Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 – Senedd
Meeting date: 28 September 2015
Meeting time: 13.30

For further information contact:
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1 Introduction, apologies, substitutions and declarations of interest

2 Evidence in relation to the Tax Collection and Management (Wales) Bill

(Pages 1 – 27)

(Indicative time13.30)

Jane Hutt AM, Minister for Finance and Government Business;
Sean Bradley, Welsh Government;
Richard Clarke, Welsh Government

CLA(4)-23-15 – Paper 1 – Statement of Policy Intent
CLA(4)-23-15 – Research Service Briefing
CLA(4)-23-15 – Legal Advice Note

3 Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA582 - The Zootechnical Standards (Wales) Regulations 2015

(Pages 28 - 48)

Negative procedure; Date made: 14 September 2015; Date laid: 17 September 2015; Coming into force date: 9 October 2015

CLA(4)-23-15 - Paper 2 - Report

CLA(4)-23-15 - Paper 3 - Regulations

CLA(4)-23-15 - Paper 4 - Explanatory Memorandum

4 Papers to note

(Pages 49 - 73)

CLA(4)-23-15 - Paper 5 - Pre-legislative Scrutiny of the Draft Wales Bill: Terms of Reference, Welsh Affairs Committee

CLA(4)-23-15 - Paper 6 - Delivering a Reserved Powers Model of Devolution in Wales, Wales Governance Centre

5 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

(iv) the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; or is preparing itself to take evidence from any person;

Consideration of Evidence

Final Report Historic Environment (Wales) Bill

(Pages 74 – 99)

CLA(4)-23-15 – Paper 7 – Final Report

Llywodraeth Cymru
Welsh Government

TAX COLLECTION AND MANAGEMENT (WALES) BILL

Policy intent for regulations, directions and guidance

July 2015

TAX COLLECTION AND MANAGEMENT (WALES) BILL 2014
POLICY INTENT FOR SUBORDINATE LEGISLATION, DIRECTIONS AND GUIDANCE

This document provides an indication of the current policy intention for the subordinate legislation, directions and guidance that the Welsh Ministers are empowered or required to make under the provisions of the Tax Collection and Management (Wales) Bill ('the Bill'). It has been published in order to assist the responsible Committee during the scrutiny of the Bill and should be read in conjunction with Chapter 5 of the Explanatory Memorandum and Explanatory Notes.

The Tax Collection and Management (Wales) Bill is the first of three anticipated bills to establish devolved tax arrangements in Wales. This Bill will be followed by tax specific legislation establishing new Welsh taxes - Land Transaction Tax and Landfill Disposals Tax. The provisions in this Bill will ultimately need to be considered as part of this wider legislative programme.

The purpose of this Bill is to put in place the legal framework necessary for the future collection and management of devolved taxes in Wales. In particular, the Bill provides for:

- the establishment of the Welsh Revenue Authority (WRA) whose main function will be the collection and management of devolved taxes;
- the conferral of appropriate powers and duties on WRA (and corresponding duties and rights on taxpayers and others) in relation to the submission of tax returns and the carrying out of enquiries and assessments so as to enable WRA to identify and collect the appropriate amount of devolved tax due from taxpayers;
- comprehensive civil investigation and enforcement powers, including powers allowing WRA to require information and documents and to access and inspect premises and other property;
- duties on taxpayers to pay penalties and interest in certain circumstances;
- rights for taxpayers to request internal reviews of certain WRA decisions and to appeal to the First Tier Tribunal against such decisions; and
- the conferral of criminal enforcement powers on WRA.

Apart from some technical provisions, the Bill will be commenced by Order.

Section	Description	Policy intention
PART 2: The Welsh Revenue Authority (WRA)		
Part 2 s3(3)	The Welsh Ministers may by regulations substitute any of the numbers in section 3(1) - that provides the Welsh Revenue Authority is to consist of a chairperson, no fewer than 3 and no more than 8 on-executive members, the chief executives and 1 or 2 members of WRA staff.	It is intended that this power would generally only be used if the number of people on the board is considered to be limiting or detrimental to the successful running of the WRA. It is the policy intention that the board of the WRA will always have a majority of non-executive members.
Part 2 s4 (k)	Section 4 sets out the offices that disqualify a person from becoming a non-executive member of the Welsh Revenue Authority (WRA). Section 4(k) provides that the Welsh Ministers may prescribe, through regulations, additional holders of an office, or members of staff of a body that may be disqualified.	The offices that disqualify a person from becoming a non-executive member are listed on the face of the Bill. It is intended that this power would generally only be used to change the list if there is a significant change of circumstance, such as the creation of a new public office.
Part 2 s13(1)	The Welsh Ministers may by regulations, under section 13(1), prescribe persons to whom WRA may delegate any of its functions.	We anticipate that this power will be exercised to allow WRA to delegate tax collection and management functions from the point of its establishment. The bodies that could be prescribed in regulations to which WRA might then subsequently delegate its functions were set out in a written statement on the 30 June 2015.
Part 2, s.14(1)	The Welsh Ministers may give to WRA directions of a general nature.	It is intended that this power could be used, for example, by the Welsh Ministers to set out an annual remit for WRA to specify policy priorities. Any such remit would be published. In exceptional circumstances, the Welsh Ministers might direct the WRA where they consider an intervention is necessary to ensure the efficient and effective collection and management of devolved taxes.

Part 2 s17 (2)	Section 16 prohibits the disclosure of taxpayer information by a relevant official (as defined at section 16(2)) unless it is expressly permitted. Breach of this requirement is a criminal offence under section 19. Section 17(1) sets out the circumstances in which it is permissible to disclose protected taxpayer information. Section 17(2) provides that the Welsh Ministers may, by regulations, amend subsection (1).	It is intended that this power would be used to enable information sharing between bodies for the purpose of supporting wider public service delivery.
Part 2 s26(7)(a)	Section 26 provides that the Welsh Revenue Authority must prepare a corporate plan. The corporate plan must be made by reference to a planning period and section 26(7)(a) gives the Welsh Ministers a regulation making power to prescribe the first planning period.	The power allows the Welsh Ministers to set the planning period that WRA's corporate plan will cover. The corporate plan will set out WRA's main objectives, the outcomes that would demonstrate achievement of these objectives and the activities that WRA expects to undertake. WRA will be responsible for the collection and management of devolved taxes from 1 April 2018. WRA will need time to prepare, consider and consult on its first corporate plan. Section 26(9) requires the plan to be submitted for the approval of the Welsh Ministers not later than 6 months after the establishment of the WRA. The regulations provide that the Welsh Ministers may set a first planning period and this will be exercised in readiness for the establishment for WRA's establishment.
Part 2 s26(8)	Section 26(7)(b) provides that when the Welsh Ministers have specified the first planning period (for the corporate plan), each subsequent planning period will be for three years after the first planning period. Section 26(8) provides that the Welsh Ministers may by regulations substitute for this three year period such other period as they consider appropriate.	It is intended that this power would generally only be used if there was a strong rationale for amending the planning period, related to the efficient and effective running of the WRA.

PART 3: TAX RETURNS, ENQUIRIES AND ASSESSMENTS		
Part 3 s36 (6)	Regulation making power to specify particular records or supporting documents for tax returns that do or do not fall within the duty to be kept and preserved.	This power is intended to be used from time-to-time to bring the provisions up to date. For example, new technology may mean that records or supporting documents for tax returns take a different form.
Part 3 s37 (b)	Section 36 sets out taxpayer duties to keep and preserve records. Section 37 provides that the duty under section 36 may be satisfied by preserving the information contained in the records in any form and by any means, subject to any conditions or exceptions prescribed by regulations made by the Welsh Ministers under section 37(b)	This power is intended to be used from time-to-time to bring the provisions up to date. For example, new technology may mean that records or supporting documents for tax returns take a different form, and therefore different provisions are required for their preservation.
Part 3 s39 (3)(b)	Regulation making power to allow the Welsh Ministers to amend the relevant date for filing a tax return.	It is intended that this power would generally only be used if there was a strong rationale for amending the date for filing a tax return, related to the efficient and effective running of the WRA.
Part 3 s50 (7)	Section 50 makes provision for the WRA to make a determination of tax chargeable if no tax return made. Subsection (6) provides that no WRA determination may be made more than 4 years after the relevant date. Subsection (7) provides that the relevant date is either the relevant filing date, or such other date as the Welsh Ministers may by regulations prescribe.	It is intended that this power would be used if, in the operation of the collection of devolved taxes, it was found to be necessary to amend the relevant filing date to ensure that tax owed was paid.
Part 3 s64 (1)	Section 62 provides a defence to a claim to the WRA for repayment of overpaid tax. The defence is that "repayment or, as the case	The provisions are designed to prevent repayments of overpaid tax where the cost of the overpaid tax has not actually been borne by the taxable person. This is on the basis that any repayment would be a windfall to (and so would unjustly enrich) the taxable person. In other words, there is no repayment where the cost of the tax has

	may be, discharge of the amount would unjustly enrich the claimant." The Welsh Ministers may by regulations make provision for reimbursement arrangements made by any person to be disregarded for the purposes of section 62, except where the person complies with the arrangements required by those regulations. Regulations under this section, among other things, may impose obligations on persons specified in the regulations to make repayments to WRA. Regulations under this section may also make provision for penalties.	been passed on (normally, to the customer). However, loss or damage suffered by the taxable person because of the passing on may mean that repayment of overpaid tax will not result in a windfall. In these circumstances, repayment to the extent it compensates the taxable person for his loss or damage is allowed. Currently, the equivalent regulation-making power under UK legislation is used to provide for the reimbursement 'scheme'. The scheme is not compulsory as it gives those registered landfill site operators who accept they would be unjustly enriched by receiving a tax refund a choice. They can either: • do nothing; or • claim the refund. If they do they must abide by the terms of the scheme and reimburse consumers in a set manner.
Part 3 s67(3)	Section 67 places a duty to keep and preserve any records enabling a person to make a claim to recover overpaid tax. The regulation making power in s.67 (3) provides Welsh Ministers with the power to specify particular records or supporting documents that must be kept and preserved to enable a person to make a correct and complete claim.	This power is intended to be used from time-to-time to bring the provisions up to date. For example, new technology might lead to records or supporting documents for tax returns taking a different form.
Part 3 s68 (b)	Section 68 provides that the duty under section 67 to preserve records may be satisfied by preserving the information contained in them in any form and by any means, subject to any conditions or exceptions prescribed by regulations made by the Welsh Ministers under	This power is intended to be used from time-to-time to bring the provisions up to date. For example, new technology might lead to records or supporting documents for tax returns taking a different form, and therefore different provisions are required for their preservation.

	section 68 (b).	
PART 4: INVESTIGATORY POWERS OF THE WRA		
Part 4 s83 (2)	Section 83 sets out what is meant in Part 4 by references to the 'carrying on a business.' Section 83(2) enables the Welsh Ministers to specify by regulation what activities are or are not to be treated as the carrying on of a business.	This power would be used if a broader definition of 'carrying on a business' was required for the fair and efficient collection of taxes, for example to encompass a broader definition of landfill business.
Part 4 s94 (2)	Section 93 sets out the conditions for complying with compliance notice. Section 94 (1) sets out that unless original documents are required in the notice, a copy may be used to comply. Regulations made by the Welsh Ministers under section 94 (2) enable the Welsh Ministers to make conditions and exceptions relating to subsection (1).	This power is intended to be used from time-to-time to bring the provisions relating to copies of original documents up to date.
Part 4 s99 (3)	Regulations to make provision for the resolution by the Tribunal of any dispute as to whether any information or a document (requested in an information notice) is legally privileged.	Administrative matters relating to resolutions by the Tribunal in relation to information notices (and whether the documentation that supports the notices is legally privileged) may need to be updated from time to time.
PART 5: PAYMENT OF PENALTIES		
Part 5, s154	Power to make regulations about the amounts of penalties and the procedure for assessing them under Part 5.	It is intended that the power would only be used to make adjustments to the amounts of penalties or the mechanism for their application, for example, to encourage compliance in Wales or to ensure comparability with the rest of the UK.
PART 6: INTEREST		
Part 6, s161 (1)	Regulations to enable the Welsh Minister to set the rate of interest that applies to late payment interest.	It is intended that the power would only be used to make adjustments to the amounts of interest, for example, to ensure comparability with the rest of the UK.
Part 6, s161	Regulations to enable the Welsh Minister to set	It is intended that the power would only be used to make adjustments to the

(2)	the rate of interest that applies to repayment interest.	amounts of interest, for example, to ensure comparability with the rest of the UK.
PART 7: PAYMENT AND ENFORCEMENT		
Part 7, s165	The Welsh Ministers may by regulations provide that where a person pays a relevant sum in respect of tax, interest or penalties to WRA using a method of payment prescribed by the regulations, the person must also pay a fee prescribed by, or determined in accordance with, the regulations. Regulations under this section may make provision about the time and manner in which the fee must be paid.	The WRA expects that it, or the person authorised by it, will be required to pay a fee in connection with the use of certain payment methods used by taxpayers. For example, a fee in connection with amounts paid where internet authorisation is given for payment by credit card. This power is intended to be used from time-to-time to bring the provisions relating to a fee for payment (for example a fee to accompany payment by cheque or credit card) up to date.
Part 7, s167 (6)	Section 167(1) sets out that where a relevant sum of any one of the descriptions specified in section 162, (e.g. interest on a devolved tax) is payable by a person, and it does not exceed £2,000; it is recoverable summarily as a civil debt. Under subsection (6) the Welsh Ministers may by regulations increase the sum specified in subsection (1).	The power relates to the amount that can be summarily recovered as a civil debt, which may need to be amended from time-to-time, for example, as a result of inflation.
PART 8: REVIEWS AND APPEALS		
Part 8, s 170(7)	Sections 170(2) and (3) set out the decisions by the WRA that are appealable decisions and those that are not respectively. The Welsh Ministers may by regulations add or remove a decision from subsections (2) or (3) or vary the description of a decision in those	This provision provides the Welsh Ministers with power to modify or amend the appeals provisions to reflect, for example, the circumstances of the specific devolved taxes as they are developed. Any amendment to the provisions would be subject to public engagement and consultation with taxpayers.

	subsections. Section 170(5) limits the grounds upon which a review or appeal of specified appealable decisions can be made. The Welsh Ministers may by regulations amend Part 8 to make provision about the grounds on which a review or appeal can be made.	
PART 9: INVESTIGATION OF CRIMINAL OFFENCES		
Part 9, s183 (1)	The Welsh Ministers may by regulations direct that any provision of the Police and Criminal Evidence Act 1984 which relates to investigations of offences conducted by police officers or to the detention of persons by the police is to apply to investigations conducted by WRA. They may also make provision permitting a person exercising a function conferred on WRA by the regulations to use reasonable force in the exercise of such a function.	Section 183 amends the Police and Criminal Evidence Act 1984 ("PACE") to provide the Welsh Ministers with the power to make regulations to apply certain provisions of PACE to the investigation of criminal offences conducted by the WRA. This would enable WRA to use specified PACE powers during the investigation of various criminal offences relating to devolved taxes, such as the offences created in this bill, as well as those established by the Fraud Act 2006, or the common law offence of cheating the public revenue. The powers provided by PACE include the standard tools of criminal investigations, such as search warrants, the power to arrest and detain a person in connection with an investigation; and orders requiring the production of certain information. Section 114 of PACE provides HM Treasury with a similar power to apply certain provisions of PACE to the criminal investigation of offences conducted by HMRC. Any proposed additional powers would be subject to public engagement and consultation with taxpayers before regulations would be made by the Welsh Ministers using this power.
Part 9, s183 (2)	The Welsh Ministers may by regulations direct that any provision of the Criminal Justice and Police Act 2001 is to apply to investigations	Section 183(2) provides the Welsh Ministers with a power to make regulations to apply the provisions in Part 2 of the Criminal Justice and Police Act 2001 ("the CJPA") to investigations undertaken by WRA, which give investigators certain

	conducted by WRA. They may also make provision permitting a person exercising a function conferred on the Welsh Revenue Authority by the regulations to use reasonable force in the exercise of such function.	powers to seize and retain material found during the course of a search. Any proposed additional powers would be subject to public engagement and consultation with taxpayers before regulations would be made by the Welsh Ministers using this power.
Part 9, s184(4)	The Welsh Ministers may by Order provide that a specified reference in the Proceeds of Crime Act 2002 to an accredited financial investigator includes a reference to a person exercising a function of the Welsh Revenue Authority who falls within a specified description.	Section 184 provides for various amendments to the Proceeds of Crime Act 2002 ("POCA") to give WRA access to certain powers contained in POCA. Subsection (4) will insert a new Order-making power into POCA so that the Welsh Ministers are able to specify those staff of WRA able to exercise certain functions under POCA, which will enable WRA to recover the proceeds of criminal conduct relating to devolved taxes.
Part 9, s185 (2)(b)	The Welsh Ministers may make an Order under the Regulation of Investigatory Powers Act 2000 to prescribe persons exercising WRA functions as persons designated for the purposes of sections 28 and 29 of that Act.	Section 185 amends the Regulation of Investigatory Powers Act 2000 ("RIPA") so as to give WRA access to certain powers to undertake directed surveillance (as defined by section 26(2) of RIPA), and covert human intelligence surveillance (as defined by section 28(2) of RIPA, subject to necessary safeguards provided by RIPA. Subsection (2)(b) will insert a new Order-making power into RIPA to enable the Welsh Ministers to prescribe the persons within WRA that are able to grant authorisations for directed surveillance or covert human intelligence under sections 28 and 29 of RIPA.
General		
Part 10, s.186 (1)	The Welsh Ministers can make supplementary, incidental, consequential, transitional or saving provisions in order to give full effect to a provision of the Bill	This power would only be used for such matters as making changes to other legislation needed in consequence of the provisions of this Bill, or to deal with unforeseen details arising out of the implementation of the new system. Transitional, saving and consequential elements are designed to cater for the process of moving from one regime to another, so that the process is as "seamless" as possible and that the new law works.

