Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
16 November 2015

Meeting time:
13.30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

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Agenda

1 Introduction, apologies, substitutions and declarations of interest

2 Evidence in relation to the Draft Wales Bill (Pages 1 - 76)

(Indicative time 13.30 - 14.30)

Dame Rosemary Butler AM, Presiding Officer;
Adrian Crompton, Director of Assembly Business, Assembly Commission;
Elisabeth Jones, Director of Legal Services, Assembly Commission

CLA(4)-28-15 - Paper 1 - Written Evidence
CLA(4)-28-15 - Research Service Briefing

3 Evidence in relation to the Draft Wales Bill (Pages 77 - 90)

(Indicative time 14.30 - 15.30)

Rt Hon Carwyn Jones AM, First Minister;
Hugh Rawlings, Director of Constitutional Affairs and Intergovernmental Relations, Welsh Government

CLA(4)-28-15 – Paper 2 – Written Evidence

4 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Pages 91 – 94)

CLA(4)-28-15 – Paper 3 – Statutory instruments with clear reports

Negative Resolution Instruments

CLA604 – The Care and Support (Review of Charging Decisions and Determinations) (Wales) Regulations 2015
Negative procedure; Date made: 27 October 2015; Date laid: 3 November 2015; Coming into force date: 6 April 2016

CLA605 – The Care and Support (Direct Payments) (Wales) Regulations 2015
Negative procedure; Date made: 21 October 2015; Date laid: 3 November 2015; Coming into force date: 6 April 2016

CLA606 – The Care and Support (Charging) (Wales) Regulations 2015
Negative procedure; Date made: 27 October 2015; Date laid: 3 November 2015; Coming into force date: 6 April 2016

CLA607 –The Care and Support (Deferred Payment) (Wales) Regulations 2015
Negative procedure; Date made: 27 October 2015; Date laid: 3 November 2015; Coming into force date: 6 April 2016

CLA608 –The Care and Support (Choice of Accommodation) (Wales) Regulations 2015
Negative procedure: Date made: 27 October 2015; Date laid: 3 November 2015; Coming into force date: 6 April 2016

CLA609 –The Care and Support (Financial Assessment) (Wales) Regulations 2015
Negative procedure; Date made: 27 October 2015; Date laid: 3 November 2015; Coming into force date: 6 April 2016

CLA615 – The Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015 (Pages 95 – 107)
Negative procedure; Date made: 21 October 2015; Date laid: 4 November 2015; Coming into force date: 23 November 2015.

CLA(4)-28-15 – Paper 4 – Regulations
CLA(4)-28-15 – Paper 5 – Explanatory Memorandum
CLA(4)-28-15 – Paper 6 – Letter from the Minister regarding breach of the 21 day rule

Other Legislation Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA601 – The Code of Practice on the Exercise of Social Services Functions in relation to Part 4 (Meeting Needs) of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA602 – The Code of Practice on the Exercise of Social Services Functions in relation to Part 3 (Assessing the Needs of Individuals) of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA603 – The Code of Practice on the Exercise of Functions in relation to Part 6 (Looked After and Accommodated Children) of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA611 – Code of Practice and Guidance on the Exercise of Social Services Functions and Partnership Arrangements in relation to Part 2 (General Functions) of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA612 – Code of Practice on the Exercise of Social Services Functions in relation to Advocacy under Part 10 and Related Parts of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA613 – Code of Practice on the Exercise of Social Services Functions in Relation to Part 11 (Miscellaneous and General) of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA614 – Code of Practice on the Exercise of Social Services Functions in relation to Part 4 (Direct Payments and Choice of Accommodation) and Part 5 (Charging and

Financial assessment) of the Social Services and Well-being (Wales) Act 2014
Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

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

Negative Resolution Instruments

CLA610 -The National Independent Safeguarding Board (Wales) (No. 2) Regulations 2015 (Pages 108 - 121)
Negative procedure: Date made: 30 October 2015; Date laid: 3 November 2015; Coming into force date: 25 November 2015

CLA(4)-28-15 - Paper 7 - Report
CLA(4)-28-15 - Paper 8 - Regulations
CLA(4)-28-15 - Paper 9 - Explanatory Memorandum

6 Papers to note (Pages 122 - 167)

CLA(4)-28-15 - Paper 10 - Letter from the Chair of the Finance Committee in relation to the Draft Wales Bill

CLA(4)-28-15 - Paper 11 - Letter from the Chair of the Public Accounts Committee in relation to the Draft Wales Bill

CLA(4)-28-15 - Paper 12 - Letter from the Minister for Natural Resources in relation to the Environment (Wales) Bill

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

(vi) 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 Oral Evidence

Final Draft Report Tax Collection and Management (Wales) Bill (Pages 168 - 181)
CLA(4)-28-15 - Paper 13- Final Report

Final Draft Report Public Health (Wales) Bill (Pages 182 - 209)
CLA(4)-28-15 - Paper 14 - Final Report Public Health (Wales) Bill

European Commission Work Programme 2016 (Pages 210 - 219)
CLA(4)-28-15 - Paper 15 - European Commission Work Programme

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Your ref:
Our ref: PO/RB/ER/BA

11 November 2015

Dear David

Thank you for inviting me to provide evidence to inform your Committee's consideration of the draft Wales Bill.

