amended or restated in an Assembly Act.
202 – Equal opportunities	This reservation significantly reduces the Assembly's equality competence: <ul style="list-style-type: none"> • At present, the Assembly can amend equality legislation insofar as its legislation relates to equal opportunities public authorities. This reservation removes that competence; • The Assembly's competence is not tied to UK legislation at present. However, this reservation ties competence to the Equality Acts 2006 and 2010. The Assembly's competence should specifically encompass the protected characteristics in their own right and should not be tied to specific statutory references. Socio-economic disadvantage should be added to this

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	<p>list and not linked to UK legislation;</p> <ul style="list-style-type: none"> • At present, an Assembly Act would be able to prohibit or regulate the encouragement of either 'equal opportunities' matters. The reservation removes the Assembly's competence to prohibit and regulate. There are considerable difficulties associated with Assembly competence can only "encourage" compliance; • The reservation only enables "due regard" provisions, but there is no such current exception. The current settlement enables the Assembly's legislation to require more than "due regard"; • The Assembly would be unable to legislate on gender balance quotas on public boards, whereas it has the competence to do so at present. • The definition of "Welsh Public Authority" is arguably narrower than that in Schedule 7 to GoWA and therefore restricts competence.
214 – Student Loans	<p>Whilst we acknowledge that this is classed as 'marker provision', we are firmly of the view that, in its current form, this reservation would result in a substantial narrowing of the Assembly's legislative competence.</p>
215 – Welsh public authorities	<ul style="list-style-type: none"> • The definition of "Welsh public authority" is very restrictive – much more restrictive than provision in the Scotland Act about "Scottish public authorities" which applies a 'mixed functions test' rather than a 'wholly or mainly test'; • It is complex and potentially impossible to ascertain every function of Welsh bodies in order to ascertain whether those functions are "wholly or mainly functions that do not relate to reserved matters". For example, local authorities have a vast array of functions, some of which are cross-border functions and functions that relate to reserved matters (such as trading standards, entertainment licensing, sale and supply of alcohol, functions as primary authorities under the Regulatory Enforcement and Sanctions Act 2008). This will probably take them outside the definition of a "Welsh public authority"; • The reservation reduces significantly the Assembly's local government competence • There is doubt over whether the provision enables the Assembly to confer, impose, modify remove functions of a Welsh public authority, as opposed to just doing those things in relation to functions specifically exercisable in relation to a Welsh public authority.

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
216 – Named bodies	This reservation catches nearly twice as many bodies as the equivalent reservation in Scotland (30 bodies in Wales versus 16 in Scotland). This reservation also prevents the Assembly from 'modifying' the functions of a named body, which doesn't appear to be within the ambit of the equivalent Scottish provision
Additional Audit matters	<p>In addition to being outside Assembly competence if it relates to a reserved matter, the new section 108A of Schedule 7A provides that a provision of an Act of the Assembly will be outside competence if it breaches any of the restrictions in Part 1 of Schedule 7B. One such restriction is that found in paragraph 8 in relation to "reserved authorities".</p> <p>The definition of "<i>reserved authority</i>" includes any public authority which is not a "<i>Welsh public authority</i>". The definition of such a Welsh public authority is more restrictive than the current definition of "<i>auditable public authorities</i>" in paragraph 14 of Schedule 7 to GOWA. This allows the Assembly to legislate in relation to the audit, examination, regulation and inspection of "<i>auditable, public bodies</i>".</p> <p>Similarly, questions are also raised as to whether the Wales Audit Office and/or the Auditor General for Wales would be certain of meeting the definition of a "<i>Welsh public authority</i>".</p>
Restriction 1 – Schedule 7B – The law on reserved matters	At present the Assembly can legislate on matters which are outside its competence as a result of s108(5) GoWA where the provision provides for enforcement, is appropriate for making its legislation effective or is incidental or consequential upon such provision. This restriction introduces a new "necessity" test which does not currently exist.
Restriction 3 – private law	<ul style="list-style-type: none"> • There is currently no restriction on the Assembly legislating on private law matters as long as the legislative provision relates to a conferred subject • This restriction significantly reduces the Assembly's competence by introducing a double necessity test (paragraph 3(4)(a) and (b) which currently does not exist. • The NHS Redress (Wales) Measure 2008 could not now be made under the proposed new settlement. • The restriction flies in the face of the Supreme Court's judgment in the Agricultural Sector (Wales) Bill case which is authority for the proposition that as long as an Assembly Bill provision fairly and realistically relates to a conferred subject, it will prima facie be within

Table (1): reservations and restrictions which reduce the Assembly's existing legislative competence	
Reservation or Restriction	Issue(s)
	<p>competence.</p> <ul style="list-style-type: none"> • The Renting Homes (Wales) Bill potentially modifies the law of contract and the law of property and this restriction therefore reduces the Assembly's competence.
Restriction 4 – criminal law and civil penalties	There is currently no restriction on the Assembly legislating on criminal law matters as long as the legislative provision relates to a conferred subject. The creation of offences and sanctions will either form part of the conferred subject or come within competence as a result of s108(5). The new restriction reduces the Assembly's competence by introducing a new necessity test.
Restriction 8 – Minister of the Crown, government departments and other reserved authorities	<ul style="list-style-type: none"> • Currently, the Assembly can remove or modify a pre-commencement Minister of the Crown functions without consent where such removal or modification is incidental to or consequential upon a within-competence provision; • This competence has been removed by this restriction; • The bye laws legislation which survived an Attorney General's reference would not be possible under the proposed new settlement; • The Assembly's competence is reduced even further by this restriction because the restriction applies to: (1) all functions (whether pre-commencement or not) and (2) "reserved authorities" as well as Ministers of the Crown; • A body is a "reserved authority" if it is not a "Welsh public authority". The summaries provided elsewhere illustrate the substantial difficulties in ascertaining whether a body is a "Welsh public authority".

Table (2): reservations and restrictions which require clarification	
Reservation or restriction	Issue(s)
4 & 5 – Political Parties and elections	The reservations do not appear to give the Assembly competence over the control of campaign expenditure by political parties and controlled expenditure by third parties as set in the St David's day command paper. We would have expected to see an exception to the reservation or square brackets around these words.
19 – The subject-matter of Part 7 of the Political Parties, Elections and Referendums	Request clarification as to scope.

Table (2): reservations and restrictions which require clarification	
Reservation or restriction	Issue(s)
2000	
33 – The prevention, detection and investigation of crime	Vague and potentially wide-ranging. This reservation needs to be significantly trimmed back to make it more certain and to match the Assembly's existing enforcement competence within the conferred subjects and s108(5)(a).
34 – The maintenance of public order	Vague and potentially wide-ranging. Further information required.
35 – Policing	This term is vague and uncertain. It is a term that is used to mean more than the PCC and police force: it is used to describe regulation by those other than the police. The terms "police" or "police service" are more certain. There should be a specific exception relating to PCC precepts and council tax in which payment of grant to the police forms part of the revenue support grant mechanism.
36 – Anti-social behaviour	Vague and potentially wide-ranging. Further information required.
39 – Emergency powers	The Civil Contingencies Act 2004 is already a restriction (paragraph 5 of Schedule 7B). If this reservation is intended to cover more than the 2004 Act, further clarification and detail is required. If not, the restriction in paragraph 5 will be sufficient.
46 – Private security	The meaning of this reservation is unclear and there is no equivalent reservation in Scotland. On its widest interpretation, it could mean any security service which is not provided by the state (the police, army etc.) and/or out of public funds. It is arguable that the Assembly could currently make provision on private security as long as it related to one of the conferred subjects. A practical example of this would be amendments to the law on security at Shellfish farms (see section 192 of the Marine and Coastal Access Act 2009).
58-59 Charities and raising funds for charitable, benevolent or philanthropic purposes	<ul style="list-style-type: none"> • Do these reservations relate to only charity law, or regulation of charities, or does the reservation engage any legislative provision which confers/modifies/imposes functions upon public bodies that have charitable status (for example, National Library, National Museum)? • What is the rationale for reserving "raising funds for charitable, benevolent or philanthropic purposes"?
60 & 61- business associations and business names	Clarify definition of public bodies in exception and of business association.

Table (2): reservations and restrictions which require clarification	
Reservation or restriction	Issue(s)
63 – Winding up solvent business associations.	Question whether the definition of business association in section C1 should also apply to this reservation? Also question whether the exception to section C1 (create, operation, regulation, dissolution of particular bodies etc) should also apply to enable legislative proposals on “creation, operation, regulation and dissolution” of particular public bodies to also make provision for the winding up of those falling into the category of solvent business associations.
66 – Import, exports and movements of plants etc	Clarify rationale for the change from “into and out of, and within Wales” to “the UK”. Clarify rationale for the change in terminology to “prohibition and regulation”.
68 – Safety of, and liability for, services supplied to consumers.	Undefined and potentially wide-ranging. Further information required.
72 – Technical standards and requirements in relation to products in pursuance of an obligation under EU Law	Request confirmation that this reservation is limited standards and requirements in relation to products in pursuance of an obligation under EU law, i.e. there is no stand-alone reservation for technical standards. Does the reservation have the effect of preventing the Assembly from making legislation which engages the Technical Standards Directive? Or, is it limited to legislation which imposes technical standards and/or requirements as a result of an EU obligation?
73 – The national accreditation body and the accreditation of bodies which certify or assess conformity to technical standards in relation to products or environmental management systems.	Request clarification as to meaning and scope of this reservation.
Exception to reservations found at section C7 (product standards, safety and liability)	Request clarification as to why the new exception to the reservation is in relation to “ <i>animal feeding stuffs</i> ” as opposed to “ <i>animals and animal products</i> ”, as is within Schedule 7.
Exception to reservations found at section C7 (product standards, safety and liability)	Request clarification from UK Government as to why “ <i>agricultural and horticultural produce</i> ” has been used in the exception to the reservation as opposed to “ <i>agricultural and horticultural products</i> ”, as currently found within Schedule 7.