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National Assembly for Wales
Constitutional and Legislative Affairs Committee

CLA582 - The Zootechnical Standards (Wales) Regulations 2015

Procedure:

Negative

Background

These Regulations provide for the recognition of organisations which record the pedigree of cattle, goats, pigs and set out the requirements which govern these organisations in relation to: the form and content of pedigree records, the form of zootechnical certificates and methods of recording breeding performance and assessing genetic value for the acceptance of animals for breeding purposes.

These Regulations apply in relation Wales and revoke and replace the Zootechnical Standards Regulations 1992 (SI 1992/2370) and the Zootechnical Standards (Amendment) Wales Regulations 2008 (SI 2008/1064).

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument

Merits Scrutiny

There are two points are identified for reporting under Standing Order 21.3 in respect of this instrument. These Regulations replace current domestic Zootechnical legislation to implement a number of European instruments which have been agreed since Welsh legislation came into force in 1992 and amendments made in 2008.

Corresponding Regulations were made in England in 2012 to avoid infraction proceedings. These English Regulations also include provision for a ministerial review to be undertaken after 5 years within the coming into force of the Regulations and publishment of the conclusions of a review in a report.

There has therefore, been some delay in the making of these Welsh Regulations and there is also no similar provision for a ministerial review and period within the Welsh Regulations.

The European Commission has also put forward proposals for a new overarching Zootechnical Regulation in 2014 which is likely to come into effect post 2016. Given these developments, it is likely that these Regulations will need to be revoked in a relatively short period given the delay in their making.

This is an example of statutory instruments for which transposition notes from the Government would have considerably assisted the Committee's scrutiny of the Regulations. The preparation of such notes would also ensure that the Government has transposed all the necessary provisions of European law.

Legal Advisers
Constitutional and Legislative Affairs Committee
18 September 2015

WELSH STATUTORY INSTRUMENTS

2015 No. 1686 (W. 218)

ANIMALS, WALES

The Zootechnical Standards (Wales) Regulations 2015

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for the recognition of organisations which record the pedigree of cattle, sheep, goats and pigs and set out the requirements which govern these organisations in relation to the form and content of pedigree records, the form of zootechnical certificates, and methods of recording breeding performance and assessing genetic value for the acceptance of animals for breeding purposes. They apply in relation to Wales and they revoke and replace the Zootechnical Standards Regulations 1992 (S.I. 1992/2370).

They transpose the following EU instruments in relation to cattle:

— Council Directive 2009/157/EC on pure-bred breeding animals of the bovine species (OJ No L 323, 10.12.2009, p1);

— Commission Decision 2006/427/EC laying down performance monitoring methods and methods for assessing cattle's genetic value for pure-bred breeding animals of the bovine species (OJ No L 169, 22.6.2006, p56);

— Commission Decision 2005/379/EC on pedigree certificates and particulars for pure-bred breeding animals of the bovine species, their semen, ova and embryos (OJ No L 125, 18.5.2005, p15);

— Council Directive 87/328/EEC on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species (OJ No L 167, 26.6.1987, p54);

— Commission Decision 84/247/EEC laying down the criteria for the recognition of breeders' organisations and associations which maintain or establish herd-books for

pure-bred breeding animals of the bovine species (OJ No L 125, 12.5.1984, p58);

— Commission Decision 84/419/EEC laying down the criteria for entering cattle in herd-books (OJ No L 237, 5.9.1984, p11).

They transpose the following EU instruments in relation to pigs:

— Council Directive 88/661/EEC on the zootechnical standards applicable to breeding animals of the porcine species (OJ No L 382, 31.12.1988, p36);

— Commission Decision 89/501/EEC laying down the criteria for approval and supervision of breeders' associations and breeding organisations which establish or maintain herd-books for pure-bred breeding pigs (OJ No L 247, 23.8.1989, p19);

— Commission Decision 89/504/EEC laying down the criteria for approval and supervision of breeders' associations, breeding organisations and private undertakings which establish or maintain registers for hybrid breeding pigs (OJ No L 247, 23.08.1989, p31);

— Commission Decision 89/502/EEC laying down the criteria governing entry in herd-books for pure-bred breeding pigs (OJ No L 247, 23.8.1989, p21);

— Commission Decision 89/505/EEC laying down the criteria governing entry in registers for hybrid breeding pigs (OJ No L 247, 23.8.1989, p33);

— Commission Decision 89/503/EEC laying down the certificate of pure-bred breeding pigs, their semen, ova and embryos (OJ No L 247, 23.8.1989, p22);

— Commission Decision 89/506/EEC laying down the certificate of hybrid breeding pigs, their semen, ova and embryos (OJ No L 247, 23.8.1989, p34);

— Commission Decision 89/507/EEC laying down methods for monitoring performance and assessing the genetic value of pure-bred and hybrid breeding pigs (OJ No L 247, 23.8.1989, p43);

— Council Directive 90/118/EEC on the acceptance of pure-bred breeding pigs for breeding (OJ No L 71, 17.3.1990, p34);

— Council Directive 90/119/EEC of hybrid breeding pigs for breeding (OJ No L 71, 17.3.1990, p36).

They transpose the following EU instruments in relation to sheep and goats:

— Council Directive 89/361/EEC concerning pure-bred breeding sheep and goats (OJ No L 153, 6.6.1989, p30);

— Commission Decision 90/254/EEC laying down the criteria for approval of breeders' organisations and associations which establish or maintain flock-books for pure-bred breeding sheep and goats (OJ No L 145, 8.6.1990, p30);

— Commission Decision 90/255/EEC laying down the criteria governing entry in flock-books for pure-bred breeding sheep and goats (OJ No L 145, 8.6.1990, p32);

— Commission Decision 90/258/EEC laying down the zootechnical certificates for pure-bred breeding sheep and goats, their semen, ova and embryos (OJ No L 145, 8.6.1990, p39);

— Commission Decision 90/256/EEC laying down methods for monitoring performance and assessing the genetic value of pure-bred breeding sheep and goats (OJ No L 145, 8.6.1990, p35);

— Commission Decision 90/257/EEC laying down the criteria for the acceptance for breeding purposes of pure-bred breeding sheep and goats and the use of their semen, ova or embryos (OJ No L 145, 8.6.1990, p38).

They also transpose Article 4 of Council Directive 94/28/EC laying down the principles relating to the zootechnical and genealogical conditions applicable to imports from third countries of animals, their semen, ova and embryos, and amending Directive 77/504/EEC on pure-bred breeding animals of the bovine species (OJ No L 178, 12.7.1994, p66).

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from the Welsh Government, Cathays Park, Cardiff CF10 3NQ.

WELSH STATUTORY INSTRUMENTS

2015 No. 1686 (W. 218)

ANIMALS, WALES

The Zootechnical Standards (Wales) Regulations 2015

Made *14 September 2015*

Laid before the National Assembly for Wales *17 September 2015*

Coming into force *9 October 2015*

The Welsh Ministers are designated(**1**) for the purposes of section 2(2) of the European Communities Act 1972(**2**) in relation to the common agricultural policy of the European Union.

The Welsh Ministers make these Regulations in exercise of the powers conferred by that section and paragraph 1A of Schedule 2 to the European Communities Act 1972(**3**).

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972 and it appears to the Welsh Ministers that it is expedient for the references in these Regulations to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

Title, application and commencement

1.—(1) The title of these Regulations is the Zootechnical Standards (Wales) Regulations 2015.

(2) They apply in relation to Wales.

(3) They come into force on 9 October 2015.

(**1**) S.I. 2010/2690.

(**2**) 1972 c.68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51) and Part 1 of the Schedule to the European Union (Amendment) Act 2008 (c. 7).

(**3**) Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006.

Interpretation

2.—(1) In these Regulations—

"cattle" ("*gwartheg*") means all animals of bovine species;

"flock-book" ("*llyfr diadell*") means any book, register, file or data medium—

(a) which is maintained by a recognised organisation, and

(b) in which pure-bred breeding sheep or goats of a given breed are entered or registered with mention of their ancestors;

"herd-book" ("*llyfr buches*" in relation to cattle, or "*llyfr cenfaint*" in relation to pigs) means any book, register, file or data medium—

(a) which is maintained by a recognised organisation, and

(b) in which pigs or pure-bred cattle of a given breed are entered or registered with mention of their ancestors;

"hybrid pig" ("*mochyn hybrid*") means a pig which is produced by deliberate cross breeding—

(a) between pure-bred pigs of different breeds or lines,

(b) between animals which are themselves outcomes of a cross between different breeds or lines, or

(c) between pure-bred pigs and pigs belonging to one or other of the above categories;

"pure-bred" ("*o frid pur*"), in respect of an animal of a breed, means that its parents and grandparents appear in a herd-book or flock-book of the breed, and it appears itself or is eligible to appear in a herd-book or flock-book of the breed;

"recognised organisation" ("*sefydliad cydnabyddedig*") means an organisation recognised by the Welsh Ministers under regulation 4.(1).

(2) In these Regulations any reference to an EU instrument is a reference to that instrument as amended from time to time.

Notices

3. Notices under these Regulations must be in writing and may be withdrawn by further notice.

Recognition of organisations

4.—(1) The Welsh Ministers must, subject to paragraph (2), by notice recognise an organisation as a recognised organisation in relation to a breed of animals if—

(a) it submits an application to the Welsh Ministers to be so recognised; and

(b) in the Welsh Ministers' opinion, it satisfies the criteria mentioned in—

(i) the Annex to Commission Decision 84/247/EEC(**1**) laying down the criteria for the recognition of breeders' organisations and associations which maintain or establish herd-books for pure-bred breeding animals of the bovine species, in relation to pure-bred cattle;

(ii) the Annex to Commission Decision 90/254/EEC(**2**) laying down the criteria for approval of breeders' organisations and associations which establish or maintain flock-books for pure-bred breeding sheep and goats, in relation to pure-bred sheep and goats;

(iii) the Annex to Commission Decision 89/501/EEC(**3**) laying down the criteria for approval and supervision of breeders' associations and breeding organisations which establish or maintain herd-books for pure-bred breeding pigs, in relation to pure-bred pigs; or

(iv) the Annex to Commission Decision 89/504/EEC(**4**) laying down the criteria for approval and supervision of breeders' associations, breeding organisations and private undertakings which establish or maintain registers for hybrid breeding pigs, in relation to hybrid pigs.

(2) The Welsh Ministers may refuse to grant recognition under paragraph (1) if—

(a) there exists a recognised organisation in respect of the same breed or an organisation in respect of the same breed recognised pursuant to the legislation listed in paragraph (1)(b) elsewhere in the United Kingdom; and

(b) the Welsh Ministers consider that granting the approval would—

(i) endanger the preservation of that breed; or

(ii) jeopardise the zootechnical programme of the recognised organisation in question.

(3) The Welsh Ministers must inform an applicant of any refusal of recognition by notice and give reasons.

(**1**) OJ No L 125, 12.5.1984, p58, amended by Commission Decision 2007/371/EC, OJ No L 140, 1.6.2007, p49.
(**2**) OJ No L 145, 8.6.1990, p30.
(**3**) OJ No L 247, 23.8.1989, p19.
(**4**) OJ No L 247, 23.8.1989, p31.

Withdrawal of recognition

5.—(1) The Welsh Ministers—

(a) may by notice withdraw recognition from an organisation which fails to satisfy the criteria mentioned in regulation 4(1)(b); and

(b) must by notice do so from an organisation which persistently fails to satisfy those criteria.

(2) The Welsh Ministers may by notice withdraw recognition from an organisation which fails to comply with its obligations under these Regulations.

List of recognised organisations

6. The Welsh Ministers must—

(a) establish and maintain a list of recognised organisations; and

(b) publish the list in accordance with Commission Decision 2009/712/EC implementing Council Directive 2008/73/EC as regards Internet-based information pages containing lists of establishments and laboratories approved by Member States in accordance with Community veterinary and zootechnical legislation(**1**).

Establishment of a herd-book, flock-book or register

7. A recognised organisation must establish and maintain a herd-book, flock-book or register (as the case may be).

Entry of animals into a herd-book, flock-book or register

8.—(1) A recognised organisation must enter—

(a) pure-bred cattle into a herd-book in accordance with Commission Decision 84/419/EEC(**2**) laying down the criteria for entering cattle in herd-books;

(b) pure-bred sheep and goats into a flock-book in accordance with Commission Decision 90/255/EEC(**3**) laying down the criteria governing entry in flock-books for pure-bred breeding sheep and goats;

(c) pure-bred pigs into a herd-book in accordance with Commission Decision 89/502/EEC(**4**)

(**1**) OJ No L 247, 19.9.2009, p13.
(**2**) OJ No L 237, 5.9.1984, p11, amended by Commission Decision 2007/371/EC, OJ No L 140, 1.6.2007, p49.
(**3**) OJ No L 145, 8.6.1990, p32, amended by Commission Decision 2005/375/EC, OJ No L 121, 13.5.2005, p87.
(**4**) OJ No L 247, 23.8.1989, p21.

laying down the criteria governing entry in herd-books for pure-bred breeding pigs; or

(d) hybrid pigs into a register in accordance with Commission Decision 89/505/EEC(**1**) laying down the criteria governing entry in registers for hybrid breeding pigs.

(2) A recognised organisation may only enter an animal imported from a third country, or which originates from semen, an ovum, or an embryo imported from a third country, into a herd-book, flock-book or register if that animal, or the semen, ovum or embryo from which it originates, has been imported in accordance with Article 4, 5, 6 or 7, as applicable, of Council Directive 94/28/EC laying down the principles relating to the zootechnical and genealogical conditions applicable to imports from third countries of animals, their semen, ova and embryos, and amending Directive 77/504/EEC on pure-bred breeding animals of the bovine species(**2**).

Requirement to enter animals into a herd-book, flock-book or register

9.—(1) A recognised organisation may not refuse to enter an animal into its herd-book, flock-book or register if it satisfies the criteria for entry.

(2) An animal which appears in a herd-book, flock-book or register of the same breed maintained by an organisation recognised anywhere in the European Union pursuant to the legislation listed in regulation 4(1)(b) must be taken to satisfy the criteria.

Zootechnical certificates for intra-Community trade

10.—(1) A zootechnical certificate for intra-Community trade in—

(a) animals;

(b) semen;

(c) ova;

(d) embryos,

may only be issued by an organisation mentioned in paragraph (2).

(2) The organisations are—

(a) where the certificate is for an animal, a recognised organisation in relation to that breed of animal;

(b) where the certificate is for bovine semen, a collection or storage centre approved under

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(**1**) OJ No L 247, 23.8.1989, p33.
(**2**) OJ No L 178, 12.7.1994, p66, last amended by Council Directive 2008/73/EC, OJ No L 219, 14.8.2008, p40.

the Bovine Semen (Wales) Regulations 2008(**1**) ;

(c) where the certificate is for bovine embryos or ova, an embryo collection team approved under the Bovine Embryo (Collection, Production and Transfer) Regulations 1995(**2**) ;

(d) where the certificate is for the semen, ova or embryos of any other animal, a recognised organisation in relation to the relevant breed.

(3) A zootechnical certificate must comply with—

(a) Commission Decision 2005/379/EC(**3**) on pedigree certificates and particulars for pure-bred breeding animals of the bovine species, their semen, ova and embryos, in relation to pure-bred cattle;

(b) Commission Decision 90/258/EEC(**4**) laying down the zootechnical certificates for pure-bred breeding sheep and goats, their semen, ova and embryos, in relation to pure-bred sheep and goats;

(c) Commission Decision 89/503/EEC(**5**) laying down the certificate of pure-bred breeding pigs, their semen, ova and embryos, in relation to pure-bred pigs; or

(d) Commission Decision 89/506/EEC(**6**) laying down the certificate of hybrid breeding pigs, their semen, ova and embryos, in relation to hybrid pigs.

Monitoring performance and assessing genetic value

11. A recognised organisation must accept for testing any animal entered in its herd-book, flock-book or register, and must carry out the monitoring or testing in accordance with the criteria specified in—

(a) Annex 1 to Commission Decision 2006/427/EC laying down performance monitoring methods and methods for assessing cattle's genetic value for pure-bred breeding animals of the bovine species, in relation to pure-bred cattle(**7**);

(b) the Annex to Commission Decision 90/256/EEC laying down methods for monitoring performance and assessing the genetic value of pure-bred breeding sheep and

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(**1**) S.I. 2008/1040 (W.110).
(**2**) S.I. 1995/2478.
(**3**) OJ No L 125, 18.5.2005, p15.
(**4**) OJ No L 145, 8.6.1990, p39.
(**5**) OJ No L 247, 23.8.1989, p22.
(**6**) OJ No L 247, 23.8.1989, p34.
(**7**) OJ No L 169, 22.6.2006, p56.

goats, in relation to pure-bred sheep and goats(**1**); or

(c) the Annex to Commission Decision 89/507/EEC laying down methods for monitoring performance and assessing the genetic value of pure-bred and hybrid breeding pigs, in relation to pigs(**2**).

Acceptance for breeding purposes

12.—(1) A recognised organisation must accept for natural breeding purposes all pure-bred animals of the breed whose herd-book or flock-book it maintains.

(2) A recognised organisation which maintains the herd-book or flock-book of a cattle, sheep or goat breed or a breed of pure-bred pigs must accept for breeding purposes the ova of all pure-bred animals and all embryos whose parents are both entered in the breed's herd-book or flock-book.

(3) A recognised organisation which maintains the herd-book of a cattle breed or a breed of pure-bred pigs must accept for breeding by artificial insemination the semen of any male animal entered in its herd-book which has been approved according to the tests referred to in regulation 11.

(4) A recognised organisation which maintains the herd-book of a cattle breed or a breed of pure-bred pigs may only accept for the purpose of artificial insemination the semen of animals which have been approved according to the tests referred to in regulation 11.

(5) A recognised organisation which maintains a register for hybrid pigs must accept for breeding purposes—

(a) all hybrid pigs;

(b) the semen of all hybrid pigs whose line has been tested for performance and genetic value; and

(c) the ova and embryos of all hybrid pigs,

whose parentage is established according to the rules of that organisation.

(6) A recognised organisation which maintains the flock-book of a breed of pure-bred sheep or goats must accept semen for the purposes of artificial insemination from such animals in accordance with Article 2(1) of Commission Decision 90/257/EEC(**3**).

Revocations

13. The following Regulations are revoked—

(**1**) OJ No L 145, 8.6.1990, p35.
(**2**) OJ No L 247, 23.8.1989, p43.
(**3**) OJ No L 145, 8.6.1990, p38.

(a) the Zootechnical Standards Regulations 1992(**1**) in relation to Wales; and

(b) the Zootechnical Standards (Amendment) (Wales) Regulations 2008(**2**).

Carl Sargeant
Minister for Natural Resources, one of the Welsh Ministers

14 September 2015

(**1**) S.I. 1992/2370.
(**2**) S.I. 2008/1064 (W.113).

EXPLANATORY MEMORANDUM TO

THE ZOOTECHNICAL STANDARDS (WALES) REGULATIONS 2015

Explanatory Memorandum to

This Explanatory Memorandum has been prepared by The Department of Environment and Sustainable Development and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Zootechnical Standards (Wales) Regulations 2015. I am satisfied that the benefits outweigh any costs.

Carl Sargeant

Minister for Natural Resources

14 September 2015

1. **Description**

The Zootechnical Standards (Wales) Regulations 2015 will repeal and replace the Zootechnical Standards Regulations 1992 (the 1992 Regulations) in relation to Wales and the Zootechnical Standards (Amendment) (Wales) Regulations 2008. The 1992 Regulations allow for the official approval of breed societies and associations which record the pedigree of animals and set out the requirements which govern these organisations in relation to the form and content of pedigree records, the form of zootechnical certificates, methods of recording breeding performance and assessing genetic value for the acceptance of animals into herd and flock books for breeding purposes.

2. **Matters of special interest to the Constitutional and Legislative Affairs Committee**

Although the European Communities Act 1972 offers a choice between negative and affirmative procedures the negative procedure will be used in this case as the discretion of the Welsh Ministers is limited over the content of the SI because it is giving effect to EU provisions.

3. **Legislative background**

These Regulations will be made by the Welsh Ministers using powers designated to them by virtue of the European Communities (Designation) (No.5) Order 2010 (2010/2690) for the purposes of section 2(2) of the European Communities Act 1972 in relation to the common agricultural policy and paragraph 1A of Schedule 2 of the European Communities Act 1972.

The negative procedure will be used in this case as the discretion of the Welsh Ministers is limited over the content of the SI because it is giving effect to EU provisions.

4. **Purpose & intended effect of the legislation**

These Regulations repeal and replace our current domestic Zootechnical legislation to set out the rules that facilitate intra-Community trade in pedigree breeding cattle, pigs, sheep and goats. This is being done to implement five European instruments which have been agreed since the legislation came into force in 1992, with a minor amendment in 2008.

These are:

a. **Decision 2007/371/EC** as regards herd-books for animals of the bovine species;
b. **Decision 2006/427/EC** laying down performance monitoring methods and methods for assessing cattle's genetic value for pure-bred breeding animals of the bovine species;

c. **Decision 2005/379/EC** on pedigree certificates and particulars for pure-bred breeding animals of the bovine species, their semen, ova and embryos;
d. **Decision 2005/375/EC** on entering male sheep and goats in an annex to the flock book; and
e. **Council Directive 94/28/EC** as amended by Directive 2008/73/EC on third country imports. Directive 2008/73/EC also requires Member States to publish up to date lists of approved breed societies and associations on the internet.

These are fully explained in the Regulatory Impact Assessment (RIA) below.

5. Consultation

Breed societies have not been formally consulted on the changes as the legislation is necessary to implement EU instruments that are already in force, and we would have been unable to act on their views. They are aware of the changes. To date there has been no comment from industry on these changes. We intend to write to recognised breed societies and associations when the Regulations come in to force.

PART 2 – REGULATORY IMPACT ASSESSMENT

Impact Assessment of Zootechnical Standards (Wales) Regulations 2015 (Subordinate Legislation)

Policy objectives and intended effects

1. Satisfactory results in animal production depend largely on the use of breeding animals of high genetic quality. The Welsh Government needs to be involved in zootechnics because there is an EU obligation to recognise breed societies and associations that meet specific criteria. The policy objective is to facilitate free trade in such animals and their genetic material, and to preserve breeds throughout the EU. There are statutory obligations under zootechnical legislation about the recognition of breed societies by Member States and the criteria to be met. The new regulations revoke and replace the Zootechnical Standards Regulations 1992 as amended by the Zootechnical Standards (Amendment) (Wales) Regulations 2008. They provide additional minor flexibilities and will result in a small reduction in administrative burdens. Breed societies and associations are not obliged to take advantage of the flexibilities. Wales is currently giving effect to the EU Regulations administratively and Industry is aware of the position. Therefore, these Regulations are being amended purely in order to bring them in line with EU requirements and tidy up domestic legislation.

2. Zootechnical legislation covers horses, cattle, pigs, sheep and goats. The EU legislation is similar, but not identical, for all species. These new domestic regulations encompass cattle, pigs, sheep and goats. Equines are dealt with under separate domestic legislation.

Rationale for intervention

3. Intervention is proposed to implement the following new or amended EU zootechnical legislation. The Regulations apply in Wales only. Separate regulations were implemented in England in 2012. Scotland and Northern Ireland are working to their own timetables.

4. The changes are as follows:

    a. **Commission Decision 2007/371/EC amending Commission Decisions 84/247/EEC on laying down the criteria for the recognition of breeders' organisations and associations which maintain or establish herd books for pure-bred breeding bovines, and 84/419/EEC, on laying down the critera for entering cattle in herd books**
    This Decision allows for the establishment of new herd books for new breeds of cattle. Previously, Commission Decision 84/419/EEC allowed only for pure-bred animals of the same breed to be entered into the main section of the herd book of a particular breed or for

specific grading up arrangements. The revised legislation allows breeders to enter pure-bred cattle, or descendants of pure-bred cattle, from other breeds directly into the main section of a new herd book. The period of establishment of the new breed should be defined in the breeding programme with the agreement of the competent authority. The new breed must be assigned a name that cannot be confused with the name of an existing breed. Where an animal is entered into the new herd book and it or its parents are already registered in another existing herd book, reference to the name of the original herd book should be documented. This Decision also allows male animals to be entered into the supplementary or grading up section of the herd book where previously only females could be entered. These animals must conform to the breed standard and may belong to the breed but have no known origin or be obtained through a crossing programme approved by the breed society. However, only a female animal may move from the supplementary section to the main section of herd book and it may only do so i.e. be registered in the main section of the herd book and thus have full pedigree pure-bred status, if its mother and maternal grandmother were registered in the supplementary section and its father and two grandfathers were registered in the main section of the herd book.

b. **Commission Decision 2006/427/EC laying down performance monitoring methods and methods for assessing genetic value for pure-bred breeding bovines**
This Decision is a codification of previous legislation set out in Commission Decision 86/130/EEC as amended by Commission Decision 96/509/EC which has been repealed. Commission Decision 96/509/EC updated the standards set out in Decision 86/130 but has not been implemented in law in the UK. Industry will already be using up to date international methodology as necessary such that this update in legislation is not expected to have any material effect in practice.

c. **Commission Decision 2005/379/EC on pedigree certificates and particulars for pure-bred animals of the bovine species, their semen, ova and embryos**
This Decision relates to intra-Community trade and repeals earlier Decisions (86/404/EEC and both 88/124/EEC and 96/80/EC as amended by Commission Decision 2002/8/EC) which included model pedigree certificates. It instead sets out the details that must be included either in pedigree certificates or in other documents accompanying pedigree cattle, their semen, ova and embryos but no longer specifies how the information should be presented. It allows reference to performance data that is publically available on the internet. This Decision also incorporates the provisions in Decision 2002/8/EC that allowed methods of genetic identification providing scientific guarantees equivalent to blood group analysis (such as DNA analysis) to be used instead of blood group analysis.

The Decision also allows for pedigree certificates for intra-Community trade in semen to be issued by approved collection or storage centres and, in the case of embryos, by approved collection teams.

d. **Commission Decision 2005/375/EC amending Decision 90/255/EEC as regards the entry of male sheep and goats into an annex to the flock book**
Previously, breeders of hardy breeds of sheep and goats where there was a lack of pedigree males could enter male animals in an annex to the flock or herd book if they were of certain breeds specified in a closed list. Progeny of these animals could be eligible for entry to the main section of the flock or herd book under certain conditions subject to prior approval by the competent authority. This Decision allows breed societies for hardy breeds where there is a lack of pedigree males to use in the same way any males which conform to the breed standard and are valuable for preservation of the breed.

e. **Council Directive 94/28/EC, as amended by Council Directive 2008/73/EC, laying down the principles relating to the zootechnical and genealogical conditions applicable to imports from third countries of animals, their semen, ova and embryos, and amending Direction 77/504/EEC on pure-bred breeding animals of the bovine species**
This Directive in effect requires that an animal imported from a non-EU Member State, or an animal that results from imported genetic material, is only included in the main section of a UK herd or flock book if it is certified as deriving from pedigree animals by a body operating to the same standards as EU bodies approved under EU Zootechnical legislation. The list of approved bodies which are in Argentina, Australia, Canada, Iceland, Israel, New Zealand and the United States of America is published by the Commission at http://ec.europa.eu/food/animal/zootechnics/approved_bodies_3rd_countries_en.htm
For completeness, Council Directive 2008/73/EC also requires Member States to publish up to date lists of approved breed societies or associations and Commission Decision 2009/712/EC sets out how the information should appear on the internet. These arrangements have been implemented administratively. Lists of approved breed societies and associations in the UK are available at: http://archive.defra.gov.uk/foodfarm/policy/zootechnic/index.htm

Options

5. **Option 1** – Revert to position before Directions and Decisions came in to effect - The new and amending EU Zootechnical instruments in the form of four EC Decisions and one Council Directive are currently being enforced administratively within Wales. This option outlines the position should the instruments not have been implemented. By not making use of the updated instruments, herd and flock books in Wales would remain outdated in relation to other Member States which would place the industry in Wales at

a disadvantage when trading within the EU. We would also be at risk of infraction by not fully meeting the requirements of EU zootechnical legislation.

6. **Option 2** – Do Nothing - Maintain the status quo and continue to give effect to these EU instruments administratively. Industry is aware of the requirements of the EU Decisions and Directive and is able to be flexible in their use. As they stand, Industry may find that conforming to them can prove to be unwieldy and confusing. Also, by not bringing these instruments in to our domestic legislation, we are at risk of not fully meeting the requirements of EU zootechnical legislation. However, this risk is small as the legislation is being adhered to albeit administratively.

7. **Option 3** – Repeal and replace the current Zootechnical Standards Regulations 1992 (as amended) - A new set of regulations will ensure that Welsh legislation fully meets the requirements of EU zootechnical legislation. It would also bring consistency by putting the requirements of the EU legislation on a statutory footing. This option would also deliver measures which strengthen the sector through harmonisation at EU level to break up trade barriers.

Costs and Benefits

8. **Option 1** – By maintaining outdated herd/flock books and not taking advantage of the increased flexibilities, the Industry in Wales could have been put at a disadvantage when trading within the EU. The cost of this is undetermined and not applicable as this is no longer the case. There would also be a risk of infraction – cost undetermined.

9. **Option 2** – This is the current situation in Wales so retaining this option would maintain the status quo. The risk of infraction is reduced as the Welsh Government is giving effect to the instruments administratively. There are benefits in that the provisions offer increased flexibilities which businesses may decide to take up. However, on the other hand, there is a risk of attracting an unquantifiable administrative cost by having to refer to and source information from numerous EC Directives and Decisions. There is also a slight risk of non compliance by Breed Societies due to confusion as they try to source the appropriate information.

10. **Option 3** – There is an assumption that this option will provide a small reduction in administration burdens for the Industry as all the provisions will appear in the one Regulation, therefore making it less unwieldy. Because Breed Societies are not obliged to take advantage of the changes the cost of this remains undetermined. Laying these amended Regulations has been accounted for in the current work stream within the Departmental budget. This includes writing out to Breed Societies based within Wales (7 in total). This option ensures there is no risk of infraction.