Table (2): reservations and restrictions which require clarification	
Reservation or restriction	Issue(s)
86 – The subject matter of sections 1 and 8(5) and (7) of the Industrial Development Act 1982.	The Scotland Act 1998 only reserves section 1 of the IDA 1982 – Why is section 8 also reserved for Wales?
99 – Oil and gas	Clarification of the following is requested: <ul style="list-style-type: none"> • What is the meaning of ‘oil and gas’? Does it just refer to the naturally occurring unprocessed crude oil and ‘natural gas’ or does it include all petroleum/gas produced from that oil/gas? Does it also include biogas? Or manufactured gases? • 99(b) – what is the meaning of “offshore” and “pipelines” in the context of this reservation; • 99(e) – it is unclear why “relevant territorial waters” are defined as 3 nautical miles from coastal baselines, as the inshore area is usually defined as 12 nautical miles from coastal baselines. • 99(g) – what is meant by “liquefaction of natural gases”?
127(d) Marine or waterway transport (not falling within the subject-matter of the Merchant Shipping Act 1995), including navigational rights and freedoms	What is meant by navigation?
132 – Construction or operation of inland waterways	Clarify whether “inland waterways” means fresh waters such as canals, lakes, rivers, water course, inlets and bays that area nearest the shore.
139 – 140 - Social security schemes	s.32 of the Housing (Wales) Act 2014 allows a residential property tribunal to make a rent repayment order which may require the re-payment of awards of universal credit or housing benefit. The reservation appears to be wider than the current competence of the Assembly so that a provision such as s.32 may not be within competence.
149 - The rest of the subject – matter of Part 1 of the Health and Safety at Work Act 1974.	Under Subject 9 of Schedule 7 to GOWA 2006, health and health services, the following is an exception: <p><i>“..provision made by health and safety regulations.”</i></p> <p>As the Reservation covers the “<i>subject matter of Part 1 of the Health and Safety at Work Act</i>” etc this</p>

Table (2): reservations and restrictions which require clarification	
Reservation or restriction	Issue(s)
	<p>is considered to be broader than the current exception which is limited to provision made by health and safety regulations.</p> <p>Request further clarification of the scope of the reservation from the UK Government.</p>
154 – Employment and Industrial relations	<p>Vague and potentially wide-ranging. Further information required. The Proposed reservation is ambiguous. Should the reservation be interpreted as meaning employment rights and duties relating to those employment rights or should be it interpreted as meaning employment rights and any duties relating to employment?</p> <p>Also clarify the scope of the reservation in light of the Attorney General's position in the Agriculture reference to the Supreme Court.</p>
156 – Arrangements for assisting persons to select, train for, obtain and retain employment and to obtain suitable employees.	<p>This reservation narrows the Assembly's competence in the area of economic development. Exceptions call into question what reservation is intended to capture?</p>
173 – Broadcasting and other media	<p>Vague and potentially wide-ranging. Further information required. Is the reservation intended to cover any aspect of broadcasting and other media or just their regulation? What are "other media"?</p>
184 – Arbitration	<p>Vague and potentially wide-ranging. Further information required.</p>
186 – Protection of personal data	<p>Vague and potentially wide-ranging. Further information required. It is assumed that the reservation is intended to relate to the regulatory regime which applies to the processing of personal data as provided for under the Data Protection Act 1998 (which is currently a restriction in Schedule 7 GOWA). However, without further clarification, the position is unclear.</p>
188 - 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).	<p>Reservations 188(a) and 188(b) are both defined with reference to "the subject matter" of the specified regulations.</p> <p>Further information is required on the precise ambit of the "subject matter" of the listed Regulations.</p>
189 - The subject-matter of the Public Records Act 1958	<p>There is no exception which specifically refers to public records and there is no restriction under Part</p>

Table (2): reservations and restrictions which require clarification	
Reservation or restriction	Issue(s)
	<p>2 of Schedule 7 to GOWA 2006 which would prevent the Assembly from modifying the Public Records Act 1958 (PRA)</p> <p>It is noted that there is no equivalent reservation in the Scotland Act 1998.</p> <p>Further clarification is needed. It is unclear why the subject-matter of the PRA has been listed as a reservation and what the extent of that reservation is intended to cover. Is it intended to specifically refer to the regulatory framework which governs the management of public records under that Act or is it of wider application than that?</p>
192 – Offender Management	The wording of reservation 192 is ambiguous and unclear. For example, in paragraph 192(3) it is unclear why education in certain young offender institutions, secure training centres or secure colleges is reserved, but education in prisons and other types of young offender institutions is not. Equally, the term “management of offenders” is not exhaustively defined.
193 – Family law	Vague and potentially wide-ranging. Further information required.
201 – The subject matter of the Universities and College Estates Act 1925 and 1964	It is not clear why there is a need to include this reservation which covers the sale of land by certain English educational institutions. We do not think it is appropriate for a constitutional document such as the Wales Bill.
204 – Ordnance Survey	This is a new reservation with no indication of extent or what it intends to capture.
209 – Deep sea bed mining operations	The 1981 Act has an incorrect title. Please clarify what is meant by “the limits of national jurisdiction”.
211 – Intercountry adoption	The wording of this reservation currently appears as an exception to the exception on intercountry adoption in paragraph 15 of Schedule 7 to GoWA. It is not clear why this has now become a reservation.
All references to the “subject matter of” particular Acts	Such drafting requires the reader to search outside the Wales Bill for competence. This is poor drafting practice.
Paragraph 4 of Schedule 7B	It would be beneficial if the phrase ‘civil penalties’ could be clarified.

Clarification is sought from the UK Government as to why the reservations and restrictions are not the same as in the Scottish settlement

Table (3): reservations and restrictions which contain restrictions to legislative competence over and above the restrictions which apply to the Scottish Parliament	
Reservation or restriction	Issue(s)
6- Jurisdiction, courts and tribunals	Reservation 6 and paragraph 8 of Schedule 7B don't allow the Assembly to legislate in relation to Courts and Tribunals without Minister of the Crown consents
13 – Fiscal, economic and monetary policy	The Scottish reservation does not include the Office for Budget Responsibility, the National Audit Office and the Comptroller and Auditor General. What is the rationale for this?
17 – Distribution of money from dormant bank and building society accounts	This reservation does not apply in Scotland. What is the rationale for this?
18 – Elections for membership of the House of Commons and the European Parliament	This reservation contains additional statutes to the equivalent reservation in the Scotland Act 1998.
19-20 Elections and referendums	These reservations do not apply in the Scotland Act 1998.
30-32 Communications Data and surveillance	These reservations do not apply in Scotland. What is the rationale for this?
36 – Anti-social behaviour	This reservation does not apply in Scotland.
38 – The subject-matter of the Modern Slavery Act 2015	This reservation does not apply in Scotland. What is the rationale for this?
45- Misuse or dealing in drugs or psychoactive substances.	This reservation does not apply in Scotland. What is the rationale for this?
48(b) Licensing of late night refreshment.	This reservation does not apply in Scotland., What is the rationale for this?
49- The sale and supply of alcohol.	This reservation does not apply in Scotland. What is the rationale for this?
54-56 Civil registrations and gender recognition	These reservations do not apply in Scotland. What is the rationale for this?
58 - Charities	No previous reference to charities in schedule 7. Scotland have an exception to their reservation for the "creation, operation, regulation and dissolution of charities". Why is their competence wider in this area?
59 – Raising funds for charitable, benevolent or philanthropic purposes.	This reservation does not apply in Scotland. What is the rationale for this?
61- The regulation of the name under which an individual or business association carries on business.	This reservation does not apply in Scotland
86 – The subject matter of	The Scotland Act 1998 only reserves section 1 of the

Table (3): reservations and restrictions which contain restrictions to legislative competence over and above the restrictions which apply to the Scottish Parliament	
Reservation or restriction	Issue(s)
sections 1 and 8(5) and (7) of the Industrial Development Act 1982.	IDA 1982 – Why the difference?
89 – The subject-matter of the Export and Investment Guarantees Act 1991	These reservations do not apply in Scotland. What is the rationale for this?
94 – The exploration for and exploration of minerals which are not capable of producing energy.	This reservation does not apply in Scotland. What is the rationale for this?
95 – Pubs Code adjudicator	This reservation does not apply in Scotland. A constitutional document is not the place for such provision.
97 – Pedlars and street trading	This reservation does not apply in Scotland. What is the rationale for this?
108 - Driver Licensing (including training, testing and certification)	Specific powers within the Road Traffic Act 1998 in relation to road safety information and training and road safety grants are excepted from the reservation of the subject matter of the Road Traffic Act 1998. What is the rationale for the different approach?
131 - Insurance against war risks.	The Scotland Act 1998 adopts a different approach to the wording of this reservation. What is the rationale for this?
149- Health Professions	The equivalent reservation in the Scotland Act 1998 is worded differently. The proposed reservation is wider than Scotland as it applies to “any other profession concerned with the physical or mental health of individuals, ” whilst in Scotland the reservation only applies to specific listed professions set out in G2. What is the rationale for this approach?
152-153 – Recognition of professional qualifications and experience	This reservation does not apply in Scotland. What is the rationale for this? Is it designed to cover more than the European directive in this area? If not, why is it needed?
154 – Employment and Industrial relations	This reservation contains 10 pieces of legislation which do not appear in the Scottish reservation. What is the rationale for this?
159 – Human genetics, human fertilisation, human embryology, surrogacy arrangements	It is noted that the equivalent reservation in the Scotland Act 1998 is worded differently. However, the wording of the proposed reservation replicates the wording of the current exception in paragraph 9 of Schedule 7 to GOWA.
169 – The rest of the subject-	There is an interpretation provision in the Scotland

Table (3): reservations and restrictions which contain restrictions to legislative competence over and above the restrictions which apply to the Scottish Parliament	
Reservation or restriction	Issue(s)
matter of Part 1 of the Health and Safety at Work Act 1974	Act 1998 which contains further clarity as to the circumstances when the reservation applies. It is unclear why a different approach has been taken towards the drafting of this reservation.
172- Protection of the public from radiation.	This reservation does not apply in Scotland. What is the rationale for this?
183 - Inquiries under or by virtue of an enactment	This reservation does not apply in Scotland. What is the rationale for this?
188 - The subject matter of – (c) the INSPIRE Regulations 2009 (S.I. 2009/3157) (d) the Re-use of Public Sector Information Regulations 2015 (S.I.2015/1415).	This reservation does not apply in Scotland. What is the rationale for this?
189 - The subject-matter of the Public Records Act 1958	This reservation does not apply in Scotland. What is the rationale for this?
195 – Local Land Charges	This reservation does not apply in Scotland. What is the rationale for this?
197 - The regulation of – (a) the design and construction of buildings, (b) the demolition of buildings, and (c) services, fittings and equipment provided in or in connection with buildings.	This reservation does not apply in Scotland. What is the rationale for this?
199 – Community Infrastructure Levy	This reservation does not apply in Scotland. What is the rationale for this?
200 – Compulsory purchase of land	This reservation does not apply in Scotland. What is the rationale for this?
212 – The Children's Commissioner	No equivalent reservation in Scotland even though the functions of the Children and Young People's Commissioner for Scotland do not extend to reserved matters. Not clear why position is more restrictive in Wales.
215 – Welsh public authorities	The qualifying test for a Welsh public authority is significantly more restrictive than the test for Scottish

Table (3): reservations and restrictions which contain restrictions to legislative competence over and above the restrictions which apply to the Scottish Parliament	
Reservation or restriction	Issue(s)
	public authority. Also no carve out in relation to bodies with exclusively Welsh functions.
216 – Named bodies	The reservation contains 14 more bodies than are contained in the equivalent Scottish provision. This reservation also prevents the Assembly from 'modifying' the functions of a named body, which doesn't appear to be within the ambit of the equivalent Scottish provision. What is the rationale for these difference?