(Defra have made cost benefit assumptions based on the number of Breed Societies within the UK. Although it is known that 7% of these societies are based in Wales, the cost benefit cannot be assumed as the membership of these societies is not known. However, if we were to use Defra's figure as a comparison, their estimated benefit to the whole UK Industry was in the region of £32,400 per year. From a Wales perspective, 7% of this figure would equate to just over £2,200 per year.)

Summary of preferred option

11. The preferred option is **Option 3**. This option involves revoking the Zootechnical Standards Regulations 1992 in relation to Wales and the Zootechnical Standards (Amendment) (Wales) Regulations 2008 and replacing them with the Zootechnical Standards (Wales) Regulations 2015.

12. This option can be seen as supporting free trade within the EU in pure-bred breeding animals and their genetic material because it would bring legislation in Wales into line with legislation in the rest of the EU.

13. We will write to the seven Breed Societies/Associations in Wales to remind them of the requirements in EU legislation and inform them of the minor optional technical changes that will be introduced by updating our domestic legislation.

Pre-legislative scrutiny of the draft Wales Bill

The Welsh Affairs Committee will undertake pre-legislative scrutiny of the draft Wales Bill in October and November 2015. The Government plans to publish the draft Bill when Parliament returns from the party conferences in mid-October.

The draft Bill aims to:

- Move the Welsh model of devolution from a 'conferred' to 'reserved' powers model
- Devolve further powers to Wales in respect of energy, transport, the environment and elections

Terms of reference

Interested parties are invited to consider:

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

The Committee particularly welcomes suggestions of specific amendments or modifications to clauses in the Bill.

Interested parties are requested to keep to a word limit of 3,000 words and to focus on key areas that the Committee should investigate during its inquiry. There is no need to address all issues raised in the Bill.

The Committee will accept written evidence before and during its programme of oral evidence, but early submissions are recommended. The Welsh Affairs Committee welcomes written evidence in either English or Welsh.

The Committee will be holding oral evidence sessions in Westminster and Cardiff during October and November. The Government plans to introduce the Bill in early 2016.

DELIVERING A RESERVED POWERS MODEL OF DEVOLUTION FOR WALES

September 2015

CARDIFF UNIVERSITY
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Foreword

This is the report of a joint project of the Wales Governance Centre at Cardiff University and the Constitution Unit at UCL on a reserved-powers model for Welsh devolution. We assembled teams of experts in Cardiff and London with extensive experience of legislative drafting and of devolution, and we are very grateful to them for working so rapidly to produce this report. Special thanks are due to Alan Cogbill (former head of the Wales Office) and Sir Stephen Laws (former First Parliamentary Counsel) for leading the project, and to Alan Trench (Constitution Unit) for drafting the report. The other contributors were Ronan Cormacain, Steffan Evans, Robert Hazell, Richard Wyn Jones, Emyr Lewis, Sir Paul Silk and Alan Whysall. We are also grateful to the School of Law and Politics at Cardiff University for kindly funding the project.

We had hoped initially to produce a draft Schedule of reserved powers, similar to the list of powers reserved to Westminster in Schedule 5 of the Scotland Act 1998. But it soon became apparent that drafting a list of reserved powers for Wales required a whole set of issues affecting policy and conceptual principles to be addressed first. A drafting approach cannot determine the underlying policy or be treated as independent of it. Drafting a reserved-powers policy by inferring it from a list of what is to be devolved was bound to be unsuccessful. We decided that we could make a more useful contribution by examining the issues raised by using a reserved powers model as the basis for formulating the policy. Our work has been guided by two key questions: What is any new settlement seeking to achieve? And what are the different options for doing so?

The report explains and illustrates in greater detail the policy decisions that will be required, and we hope that it will inform those decisions, and the wider political and public debate that must take place before a satisfactory reserved powers model can properly be developed.

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Contents

Executive Summary

- Wales's model of legislative devolution – with the National Assembly only being able to legislate where powers are directly conferred on it – differs significantly from the model used for Scotland and Northern Ireland. The commitment following the St David's Day process to move to the 'reserved powers' model instead is not a straightforward technical change but raises fundamental questions about the development of Welsh devolution. (Chapter 1)

- It will not be possible simply to adopt the reserved powers model while maintaining the substantive powers of the National Assembly largely as they currently are. The question of which substantive areas to reserve (and which will be devolved by omission) needs to be rooted in some set of wider principles about how a devolved UK should work.

- Those principles must themselves be related to a shared understanding of how functions should be divided between the UK and devolved tiers of government. Another ad hoc political bargain underpinned by short-term considerations will not produce a robust, stable and lasting settlement. (Chapter 3)

- The UK Government's outline list of proposed reservations set out in the February 2015 Command paper *Powers for A Purpose* fails to achieve this. It includes many reservations that have no parallel in Scotland and Northern Ireland, and lacks any principled justification for the list of reserved powers. (Chapter 3)

- It will be particularly hard to reserve the civil law and procedure or the criminal law and procedure, as the UK Government proposes. These are mechanisms through which policy is delivered, not simply topics in themselves. It is necessary for the National Assembly to have powers to pass legislation affecting them if that legislation is to be effective. This is already the case under Part 4 of the Government of Wales Act 2006. (Chapter 4)

- It might be possible to reserve the law relating to specified criminal offences such as murder or theft. It would be extremely hard – in practical terms, nearly impossible – to draft reservations of the civil law that would not undermine the effectiveness of the National Assembly. (Chapter 4)

- Such legislation will necessarily raise questions of whether it also has effect in England. Such an effect can be minimised if a distinct (if not entirely separate) Welsh legal jurisdiction were established. (Chapter 5)

- A Welsh legal jurisdiction would not be the only way to address this, but other solutions will be complicated and may be cumbersome to apply in practice. (Chapter 5)

- Whether or not a distinct Welsh jurisdiction is established, Assembly legislation may sometimes need to have effect in England in order to be effective. This is already the case under the present arrangements. This may be true to some degree even where the legislation affects reserved matters. Exactly how this 'overspill' (which could also apply conversely, from legislation for England into Wales) should be dealt with will require the most careful consideration (Chapter 5).

- The Scotland Act 1998 uses the 'reserved powers' model, and in many respects provides an attractive legal precedent for Wales as well in the way it addresses the law-making competence of the devolved legislature, and in outlining ways of adjusting the legislative and executive powers of each tier of government. However, Schedule 5 to the Scotland Act does not provide a direct model due to the different legal position of Wales and the different character of Welsh devolution, and has been subject to only limited examination by the courts. (Chapters 1 and 5)

1

What is a 'reserved powers' model?

1.1. Why a reserved powers model?

The 'reserved powers' model has had widespread support from a number of bodies for some considerable time. The Richard Commission, in 2004, argued for a legislative assembly with powers reserved to Westminster.[1] More recently, the Silk Commission endorsed such a model for reasons related to its overall principles, principally to ensure greater certainty about law-making powers. This would reduce the likelihood of referral of devolved legislation to the UK Supreme Court, promoting efficiency and improving accountability and engagement.[2] This approach was endorsed by the UK Government following the St David's Day process on the ground that 'it would prove a more coherent, stable and better functioning devolution settlement... that works in the interests of Wales and the United Kingdom as a whole'.[3]

The Silk Commission's principles

- Accountability
- Clarity
- Coherence
- Collaboration
- Efficiency
- Equity
- Stability
- Subsidiarity and localism

The Constitution Unit's analysis of the issue in a Scottish context in 1996 emphasised that 'Legislation based on specifying the powers retained would be quicker to draft, easier to understand, more workable in practice, technically more robust and more durable'.[4] In its evidence to the Silk Commission, the UK's Changing Union project similarly echoed the

1 Commission on the Powers and Electoral Arrangements of the National Assembly for Wales *Report of the Richard Commission* (Cardiff, 2004), box 13.5, p. 250.

2 Commission on Devolution in Wales *Empowerment and Responsibility: Legislative powers to strengthen Wales* (Cardiff, 2014), chapter 4.

3 HM Government P*owers For A Purpose: Towards a lasting devolution settlement for Wales* Cm 9020, February 2015, paragraph 2.I.2.

4 The Constitution Unit *Scotland's Parliament: Fundamentals for a New Scotland Act* (London: The Constitution Unit, 1996), paragraph 96.

need for a reserved powers model for the next stage of Welsh devolution.[5]

Calls from Wales are not the only reason for such a move. Developments since the Scottish independence referendum – particularly further devolution for Scotland following the work of the Smith Commission, and UK Government proposals for 'English votes for English laws' in the House of Commons – have a far-reaching impact. They mean that there are needs to address a UK-wide conception of devolution, rather than treating arrangements for Scotland, Wales and Northern Ireland as exceptions to an English-driven norm. They also mean that issues of the imbalance between (devolved) Wales and England (governed still through Westminster and Whitehall) have to be addressed. Proposals for 'English votes for English laws' only strengthen this case, particularly as part of the test proposed to determine whether a matter relates to England for the purpose of limiting Commons votes to English MPs is whether a matter would be within the legislative competence of the devolved legislatures.[6] If the test for this is radically different between the various devolved parts of the UK, it will become difficult or even impossible to apply in practice. Formulated properly, a reserved powers model for Wales can help address these problems. Formulated badly, it will make them worse.

The choice of a model of devolution has a number of implications, symbolic as well as practical, but it is first and foremost a legal matter; it is a means to reach the goal of effective devolved legislative powers. From this point of view there are clear problems with the current Welsh settlement. The sequence of references of Welsh legislation to the UK Supreme Court emphasises the difficulty. This problem is increased by the varied arguments and reasoning in such cases.[7] The majority opinion in the most recent such case, regarding the *Medical Costs for Asbestos Diseases (Wales) Bill*, departed from the reasoning of earlier cases in such a way as to make it extremely difficult to say with any certainty what is likely to be within devolved competence.[8] These legal difficulties are serious and go to the heart of the Welsh arrangements.

A reserved powers model potentially offers greater certainty at the margin. Legally, it is not a transformatory change; the law-making powers of the National Assembly will continue to be limited and certain matters will be beyond its powers. Defining these negatively will reduce the impact of these, as – at the margin – any restriction will need to be construed more narrowly, as anything that is not stated as 'reserved' to the UK Parliament will be within devolved powers. A matter affecting England (or the UK as whole) as well as Wales will in most cases be presumed to be within devolved competence unless it 'relates to' a reserved matter.

Greater certainty at the margin will therefore help make a devolution settlement more workable for those who have to operate within it (whether legislators, government officials, lawyers or the general public). This will help ensure that Welsh devolution can fulfil the Secretary of State's goal of a 'clear, robust and lasting devolution settlement'.[9]

5 See also UK's Changing Union *Evidence to the Commission on Devolution in Wales: A Stable, Sustainable Devolution Settlement for Wales*, March 2013, available at http://www.law.cardiff.ac.uk/ukcu/papers/02/UKCU%20Submission%20to%20Silk%202%20March%202013%20FINAL.pdf

6 See Cabinet Office *English Votes for English Laws: Revised Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum*, July 2015.

7 For a discussion, see the annex to Bingham Centre for the Rule of Law *A Constitutional Crossroads: Ways Forward for the United Kingdom* (London, 2015).

8 [2015] UKSC 3

9 *Powers For A Purpose* Cm 9020, p.6.

1.2. The present arrangements

The current law-making powers of the National Assembly are set out in Part 4 of the Government of Wales Act 2006 (GWA for short). The Assembly has the power to make laws, known as Acts of the National Assembly for Wales (s. 107 (1) GWA) which may make any provision that could be made by Act of Parliament (s. 108(1)). An Assembly Act is only law so far as it within the Assembly's legislative competence (s. 108(2)). To be within competence, a provision must either —

A) satisfy both the following conditions —

   i) relate to one or more subjects in Part 1 of Schedule 7 (s. 108(4)(a)) and not breach any of the restrictions in Part 2 of Schedule 7 unless excepted from that restriction by Part 3 of that Schedule (s.108(6)(a)); and

   ii) neither apply otherwise than in relation to Wales nor confer, impose, modify or remove functions exercisable otherwise than in relation to Wales (s. 108(4)(b)), or

B) provide for the enforcement of a provision satisfying the first two tests or otherwise be incidental to or consequential on such a provision (s. 108(5)).

Thus, where devolved legislation is for enforcement or is incidental or consequential, it is not required to apply only in relation to Wales, and can apply to matters with no connection with Wales. Otherwise, legislation must both comply with the provisions of Schedule 7 and only apply in relation to Wales.

In addition:

a) devolved legislative provisions must not be incompatible with European Community law or the parts of the European Convention on Human Rights implemented by the Human Rights Act 1998 (s.108(6)(c),

b) they can have effect only as part of the law of England and Wales (s. (108(6)(b)) (so, for example, consequential, etc. and enforcement measures cannot be applied to Scotland or Northern Ireland), and

c) if devolved legislative provisions would have an adverse effect on matters not devolved (by being listed in Part 1 of Schedule 7), adversely affect water resources, supply or quality in England, the operation of the law in England, or the UK's international obligations, defence or national security, the Secretary of State may prohibit them from receiving Royal assent (s. 114).

The 2006 Act also includes two interpretative provisions to assist in determining whether devolved Welsh legislation is within competence. First, such questions are to be determined by reference to the purpose of the provision, with regard to its effect in all the circumstances (s. 108 (7)). Second, where any provision could be read in such a way as to be outside the Assembly's legislative competence, it should be read as narrowly as is required for it be within competence, if such a reading is possible (s. 154).[10] Both these clauses mirror provisions in the Scotland Act 1998 (ss. 29(3) and 101, respectively). The first provision therefore provides for a purposive interpretation subject to a 'pith and substance' test; the second, for what is known as 'reading down' where more than one interpretation of a statute is possible, goes beyond a 'blue pencil' provision enabling the courts to delete specific words to produce a provision within competence and, instead, invites the courts to construe legislation in a more active way to do so.

10 Note also that s. 108(2) GWA provides that Assembly legislation is not law '*so far as* any provision of the Act is outside the Assembly's legislative competence' (emphasis added) – implying that legislation is law to the extent that it is within competence.

These limits on the Assembly's competence to make laws are policed in a number of ways. When a bill is introduced into the Assembly, statements that a bill's provisions would be within legislative competence have to be made by both the person introducing the bill and the Presiding Officer (s. 110). Bills may be referred to the UK Supreme Court by the Welsh Government's Counsel General or the UK Attorney General (s. 112). After enactment, they are also open to challenge by private parties in the course of 'ordinary' litigation. (All challenges to competence after enactment would be determined using the 'devolution issue' procedures set out in Schedule 9 to GWA, which among other things provide for rapid referral to the UK Supreme Court.)

1.3. The Scottish and Northern Ireland models

Devolution for both Scotland and Northern Ireland proceeds on a different basis from that in Wales. Extensive legislative powers for the Scottish Parliament and Northern Ireland Assembly were part of the design of each institution from the outset. Confronted with the drafting and practical problems that a 'conferred powers' model would have created, the choice of a 'reserved powers' approach was readily adopted in both cases.[11] This in turn drew on the Government of Ireland Act 1920, which had provided the legal framework for the Northern Irish Parliament from 1921 until suspension in 1972, and difficulties identified in retrospect with the Scotland Act 1978 which used a 'conferred powers' approach.

In the Scottish case, the list of matters reserved to Westminster for which the Scottish Parliament has no power to legislate is set out in Schedule 5, and runs to about 16 pages in the original Queen's Printer's version of the Act. In addition, Schedule 4 prevents the Scottish Parliament from modifying a number of enactments and other provisions (though the Scottish Parliament may legislate on those matters provided it does not modify the protected provisions). In Northern Ireland, there is a distinction between 'excepted' and 'reserved' matters, set out respectively in Schedule 2 and Schedule 3 to the Northern Ireland Act 1998. In principle, both are beyond the legislative competence of the Northern Ireland Assembly, but reserved matters may be devolved by order, and may also be the subject of devolved legislation provided the Secretary of State consents to the devolved legislation.[12] Excepted matters are not liable to transfer. These two schedules are set out in much less detail and together run to about six pages in the Queen's Printer's version. (Both schedules have been amended since 1998.)