Table (4): reservations and restrictions which are unworkable as presently drafted	
Reservation or Restriction	Issue(s)
8 - Defence	The reservation needs to be adapted to deal with the Marine and Coastal Access Act 2009 issue set out in the above table.
18 - Elections and referendums	Without further provision, even if the wording in square brackets is removed, competence will still be limited as a result of requiring Minister of the Crown consent (para 8 of Schedule 7B) under associated legislation (for example, the Representation of the People Acts). Similarly, the restriction on amending relevant provisions within GoWA 2006 will need to be addressed.
Reservations 90 and 91 in conjunction with section 215 (see further below) and paragraph 8 of Schedule 7B	There is uncertainty as to whether the Welsh water undertakers (those undertakers operating wholly or mainly in Wales) for which the Welsh Ministers exercise executive functions, would meet the criteria in the "Welsh public authority" test set out in paragraph 8 of Schedule 7B. If they do not meet the test, there would be a requirement to seek Secretary of State consent in respect of matters which are currently devolved.
213 – Teachers' pay and conditions	This should not be a reservation. At present, the Assembly has competence to legislate in this area, but cannot ultimately do so due to the Minister of the Crown restriction in Part II of Schedule 7 GoWA. This reservation should be removed as the Assembly's competence to legislate in this area is still subject to the Secretary of State restriction in paragraph 8 of Schedule 7B
215 – Welsh public authority	Due to the very restrictive nature of the test for Welsh public authority and in particular the need to ascertain each body's functions in full as part of that test, it is very difficult to establish whether a body is a "Welsh public authority". For the avoidance of doubt, certain bodies such as local authorities, Fire and Rescue Authorities, National Park Authorities, health bodies, the Auditor General for Wales etc should be specifically named as Welsh public authorities or a more flexible test should be adopted.
Restrictions 1,2,3 and 4 of Schedule 7B	A new "necessity" test is introduced. The nature of this term will inevitably lead to disagreement as to whether a provision is "necessary". Ultimately, a court will decide on an issue which is political and not legal. It is hoped that the court will give a margin of appreciation to decisions made by an elected

Table (4): reservations and restrictions which are unworkable as presently drafted	
Reservation or Restriction	Issue(s)
	legislature, but without established caselaw, the necessity test, which appears in several place is fraught with uncertainty.
Restriction 8 of Schedule 7B	The same difficulties arise as in reservation 215 when seeking to establish whether a body is a “Welsh public authority”
217 – Interpretation of Schedule References to “the subject matter” of specified Acts	Such drafting lacks clarity and workability. There are over 70 references to Acts which Welsh citizens would have to consider in detail in order to work out what their subject matter is. The subject matter of an Act would inevitably be open to debate, which creates an opaque, impenetrable settlement for the reader, especially readers without a legal background.

Tables of Acts, Measures and Bills which have or could be made under the current settlement but which could not be made

****This document contains two separate tables. Table 1 contain details of Acts and Measures that have been passed by the Assembly, but which could not be made under the proposed new reserved powers settlement. Table 2 contains details of Bill provisions which could be made under the current settlement but not under the proposed settlement.*

*These tables are not a definitive list of such Acts, Measures and Bills, but serve to highlight the competence issues set out in the other related papers.****

Table (1): Assembly Acts and Measures which have been passed, but which could not be passed under the Wales Bill proposed settlement		
Assembly Act or Measure	Relevant provision(s)	Reasons why the same provision could not be made under the new Wales Bill settlement
Control of Horses (Wales) Act 2014	Section 7 (dispute resolution procedure for disagreements between horse owners and the local authority)	Arguably would engage reservation 184 (arbitration)
Planning (Wales) Act 2015	Section 50 and paragraph 27 of Schedule 5	<p>Engagement of reservation 183 (inquiries under or by virtue of an enactment)</p> <p>Section 50 of the Planning (Wales) Act 2015 inserts new section 323A into the Town and Country Planning Act 1990. This section confers power on the Welsh Ministers to make regulations prescribing the procedure to be followed in connection with planning hearings and inquiries. Planning hearings and inquiries take place under powers contained in section 320 TCPA 1990.</p> <p>WG relied on subjects listed in Part 1 Schedule 7 namely paragraph 18 (Town and country planning) and paragraph 14 (inquiries in respect of matters in relation to which the Welsh Ministers exercise functions). (M of C consent was received so far as the provision removed or modified functions of the Lord Chancellor under section 9 Tribunals and Inquiries Act 1992.)</p> <p>This provision would not be possible under reservation 183.</p> <p>Also, paragraph 27 of Schedule 5 to the Planning (Wales) Act made an amendment to the definition of "statutory inquiry" in the Tribunals and Inquiries Act, to exclude Planning Act inquiries in Wales.</p>
Planning (Wales) Act 2015	Section 288 creates a right of challenge to the High Court.	These amendments were consequential on changes in Part 5 P(W)A. Depending on the view taken of the meaning of "civil proceedings" and "judicial review of administrative action", it is possible/ likely that these reservations if in force would have inhibited the Assembly's ability to pass paragraphs 15 and 16 Schedule 4 P(W)A.
Local Government	Section 49(7)	Creation of Offences would be considered ancillary but Minister of the Crown consent

Table (1): Assembly Acts and Measures which have been passed, but which could not be passed under the Wales Bill proposed settlement		
Assembly Act or Measure	Relevant provision(s)	Reasons why the same provision could not be made under the new Wales Bill settlement
Education (Wales) Measure 2009	Sections 9 to 16	These provisions gave the Special Educational Needs Tribunal for Wales jurisdiction to hear disability discrimination claims. As these provisions made amendments to the Equality Act 2010, they may well have related to reservation 202 which includes – the subject matter of the Equality Act 2010.
School Standards and Organisation (Wales) Act 2013	Section 61	Local inquiries on proposals submitted or proposed in relation to education provision. It is arguable that this provision may now relate to reservation 183 – Inquiries under or by virtue of an enactment.
Qualifications (Wales) Act 2015	Section 35	This provision excludes Ofqual's conditions of recognition from applying in relation to qualifications awarded in Wales. Depending on the finalised legal position, this may amount to a modification of Ofqual's functions and therefore require consent under paragraph 8 of Schedule 7B. No consent was required during the passage of the Act.
Mobile Homes (Wales) Act 2013	e.g sections 17, 21, 22	Confers jurisdiction on the court to consider certain questions arising under the Act, this would fall within the reservation in paragraph 6, as there is no exception that it could relate to devolved matters also Minister of the Crown consent is likely to be required as the right of appeal is to the upper tribunal by virtue of section 231 of the Housing Act 2004,
The Agricultural Sector (Wales) Act 2014	Section 24 provides that "A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 23	Minister of the Crown consent would have been needed for this provision.
NHS Redress (Wales) Measure 2008		The preamble to the Measure provides that the purpose of the Measure is to: "to make provision about arrangements for redress <i>in relation to liability in tort</i> in connection with services provided as part of the health service in Wales; and for connected purposes." Arguably the whole Measure is outside competence as a result of the restriction on modifying the private law in paragraph 3 of Schedule 7B. In addition, section 6 of the Measure (suspension of limitation periods) arguably

Table (1): Assembly Acts and Measures which have been passed, but which could not be passed under the Wales Bill proposed settlement		
Assembly Act or Measure	Relevant provision(s)	Reasons why the same provision could not be made under the new Wales Bill settlement
		relates to Reservation 6(2) (g) (Single legal jurisdiction of England and Wales – limitation of actions) and Reservation 180 (Claims management services). As the effect of the Measure is to impose functions on NHS bodies in England, Minister of the Crown consent would also have been needed (paragraph 8 of Schedule 7B).
Food Hygiene Rating (Wales) Act 2013	Section 14	The imposition of functions on the Food Standards Agency would have breached the restriction on imposing functions on reserved authorities (paragraph 8 of Schedule 7B). Minister of the Crown consent would have been needed.
Human Transplantation (Wales) Act 2013	Section 15	The imposition of functions on the Human Tissue Authority would have breached the restriction on imposing functions on reserved authorities (paragraph 8 of Schedule 7B). Minister of the Crown consent would have been needed.
Welsh Language (Wales) Measure 2011	The whole Measure	If the purpose of the Measure is to promote equality for Welsh language speakers and to prevent Welsh language speakers from discrimination, then the Measure will engage the equal opportunities reservation (202) and would be outside competence under the proposed new settlement.
Welsh Language (Wales) Measure 2011	Part 4 (standards)	The imposition of standards on certain bodies will relate to the named bodies reservation (216) and/or breach the restriction on imposing functions on reserved authorities (paragraph 8 of Schedule 7B) for which Minister of the Crown consent will be required under the proposed new settlement, but which was not obtained under Part 3 of GoWA 2006.
Social Services and Well-being (Wales) Act 2014	Section 134	Section 134 designates the chief officer of police as a partner on safeguarding boards. This would be outside competence as a result of one or more of reservations 33-35.
Violence Against Women, Domestic Abuse and Sexual Violence (Wales) act	Various provisions	The stated purposes of the Act are set out in section 1: (a) arrangements for the prevention of gender-based violence, domestic abuse and sexual violence; (b) arrangements for the protection of victims of gender-based violence, domestic abuse and sexual violence; (c) support for people affected by gender-

Table (1): Assembly Acts and Measures which have been passed, but which could not be passed under the Wales Bill proposed settlement		
Assembly Act or Measure	Relevant provision(s)	Reasons why the same provision could not be made under the new Wales Bill settlement
2015		based violence, domestic abuse and sexual violence. The Act could be outside competence under the new settlement due to the “anti-social behaviour” reservation (36).
Housing (Wales) Act 2014	Section 95	Paragraph 8 of Schedule 7A would have meant that Minister of the Crown consent would have been required for the conferral of the function of co-operation of local authorities and other public bodies in England. Was not needed under current settlement.
Housing (Wales) Measure 2011	Part 2	Minister of the Crown consents would be needed when not required under current settlement. RSLs can be charities and therefore provisions within Part 2 of the Measure which impose functions in relation to RSLs which are charities may now have been outside competence due to the Charities reservation.
Well-being of Future Generations (Wales) Act 2015	s. 30 in relation to bullet point 1.	<ul style="list-style-type: none"> • Section 30 authorises a public services board to invite the participation of the relevant PCC and chief constable. This would be outside competence as a result of one or more of reservations 33-35. • Highly likely that provisions of the Act would constitute ‘regulation’ therefore falling outside the competence of the Assembly in respect of the first exception in reservation 202. • The narrower definition of ‘Welsh Public Authority’ would also restrict competence. • Minister of the Crown consent would now be required • Reservation 58 –charities would have caused difficulties.
Children and Families (Wales) Measure 2010	Part 2	Offences relating to regulation of child minding and day care services may relate to reservation 36 on detection and investigation of crime.
Further and Higher Education (Governance and Information) (Wales) Act 2014	Section 4 and section 9	<p>We have concerns around the definition of ‘business association’ in section C1 (reservations 60 and 61). This may catch designated institutions (a type of further education institution – usually companies ltd by guarantee) which may not satisfy the exception relating to public bodies.</p> <p>This may have complicated the passage of section 4 of the Bill which deals with the</p>

<u>Table (1): Assembly Acts and Measures which have been passed, but which could not be passed under the Wales Bill proposed settlement</u>		
Assembly Act or Measure	Relevant provision(s)	Reasons why the same provision could not be made under the new Wales Bill settlement
		governance of designated institutions.
Higher Education (Wales) Act 2015	Entire Act	Questionable whether the Higher Education Funding Council for Wales is a 'Welsh public authority' for the purposes of paragraph 8 of Schedule 7B, as it exercises some functions in England. The Assembly may therefore have required Secretary of State consent, which it did not require under the existing settlement.
Social Services and Well Being (Wales) Act 2014	Sections 34, 78, 85, 127, 138, 139 and Part 11.	<p>Section 127 (adult protection orders) and section 78 (protecting members of the public from serious injury) may now relate to reservation 36 on anti social behaviour and therefore fall outside competence.</p> <p>Section 85 and Schedule 1 (payments in respect of care from those with parental responsibility) may now be found to relate to reservations 141 and 142 on child support.</p> <p>Part 4 - elements of duties relating to those detained in secure estate may relate to reservation 192 – Offender Management.</p> <p>Section 138 and 139 (safeguarding board partners) would have required Secretary of State consent under paragraph 8 of Schedule 7B.</p>

Table (2): existing Assembly Bills and future Assembly Bills which have been introduced or proposed, but which could not be passed under the Wales Bill proposed settlement

Assembly Bill or Assembly Bill proposal	Section or part	Policy	Competence under new settlement
Tax Collection and Management Bill	Section 183	Confer powers on the WM to apply provisions of PACE to allow criminal investigations by WRA. There are two options: (1) amend PACE to add WRA or (2) replicate PACE provisions in the Bill	If option (1), within competence on the basis that the amendment to PACE does not relate to a reservation and complies with the ancillary and necessity test in paras 1 and 2 of Schedule 7B. If option (2), reservation 33 (prevention, detection and investigation of crime) is potentially engaged and provision is outside competence.
Tax Collection and Management Bill		Use of the First Tier Tribunal for tax appeals	May require consent as a result of paragraph 8 of Schedule 7B
Tax Collection and Management Bill		Imposing obligations on the Land Registry not to register certain transactions with Land Transaction Tax has not been paid in advance	May engage reservation 194 (registration of land and land charges) and also conferring and imposing functions on the Land Registry will require MoC consent whereas no consent may be needed under the present settlement
Tax Collection and Management Bill	Section 8(6)	Service as the chief executive or as any other member of staff of WRA is service in the civil service of the State	Reservation 3 (The Civil Service of the State is a reserved matter) is engaged although clarification is sought on whether reservation 215 can assist in this regard.

Table (2): existing Assembly Bills and future Assembly Bills which have been introduced or proposed, but which could not be passed under the Wales Bill proposed settlement

Assembly Bill or Assembly Bill proposal	Section or part	Policy	Competence under new settlement
Environment (Wales) Bill	Section 6	Biodiversity duty – imposes a duty on public authorities to maintain and enhance biodiversity	Paragraph 8 of Schedule 7B would mean that consent would have been required for a greater number of provisions (in relation to “reserved authorities”).
	Section 17	Registration of land management agreement	The provision could be outside competence because of reservation 194(a) and (b), namely the subject-matter of the Land Charges Act 1972 and the Land Registration Act 2002.
	Section 23	Effect is to repeal Natural Resources Wales’ power to compulsorily acquire land	Even if it did not relate to these reservations, the restriction in paragraph 3 of Schedule 7B in relation to the private law would also cause difficulties.
	Part 6	Part 6 of the Environment (Wales) Bill enables the marine licensing authority to charge certain additional costs associated with administering the marine licensing regime. For example, fees may be charged in relation to the costs of monitoring a marine licensing activity whereas previously they were not. If fees are not paid the licensing authority may, upon services of notice, suspend or revoke a marine licence. The Welsh Ministers have an	Concern that this could relate to reservation 200 ‘compulsory purchase of land’ if that given wide interpretation. There is potential for reservation 184 (arbitration) to be engaged and for the proposed dispute resolution provision to be outside competence The Shellfisheries provisions in the Environment (Wales) Bill include an appeal mechanism that involves reference to the First Tier Tribunal. Arguably, this would be outside legislative competence (in future) because the appeal ‘relates to’ reservation 6 (the FTT is a tribunal that will make determinations on devolved and non-devolved matters). In any event, SoS consent will be required to conferring this right of appeal on the FTT – such consent would not be required under the current settlement. Difficulties in satisfying the stricter test of “ancillary” under new Schedules (the new necessity test).

Table (2): existing Assembly Bills and future Assembly Bills which have been introduced or proposed, but which could not be passed under the Wales Bill proposed settlement

Assembly Bill or Assembly Bill proposal	Section or part	Policy	Competence under new settlement
		<p>obligation to establish an appeals mechanism in relation to such notices, it is likely that they will adopt the FTT. However, it would be possible to adopt other dispute resolution mechanisms other than the FTT.</p>	<p>It is not clear how reservation 58, "charities" is to be interpreted. Officials have expressed concern that a wide interpretation could be problematic in that persons subject to section 66 includes charities.</p>
	Section 57	This section provides that the proceeds of carrier bags sales by retailers must be applied to charitable purposes	It could be argued that this provision breached paragraph 4 of Schedule 7B unless it could meet the definition of "ancillary".
	Section 66	This imposes requirements in relation to the separate collection of waste.	
	Section 67	Section 67 inserts section 34D(1) in the Environmental Protection Act 1990 which prohibits occupiers of non-domestic premises from discharging food waste into a public sewer.	
It is possible that there will be a second Planning bill during the next Assembly (the Law Commission is engaged on a project to consolidate	TBC	TBC	Reservation 6(1)(c) and (f): challenges to planning decisions in the High Court could considerably restrict the Assembly's ability to pass a planning law reform act, depending on the outcome of the Law Commission's work and the proposed contents of the bill.

Table (2): existing Assembly Bills and future Assembly Bills which have been introduced or proposed, but which could not be passed under the Wales Bill proposed settlement

Assembly Bill or Assembly Bill proposal	Section or part	Policy	Competence under new settlement
and/or reform planning law).			
Historic Environment (Wales) Bill	Clause 12, 3(2), 11 to 17, 28 & 29.		<p>New section 9ZE of the Ancient Monuments and Archaeological Areas Act 1979 (as inserted by clause 12 of the Historic Environment (Wales) Bill) creates a right of appeal against an enforcement notice. This right of appeal is ancillary to the provisions establishing the SMEN regime, the purpose of which is to prevent works to a scheduled monument being carried out in contravention of the 1979 Act, and necessary to ensure Article 6 compliance. As section 108(3) does not apply to provisions which fall within 108(2)(c) (i.e. reserved matters) it is possible that such provision could not be made under the reservations schedule. This right of appeal is to the Magistrates Court.</p> <p>Also the creation of these criminal offences will arguably modify the functions of reserved authorities which would under paragraph 8 of Schedule 7B require Minister of the Crown consent. This is very different to the position under the current devolution settlement where there is no restriction on the creation of criminal offences and where Minister of the Crown consent is not required.</p>
Renting Homes (Wales) Bill		Creates new forms of occupation contract to replace existing tenancy. Confers new rights of appeal & rights of review. Allows 16 and 17 year olds to hold occupation contracts and makes new succession provisions.	<ul style="list-style-type: none"> • Schedule 7B prevents modification of private law – Bill potentially modifies law of property and law of succession. • If courts are a reserved authority then Minister of the Crown consent would be required. • Bill makes provision for civil penalties • Anti social behaviour reservation problematic
Regulation and Inspection of	Parts 2 to 8 (in so	A bill on the regulation and	The Assembly would be unable to pass Parts 2-8 of this Bill in so far as

Competence tests currently under Part 4 of and Schedule 7 to the Government of Wales Act 2006

1. Does the provision relate to one or more subjects listed in Part 1 of Schedule 7?

If yes, got to question 2

If no – the provision is outside competence unless:

*(a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;
or*

(b) it is otherwise incidental to, or consequential on, such a provision.

If yes:

2. Does the provision fall within any of the exceptions in Part 1 of Schedule 7?

If no, go to question 3.

If yes – the provision is outside competence unless:

*(a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;
or*

(b) it is otherwise incidental to, or consequential on, such a provision.

3. Does the provision apply otherwise than in relation to Wales or confer, impose, modify or remove (or give power to do so) functions exercisable otherwise than in relation to Wales?

If no, go to question 4.

If yes – the provision is outside competence unless:

*(a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;
or*

(b) it is otherwise incidental to, or consequential on, such a provision.

4. Do any of the restrictions in Part 2 of Schedule 7 apply having regard to any exception to those restrictions in Part 3 of that Schedule?

(a) Does the provision remove or modify (or confer power to do so) any pre-commencement function of a Minister of the Crown?

(b) Does the provision confer or impose (or confer power to do so) any function on a Minister of the Crown?

(c) Does the provision modify any of the provisions listed in the table in paragraph 2(1) of Part 2 of Schedule 7 (having regard to any relevant exceptions)?

(d) Does the provision make modifications of (or confer power to do so) any provision of an Act of Parliament other than GoWA 2006 which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund?

(e) Does the provision make modification of (or confer power to do so) any functions of the Comptroller and Auditor General or the National Audit Office?

(f) Does the provision remove or modify (or confer power to do so) any function or Her Majesty's Revenue and Customs?

(g) Does the provision confer or impose (or confer power to do so) any function on Her Majesty's Revenue and Customs?

(h) Does the provision modify provisions of GoWA 2006, other than those provisions referred to in paragraph 5(2),(3) and (4A) of Part 1 of Schedule 7?

If yes, the provision is outside competence.

If no:

5. Does the provision extend otherwise than only to England and Wales?

If yes – the provision is outside competence.

If no:

6. Is the provision incompatible with the Convention rights or with EU law?

If yes – the provision is outside competence.

If no – the provision is within competence.

Competence tests under section 108A and Schedules 7A and 7B of the proposed Wales Bill

1. Does the provision extend otherwise than only to England and Wales?

If yes – the provision is outside competence

If no:

2. Does the provision apply otherwise than in relation to Wales or confer, impose, modify or remove (or give power to do so) functions exercisable otherwise than in relation to Wales?

If no, go to question 3:

If yes, is the provision:

(a) ancillary to a provision which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly), and

(b) does it have no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision.

If no – the provision is outside competence.

If yes:

3. Does the provision relate to reserved matters (see Schedule 7A)?

If yes – outside competence.

If no:

4. Does the provision breach any of the restrictions in Part 1 of Schedule 7B, having regard to any exception to those restrictions in Part 2 of that Schedule? (see questions 5 to 11)

5. Does the provision modify “the law on reserved matters” (see paragraph 1(2) of Part 1 of Schedule 7B)?

If no, go to question 6

If yes:

*Is the modification ancillary to a provision which does not relate to reserved matters **and** has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision?*

If yes, go question 6.

If no, the provision is outside competence.

6. Does the provision modify the private law (see paragraph 3(2) of Part 1 of Schedule 7B)?

If no, go to question 7

If yes:

*Is the modification (1) necessary for a devolved purpose or (2) is ancillary to a provision made which has a devolved purpose **and** has no greater effect on the general application of the private law than is necessary to give effect to that purpose?*

If yes, go to question 7.

If no, the provision is outside competence.

7. Does the provision modify the criminal law?

If no, go to question 8.

If yes:

*Is the modification ancillary to a provision which has a devolved purpose **and** has no greater effect on the general application of the criminal law than is necessary to give effect to the purpose of that provision?*

If yes, go to question 8.

If no, the provision is outside competence.

8. Does the provision modify any of the provisions listed in the table in paragraph 5(1) of Part 1 of Schedule 7B (having regard to relevant exceptions)?

If yes, the provision is outside competence

If no, go to question 9.

9. Does the provision make modifications of (or confer power to do so) any provision of an Act of Parliament (other than this Act) which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund?

If yes, the provision is outside competence

If no, go to question 10

10. Does the provision modify provisions of the Wales Bill/Act, other than those provisions referred to in paragraph 7(2)(3) and(4) of Part 1 of Schedule 7B?

If yes, the provision is outside competence,

If no, go to question 11.

11. Does the provision:

(a) remove or modify (or confer power to do so), any function of a reserved authority;

(b) confer or impose (or confer power to do so) any function on a reserved authority;

(c) confer, impose, modify or removed (or confer power to do so) functions specifically exercisable in relation to a reserved authority, or

(d) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority?

If no, go to question 12.

If yes, has the appropriate UK Minister consented to the provision?

If yes, go to question 12.

If no, the provision is outside competence.

12. Is the provision incompatible with the Convention rights or with EU law?

If yes, the provision is outside competence.