1.4. Reserved powers model and devolved executive powers

Both Welsh and Scottish devolution were based on pre-existing administrative devolution, to the Welsh and Scottish Offices. In the Welsh case, it was based on functions that were already exercisable by the Welsh Office, and for the purpose of being transferred to the Assembly were listed in transfer of functions orders (in the case of functions established by statute before 1999) or in statute (in the case of subsequently conferred functions).[13] The conferred powers model preserves this approach, since the National Assembly only has power to confer executive functions in relation to fields or subject areas where it has

11 For Scotland, see Constitution Unit *Scotland's Parliament: Fundamentals for a New Scotland Act* (London, 1996), and Scottish Office, *Scotland's Parliament,* Cm 3658 (London: The Stationery Office, 1997).

12 The mechanism for devolution of reserved matters by order does not appear to have been used in practice. Although the criminal law, the courts and policing were included on the 'reserved' list, devolution was accomplished by a combination of primary and secondary legislation.

13 The main transfer of functions order was The National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999 no. 672. Subsequent orders include SI 1999 no. 2787, SI 2000 no. 253, SI 2000 no. 1829, SI 2000 no. 1830, SI 2001 no. 3679, SI 2004 no. 3044 and SI 2005 no. 1958.

legislative powers. Moreover, this is subject to the general protection of pre-commencement (i.e. pre-2011) functions of 'ministers of the crown'.[14] The UK Government proposes to maintain this protection for UK ministerial functions, with a non-statutory 'presumption of consent' in most cases and agreed deadlines, but without specifically identifying those functions.[15]

Executive functions in Scotland are wider. This reflects the wider remit of the Scottish Office before devolution, and is partly because of the greater extent of devolved legislative competence and the power of the Parliament to confer functions on Scottish ministers in relation to any of those functions. It is also because there is no express saving for functions of ministers of the crown. Indeed, the rule here is quite the opposite; following advice by the Attorney General, the UK Government accepts that the Scottish Parliament has power to confer functions on UK ministers, or remove any functions they have in Scotland, provided that these do not relate to reserved matters.[16]

It is not always clear what UK interest is served by protecting pre-commencement functions of UK ministers in relation to Wales, particularly following the UK Supreme Court's judgment in the reference on the *Local Government Byelaws (Wales) Bill*.[17] In some cases, there may be a clear issue of administrative convenience: shared functions may produce economies of scale, administrative simplicity or more effective administration, for both sides of the border. (It follows that Welsh 'withdrawal' from such arrangements would have consequential effects for England.) In others, administrative considerations are less clear, and the protection of UK ministerial functions may have an impact on devolved government in one or more ways. It may preserve UK powers in relation to a function widely understood to be devolved; it may confuse responsibility and accountability for that function; or it may lead to a lack of certainty and clarity about what the Welsh Government or National Assembly may do (as the preserved UK ministerial functions are not listed in one place and so may not always be easily identifiable).

Equally, there is no evidence of significant problems arising from the situation in Scotland which have not been addressed by requirements for consultation etc set out in Devolution Guidance Note 15 and the provisions in sections 88-90 of the Scotland Act 1998 for cross-border public bodies.[18] It would be possible to make provision equivalent to sections 88-90 for Wales, and doing so would have many advantages.

There would be advantages in having similar rules for both Scotland and Wales in dealing with the problem of cross-border bodies and ministerial functions. If the rules are to be different, there needs to be greater clarity about what they are. One option might be to presume consent if there were not a notice from the UK Government expressly withholding consent within a specified time period. Another would be to schedule those UK ministerial functions in relation to which presumed consent would not apply and where express consent would be needed. The desirability of consistency across the various devolution settlements is all the greater if rules about 'English votes for English laws' using the settlements as a test of what is "English" are to be applied.

14 See, now, paragraph 1 of Part 2 to Schedule 7 to GWA. A parallel provision was also in Schedule 5.

15 *Powers For A Purpose* Cm 9020, paragraph 2.1.31.

16 See the Cabinet Office's Devolution Guidance Note 15 *Scottish Legislative Proposals giving Devolved Powers and Functions to UK Bodies*, November 2005.

17 [2012] UKSC 53.

18 The list of designated cross-border public bodies under the Scotland Act was long and included such bodies as the Advisory Committee on Pesticides, the British Wool Marketing Board, the Criminal Injuries Compensation Board and appeals panel, the Forestry Commissioners, the Meat and Livestock Board and the National Criminal Intelligence Service. Many of these have been reformed or abolished subsequently, notably by the Public Bodies Act 2011.

2

Subjects to reserve or consider reserving

2.1. How to decide what should be reserved?

The decision about what matters should be reserved or not is far from straightforward. At its heart lie a number of questions about what the UK, as a state, needs to do at the centre or should do there; what the powers of the UK Parliament and Government should be, in relation to those of devolved legislatures. This is a line that has moved over time, and in a Welsh context is also entangled with the complex relationship between England and Wales. Twenty years ago, the assumption was that the UK Government needed to be in control of all services, but devolution has dramatically changed that. Devolution has instead brought a degree of confusion, leading to a 'jagged edge' or 'jigsaw' pattern of interaction between devolved and non-devolved functions in which it can be hard to discern any clear rationale.

There have been two recent attempts to formulate consistent and coherent statements about what should be devolved and what should not. In the Welsh context, the attempt to formulate a coherent package of devolved powers lay at the heart of the work of the Silk Commission, and particularly its Part 2 report. The Silk Commission also endorsed the importance of reservations being drafted clearly, in a way that was defensible by the UK Government so that they were coherent and understandable as functions of the UK Parliament.

Likewise, in its recent devolution review chaired by Sir Jeffrey Jowell, the Bingham Centre for the Rule of Law endorsed an approach to 'Union constitutionalism' for the UK as a whole, based on principles such as consent, respect for democracy and the rule of law, autonomy, accountability along with social solidarity, common security and defence and a common economic framework.[19]

While there are important differences between the aims of the two sets of principles, there is also a high degree of overlap between them: principles such as accountability, clarity and coherence overlap with respect for democracy and the rule of law, equity with social solidarity, and collaboration with comity, trust and fair dealing. Like a number of other inquiries such as the Calman Commission in Scotland, they have understood the UK as a state that combines autonomy with shared features of government, and in particular shared (but not necessarily all-encompassing) social and economic unions as well as a political one.[20]

By contrast, the St David's Day process appears to be underpinned by no such principles. In his foreword to *Powers for a Purpose* the Secretary of State says, 'I want to establish a clear devolution settlement for Wales which stands the test of time. I firmly believe that there should always be a clear purpose for devolving new powers to the Assembly'. However, it is evident that the outcome of the St David's Day process is primarily a political accommodation which relates more to the wishes of the parties involved at the time and less to what might achieve the clear, robust and lasting settlement he seeks.

No line dividing functions between tiers of government can be set in stone. The question is how rigidly the line might be drawn, particularly where the UK Government has fundamental concerns about whether a function should be reserved and the implications of doing so for core functions for the central state. These may be addressed if there are ways for governments to agree to consult each other properly when cases on one side of the line have implications affecting things on the other side. A mechanism to facilitate or encourage such discussions is a key element of an effective overall settlement, and a role which the proposed Welsh Intergovernmental Committee might usefully fill.

2.2. Principles for deciding what functions should be reserved

For a devolved Union to work, the centre needs to retain control of some key functions, whether across the UK a whole, in relation to Great Britain, or in relation to England and Wales. There are three potential categories here of matters which the UK Government might seek to see reserved for Wales. First, there are matters which are necessary for the functioning of the UK and its central state machinery – matters such as defence, foreign relations or the currency. Second are matters which the UK might wish to operate in the same way across its territory, particularly to ensure the operation of its social, economic or political unions – a common energy market, for example. In relation to these matters, there is a degree of choice, though one shaped by the sort of Union overall that the UK Government wishes to see (and which devolved governments and legislatures support). An important consideration here is the extent to which the centre understands that it is possible for it to devolve functions without, in practice, finding itself still held politically responsible for how those functions are used, or unreasonably inhibited in carrying out the functions for which it does remain responsible. Third, there are matters where Welsh decisions might have an effect specifically in England (rather than across the UK as a whole), principally because of their direct cross-border effects. Here, a decision might also be made to reserve the function, but if so that decision also needs to take into account its effect on functions which are already devolved as well, and to proceed on the basis of reciprocity and mutual respect given the nature of the functions exercisable by each tier of government.

The fact that the same institutions are responsible for both UK-wide matters and those relating solely to the interests of England makes it sometimes difficult to discern what considerations are in play, or what underpins the taking of some decisions.

Ensuring reciprocity while also maintaining adequate and appropriate accountability, respectively to the devolved and UK legislatures, for the exercise of devolved functions and the protection of the interests of the UK and England adds to the complexity of such reservations.

Identifying principles for what should be devolved is not straightforward. The list of 'excepted matters' for Northern Ireland, set out in Schedule 2 to the Northern Ireland Act 1998 (and reproduced in Annex A) can be regarded as including those matters which the UK Government regarded as essential (although it also includes a range of other matters with particular importance in a Northern Ireland context). As a brief outline of key matters which the UK Government needs to retain in order to function as a state, it provides a useful starting point – and as a starting point emphasises how the inclusion of other matters reflects political factors that go beyond what may be seen as essential to the operation of the UK's central state machinery . The relevance of those factors may be subject to debate,

19 For the full list, see Bingham Centre *A Constitutional Crossroads,* section 4.1, pp. 20-1.

20 Commission on Scottish Devolution Final Report *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Edinburgh, 2009).

but it would be better if it were informed by a more principled basis for determining what reservations from a devolved settlement are seeking to achieve.

It is not appropriate to address here the question of the political choices about which functions should be devolved and which reserved. However, the absence of any coherent principle for the division of functions between the devolved and UK/England tiers of government will leave the door open to further debate about these issues, and add to the innate instability of any arrangements that are put in place. They are unlikely to deliver a stable long-term settlement as is widely sought. Coherence and stability will only be achieved by adopting a longer term perspective.

2.3. Schedule 5 Scotland Act 1998 as a model?

Schedule 2 to the Northern Ireland Act 1998 may provide an indication of key areas where the UK Government needs to retain control. Schedule 5 to the Scotland Act 1998 sets out the detailed list of reserved matters for Scotland. In that context, it may be seen as a precedent or model for Wales, both in the wide sense of indicating areas where the UK Government may wish to reserve matters, and in the narrower one of showing how such a schedule might be drafted.

2.4. Areas of difference from Scotland

Wales is notably different from Scotland in two key aspects of devolution. First, functions relating to criminal justice – policing, criminal law and justice, the courts, and prisons and offender management – are not proposed to be devolved. (This is despite recommendations from the Silk Commission for devolution of some of them as soon as practicable and for further consideration of devolution of others). In that respect, even plans for a 'reserved powers' model will lack a significant element of devolved government in Scotland (and indeed Northern Ireland.)

Second, the importance of the Welsh language adds a further dimension of complexity. Powers in relation to the Welsh language are devolved. Its extensive use and cultural importance mean it plays a key role in the drafting of legislation, the working of the courts as well as political and public life more generally.

2.5. Considering the UK Government's proposed reservations

Schedule 5 to the Scotland Act 1998 (henceforth SA) has clearly influenced thinking about the scope of reserved matters for Wales, as the table at Annex B illustrates. This shows the proposed reservations set out in Annex B to *Powers for A Purpose*, and compares them with reserved matters for Scotland and excepted and reserved matters for Northern Ireland. Many of the proposed reservations have clearly been drawn directly from Schedule 5 SA. In these cases, we can see an argument for reserving similar matters for Wales. Similar reservations would promote consistency between the terms of the different devolution enactments and of their application, and so facilitate similar approaches to interpretation by the courts if they were the subject of litigation. However, that does not mean that such reservations should proceed without careful examination. The differences between Wales and Scotland are such that it is necessary to consider whether reservations that are appropriate for Scotland may not be necessary or appropriate in a Welsh context, and not just the other way round. Identifying reservations also needs to take into account broad support for the principle of subsidiarity and things being done at the more local level where that is possible and appropriate.

In other cases, proposed reserved matters do not appear to have any precedent in either Scotland or Northern Ireland. Table 1 below is abstracted from our Annex A, and shows those matters. It is unclear to what extent any of these would be justifiable in terms of the principles set out by such bodies as the Silk Commission or the Bingham Centre. Rather, they appear to reflect a wish-list of matters over which Whitehall departments wish to retain control – without articulating any clear basis in principle that might promote the formulation of a robust and lasting basis for Welsh devolution. In some cases these relate to high-level political decisions about devolving policing and criminal justice functions, the civil law or both, and can be regarded as consequential on that decision.

Even in such cases, the linkages are not automatic; arguments about such matters as land charges and land registration merit careful consideration, and might appropriately be devolved even if the civil law (and with it land law) were to remain determined at Westminster (though we suggest below that this is highly problematic). Moreover, there are a number of cases where even that rationale does not apply. It is hard to see in what respects the interests of the UK as a whole, or even of England, might be served by retaining control at the UK/England and Wales level of such matters as alcohol or entertainments licensing or sports ground safety in Wales. Similarly, reservation of such matters as teachers' pay and sale of student loans may reflect rather short-term political choices rather than any consistent or principled attempt to distinguish between what needs to be done at UK level and what should or could be done at a lower level.

Table 1: Matters proposed for reservation in Wales but not reserved in Scotland and Northern Ireland

Proposed Welsh reservation	Reserved in Scotland?	Reserved/excepted in N Ireland?	Policy issues and other comments
Civil Law and Procedure	No	No	Linked to existence of a separate legal jurisdiction.
Criminal Law and Procedure	No	No	Linked to existence of a separate legal jurisdiction.
Policing (including police forces and Police and Crime Commissioners)	No	No	For N Ireland: some restrictions on devolved powers notwithstanding devolution of policing and justice.
Prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings	No	No	Linked to devolution of policing and justice.

Criminal records	No	No	Linked to devolution of policing and justice.
Private security industry	No	No	Linked to devolution of policing and justice?
Riot damages	No	No	Linked to devolution of policing and justice?
Anti-social behaviour	No	No	Linked to devolution of policing and justice?
Regulation of CCTV and other surveillance camera technology	No	No	For Scotland: expressly excepted from reservation: see Schedule 5 Head B8, 2nd indent.
Modern slavery	No	No	
Licensing of the sale and supply of alcohol	No	No	
Provision of entertainment and late night refreshment	No	No	
Safety at sports grounds	No	No	
Control of dangerous dogs and hunting with dogs	No	No	
The movement of food, animals and plants within the UK	No	No	For Scotland, expressly excepted from reservations in Heads C5 and C8.
Non-Energy Minerals	No	No	
Teachers Pay	No	No	
Sale of Student Loans	No	No	
Development of Land including national infrastructure projects	No	No	
Land Registration	No	No	Linked to devolution of civil law.
Land Charges	No	No	Linked to devolution of civil law.
Regulation of the legal profession and legal services	No	No	Linked to devolution of the legal system.
Regulation of claims management	No	No	Linked to devolution of the legal system.
Administration of Justice	No	No	Linked to devolution of the legal system.
Offender Management	No	No	
Legal Aid	No	No	Linked to devolution of the legal system.
Mental Capacity	No	No	Linked to devolution of the legal system.
Information Rights	Yes in part	No	
Family Law	No	No	Arguably linked to devolution of the legal system.
Inter-Country Adoption	No	No	

2.6. Considerations for identifying functions that should be reserved

Whether a function should be reserved is not, as argued above, a straightforward question. Attention needs to be given both to the impact of reserving a specific function or matter, and of the overall package of reservations. In approaching this question, it may be helpful for policymakers to consider, in particular, the following questions:

1. Is its retention at UK level necessary for the functioning of the UK as a state – for its operation on the international level, or for the social, economic and political unions it comprises internally?
2. Does the overall package of reserved matters taken as a whole constitute a coherent, consistent package? Does its overall impact make for effective or ineffective law-making and public administration? Will its coherence make it comprehensible and accessible to lawmakers and the public at large?
3. Does retention of a particular function make the governance of the UK generally less clear or comprehensible? Does it affect the coherence of the package of devolved powers and functions?
4. Does retention of a function undermine the workability, stability or durability of the devolution settlement?