If no, the provision is within competence.



Ein cyf/Our ref: LF/FM-/0861/15

Rt Hon Stephen Crabb MP
Secretary of State for Wales
Gwydyr House
London
SW1A 2NP

22nd September 2015

Dear Stephen

Wales Bill: Proposals for Devolution

In my letter of 7th August I undertook to send you papers making the case for devolution of a number of matters which it makes sense to consider in the context of the Wales Bill. You are aware of the most significant of these which I have raised with you previously. The others are more technical matters which should be straightforward. Since then, of course, we had a useful discussion on 16 September, and we are due to meet again shortly.

As noted generally in the Welsh Government's evidence to Silk, I will be looking for a full and fair transfer of resources to reflect transfers of responsibility.

The case for devolution of employment programmes is to enable the Welsh Government to design a system which works much more effectively for participants. The present arrangements create complexity for citizens and undermine value for money. This will promote our governments' shared objective of improving individuals' skills and work prospects.

I have asked my officials to carry out detailed discussions with the DWP on all aspects of implementation including in relation to resources that would accompany a transfer and to report back on the outcome.

Recognising the detailed work that is needed in respect of the executive responsibilities, the paper proposes a phased approach that may mean that we do not need to conclude discussions in the Wales Bill timetable. I propose that we consider the legislative competence in the context of discussions on the Schedule of Reservations.

It is important to register here that the Welsh Government's major investments in employment and skills training have the effect of securing significant savings for the DWP, but the current devolution settlement does not allow us to realise benefits of the savings we

can make to non-devolved budgets. Our investment in childcare is another example, and I may need to write to you again on our powers in this area.

Alcohol licensing and the Community Infrastructure Levy were included in the Welsh Government's evidence to the Silk Commission, but were not the subject of recommendations and thus do not feature in your St David's Day document. Both matters are inextricably linked with the delivery of our existing responsibilities for public health and for planning, as the papers make clear, and I see no case for reserving them in the Wales Bill.

In respect of civil contingencies, I am seeking the transfer of Ministerial functions, with a commensurate resource transfer, to reflect the defacto position and to remove the current uncertainty.

On the expansion of Welsh Ministers' powers to the Welsh offshore region, the proposed transfer is the logical consequence of the St David's day consensus matters in this area. The proposal in respect of licensing marine fishing vessels is needed to remove legal uncertainty.

Finally, the proposed new legislative competence in respect of accountability arrangements would place the responsibility for the design and scrutiny of such arrangements with the National Assembly, consistently with the powers it already has for budgetary procedures.

I look forward to your response to these proposals.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

CARWYN JONES

EMPLOYMENT SUPPORT PROGRAMMES

Proposal

1. The Welsh Government is seeking a transfer of responsibility for the delivery employment programmes currently operated by DWP to Wales. The objective is to simplify and streamline current arrangements so that they work better for citizens and employers, and provide better value for money across training and employment programmes. Currently the process of moving between devolved and non-devolved programmes is demotivating for participants and does not help them in moving quickly into work.
2. Given the tight timescales for re-contracting of the DWP Work Programme and Work Choice from April 2017, the Welsh Government proposes a phased approach to implement the transfer. This would involve Welsh Government entering into a joint-commissioning agreement with DWP to deliver the next Work Programme contract from April 2017 (in line with the joint-commissioning proposals being developed with Manchester and London). The contract would run for a two year period and would then be followed by the transfer of responsibilities to allow the delivery of a Welsh Government led work programme for Wales from April 2019. This proposal would allow sufficient time to design and implement an integrated employment and skills system in Wales and ensure a robust delivery system is in place.

Case for change

3. The current delivery of employment and skills programmes operated by DWP, Welsh Government and other organisations (that are often ESF¹ funded) means that the system is overly complex, encourages duplication and does not allow the Welsh Government to create an integrated and flexible employment system that meets the needs of the people of Wales. Also, due to the current Work Programme 'black box'² contracting arrangements there have been a range of challenges that remain unresolved with regard to Welsh Government allowing access to its own and ESF funded provision for Work Programme participants.
4. Enabling the Welsh Government to take part in the initial joint commissioning exercise will allow us to concentrate on minimising duplication, ensure access to Welsh Government programme and European funding and to focus provision and support to the most disadvantaged individuals in the labour market.
5. Whilst the joint commissioning pilot is taking place the Welsh Government will commission research and undertake consultations to consider options for the reform of the system that could start to be implemented from 2019. This will concentrate on:

¹ ESF = European Structural Funds

² The DWP 'black box' contracting arrangements mean that there is very little specification within the contract bidding process. Potential bidders are expected to outline the activities they will undertake to meet the priorities of the programme; in the case of the Work Programme this is to place participants in sustained employment. This has been a challenge for the delivery of Work Programme in Wales and has meant that Welsh Government has withdrawn access to Welsh funded provision (including ESF) due to the inability to demonstrate added value and mitigate any potential duplication.

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- alternative interventions depending on assessment and categorisation of the individual's needs;
 - national, regional and locally targeted services;
 - minimum service standards;
 - transparency in the contract provision;
 - use of regional and national partnerships to ensure joint working across policy boundaries;
 - defining success and national benchmarking.
6. Taking responsibility for the employment programmes will enable the Welsh Government to redesign its own programmes to make sure that they align, and that the transition between programmes is seamless for participants. It will also remove the difficulties encountered through the current Work Programme 'black box' contracting arrangements (see note 1 for further information).
 7. Transferring responsibility for delivering employment programmes would mean that the Welsh Government could re-position existing provision (including ESF funded operations) to complement activities undertaken in the new programme. It would also mean that individuals who become unemployed would not have to wait between 9 and 12 months to enter the employment programme, rather they would be assessed and classified early which would allow access to the right provision or additional help within the system. The Welsh Government would continue to work with DWP and other stakeholders to continue to provide a range of support depending on each individual's requirements and to ensure that access is timely. The mapping of provision will avoid duplication, reduce confusion and allow a link to the work of the regional skills partnerships and their plans for their area with clear links to local labour market opportunities.
 8. The Welsh Government would be able to achieve its ambition to support people of all abilities to reach their potential and obtain secure, sustained and suitable employment. The ultimate aim is for Wales to develop a joined up skills system that will provide the employment support necessary to assist individuals into employment while supplying the tools to enable them to take responsibility for improving the value of their skills within the economy. This ambition is reflected in the Policy Statement on Skills³ that was published in January 2014.

Powers

9. The Welsh Ministers currently have powers to secure education and training for those persons who have attained the age of 16 years (these include sections 31 to 35 of the Learning and Skills Act 2000; section 14 of the Education Act 2002). The Welsh Ministers may also exercise functions under section 2 of the Employment and Training Act 1973 which includes assisting persons to obtain and retain employment, except that the power cannot be used for the purpose of helping all those (as distinct from a particular section of the population of Wales) without work to find employment.
10. As well as the devolution of executive functions and/or legislative competence in respect of work programmes, additional data sharing powers are likely to be

³ Welsh Government – Policy Statement on Skills, January 2014

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needed to allow information to be shared between those administering work programmes in Wales and the DWP. For example to share information on the attendance and completion of courses by welfare claimants.

Financial implications

11. Official discussions will need to identify the financial implications of transfer and the required consequential for Wales. In particular there will need to be a transfer of the resources required to exercise the transferred functions. A significant consideration relating to the transfer of responsibility for employment programmes relates to the funding arrangements which are referenced in the Scottish command paper⁴ as follows: *“the Work Programme is funded by savings made in benefits spending – there is no set grant from HM Treasury to the Department for Work and Pensions each year as this is dependent on providers’ performance. While future negotiations with Scotland need to be conducted, we must ensure that this aligns with the no detriment principle. Any funding arrangement must ensure that Scotland receives funding on an equivalent basis to the rest of the UK.”*
12. The same principle would need to apply in relation to Wales.

⁴ HM Government – Scotland in the United Kingdom: An Enduring Settlement, January 2015.

ALCOHOL LICENSING

Proposal

1. The Welsh Government is seeking the devolution of legislative competence to the National Assembly for Wales ("NAW") in relation to the licensing of the sale and supply of alcohol and late night refreshment.
2. Transferring alcohol licensing powers to Welsh Government would be consistent with its responsibilities for health and enable a more effective response to the serious problem of alcohol-related harm in Wales

Case for change

3. The NAW has broad legislative competence in relation to Health and Health Services (set out in subject 9 of Schedule 7 to GOWA 2006) including the *"promotion of health, prevention, treatment and alleviation of disease, illness, injury disability and mental disorder"*. The Welsh Government is seeking legislative competence for the NAW in relation to the licensing of the sale and supply of alcohol and late night refreshment as they are inextricably linked to health services, and protecting the health of the people of Wales.
4. Alcohol remains a major cause of preventable death and illness in Wales; it can lead to a number of health and social harms, particularly for a significant minority of people who drink to excess. Whilst consuming alcohol at low levels may have some health benefits for certain specific medical conditions, we know there is compelling evidence, built up over many decades of research, that excessive intake of alcohol causes harm.
5. A report by the Public Health Wales Observatory, *Alcohol in Wales 2014* stated that: *"Every week in Wales, alcohol results in 29 deaths; around 1 in 20 of all deaths. The impact of alcohol on health also creates enormous pressures on our health systems. Every week our hospitals handle as many as 1,000 admissions related to alcohol, increasing strains on already stretched services. Such admissions are only the tip of an iceberg which includes many more presentations at emergency departments, ambulance requests and GP appointments, all resulting from alcohol."*
6. The report also indicated *"while we are making progress much more is still to be done if we want to reduce the avoidable harms that alcohol causes families, business and communities across Wales"*. Although the percentage of adults drinking above guidelines has fallen slightly since 2008, in the Welsh Health Survey 2014, 40% of adults still reported drinking more than the guideline amounts at least once in the past week.
7. This level of alcohol consumption has led to a range of health and social harms, particularly for the minority of people who drink to excess. The alcohol related death rate for males in particular is significantly higher in Wales than that in England (20.7 per 100,000 compared with 17.8 per 100,000 population). And there is an overall alcohol misuse in Wales is estimated to cost the health service around £109m each year in hospital admissions alone.
8. There is a pressing need to tackle alcohol misuse using the full range of tools at our disposal, and policies that control the way in which alcohol is sold and

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supplied are widely acknowledged to be amongst the most effective mechanisms for tackling alcohol related harms. Regulating the availability of alcohol is an important way to reduce the general level of harmful use of alcohol, particularly in tackling easy access to alcohol by vulnerable and high-risk groups. Licensing controls are therefore an essential tool in tackling health related harms and must form part of the Welsh Government's overall strategy to tackle alcohol related harm which places such a burden on devolved services such as health.

9. Currently, the licensing of the sale and supply of alcohol and late night refreshment are not devolved to the Welsh Government and this limits how much action can be taken to tackle alcohol availability. Having the necessary powers would enable a strong and distinctively Welsh approach to tackling alcohol related harms. The health harms associated with alcohol misuse are a grave and increasing problem. The health and social burdens associated with alcohol misuse in Wales fall squarely on health services for which responsibility is devolved to the NAW.
10. The NAW generally set the legislative framework for local authorities, and have broad legislative competence relating to the "*powers and duties of local authorities*" in subject 12 of Schedule 7 to GOWA 2006.. Devolution would enable the Welsh Government to link enforcement in this area more effectively to the Welsh Government's health policy agenda and other health promoting activity by local government, and would be consistent with the position in Scotland and Northern Ireland..
11. There is cross-party consensus that the National Assembly should have the powers and policy levers necessary to tackle alcohol related harm. The Health and Social Care Committee Inquiry report into Alcohol and Substance Misuse, published in August 2015, called for '*assurances that the forthcoming Wales Bill will provide the Assembly with an appropriate set of powers to enable the Welsh Government to address the problems relating to alcohol and substance misuse in a holistic way.*'

What needs to be done to devolve the legislative competence to the NAW?

12. In order for the NAW to make primary legislation in relation to the licensing of the sale and supply of alcohol and the licensing of late night refreshment, it would be necessary to omit Reservations 48(b) and 49 from the proposed Reservation Schedule to the Wales Bill.

The Community Infrastructure Levy (CIL)

Proposal

13. Development plans in Wales provide certainty for investors and communities, driving the Welsh economy, thereby raising people's standard of living, prosperity and well-being. Such plans are devolved. However, delivering the infrastructure to support this goal is reliant partially on non-devolved funding mechanisms, such as the Community Infrastructure Levy (CIL). Having the full set of powers to shape how finance is raised to support development plans is critical in delivering a more prosperous and resilient Wales
14. Part 11 of the Planning Act 2008 provides the primary legislative framework for the CIL, with the detail contained in implementing regulations, made by the Secretary of State and applicable in both Wales and England. The CIL enables local planning authorities to set a financial charge on development for mitigation directly related to development, ensuring that any charge does not make development financially unviable⁵. This is a voluntary approach local planning authorities can take to provide financial support for the delivery of development, as set out in an up-to-date development plan (Local Development Plan in Wales). The UK Government has consistently maintained that this is a non-devolved matter not within the competence of the Assembly.
15. Silk II⁶ did not make any recommendations in relation to CIL, albeit there was discussion. Paragraph 199 of the draft reservations schedule for the Wales Bill reserves CIL. This reflects the UK Government's view of the current law, that the levy is a tax and therefore outside the competence of the Assembly. The Welsh Government response to Silk sought devolution of the levy (both in terms of legislative competence and in terms of functions of the Welsh Ministers).

Case for change

16. In Wales all local authorities have a statutory duty to prepare a Local Development Plan (LDP) under the Planning and Compulsory Purchase Act 2004. An adopted LDP provides certainty for both investors and communities by setting out policies and allocations for the use of land over the plan period. A key element when preparing an LDP is to demonstrate it can be delivered, including financial aspects. The scope and extent of s106 of the Town and Country Planning Act 1990 (TCPA) or a CIL charge to provide the necessary financial support to facilitate change is crucial.
17. The scope of the Assembly's existing competence to amend s106 will depend on the purpose and effect of a provision, whether it relates to town and country planning (which it probably would); or whether it falls within the fiscal or local land charges exceptions.

⁵ Section 211(2)(b) and regulation 14.

⁶ Empowerment and Responsibility: Legislative Powers to Strengthen Wales, March 2014

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18. Currently, Welsh Ministers do not have the ability to influence CIL as functions in relation to the CIL Regulations are not exercisable by the Welsh Ministers; it would appear that through the CIL Regulations the Secretary of State for Communities and Local Government could effectively fetter what Welsh Ministers do through the Planning Act 2008 (2008 Act).
19. Until the Welsh Ministers gain functions and the Assembly legislative competence in relation to CIL, there will be limited legal and practical ability to legislate in Wales on s106 planning obligations. Having competence and powers in relation to CIL is necessary for Welsh Ministers to influence and steer s106 planning obligations to meet the needs of Wales and Welsh communities. However, the current legislative framework means that s106 planning obligations are 'trumped' by the UK Government's CIL provisions.
20. Under s205 of the 2008 Act the Secretary of State may make regulations for CIL. Under section 223(1) the CIL regulations may make provision for how powers under s106 of the TCPA may be used. Under section 223(4) the Secretary of State may make provision "necessary or expedient" for (inter alia):
 - (i) preventing agreements, undertakings or other transactions from being used to undermine or circumvent CIL regulations,
 - (ii) preventing agreements, undertakings or other transactions from being used to achieve a purpose that the Secretary of State thinks would better be achieved through the application of CIL regulations, or
 - (iii) preventing or restricting the imposition of burdens, the making of agreements or the giving of undertakings, in addition to CIL.
21. Even if a provision was within competence, the Secretary of State could still use powers under section 233 (2008 Act) to effectively undermine or negate whatever provision was contained in an Assembly Act.
22. The Assembly should have legislative competency over all matters relating to town and country planning including the financial aspects that support a plan-led system in Wales, and the Welsh Ministers have devolved functions in relation to CIL. In addition there would be several particular benefits for Wales:
 - Development in rural authorities is often smaller in scale and nature. A CIL charge will therefore bring in lower receipts, potentially only covering the costs of setting up the charge. S106 planning obligations are still required for the delivery of affordable housing, as this is outside the remit of the CIL and forms the basis for most s106 planning obligations. A CIL charge may not be appropriate to most local authorities in Wales.
 - The Planning (Wales) Act 2015 facilitates Strategic Development Plans (SDPs) unique to Wales. Having the competency to shape and create a financial support system unique to the Welsh approach to spatial planning, assisting delivery and maximising financial receipts will be crucial in raising Wales's prosperity. Widening the definition of a charging authority to include a Strategic Planning Panel (SPP); top slicing a proportion for regional infrastructure or even the economies of scale of undertaking a single evidence base could prove highly cost effective.

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- The ability to apply receipts to different elements of the devolved development plan system will assist delivery. In England up to 25% of a CIL charge can be given to local communities where a Neighbourhood Plan exists. In contrast only 15% in Wales can be transferred to community councils. Place Plans, as set out in the Welsh Government's 'Positive Planning' (December 2013) could, subject to securing powers over CIL, be supported by a 25% charge. Such powers should not alter the principle that development remains financially viable.
- The CIL and s106 are inter-related, both in terms of a policy approach and competency. Having the ability to shape and influence both would reflect the unique policy framework and nature of Wales. Aligning CIL to the Welsh Ministers' definition of affordable housing and varying the scope of s106 planning obligations could focus receipts on uplifts in land values to the benefit of local communities/ businesses.

What needs to be done to devolve the function(s)?

23. Legislative competence should be conferred on the Assembly to make provision for CIL and executive functions of the Secretary of State under Part 11 should be devolved to the Welsh Ministers.

CIVIL CONTINGENCIES

Proposal

24. The Welsh Government is seeking the transfer of the Ministerial functions under Part 1 of the Civil Contingencies Act 2004, with full transfer of the necessary resources.

Current Constitutional Position

25. Whilst civil contingencies, as a discrete function, is not devolved to the Welsh Government, the Civil Contingencies Act 2004 and its supporting regulations recognise the important role the Welsh Government plays in this area given that it has devolved responsibility for a number of organisations which are Category 1 and 2 responders under the Act.
26. The work on developing the Civil Contingencies Act commenced following the creation of the Cabinet Office Civil Contingencies Secretariat in 2001. The work therefore took place only a few years after the creation of the National Assembly for Wales, when no legal separation between the legislative and executive arms of government in Wales existed.
27. The Welsh Government has a statutory role to play in the introduction of regulations and guidance which relate wholly or partly to Wales. Where action is taken by the UK Government under Part 1 of the Act i.e. (making regulations or orders, giving directions, issuing guidance or taking enforcement action), which applies to bodies in relation to which the Welsh Government has functions, the UK Government must seek the consent of the Welsh Ministers (Section 16(2)). In other cases where such action relates wholly or partly to Wales, the UK Government must consult the Welsh Ministers (Section 16(1)).
28. The only additional function is that the Welsh Government can issue risk assessments and guidance in Wales but only with the consent of the UK Government (Regulations 14(4) & (5)).

Monitoring Performance

29. It is only the UK Government and responders under the Act who can bring proceedings against responders in Wales for failure to comply with the duties contained in the Civil Contingencies Act. The Civil Contingencies Act 2004 assigns UK Ministers and Ministers in Scotland and Northern Ireland with powers to monitor performance of the civil protection duties. Welsh Ministers do not have these powers and therefore have no direct role in monitoring performance or enforcing proceedings for non-compliance. Only UK Ministers can enforce proceedings in the High Court for non-compliance; even on devolved services in Wales. This can be contrasted with the position in Scotland and Northern Ireland. The statutory position is therefore complex and unclear.

Emergency Powers

30. The use of Emergency Powers under Part 2 of the Act is reserved to the UK Government. The same applies in Scotland and Northern Ireland. There is no intention to transfer functions under Part 2 of the Act to Welsh Ministers.

The Role of the Welsh Government in Civil Contingencies in Wales

31. There is a distinction drawn between the oversight of the delivery of civil contingencies legislation in Wales and the role played by the Welsh Government and Welsh Ministers in building resilience and co-ordinating the response to emergencies. Clearly, as a reserved matter, the oversight on how the Civil Contingencies Act is developed and implemented falls to Cabinet Office and the Welsh Government assists and facilitates that process where necessary.
32. The Welsh Government has built up a close working relationship with the Local Resilience Forums (LRFs) and responder agencies in Wales which has developed significantly since devolution. The Welsh Government co-ordinates the gathering of information on an all-Wales basis as part of the process which feeds into COBR during emergencies. The Welsh Government supports civil emergencies by leading on the co-ordination of all-Wales multi-agency planning, supporting local activity, acting as a link between the Local Resilience Forums and also linking in with Cabinet Office, Wales Office and other UK Departments. The Welsh Government co-ordinates planning on an all-Wales basis through its Resilience Team which facilitates the all-Wales planning structures. In its report on 'Civil Contingencies in Wales' (December 2012), the Wales Audit Office regarded the Welsh Government as a 'an effective mentor and critical friend to Category One responders and to other responders as part of a broader approach to improving public services in Wales'.
33. Welsh Ministers have provided political leadership in emergency planning through the First Minister chairing the Wales Resilience Forum and with the Minister for Public Services acting as Deputy Chair. The Forum promotes good communication and the enhancement of emergency planning across agencies and services in Wales by providing a forum for Chief Officers to discuss with Welsh Ministers strategic issues of emergency preparedness. The role of the WRF is also captured in the statutory guidance supporting the Act. However, the WRF, like the Local Resilience Forums, is not a statutory body nor does it have powers to direct its members, Local Resilience Forums or individual Category 1 or 2 responders as defined under the Act.

The Case for the Transfer of Functions

34. The nature of the devolution settlement is complex and from the WAO findings there are evidently grounds for improving the understanding of the specific roles of Welsh Government and Cabinet Office amongst responder agencies. However, when it comes to strategic oversight of the legislation this is formally the responsibility of Cabinet Office under the Civil Contingencies Act 2004.
35. The Silk Commission report published on 4 March 2014 recommended the Welsh and UK Governments should ensure there is a clear understanding of their respective roles in relation to civil contingencies and emergencies. The transfer of executive powers under the Act, with the necessary resources, is the most effective way of clarifying accountability. It would recognise the Welsh Ministers'

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existing de facto role and the co-ordination the Welsh Government undertakes, as well as providing clarity on accountability.