5. Does a failure to reserve a particular matter create the potential for devolved legislation with practical or legal cross border implications that would have an effect on the working of government in England or policy-making for England of such significance that it needs to be taken into account?
6. Is the reservation expressed in terms that go no further than is necessary to give effect to the purpose of the reservation?
7. Is the reservation expressed in terms that avoid unjustifiable interference with the exercise of functions that are meant to be devolved?

3

Reservations of the civil and criminal law

Two of the key reservations identified in the 'indicative list' in *Powers for A Purpose* are of 'Civil Law and Procedure' and 'Criminal Law and Procedure'. It is not clear what principle underlies these proposed reservations, though it may relate to decision of the St David's Day process not to agree to substantive devolution of the legal system. However, outright reservation of these matters would create considerable difficulty for the legislative powers of the National Assembly under a 'reserved powers' model. The key issue is that these are not topics but mechanisms. As such, they are be integral to the effective making of law by the National Assembly, and any blanket reservation of them would undermine the ability of the Assembly to make law independently.

Recognising that the civil law and the criminal law are mechanisms not topics, the National Assembly already has powers to legislate for matters that relate to the civil or criminal law when they are used as mechanisms for implementation or enforcement of provisions that relate substantively to devolved subjects. Section 108(5) GWA provides:

> 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.

This enables the Assembly to legislate for wider matters which are not expressly devolved and which do not fall within the devolved subjects, where this is necessary to pass workable legislation for devolved subjects. These powers enable the Assembly to do such things as:

- Alter rights in relation to land, in the exercise of the Assembly's powers regarding such subjects as agriculture or housing. Most notable is the abolition of the distinction between residential leases and licences in the Renting Homes (Wales) Bill currently before the National Assembly);
- Alter civil liability or the making of civil claims, for example in relation to claims of negligence against the NHS (to a degree already done by the NHS Redress (Wales) Measure 2008);
- Create criminal offences where necessary to make other devolved legislation enforceable – in relation, for example, to environmental protection or devolved aspects of water and flood defence.

Such mechanisms are a necessary adjunct under the 'conferred powers' model. Removing or limiting them as part of a reserved powers model would significantly undermine the ability

of the National Assembly to make laws in relation to devolved functions such as health, the environment or housing if it could not make such necessary provisions to give effect to its legislation.[21] Reservation of them would necessarily weaken the effectiveness of the Assembly as a legislature and might even make it unable in practice to exercise its functions.

It may be that the aim is to protect core areas of civil and criminal law, given that there is no present intention to devolve these. However, that raises the very difficult question of what is 'core' and what is incidental for the enforcement of devolved legislation. Section 108(5) provides a partial solution to that problem, but in the context of a conferred powers model. A reserved powers approach raises different issues. Part of the point of that approach is to remove the need for section 108(5) as such; the point is that it is open to devolved legislatures to use such mechanisms as they see fit, without limitation, to achieve their goals, so long as those do not relate to reserved matters such as defence, currency or competition law. The difficulty is that this also opens the door to much greater variations between England and Wales.

Differences in law and legal systems are of course nothing new to the United Kingdom. This is already the position for Scotland and Northern Ireland, and there is no reason to suspect any reckless use of such powers by a devolved legislature. The impact of any differences may, however, be magnified by two factors. First, the open and widely-crossed border between England and Wales border means that differences may be less obvious than in other parts of the UK but will also affect many more people where they do exist. Second, there is the absence of a distinct or separate Welsh legal jurisdiction (at least in modern times).[22]

The five options for dealing with the civil and criminal law are:

1) to permit outright devolution of civil and criminal law, without establishing a Welsh legal jurisdiction
2) to permit outright devolution of civil and criminal law, and also establish a Welsh legal jurisdiction,
3) to reserve civil and criminal law outright,
4) to reserve civil and criminal law, but enable the Assembly to legislate on such matters with UK consent, or
5) try to maintain the present position or something like it – so the National Assembly would have no power to legislate in general for the civil or criminal law but would be able to affect those matters in the context of other legislation.

The first and second options – enabling the National Assembly to legislate freely for civil or criminal law, whether with or without a separate legal jurisdiction – both raise the same *political* issue, of whether to allow important aspects of the legal system to differ between England and Wales, but have different consequences. Devolution would enable the National Assembly potentially to make far-reaching changes – to reshape the law of consideration in the law of contract, the measure of damages for tortious claims, or the nature of intention (mens rea) for criminal offences. That it could do these things does not mean it will – Northern Ireland has not sought to alter these common-law rules, whether under devolution to Stormont between 1922 and 1972, or since 1999. The open nature of the England-Wales border would be an important factor that the Assembly would need to bear in mind in making such decisions.

21 For Northern Ireland, the status of the criminal law as a reserved matter until 2007 meant that, when the Assembly was legislating, it needed to obtain the Secretary of State's consent if it wished to make sure parking legislation, for example, was enforceable by the criminal law.

22 See more generally T.G. Watkin *The Legal History of Wales* (University of Wales Press, 2007).

Each of those options raises further issues, particularly of a legal nature. Devolution without creating a Welsh legal jurisdiction increases the potential for legislation made by the Assembly to have an impact outside Wales, in England (where that legislation will also be recognised as law and enforced by English courts). It would allow there to be significant differences in the law between England and Wales, when lawyers, judges and lay people may not be aware of the difference. The existence of a legal jurisdiction can serve (among other things) as a clear indication that the laws may be different between two places. Enabling potentially significant substantive differences to arise without that indication creates serious risks that those bound by laws made in Wales will not realise how different those laws may be. Alternative clear ways of indicating those differences will be needed if such powers are to be in the hands of the National Assembly while Wales remains part of a shared legal jurisdiction with England.

The absence of a legal jurisdiction would also raise difficult technical issues of ensuring that Welsh law did not unduly affect England, which are addressed further in section 4 below.

The second option would address both aspects of this problem by creating a distinct (if not necessarily separate) legal jurisdiction for Wales. This would have further implications for such matters as the organisation of the courts, the judiciary and the legal professions as well as for the powers of the National Assembly, which again are discussed further in section 4. The advantage of establishing a Welsh legal jurisdiction is that it would minimise the scope for Welsh law to affect matters in England, and vice versa – important if legislation is to be made distinctly for England, and 'English votes for English laws' are to become part of established Parliamentary practice.

The third option would ensure consistency of the law between England and Wales, but at the price of a severely hamstrung National Assembly with considerably more limited powers than it presently has. The ability to legislate for aspects of the civil and criminal law, to give effect to devolved matters, is part and parcel of effective devolved law-making power even if the main functions of the Assembly relate to matters such as health or the environment. Nor would there be any compensating advantage to such a hamstrung Assembly. The UK Parliament would not have the time or interest in filling in the gaps in devolved powers. The UK Government would not have the administrative powers or access to Parliamentary time (let alone staff resources) to fill in the gaps left if the Assembly were only able to pass 'partial' legislation; the result in reality would often be a gap in effective framing or enforcement, and seriously flawed governance overall.

The fourth option is substantially similar to the approach used in Northern Ireland for reserved matters. In that case, *any* legislation which 'deals with a reserved matter' requires the consent of the Secretary of State, even if it is for the enforcement of legislation which otherwise would be within competence, or is incidental or consequential to legislation which otherwise would be within competence.[23] This may be accompanied by provision using section 86 of the Northern Ireland Act 1998 to reshape the boundary between devolved and non-devolved matters. Thus, certain provisions of legislation – needed to make the Assembly able to function as an effective legislature – would require external consent.

This option was considered and rejected by the Richard Commission in the early 2000s. Given the model for legislative devolution set out in Part 4 of the Government of Wales Act 2006 and the support for that in the 2011 referendum, it would be hard to see any more limited form of devolution as anything other than a backward step from what was endorsed in the referendum.

23 Northern Ireland Act 1998, section 8.

A further issue is who gives such consent. There are practical reasons for vesting such a power in a UK Minister in the Northern Ireland context, and the Northern Ireland devolution settlement contains numerous cases where the Assembly is constrained by external factors. That is not the case for Wales, where the trend of policy and legislation since 2005 has been to empower the National Assembly to make its own decisions rather than subject them to external constraints and particularly those of a minister in a different government. Indeed, *Powers For a Purpose* proposes to remove the Secretary of State's right to attend the Assembly and participate in its proceedings.[24] Mechanisms that required UK ministerial approval would run counter to this objective, while the practical difficulties of conferring such a power on the UK Parliament are considerable. Moreover, experience with the system of legislative competence orders under Part 3 of the Act between 2007 and 2011 suggest this will risk administrative and constitutional concerns becoming entangled with political ones.

The fifth option may therefore seem the most attractive. However, it is also problematic, because it is difficult if not impossible to draft. A 'reserved powers' model means that the National Assembly can legislate on any matter except those reserved to Westminster. That implies that a provision permitting legislation related to reserved matters for the purpose of enforcement or where it is incidental or consequential to other legislation (like section 108(5) GWA) becomes superfluous if not redundant. Indeed, that is the point of a reserved powers model; to remove the conditions and limitations that have inhibited legislative activity to date. Defining how far such legislation should go and what is 'reserved' is very difficult – it would be very hard to frame such legislation so it would be clear and certain.

The difficulties are probably greater for the civil law than criminal law. For criminal law, reservation of core areas or provisions would be possible, perhaps by reference to a list of categories of offences – treason, the law of homicide, offences against the person, the subject-matter of the Theft Acts 1968 and 1978 – and so forth. Such matters as police procedure ('the subject matter of the Police and Criminal Evidence Act 1984') could similarly be reserved. There would be a challenge for the UK Government in ensuring its list of offences and other matters was comprehensive, but that could be overcome. This would permit the Assembly to legislate for criminal matters arising from legislation affecting its substantive functions, but not the criminal law in general.[25]

When it comes to the civil law, such issues as rights in restitution, the working of the law of contract or the nature and extent of agency are key issues for the working of any legislation. (The requirement for presumed consent for organ donation, under the Human Transplantation (Wales) Act 2013, is a modification of the law of agency.) Reservation of 'land law' or even 'the subject-matter of the Law of Property Act 1925' would cause serious difficulties for the provisions regarding 'occupation contracts' in the Renting Homes (Wales) Bill. Indeed, so broad is the scope of the powers regarding the subject of 'Housing' in Schedule 7 GWA, it potentially encompasses large areas of land law concerning residential property.[26] It is hard to see how any reservation of specific aspects of the civil law could be framed that would not potentially impede action by the Assembly, or at least create serious uncertainty about the scope of the Assembly's powers.

24 *Powers For a Purpose* Cm 9020, paragraphs 2.2.7-2.2.8, and also Annex A, paragraphs 51a and 51b.

25 It is perhaps worth noting that, in Canada, the operation of policing and the administration of justice (including the courts) are matters of exclusively provincial jurisdiction, but the criminal law and procedure are federal matters. See Constitution Act 1867 (Canada), sections 91 and 92.

26 Subject area 11, headed 'Housing', comprises the following: 'Housing. Housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits. Encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation. Regulation of rent. Homelessness. Residential caravans and mobile homes.' Note that it is not limited to social or publicly-funded housing.

Moreover, the nature of the common law is that it is dynamic and subject to development and interpretation by the courts. This is less of a problem for the criminal law, which is much more dependent on offences defined in statute.[27] Any attempt to reserve the civil law, in particular, would be open to the fact it might end up relating to a legal doctrine that might not emerge until stated by the courts in 10 years' time. To be effective, the reservation would have to be prospective, not merely preserving a status quo. (In this context, it is worth noting that Schedule 5 SA works in relation to matters as they were when that Act was passed, a matter discussed further below.)

These difficulties go to the heart of the proposal for a reserved powers model. There are profound political objections to approaches that mean substantively narrowing the powers of the National Assembly, or making its use of them subject to UK ministerial consent. The difficulty is that the options that do not involve limiting those powers while introducing a reserved powers model necessitate devolving law-making powers for civil law matters and giving the Assembly significant powers in relation to criminal law (if not devolving both). It is hard to see a way out of this dilemma; these powers are part and parcel of having a workable – and therefore clear, stable and lasting – reserved powers model.

27 The most notable common-law offences are murder, manslaughter, conspiracy to defraud, and committing misconduct in public office.

4

A reserved powers model and a Welsh legal jurisdiction

4.1. Can you have a reserved powers model without a Welsh legal jurisdiction?

At least in the rest of the common-law world, legislatures have their own legal jurisdictions. In federal systems, this means that a legal jurisdiction exists for each parliament; Prince Edward Island and California both constitute distinct legal jurisdictions, with their own bodies of law, courts, legal professions and other institutions, as well as forming part of the overarching Canadian or US federal legal jurisdiction as well. The UK is unusual as it consists of three legal jurisdictions – England and Wales, Scotland, and Northern Ireland – but no overarching 'federal' or Union jurisdiction. For Scotland and Northern Ireland, the legal jurisdiction has two legislatures – the Scottish Parliament or Northern Ireland Assembly, and the UK Parliament. Both are able to pass laws for that part of the UK. While the Scottish Parliament clearly has responsibility for Scots law in general, some areas of Scots law remain reserved, such as banking. Wales is therefore doubly unusual; not only does it share a legal system with the UK Parliament, but it also has a devolved legislature for only part of the jurisdiction of England and Wales.

Both Scotland and Northern Ireland have their own distinct legal jurisdictions; a body of law, courts to enforce them, and legal professions to advise and appear in those courts. The Scottish legal system has existed since at least the middle ages, and continued to operate distinctly after the Union in 1707 (indeed, its preservation was key to several articles of the Treaty of Union). Northern Ireland's legal system dates from the partition of Ireland in 1922 and derives from Ireland's separate legal system which again predated and survived its formal Union with Great Britain. Control of the legal system was central to devolution for Scotland, and policing and criminal justice were largely devolved to Northern Ireland in 2007.[28] In neither case has the separate legal system or its subsequent devolution threatened any fundamental interests of the UK as a state.

Discussion of a legal jurisdiction, and of limits in relation to civil and criminal law, is a telling omission from the Welsh Government's response to the Part 2 report of the Silk Commission.[29] The Welsh Government did carry out a consultation on whether there should be a separate jurisdiction in 2012, but in its evidence to Silk Part 2 concluded 'While it would not be appropriate to establish a separate legal jurisdiction for Wales now, such a development is very likely in the longer term and action can be taken which would help to ensure a smoother transition to such a jurisdiction in due course.'[30] Equally, there was no consensus (and so no proposal for action) deriving from the St David's Day process. The question that needs to be addressed now is whether a legal jurisdiction needs to be established as part of the move to a reserved powers model, and if not what other changes are needed to accomplish that move.

4.2. Establishing a Welsh legal jurisdiction

One option would be to establish a distinct Welsh legal jurisdiction. The powers of the National Assembly (the extent of legislation which it passed) would be limited to Wales, and matters regarding Welsh law would be determined by the Welsh courts, whose powers of enforcement would be limited to Wales. Conversely, Westminster legislation would normally only extend to Wales if expressly made to do so, minimising the scope for incidental effects of English legislation on Wales, and vice versa. (This therefore bears on any approach to implement 'English votes for English laws'.) The scope for legislation passed by either Westminster or Cardiff Bay having an effect outside England or Wales (as the case may be) would consequently be limited. Decisions about the applicability in Wales of law made for England or, indeed for Scotland or Northern Ireland would be determined by the same principles as already apply between England and Wales and Scotland or Northern Ireland, including rules for dealing with conflicts of laws where applicable.

Establishing a Welsh jurisdiction would be a major political decision, and have cost implications if the courts were to be devolved as well. This is clearly a source of concern to the Welsh Government. While a Welsh jurisdiction would be a direct and clear-cut approach to the question, though it would create a range of secondary considerations that would need to be resolved, including what aspects of that Welsh jurisdiction would be within the National Assembly's legislative competence, including the civil and criminal law.

A Welsh legal jurisdiction might be *distinct*, but need not be *separate* from that of England, nor need it necessarily be established as a devolved matter under the control of the National Assembly. (It might be both separate and devolved, but that is a policy choice.) It could remain a 'reserved' matter, under Westminster's control, and continue to share judges, legal professions and other institutions with England. The High Court and Court of Appeal would cease to be those of 'England and Wales', but become those 'of England and of Wales', with judges being appointed to sit in both sets of courts and solicitors and barristers admitted in both England and Wales. The courts would be able to apply the law of England or the law of Wales according to the circumstances.

28 The Northern Ireland arrangements devolve criminal law and criminal justice (including the prosecution service and offender management). The structure of the courts and their independence remain reserved matters, as does the structure of the Police Service of Northern Ireland and cross-border policing arrangements.

29 Welsh Government, *Devolution, Democracy and Delivery: Powers to achieve our aspirations for Wales* WG22188 (Cardiff, 2014).

30 Welsh Government, *Evidence submitted by the Welsh Government to the Commission on Devolution in Wales* WG17658, (Cardiff, 2013), p. 2.

4.3. Dealing with the impact of Welsh legislation in England

Part of the reason for considering a Welsh legal jurisdiction is as a way of addressing questions of extra-territorial effect – devolved legislation 'relating to Wales' that has effects in England as well.

The easiest way to illustrate the nature of the issue is by a case study.

Extra-territoriality and 'overspill': a case study

The National Assembly wishes to prohibit a certain substance ('X') from entering the food chain in Wales. It passes legislation

- to prohibit the possession of X by farmers and their feed suppliers in Wales;
- to require that no animal which had been given X could be slaughtered in an abattoir in Wales,
- to empower inspectors authorised by Welsh Ministers to enter farmers' or feed suppliers' premises to ensure X is not being stored; and
- to require farmers presenting animals at abattoirs to certify that they had not been given X.

These obligations would need to be made enforceable by criminal law, not just as regulatory requirements.

Farmer F operates in England but normally uses a nearby abattoir, which happens to be just across the border in Wales. (The alternative is 40 miles away – so it is more inconvenient and expensive to use, and adds to the stress experienced by animals travelling for slaughter.) So if farmer F uses the Welsh abattoir, he or she has to comply with the Welsh rule not to use X, even though X is perfectly lawful in England where F buys it and supplies it to animals. If Welsh inspectors are to have the right to enter F's farm to establish whether X is being stored for the purpose of being fed to the animals brought into Wales for slaughter, the Welsh provisions need to have an effect in England. Even if the meat is brought back to market in England and so never actually enters the food chain in Wales, and all that happens is that the animal lives its life in England, is slaughtered in Wales and then sold for consumption in England, it might be thought that Welsh policy needs the same powers of enforcement as it has for farmers operating wholly in Wales. If farmer F wishes to continue to use the Welsh abattoir, however, he can be regarded as submitting to the need to be subject to Welsh law including liability to sanctions. The extension of Welsh enforcement provisions to England in this way is provided for in section 108(5) of GWA

In an instance such as the case study above, the National Assembly will wish to pass legislation that has an impact in England as well as Wales. As the categories of legislation (or matters) that 'relate to' Wales and to England are not exclusive, they will often, necessarily, overlap, as is the case here. The issue is not simply one of 'Welsh overspill' – of devolved legislation having an effect in England as well as in Wales, but also its converse, of Westminster legislation for England also having an effect in Wales. Moreover, as a result of the combined jurisdiction and the powers in section 108(5), something done in and for Wales is currently capable of applying and being made enforceable in England as well as Wales. The power of the Secretary of State to intervene (in section 114 GWA) is limited to 'adverse' impacts. It does not address effects which without being necessarily adverse – indeed which may be beneficial – are not desired by those accountable for what happens in England. The upshot in this instance is that a farmer who for practical purposes is 'English' will either have to comply with Welsh law prohibiting X (or face the consequences of not doing so), or make significant changes to his or her ways of working to avoid Wales and Welsh laws, with financial effects and perhaps health effects for the livestock too.

The question of Welsh devolved legislation having spill-over effects outside Wales arises in relation to two sorts of matters: first, reserved matters generally (such as defence or foreign affairs), and secondly matters devolved in Wales for which the UK Government and Parliament are responsible in England (such as health or education and, if not reserved more generally, the criminal and civil law relating to England). These create different but similar issues. The line between reserved and non-reserved matters has been considered by the courts in a number of cases, most notably *Martin and Miller v Lord Advocate* (for Scotland; [2010] UKSC 10) and the *Medical Costs for Asbestos Diseases (Wales) Bill* reference. However, despite these decisions, the National Assembly might still find that, in some cases, the exercise of devolved competence to implement devolved policy makes it desirable for things to be done that a reservation would put outside its competence, just as it may also be desirable, in order to implement devolved policy, for consequential, incidental and enforcement provisions to relate to things occurring wholly or partly in England or in other parts of the United Kingdom.

The drafting issues regarding allowing for provisions to operate for Welsh purposes outside the territorial borders of Wales are more complicated if there is no separate Welsh jurisdiction that can be used to limit the competence of the National Assembly to changes of the law of Wales. However, whether or not there is a Welsh jurisdiction, there may be a policy need to facilitate devolved Welsh legislation which has spill-over effects outside Wales (most likely to affect England). These could be dealt with by an Order in Council made under some mechanism akin to section 104 SA or section 86 Northern Ireland Act 1998. As discussed above, such a procedure might be objectionable when dealing with the making of provision caught by a reservation of the criminal law or civil law, because such a reservation would actually inhibit provisions for making legislation effective within Wales itself. However, it would be consistent with the other settlements as a way of extending (for example) enforcement provisions into England or to other places in the UK where that makes sense or, of dealing with consequential changes in a reserved area. A necessarily expanded version of section 108(5) for the same purpose would have the problems mentioned above and also raise difficult issues of constitutional principle.

4.4. Ways of regulating the effect of Welsh legislation other than a legal jurisdiction

Another way of addressing the problem is to analyse the issue by reference to four territorial characteristics of legislation: its extent, applicability, jurisdiction, and enforcement. 'Extent' is a formal feature of legislation and identifies the territory to whose separate law a particular rule belongs. At present National Assembly legislation has to extend to England and Wales, even if it is only applicable in relation to Wales (as the limits on the Assembly's powers provide; see section 108(4)(b) GWA). Extent in this sense is usually connected to jurisdiction, which relates to the territorial organisation of the courts. The courts of a territory usually apply only the law of that territory and their powers of enforcement are conferred by reference to that territory. Within a single legal system and jurisdiction, it is possible for rules to have limited applicability, with the limitation defined by reference to only part of the territory; and this is what is required by the restrictions on the competence of the Welsh Assembly (GWA s. 108 (4)(b)). Enforcement becomes a more open issue; as matters stand, it is not regulated by GWA, but it could be.

In the absence of a separate Welsh jurisdiction with rules to identify the cases when Welsh law would be the applicable law, it might possible to have a clause that would define those cases just for that purpose. A clause to set out rules for this might take the following form.

Possible clause to limit court jurisdiction and determine where Welsh law applies

(1) This section has effect where in any proceedings -

(a) any matter would (but for this section) fall to be determined in accordance with the provisions of Welsh legislation,

(b) the facts to which that matter relates have connections with England that are no less significant than [their] [the] connections with Wales [by reference to which the provisions of the Welsh legislation apply], and

(c) that matter would be determined differently if the provisions of Welsh legislation were to be disregarded.

(2) Where this section has effect, the provisions of the Welsh legislation that would apply are to be disregarded except to the extent that Her Majesty has by Order in Council designated those provisions as provisions that it would appropriate to apply in cases with a significant connection with England.

(3) No recommendation is to be made to Her Majesty in Council to make an Order in Council under this section unless a draft of the statutory instrument containing the Order has been laid before Parliament and approved by a resolution of each House.

(4) In this section 'Welsh legislation' means—

(a) an Act of the National Assembly for Wales;

(b) a Measure of that Assembly, or

(c) an instrument made under an Act or Measure of that Assembly or any instrument made by the National Assembly for Wales and contained in a statutory instrument.

The complexity of the overall settlement that arises with adjustments such as those discussed above to deal with issues of addressing cross-border spill-over effects and determining which body of law the courts should apply would be considerable. This may itself raise further problems, both of their legal application and of understanding the new arrangements that might be put in place. That may be an argument for the larger step of establishing a Welsh legal jurisdiction instead, even though that itself raises a number of complex issues, including identifying and defining all the cases in which the Welsh jurisdiction is to be exercisable, and the extent (if any) to which that jurisdiction should exclude any competing jurisdiction elsewhere in the UK. The alternative approach is more ad hoc and involves a significant degree of complexity that affects England and English law-making as well as law-making for Wales, though it may be more acceptable politically at present. The clause sets out only one possible test for distinguishing the cases when Welsh rules should prevail over English rules and vice versa. Clearly there is plenty of scope for consideration of whether different rules for that would be better.

5

Drafting the legislation for a reserved powers model

The drafting of a reserved powers model entails a number of choices about drafting methods and approach. Given the constitutional nature of the legislation, these choices are particularly sensitive and need to be considered with care by the drafters. In these respects, the Scotland Act 1998 (SA) serves as a much more workable model than GWA, though it is also far from perfect.

The legal structure of a reserved powers model would need to apply similar principles as those applying currently to Scotland including those in sections 28 and 29 SA. Thus, devolved legislation would apply only in Wales, not relate to a reserved matter, be contrary to EU law, Convention rights or UK international obligations, and be subject to the interpretative test (whether a provision of an Act of the National Assembly relates to a reserved matter being determined 'by reference to the purpose of the provision, having regard to its effect in all the circumstances'). This needs to be accompanied by provisions to make adjustments to other provisions, such as the provisions to make consequential changes by order in council in section 104 SA as well as to adjust the scope of devolved legislative and executive powers (sections 30 and 63 SA respectively).

5.1. Drafting methods: reservations, exceptions to reservations, exceptions to exceptions

The approach taken by Schedule 5 SA is to identify reserved matters, either generally or under a range of 'Heads' such as Home Affairs or Trade and Industry. Reserved matters are subject to 'exceptions' (i.e. matters on which, despite the general reservation, the Scottish Parliament can also legislate). Exceptions are not themselves normally subject to exceptions (so a matter is reserved), but 'interpretation' clauses are used to clarify any potential ambiguity. In addition, certain provisions – including some in the Treaty of Union – are protected from modification by inclusion in Schedule 4.

The approach has the advantage of relative clarity as well as legal certainty. If a matter is reserved, the Scottish Parliament has no power to legislate for it (subject to the various extensions of its competence set out in SA). If it is not mentioned, or excepted from a reservation, it is within devolved competence.

5.2. Drafting methods: 'subject matter of ...', 'deals with a matter', 'relates to a matter'

Identifying the scope of a reservation is also not straightforward if it is to be done with precision and certainty. Numerous reservations in Schedule 5 SA1998 refer to the 'subject matter' of an Act or Part of an Act; for example, Head C7 (Consumer Protection) refers to such acts as the Consumer Credit Act 1974. The interpretation provision notes that this relates to the subject-matter of such Acts when the Scotland Act came into effect, so avoiding the problem of subsequent changes to the Act altering the scope of the reservation. It does create the difficulty of such definitions becoming increasingly outdated as time goes by. With sufficient passage of time and updating of the law, it might well be that the only remaining statutory reference to a particular provision might be in the schedule of reserved matters for devolution.

In any case, identifying the 'subject matter' of a complex piece of legislation intended to deal with a variety of circumstances raises issues of clarity which have never been subject to close scrutiny by the courts.[31] If that were to happen, it is not certain how the courts might approach such questions – particularly if they were to analyse them in a similar way to Lord Mance in the UK Supreme Court *Medical Costs for Asbestos Diseases (Wales) Bill* reference.

5.3. Drafting methods: general/floating and specific exceptions

GWA, at present, offers a range of ways of defining exceptions to devolved subjects. There are overarching 'general restrictions' (set out in Part 2 of Schedule 7), and exceptions under particular subject headings in Part 1 of that Schedule that also apply generally.[32]

SA's structure does not create similar difficulties. It includes 'enactments protected from modification', where the Scottish Parliament may not legislate, set out in Schedule 4 to the Act, as well as 'reservations' set out in Schedule 5. Schedule 4 covers a number of similar matters as some of the Welsh 'general restrictions', protecting such provisions as the European Communities Act 1972 or the Human Rights Act 1998 from modification. (That does not stop the Scottish Parliament from legislating on these subjects, only from doing so in a way that has the effect of modifying the UK statute. In relation to human rights, the Scottish Parliament has used this to establish a Scottish human rights commission through the Scottish Commission for Human Rights Act 2006.) Schedule 5 SA sets both overarching general reservations (which are not qualified) and more specific ones, and notes that exceptions, interpretative provisions and illustrations relate only to the specific reservation involved, not more generally. There is therefore a clear distinction between 'specific' and 'general' reservations.

With one exception, Schedule 4 SA has not been altered since 1998, nor has Part 1 (the general reservations) of Schedule 5. Part 2 has, however, been subject to a number of changes, made using the power in section 30 of the Act which requires positive consent to any change from both Houses of Parliament and the Scottish Parliament.

31 There is some discussion of the interaction between matters reserved in Schedule 5 SA and devolved Scottish legislation in *Imperial Tobacco v Lord Advocate*, [2012] UKSC 61, but it is not a detailed analysis of the drafting in Schedule 5.

32 Section 108(4)(a) GWA provides that devolved legislation must relate to one or more devolved subjects and 'not fall within any of the exceptions specified in [Part 1 of Schedule 7] (*whether or not under that heading or any of those headings*).' (emphasis added)

6

Conclusions: delivering a reserved powers model

A reserved powers model for Wales has many attractions. It would simplify and clarify the devolution settlement, and reduce the need for the courts and particularly the UK Supreme Court to take an active role in matters regarding Welsh legislation. As a result, the National Assembly would be able to act as a more effective legislature, and the devolution settlement for Wales would be more workable, stable and durable. It would not be a panacea and remove all the difficulties that devolution might present, but it would offer substantial practical benefits.

These advantages are not without constraint. Much depends on how a reserved powers model is put into place: how it is drafted, the scope of the matters reserved to Westminster, and how these impinge on the powers of the National Assembly and Welsh Government. The model of the Scottish settlement, and particularly Schedule 5 to the Scotland Act 1998, has a good deal to offer in drafting technique. Even that is not an unqualified success, and if adopted as a model it should be a guide not a rigid constraint.

Within the broad approach to a policy adopting a reserved powers model, there lie a number of issues that are not technical in nature.

First, what criteria are to be used to determine what matters should be reserved? How clear will the proposed reservations be, and how coherent will they be as an overall package? We have set out some considerations in section 2 above that may help. Subsidiary questions also arise. Who will be responsible for framing the list of reservations? What engagement will there be with the Welsh Government and the National Assembly regarding it?

Second, will civil or criminal law be devolved? The analysis above shows that reserving key elements of the criminal law would be possible, but that reserving the civil law would create an unworkable model of devolution. The pressure to devolve civil law may itself make establishing a Welsh legal jurisdiction more attractive.

Third, is an equivalent of section 108(5) GWA modified to cover reserved matters practicable or justifiable in the context of a reserved powers model? If not, are any arrangements needed to deal with those cases where Welsh devolved legislation will have effects in England, and if so what should those be? This question in turn depends on the next, of a legal jurisdiction for Wales, since a direct equivalent of section 108(5) will not be needed if there is such a legal jurisdiction.

Fourth, will a legal jurisdiction for Wales be established or not? Establishing one is a major political step. If it is not established, are ad hoc rules needed, in the context of the reserved powers, to produce an effect that would serve a similar purpose to that served by jurisdictional rules: for identifying when Welsh legislation is applicable, and what should those be?

Finally resolving the questions about how to draft a reserved powers model is not straightforward, nor is it a narrow or technical exercise. Each of those questions contains a set of political judgements about how devolved Welsh powers should work, what Welsh devolution means and how Wales should relate to the UK as a whole and to England. They also have a bearing on issues of 'English votes for English laws'. The answers to those questions need to be made with a full understanding of their implications, underpinned by a larger vision of what Welsh devolution means and how it relates to the UK as a whole than an ad hoc set of political bargains driven by short-term considerations.