36. The WAO report in 2012 concluded that the Welsh Government's role is complex and there is lack of clarity of this role with responders. Its routine co-ordination of non-emergency activities is more restricted and exposes a gap between the expectations for the roles of the Welsh and United Kingdom governments for civil contingencies. In particular, WAO considers that there is a gap in the oversight of civil contingency activity in Wales. It therefore recommended that 'the Welsh Government works with the Cabinet Office to agree how to strengthen strategic oversight of the delivery of civil contingencies legislation in Wales'. The WAO also concluded that 'when taken together, the legislation and Cabinet Office guidance and expectations do not accurately reflect the current role of the Welsh Government for civil contingencies.'
37. The best way of ensuring that strategic oversight of the delivery of civil contingencies legislation is strengthened in Wales is that the Welsh Government, which has more direct contact and engagement with responder agencies, has devolved responsibility. In the same way, this will provide greater clarity over accountability and will more accurately reflect the current role of the Welsh Government.
38. The Welsh Government would exercise powers under the Act to closely monitor compliance of the duties by devolved bodies, make regulations or orders, give directions or issue guidance appropriate to the conditions and circumstances which exist in Wales. The Welsh Government is better placed to understand the specific needs of devolved bodies and the support they require and to take enforcement action when such action is needed. The powers will allow the Welsh Government to apply, monitor and further develop the legislation directly in Wales with appropriate consultation with the UK Government rather than the UK Government legislating in Wales without the same level of knowledge and understanding of devolved bodies which the Welsh Government possesses.

Transfer of Functions

39. It is proposed that a Transfer of Functions Order is made to transfer relevant functions under Part 1 of the Civil Contingencies Act 2004 from UK Government Ministers to Welsh Ministers (in relation to Wales).
40. In transferring these functions Welsh Ministers will have powers to make regulations in relation to Category 1 responders falling within devolved competence. They will have powers to issue guidance in relation to the civil contingency duties and the manner in which such duties are to be performed. This will address the issue raised by the WAO of monitoring performance against the duties. Welsh Ministers will be able to do that for those responders for which they have responsibility.
41. The transfer would also enable the Welsh Ministers to require Category 1 responders in Wales to perform any of their functions for the purpose of preventing the occurrence of an emergency, reducing, controlling or mitigating the effects of an emergency, or taking other action in connection with an emergency. The Welsh Ministers would be able to require Category 1 responders to undertake action by order, or in urgent situations, by direction.

42. By providing Welsh Ministers with similar statutory powers as their counterparts in Scotland and Northern Ireland, they will also have the power to bring proceedings in the High Court in respect of a failure by a Category 1 or 2 Responder in Wales to comply with their duties under the Act. It is currently only the UK Government, and responders under the Act, who can bring proceedings against responders in Wales for failure to comply with the duties contained in the Civil Contingencies Act 2004.

Financial Implications

43. The Transfer of Functions to Welsh Ministers should be accompanied by a full transfer of the necessary resources. The resources should adequately reflect the increased statutory responsibility and additional staffing resources required to fulfil these responsibilities. It should reflect the reduced role of Cabinet Office and the increased role of Welsh Government in meeting the requirements of these functions.

Extension of Welsh Ministers' powers to the Welsh offshore region

Proposal

1. The extension of Welsh Ministers' executive powers to the Welsh offshore region. Consistent powers across the inshore and offshore regions will promote a coherent approach to marine conservation, management, licensing and enforcement, and will align with the St David's Day Command Paper⁷ consensus recommendations 15d and 18.
2. The Welsh Government's proposals are as follows
 - (i) Extend the Welsh Ministers' functions in relation to the Marine Strategy Framework Directive, as transposed by the Marine Strategy Regulations 2010, to the Welsh offshore region.
 - (ii) Extend the Welsh Ministers' functions, in relation to the Environmental Liability Directive, as transposed by The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (EDR) and The Environmental Damage (Prevention and Remediation) (England) Regulations 2015, to the Welsh offshore region.
 - (iii) Extend the Welsh Ministers' and Natural Resources Wales' functions in relation to the Environmental Impact Assessment Directive, as transposed by the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended), to the Welsh offshore region.
3. In summary we seek an extension of the Welsh Ministers' existing functions in the Welsh inshore region to the Welsh offshore region, as defined by section 322 of the Marine and Coastal Access Act 2009 (MCAA). A map of the Welsh zone is attached with this paper, showing the Welsh inshore region (from the baseline out to the Territorial Sea Limit) and the Welsh offshore region (the extent of the sea after the Territorial Sea Limit, within the Welsh zone).
 - (i) **Extend the Welsh Ministers functions in relation to the Marine Strategy Framework Directive, as transposed by the Marine Strategy Regulations 2010, to the Welsh offshore region.**
4. The Marine Strategy Regulations 2010 (MSR) transpose the EU Marine Strategy Framework Directive (MSFD).
5. The MSR impose a general duty on the Welsh Ministers to exercise their functions to secure compliance with MSFD. This includes a duty to take the necessary measures to achieve or maintain good environmental status of marine waters within the marine strategy area by 31st December 2020.
6. The responsibility to develop the marine strategy for the UK marine area falls to the Secretary of State (SoS). The Welsh Ministers are under a duty to assist the SoS by providing proposals and information for the marine strategy for their devolved marine area. The devolved marine area for Wales is defined in section

⁷ Powers for a Purpose: Towards a lasting devolution settlement for Wales, February 2015

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2 of the MSR – the “Welsh inshore region” which means the area of sea within the seaward limits of the territorial sea adjacent to Wales.

7. The MSR also place a duty on public authorities, as well as Ministers, to have regard to the marine strategy in exercising their functions.
8. It is proposed that the Welsh Ministers’ executive functions in the Welsh inshore region should be extended to the Welsh offshore region. These functions are currently exercised by the SoS. The “Welsh offshore region” under the MSR means so much of the Welsh zone as lies beyond the seaward limits of the territorial sea. The “Welsh zone” has the same meaning as in the Government of Wales Act 2006 (see section 158(1) and (3) of that Act).

(ii) Extend the Welsh Ministers’ functions, in relation to the Environmental Liability Directive, as transposed by The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (EDR) and The Environmental Damage (Prevention and Remediation) (England) Regulations 2015, to the Welsh offshore region.

9. The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (EDR) and The Environmental Damage (Prevention and Remediation) (England) Regulations 2015 transpose the EU Environmental Liability Directive (ELD).
10. Currently the Welsh Ministers, NRW and in limited circumstances local authorities, are the enforcement authorities for environmental damage within the Welsh inshore region. Welsh Ministers also exercise functions in relation to appeals.
11. In the Welsh offshore region, these functions are exercised by the Secretary of State. The proposal is that within the Welsh offshore region the Welsh Ministers (or potentially Natural Resources Wales) would exercise the enforcement authority functions. The Welsh Ministers would also exercise appeal functions in the Welsh offshore region.

(iii) Extend the Welsh Ministers and Natural Resources Wales functions in relation to the Environmental Impact Assessment Directive, as transposed by the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended), to the Welsh offshore region

12. Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended) (MWR) transpose the EU Environmental Impact Assessment Directive.
13. The Silk 2⁸ recommendation to extend the marine licensing functions to the Welsh offshore region is being pursued through the Wales Bill. The Appropriate

⁸ Empowerment and Responsibility: Legislative Powers to Strengthen Wales, March 2014

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Authority (AA) functions under the MWR are exercised by the body that considers the relevant regulatory approval; usually a marine licence application. Currently this is Natural Resources Wales (NRW) acting as the licensing authority (by virtue of a delegation made by the Welsh Ministers of their functions, pursuant to section 98 of the MCAA). However, if the delegation were to be revoked, the AA functions would be exercised by Welsh Ministers.

14. Currently Welsh Ministers/NRW only exercise the AA functions in the Welsh inshore region. This reflects the current marine licensing responsibilities. As such, to align with the Silk 2 recommendation, we also need to extend the AA functions of Welsh Ministers/NRW to the Welsh offshore region.
15. In the Welsh inshore region the Welsh Ministers are also a Relevant Authority where a regulated activity is likely to have a significant effect on the environment of Wales and Welsh Ministers do not act as the AA. As a Relevant Authority the Welsh Ministers are consulted and notified in certain circumstances. The proposal is that the Welsh Ministers should similarly act as a Relevant Authority in relation to the Welsh offshore region. This is consistent with the arrangements in Scotland.

Case for change

(i) Extend the Welsh Ministers' functions in relation to the Marine Strategy Framework Directive, as transposed by the Marine Strategy Regulations 2010, to the offshore marine region.

16. An extension of the Welsh Ministers' functions (competent authority and devolved policy authority) to include the Welsh offshore region would align Welsh Ministers' responsibilities for MSFD with those for Fisheries and Marine Planning in the Welsh offshore region. It will also bring alignment with the Silk 2 recommendations around marine nature conservation and marine licensing in the Welsh offshore region.
17. Consistent powers across both the inshore and offshore regions will give Welsh Ministers the ability to coherently facilitate the delivery of GES for MSFD by facilitating a more integrated and holistic approach to conservation measures, fisheries management and the associated licensing and enforcement requirements. It will also simplify the marine planning process.
18. The Scottish Ministers have duties under the MSR in both their inshore and offshore regions. Extending the Welsh Ministers functions into the Welsh offshore region would result in equivalent powers.

(ii) Extend the Welsh Ministers' functions, in relation to the Environmental Liability Directive, as transposed by The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (EDR) and The Environmental Damage (Prevention and Remediation) (England) Regulations 2015, to the offshore marine region.

19. The Environmental Liability Directive (ELD) was amended by the Offshore Safety Directive (OSD) to align and extend the definition of damage to marine waters to

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support delivery of the MSFD. Accordingly, it is appropriate for Welsh Ministers to take enforcement authority functions and associated appeals functions under ELD in the Welsh offshore region. This is consistent with the extension of functions under Marine Strategy Regulations 2010 (detailed under point (i) of this document).

20. The enforcement role would align with our existing fisheries and marine enforcement functions

(iii) Extend the Welsh Ministers and Natural Resources Wales functions in relation to the Environmental Impact Assessment Directive, as transposed by the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended), to the Welsh offshore region

21. The Silk 2 recommendation is to transfer offshore marine licensing functions to Welsh Ministers.
22. The AA functions under the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended) are exercised by the body that considers the relevant regulatory approval; usually a marine licence application. It is important that this position is maintained following the Silk 2 marine licensing recommendation to transfer offshore marine licensing because EIA is intrinsically linked to the marine licensing process. An application made under Part 4 of the MCAA follows both the Marine Licensing and EIA requirements collaboratively and processes are carried out together. Not maintaining this position would mean the marine licensing process in Wales would become dis-jointed and non-streamlined as the Secretary of State/Marine Management Organisation would be responsible for delivering the AA functions in the offshore area, but not the marine licensing determination.
23. The Welsh Ministers are also a Relevant Authority where a regulated activity is likely to have a significant effect on the environment of Wales and Welsh Ministers do not act as the AA. The provisions require that the Welsh Ministers are consulted and notified in certain circumstances.
24. The proposal is that the Welsh Ministers should also act as a Relevant Authority in relation to the Welsh offshore region. This is consistent with the arrangements in Scotland. Given Welsh Ministers increasing role in the Welsh offshore region it is important that the Welsh Ministers are consulted and notified where a regulated activity is likely to have a significant effect on the Welsh offshore marine environment.
25. As well as marine licensing, the proposal is consistent with Welsh Ministers responsibilities for Marine Nature Conservation (Silk 2), MSFD and EDR (subject of this paper) and those that Welsh Ministers already have for Fisheries and Marine Planning in the Welsh offshore region.