However it is done, the flexibilities built into the Scotland Act 1998 are hugely valuable and need to be retained for Wales, where they are even more likely to be used. The power to vary the lists of reserved matters by an order under section 30 SA (with consent of both Houses at Westminster as well as the Scottish Parliament), and similar provisions for executive powers, mean that the settlement can be adjusted to accommodate practical problems while also protecting the interests of the devolved institutions. In this respect, the requirements for devolved consent as part of such order-making powers are the counterpart to the Sewel convention.

The UK Government's first attempt at proposing what powers should be reserved and what should not does not currently address these concerns. We hope that this report will help so that the proposed legislation can achieve a satisfactory outcome and put in place a durable, stable and workable model of devolution for Wales.

Annexes

Annex A: Schedule 2 ('Excepted matters') to the Northern Ireland Act 1998

(Note: this is a version of Schedule 2 to the Northern Ireland Act 1998 as updated and available on legislation.gov.uk on 1 September 2015, with references to modifications and amendments removed.)

1. The Crown, including the succession to the Crown and a regency, but not—

   (a) functions of the First Minister and deputy First Minister, the Northern Ireland Ministers or the Northern Ireland departments, or functions in relation to Northern Ireland of any Minister of the Crown;

   (b) property belonging to Her Majesty in right of the Crown or belonging to a government department or held in trust for Her Majesty for the purposes of a government department (other than property used for the purposes of the armed forces of the Crown or the Ministry of Defence Police);

   (c) the foreshore or the sea bed or subsoil or their natural resources so far as vested in Her Majesty in right of the Crown.

2. The Parliament of the United Kingdom; parliamentary elections, including the franchise; disqualifications for membership of that Parliament.

3. International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations and extradition, and international development assistance and co-operation, but not—

   (aa) co-operation between the Police Service of Northern Ireland and the Garda Síochána with respect to any of the following matters—

      (i) transfers, secondments, exchanges or training of officers;

      (ii) communications (including liaison and information technology);

      (iii) joint investigations;

      (iv) disaster planning;

   (b) the exercise of legislative powers so far as required for giving effect to any agreement or arrangement entered into—

      (i) by a Minister or junior Minister participating, by reason of any provision of section 52A or 52B, in a meeting of the North-South Ministerial Council or the British-Irish Council; or

      (ii) by, or in relation to the activities of, any body established for implementing, on the basis mentioned in paragraph 11 of Strand Two of the Belfast Agreement, policies agreed in the North-South Ministerial Council;

   (c) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law.

In this paragraph "the Human Rights Convention" means the following as they have effect

for the time being in relation to the United Kingdom —

(a) the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950; and

(b) any Protocols to that Convention which have been ratified by the United Kingdom.

4. The defence of the realm; trading with the enemy; the armed forces of the Crown but not any matter within paragraph 10 of Schedule 3; war pensions; the Ministry of Defence Police.

5. Control of nuclear, biological and chemical weapons and other weapons of mass destruction.

6. Dignities and titles of honour.

7. Treason but not powers of arrest or criminal procedure.

8. Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents.

9. The following matters —

(a) taxes or duties under any law applying to the United Kingdom as a whole;

(b) stamp duty levied in Northern Ireland before the appointed day; and

(c) taxes or duties substantially of the same character as those mentioned in sub-paragraph (a) or (b).

10. The following matters —

(a) national insurance contributions;

(b) the control and management of the Northern Ireland National Insurance Fund and payments into and out of that Fund;

(c) reductions in and deductions from national insurance contributions;

(d) national insurance rebates;

(e) payments out of public money to money purchase pension schemes;

(f) contributions equivalent premiums;

(g) rights to return to the state pension scheme.

Sub-paragraph (a) includes the determination, payment, collection and return of national insurance contributions and matters incidental to those matters.

Sub-paragraph (b) does not include payments out of the Northern Ireland National Insurance Fund which relate to —

(i) the benefits mentioned in section 143(1) of the Social Security Administration (Northern Ireland) Act 1992, or benefits substantially of the same character as those benefits; or

(ii) administrative expenses incurred in connection with matters not falling within sub-paragraphs (a) to (g).

Sub-paragraphs (b) and (e) do not include payments out of or into the Northern Ireland National Insurance Fund under —

(i) section 172(1)(b), (2)(a) or (7)(c) of the Pension Schemes (Northern Ireland) Act 1993; or

(ii) Article 202, 227, 234 or 252 of the Employment Rights (Northern Ireland) Order 1996.

In this paragraph "contributions equivalent premium" has the meaning given by section 51(2) of the Pension Schemes (Northern Ireland) Act 1993.

10A. Tax credits under Part 1 of the Tax Credits Act 2002.

10B. Health in pregnancy grant, Child benefit and guardian's allowance.

11. The appointment and removal of judges of the Court of Judicature of Northern Ireland, holders of offices listed in column 1 of Schedule 3 to the Judicature (Northern Ireland) Act 1978, county court judges, recorders, resident magistrates, lay magistrates, justices of the peace, members of juvenile court panels, coroners, the Chief and other Social Security Commissioners for Northern Ireland, the Chief and other Child Support Commissioners for Northern Ireland and the President and other members of the Lands Tribunal for Northern Ireland.

11A. The Supreme Court.

12. Elections, including the franchise, in respect of the Northern Ireland Assembly, the European Parliament and district councils.

13. The subject-matter of the Political Parties, Elections and Referendums Act 2000 with the exception of Part IX (political donations etc. by companies).

This paragraph does not include the funding of political parties for the purpose of assisting members of the Northern Ireland Assembly connected with such parties to perform their Assembly duties.

14. Coinage, legal tender and bank notes.

15. The National Savings Bank.

16. The subject-matter of the Protection of Trading Interests Act 1980.

17. National security (including the Security Service, the Secret Intelligence Service and the Government Communications Headquarters); special powers and other provisions for dealing with terrorism or subversion; the subject-matter of—

(a) the Official Secrets Acts 1911 and 1920;

(b) Chapter I of Part I of the Regulation of Investigatory Powers Act 2000, except so far as relating to the prevention or detection of serious crime (within the meaning of that Act); and

(c) the Official Secrets Act 1989, except so far as relating to any information, document or other article protected against disclosure by section 4(2) (crime) and not by any other provision of sections 1 to 4.

18. Nuclear energy and nuclear installations, including nuclear safety, security and safeguards, and liability for nuclear occurrences, but not the subject-matter of—

Proposed reservation	Reserved in Scotland?	(Head/other provision of reservation)	Reserved/ excepted in N Ireland?	Policy issues and other comments
The Constitution	Yes	Schedule 5 Part 1 para 1	The Crown and Parliament (excepted)	Scottish reservation relates to specific issues: the Crown, UK Parliament, Union of Scotland and England and the Scottish courts
The Civil Service	Yes	Schedule 5 Part 1 para 8	Yes (reserved)	NI reservation limited to Civil Service Commissioners. NICS is not part of Home Civil Service.
Political Parties	Yes	Schedule 5 Part 1 para 6	Yes (excepted)	Scottish reservation limited to registration and funding. NI exception limited to registration.
Elections and Referendums	Elections: Yes Referendums: No	Schedule 5 Head B3	Elections: yes (excepted) Referendums: partly	Reservation of elections in both cases relates to elections to UK Parliament, Scottish Parliament/NI Assembly, European Parliament, and local government franchise. (Local govt elections are devolved.) Registration of political parties is separately reserved in both cases. Referendums a devolved matter as such (depends on whether subject matter is within devolved competence). Conduct of referendums in N Ireland subject to Political Parties, Elections and Referendums Act 2000.

Civil Law and Procedure	No		No	Function devolved. Linked to existence of a separate legal jurisdiction.
Criminal Law and Procedure	No		No	Function devolved. Linked to existence of a separate legal jurisdiction.
Foreign Affairs	Yes	Schedule 5 Part 1 para 7	Yes (excepted)	
Defence	Yes	Schedule 5 Part 1 para 9	Yes (excepted)	
Fiscal, Economic and Monetary Policy	Yes	Schedule 5, Head A1	Yes (excepted)	
The Currency	Yes	Schedule 5, Head A2	Yes (excepted)	
Financial Services	Yes	Schedule 5, Head A3	Yes (reserved)	Exception to reservation in Scotland for bank holidays.
Financial Markets	Yes	Schedule 5, Head A4	Yes (reserved)	
Nationality and immigration	Yes	Schedule 5, Head B6	Yes (excepted)	
Registration of births, marriages, civil partnerships and deaths	No		No	
Extradition	Yes	Schedule 5, Head B11	Yes (excepted)	Extradition excepted for N Ireland by Northern Ireland (Miscellaneous Provisions) Act 2006

Firearms	Yes	Schedule 5, Head B4	Yes (reserved)	For Scotland, defined as 'Subject matter of the Firearms Acts 1968 to 1977. Airguns devolved to Scotland by Scotland Act 2012
Regulation of scientific procedures on live animals	Yes	Schedule 5, Head B7	No	
National security, interception of communications, official secrets and terrorism	Yes	Schedule 5, Head B8	Yes (excepted)	
Emergency powers	Yes	Schedule 5, Head B10	Yes (reserved)	For N Ireland, reservation relates to subject-matter of Emergency Powers Act (Northern Ireland) 1926. Civil defence also reserved.
Public order	No		Yes (reserved)	For Scotland: function devolved, linked to devolved status of criminal law and policing. For N Ireland: remains reserved notwithstanding devolution of policing and justice.
Policing (including police forces and Police and Crime Commissioners)	No		No	For N Ireland: some restrictions on devolved powers notwithstanding devolution of policing and justice.
Prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings	No		No	Linked to devolution of policing and justice.

Criminal records	No		No	Linked to devolution of policing and justice.
Money Laundering	Yes	Schedule 5, Head A5	Yes (reserved)	
Private security industry	No		No	Linked to devolution of policing and justice?
Riot damages	No		No	Linked to devolution of policing and justice?
Anti-social behaviour	No		No	Linked to devolution of policing and justice?
Regulation of CCTV and other surveillance camera technology	No		No	For Scotland: expressly excepted from reservation: see Schedule 5 Head B8, 2nd indent
Modern slavery	No		No	
Licensing of the sale and supply of alcohol	No		No	
Provision of entertainment and late night refreshment	No		No	
Misuse of and dealing in drugs	Yes	Schedule 5, Head B1	No	
Broadcasting and other media	Yes	Schedule 5, Head K1	Yes (reserved)	
Classification of film and video recordings	Yes	Schedule 5, Head B5	No	
Betting, gaming and lotteries	Yes	Schedule 5, Head B9	Partly	For N Ireland, the National Lottery is reserved; otherwise devolved

Public Lending Right	Yes	Schedule 5, Head K2	No	
Government Indemnity Scheme	Yes	Schedule 5, Head K3	No	
Property accepted in satisfaction of tax	Yes	Schedule 5, Head K4	Yes	For N Ireland: covered by exception for taxation generally
Safety at sports grounds	No		No	
Control of dangerous dogs and hunting with dogs	No		No	
Business Associations	Yes	Schedule 5, Head C1	No	
Insolvency and winding up	Partly	Schedule 5, Head C2	No	For Scotland: insolvency etc is reserved in relation to business associations. Personal bankruptcy is devolved. For N Ireland: insolvency is excluded from reservation of court procedures generally.
Competition	Yes	Schedule 5, Head C3	Yes (reserved)	
Intellectual Property	Yes	Schedule 5, Head C4	Yes (reserved)	
Regulation of Imports and Exports	Yes	Schedule 5, Head C5	Yes (reserved)	For Scotland, reservation is in relation to defence powers and endangered plants or animals.
Protection of Trading and Economic Interests	Yes	Schedule 5, Head C15		

The movement of food, animals and plants within the UK	No		No	For Scotland, expressly excepted from reservations in Heads C5 and C8.
Consumer Protection	Yes	Schedule 5, Head C7	No	
Product Standards, Safety and Liability	Yes	Schedule 5, Head C8	Yes (reserved)	NI reservation is for 'Consumer safety in relation to goods'.
Weights and Measures	Yes	Schedule 5, Head C9	Yes (reserved)	
Time	Yes	Schedule 5, Head L9	No	
Telecommunications and wireless telegraphy, internet services and electronic encryption	Yes	Schedule 5, Head C9	Yes (reserved)	
Postal Services	Yes	Schedule 5, Head C11	Yes (reserved)	For Scotland, reservation subject to exceptions regarding financial assistance to post offices
Research Councils	Yes	Schedule 5, Head C12	Yes (reserved)	
Designation of Assisted Areas	Yes	Schedule 5, Head C13	Yes (reserved)	

Water, sewerage and marine matters	In part	Marine transport and navigation reserved by Schedule 5, Head E3, sea fishing by Schedule 5, Head C6.	Navigation (reserved), sea fishing excepted, foreshore, sea bed etc (reserved). Not otherwise.	Water and sewerage proposed for devolution by Silk Commission and in *Powers for a Purpose*.
Non-Energy Minerals	No		No	
Electricity	Yes	Schedule 5, Head D1	No	
Oil and Gas	Yes	Schedule 5, Head D2	No	
Coal	Yes	Schedule 5, Head D3	No	
Nuclear Energy	Yes	Schedule 5, Head D4	Yes (excepted)	
Energy Conservation	Yes	Schedule 5, Head D5	No	
Transport and transport security	In part	Schedule 5, Head E1-E4,	Civil aviation and aspects of security and policing reserved; otherwise no	

Social Security Schemes	Yes	Schedule 5, Head F1	National insurance and old age state pension, tax credits, child benefit and health in pregnancy grant (excepted)	In N Ireland, social security is devolved subject to provisions for legislation to 'provide single system' for the UK. Aspects of social security to be devolved to Scotland under Scotland bill.
Child Support	Yes	Schedule 5, Head F2	No	For N Ireland: subject to provisions to secure 'single system' for UK.
Occupational and Personal Pensions (including public service pensions)	Yes	Schedule 5, Head F3	Yes (reserved)	
Armed Forces Compensation	Yes (war pensions etc)	Schedule 5, Head F4	Yes (war pensions) (excepted)	
Regulation of the Professions	Yes	Schedule 5, Head G	No	For Scotland: architects, specified medical professions and auditors.
Employment and Industrial Relations	Yes	Schedule 5, Head H1	No	
Job search and support	Yes	Schedule 5, Head H3	No	For Scotland: Work Programme proposed for devolution in Scotland bill
Teachers Pay	No		No	
Sale of Student Loans	No		No	

Equal Opportunities	Yes	Schedule 5, Head L2	Yes	Extensive provisions in N Ireland Act 1998 and other UK legislation regarding equal opportunities in N Ireland
Abortion	Yes	Schedule 5, Head J1	No	
Xenotransplantation	Yes	Schedule 5, Head J2	Yes (reserved)	
Embryology, Surrogacy and Genetics	Yes	Schedule 5, Head J3	Yes (reserved)	
Medicines, Medical Supplies and Poisons, including veterinary products	Yes	Schedule 5, Head J4	No	
Welfare Foods	Yes	Schedule 5, Head J5	No	
Health and Safety	Yes	Schedule 5, Head H2	No	
Development of Land including national infrastructure projects	No		No	
Land Registration	No		No	Function devolved. Linked to devolution of civil law.
Land Charges	No		No	Function devolved. Linked to devolution of civil law.
Ordnance Survey	Yes	Schedule 5, Head L4	Yes	

Lieutenancies	Yes	Schedule 5, Head B12	Yes (excepted)	For N Ireland: covered by N Ireland Constitution Act 1973.
Regulation of the legal profession and legal services	No		No	Function devolved. Linked to devolution of the legal system.
Regulation of claims management	No		No	Function devolved. Linked to devolution of the legal system.
Administration of Justice	No		No	Function devolved. Linked to devolution of the legal system.
Offender Management	No		No	
Legal Aid	No		No	Function devolved. Linked to devolution of the legal system.
Mental Capacity	No		No	Function devolved. Linked to devolution of the legal system.
Information Rights	Yes in part	Schedule 5, Head B13	No	
Family Law	No		No	Function devolved. Arguably linked to devolution of the legal system.
Inter-Country Adoption	No		No	

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