What needs to be done to devolve the function(s)

26. For each policy area, our preliminary view is that the most appropriate approach is to make amendments to the relevant secondary legislation, as detailed below.

(i) Extend the Welsh Ministers' functions in relation to the Marine Strategy Framework Directive, as transposed by the Marine Strategy Regulations 2010, to the Welsh offshore region.

27. Our preliminary view is that an amendment to the regulations is the most appropriate mechanism. This is because there is currently no express drafting within the regulations that provides for assistance in the preparation of the marine strategy (under MSFD), so far as it relates to the Welsh offshore region. Accordingly, there is no clearly defined function which could be easily identified and transferred by a Transfer of Functions Order

(ii) Extend the Welsh Ministers' functions, in relation to the Environmental Liability Directive, as transposed by The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (EDR) and The Environmental Damage (Prevention and Remediation) (England) Regulations 2015, to the Welsh offshore region.

28. Our preliminary view is that an amendment to the regulations is the most appropriate mechanism. The regulations set out detailed and complex arrangements as to geographical extent and relevant enforcement bodies. In the interests of clarity and accessibility our view is that it would be beneficial to set out the relevant changes on the face of the regulations rather than by way of a transfer of functions order.

(iii) Extend the Welsh Ministers' and Natural Resources Wales' functions in relation to the Environmental Impact Assessment Directive, as transposed by the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended), to the Welsh offshore region.

29. Once the offshore marine licensing functions have transferred, our view is that Welsh Ministers/NRW will become the AA in relation to marine licensing application in the Welsh offshore region, by virtue of the definition of AA in the MWR. Accordingly, we don't think there is a need for amendment or Transfer of Functions Order but we are seeking that Welsh Government and UK Government agree that the functions should be exercised in this manner.

30. In relation to the extension of Relevant Authority functions to the Welsh offshore region, our preliminary view is that an amendment to the regulations is the most appropriate mechanism

Powers of Welsh Ministers in relation to the licensing of Welsh Fishing Vessels outside of Wales and the Welsh Zone.

Proposal

1. There is a need to remove uncertainty in respect of the Welsh Ministers' executive powers to regulate the activities of Welsh administered fishing vessels operating outside of the Welsh Fisheries zone.
2. At present there is uncertainty about the ability of the Welsh Ministers to exercise the power to license fishing boats (pursuant to section 4 of the Sea Fish (Conservation) Act 1967) outside of Wales and the Welsh zone. Functions under section 4 of the 1967 Act are exercisable by the Welsh Ministers (on a concurrent basis) in relation to Wales (see S.I. 1999/672 and section 162 of and paragraph 30 of Schedule 11 to the Government of Wales Act 2006 ("GoWA 2006")) and the Welsh zone (see article 5(1) of S.I. 2010/760).
3. It is clear, consequently, that the Welsh Ministers have the power to grant a licence to a fishing vessel which entitles that vessel to operate in Wales and the Welsh zone. When such a vessel travels beyond that area, there is a question as to whether the operation of the function of granting that licence can be said to be "in relation to" Wales and the Welsh zone. Such issues will be determined by whether there is considered to be sufficient nexus or connection between the proposed action and Wales and the Welsh zone. There is, consequently, room for argument about the precise extent of the Welsh Ministers' powers in this area.
4. The UK Fisheries Concordat of 2012, signed by all UK Fisheries Ministers, agreed that each of the four UK fisheries administrations would manage fishing vessel licensing in relation to fishing vessels based in each of the relevant areas (so that the Welsh Ministers are now responsible for licensing Welsh vessels). For the reasons given above, however, there are some uncertainties about the ability of the Welsh Ministers to grant fishing vessel licences which are effective beyond the area of Wales and the Welsh zone.

Current Arrangements

5. Whilst this concern remains unresolved and in order to put the matter beyond any doubt, the Welsh Ministers have entered into an Agency Arrangement (under section 83 of GoWA 2006) with the Marine Management Organisation (MMO) so that the Welsh Ministers can exercise the MMO's function of licensing Welsh fishing boats beyond the Welsh zone (i.e. "wherever they may be"). The current Agency Arrangement runs until August 2016 and has had to be renewed on three occasions so far.

Case for change

6. The 2012 UK Fisheries Concordat laid down the basis for devolution of management arrangements for fishing opportunities and fishing vessel licensing by the various Administrations. The Agency Arrangement was only

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intended to put the Welsh Ministers powers (in relation to the licensing of Welsh boats beyond the Welsh zone) beyond doubt on a temporary basis whilst the underlying need for a more clear description of the Welsh Ministers powers in this regard was resolved. The English, Scottish and Northern Irish Ministers do not suffer the same ambiguity as the Welsh Ministers in their fishing vessel licensing role.

7. With a view to securing a permanent resolution of this issue, Welsh Government officials have been pursuing, with DEFRA support, an Order in Council under section 155 of GoWA to clarify that the exercise of the Welsh Ministers' functions under section 4 of the 1967 Act in relation to fishing boats beyond the Welsh zone was "in relation to" that area. Welsh Government
8. The proposed Wales Bill provides a potentially more satisfactory opportunity for the resolution of this issue.

What needs to be done to devolve the function(s)

9. The Welsh Government suggests that the most appropriate way of resolving this is to make amendments to the Government of Wales Act 2006 that put the Welsh Ministers executive powers beyond doubt in relation to Welsh fishing boats 'wherever they may be', (i.e. beyond the Welsh zone).
10. In relation to the issue of executive powers, a section 155 Order would have the effect of stating that the issuing of vessel licences under section 4 of the 1967 Act in relation to Welsh fishing boats beyond the Welsh zone is to be considered to be an exercise of that function "in relation to" Wales and the Welsh zone. Officials would anticipate, therefore, that the Wales Bill might insert a provision to that effect into the GoWA 2006 (possibly by insertion into section 155 of that 2006 Act). It is noted that an Order equivalent to a section 155 Order under the GoWA 2006 was made in relation to Scotland – see the Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 1999 (SI 1999/1748).
11. In relation to the Assembly's legislative competence in relation to such matters, Officials anticipate that the resolution might be to replicate (in the new Schedule 7A, set out in the Wales Bill) the reservation at paragraph C6 in Part II of Schedule 5 of the Scotland Act 1998, which reserves the "*Regulation of sea fishing outside the Scottish zone (except in relation to **Scottish fishing boats**)*".

ACCOUNTING REGIMES

Proposal

44. We are seeking the devolution of powers in respect of the financial accountability of Welsh Ministers and the Assembly Commission and the preparation of Whole of Government of Wales accounts. This will require legislative powers for the National Assembly for Wales.
45. Devolution of accounting and accountability provisions would more appropriately place the design, scrutiny and agreement of such arrangements with the National Assembly for Wales alongside those powers already devolved for budgetary procedures.

Case for change

46. Over the coming years, the way in which the Welsh Government is funded will change significantly. The Welsh Government will move from being almost wholly reliant on a block grant to a much more complex system in which its budget will be derived from a combination of a block grant, borrowing and taxes levied on Welsh businesses or citizens.
47. The existing legislation setting out the financial framework in Wales, under Part 5 of Government of Wales Act 2006 (GOWA 2006), was designed for the purpose of allocating resources. It has been recognised, following implementation of the Silk (1⁹) Commission recommendations, that changing fiscal responsibilities in Wales would require a change to the way in which the budget in Wales is scrutinised and authorised.
48. Following the recommendations of the Silk Commission, the Wales Act 2014 amended GOWA 2006 and provided the National Assembly for Wales with the ability to amend provisions within GOWA 2006 relating to budgetary procedures (Part 5 s125 – 128). It also conferred competence on the Assembly to legislate for budgetary procedures in Wales.
49. As its fiscal responsibilities evolve, the Welsh Government and National Assembly are committed to developing 'fit for purpose' financial procedures to ensure the effective and robust scrutiny and authorisation of public finances in Wales. In line with this commitment, the Finance Committee recently concluded an inquiry into best practice budgetary procedures. As part of this inquiry, the Committee identified, as good practice, the examples of enabling financial framework legislation to govern the budget and accountability arrangements seen in other legislatures. It subsequently recommended that the Welsh Government introduce similar legislation for Wales.
50. In principle, any legislation which sets out the arrangements for authorising and accounting for the income raised and resources spent in Wales should be designed, scrutinised and agreed by Welsh Ministers and the National Assembly for Wales. This would allow Welsh Ministers and the Assembly to take a holistic

⁹ Empowerment and Responsibility: Financial Powers to Strengthen Wales, November 2012

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approach to the procedures which set out how public money in Wales should be spent, how that expenditure is reported, and who is responsible for it.

51. However, currently under the provisions of the GOWA 2006, the Assembly can only legislate for and amend those parts of GOWA 2006 relating to budgetary arrangements. The Assembly cannot amend those provisions within GOWA 2006 relating to accounting and accountability arrangements. This point was specifically identified by the Finance Committee in its inquiry.
52. The accounting and accountability provisions within Part 5 of GOWA 2006 refer to preparation of accounts and responsibilities of accounting officers as directed or specified by the Treasury. In practice, the Treasury has ceased to issue directions to Welsh Ministers for a number of years. Therefore, as well as supporting the principle that accounting and accountability arrangements should be a matter for Welsh Ministers and the Assembly, the devolution of this function would further clarify the relationship between the Welsh Government and the Treasury in this regard.

What needs to be done to devolve the function(s)

53. It is requested that the Wales Bill confer competence on the Assembly relating to financial accountability. Competence can be provided in accordance with the Secretary of State's proposed schedule of reservations. This can be achieved by ensuring that the schedule of reservations does not reserve any matter relating to the financial accountability of the Welsh Ministers, the Assembly Commission and the whole of Government of Wales accounts.
54. The current draft of the schedule of reservations does not in our view provide the Assembly with the competence requested. The Assembly requires the ability to modify and/ or repeal sections of Part 5 of GOWA 2006 relating to financial accountability of Welsh Ministers (s131 – s135); financial accountability of the Assembly Commission (s137- s140), and Whole of Government Accounts (s141). It is proposed that the Part 5 provisions in GOWA 2006 as detailed are included within the excepted provisions listed in paragraph 7(2) of Part 1 of Schedule 7B so that they may be modified by an Act of the Assembly.
55. In relation to the specific reservations contained within Part 2 of schedule 7A, it is our view that a provision of an Act of the Assembly on financial accountability (as detailed above) would not relate to any of the reserved matters prescribed in Schedule 7A. This determination is made by reference to the intended purpose of the provisions, having regard to their effect in all the circumstances.
56. However, for the sake of clarity, it is requested that consideration be given to creating an outright exception for financial accountability within section A1 of schedule 7A (so as to avoid any possible arguments that any of the matters listed in section A1 restrict the competence of the Assembly to legislate on financial accountability).
57. If the Assembly is to be given competence to legislate for financial accountability, consideration should be given to the general restrictions listed in Part 1 of Schedule 7B. It is noted that a reserved authority in the schedule includes a Minister of the Crown and government department. The schedule confirms that any removal or modification of a reserved authority function will require the

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consent of the appropriate Minister. We anticipate that any repeal or modification of these provisions of Part 5 of GOWA 2006 may remove the Treasury functions in sections 131-134, 137-139 and 141 (and so require Treasury consent). In relation to these particular provisions, we would like to remove the requirement to receive consent to the removal or amendment of these Treasury functions.

Competence tests under Part 4 of, and Schedule 7 to, the Government of Wales Act 2006