As well as the issues relating to the draft Bill that I describe in this submission, I have significant concerns about the piecemeal fashion in which our constitution is developing. In addition to the draft Wales Bill, the Scotland Bill is passing through Westminster, substantial devolution is happening to the cities and regions of England and proposals to deal with English Votes for English Laws are being taken forward in Westminster. A stable constitutional basis for devolution will only emerge if such changes are made in the context of a coherent vision for the future of the Union as a whole. Regrettably, this is missing from the current array of proposals for devolution across the UK.

I remain of the view that the fundamental organising principle, and therefore the starting point for this legislation and for the devolved settlements, should be subsidiarity: the centre should reserve to itself only what cannot be done effectively at a devolved level. I made this clear in my evidence to the Constitutional and Legislative Affairs Committee earlier in the year. My second basic premise is that our national governance should be clear and understandable – not just for politicians, civil servants and the legal profession – but for all people. This is a fundamental principle of democracy that people should be able to understand easily who makes the laws by which they live.

To achieve these outcomes, I believe there needs to be a genuinely consultative process, to which the public and all four nations of the Union contribute on an equal footing, to develop a coherent constitutional framework.

The draft Bill falls short in these respects. However, I am pleased that it addresses other commitments within the St David's Day agreement to provide the Assembly with the powers to determine its own operational and electoral matters.

My support for the move to reserved powers has always been contingent on the model meeting three key criteria: clarity, workability and no roll-back of the Assembly's existing legislative competence. The challenge seems to me, therefore, to ensure that the Wales Bill which is actually introduced next year goes as far as possible towards delivering the '*clear devolution settlement for Wales which stands the test of time'* that the Secretary of State aspired to in Powers for a Purpose. As part of this, I would therefore draw your attention in particular to my proposals for simplifying the tests for legislative competence that a future Presiding Officer, Government and Assembly will need to apply.

If the UK Government proceed with the proposals presented in the draft Bill, further Supreme Court referrals and/or other legal challenges to Assembly legislation will be inevitable. I am therefore encouraged by the Secretary of State's commitment to continued dialogue during the pre-legislative scrutiny process to achieve a lasting settlement.

In that spirit, my submission suggests ways in which the draft Bill might be amended. I hope that these suggestions will be of value to the Committee and, with your support, will be acted upon by the UK Government.

Yours sincerely

Dame Rosemary Butler AM
Presiding Officer

THE DRAFT WALES BILL – WRITTEN EVIDENCE FROM DAME ROSEMARY BUTLER AM, PRESIDING OFFICER OF THE NATIONAL ASSEMBLY FOR WALES

1. Proposed reserved powers model

1.1 The draft Wales Bill would transform the Assembly's legislative competence from a conferred to a reserved powers model - a move that I greatly welcome. However, my preference would be to see the new Welsh settlement organised on the principle of subsidiarity – the centre should reserve to itself only what cannot be done at the devolved level. Such a principled approach is the only way to achieve a truly stable and sustainable settlement for Wales – a position shared by the Constitutional and Legislative Affairs Committee in their recent report on the proposals for further devolution.[1] In my view, the draft Bill does not achieve this. The number and detail of the reservations reveal a technical mind-set rather than the principled approach fitting for a stable, coherent and sustainable devolution settlement.

1.2 Irrespective of the approach taken, I have made it clear that my support for the move to reserved powers is contingent on the model meeting three key criteria: **clarity**, **workability** and **no roll-back of the Assembly's existing legislative competence**.[2] As drafted, I believe the proposals would increase the complexity of the settlement, and therefore reduce its clarity and workability. The continued intervention of the courts would be inevitable in order to clarify the Assembly's competence. The legislative competence of the Assembly would be reduced in significant ways, leaving it potentially unable to pass several pieces of legislation that have been made by the current Assembly.

1.3 I have set out my detailed concerns regarding the proposals for a reserved powers model, and the potential implications of such, in my response to the Wales Office. I have since published this analysis,[3] which includes specific illustrative examples of the complexity and impracticalities that would potentially arise from the proposals as drafted. I include this detailed analysis at annex A. The following provides a summary of some of these concerns.

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[1] National Assembly for Wales, Constitutional and legislative Affairs Committee, The UK Government's Proposals for Further Devolution to Wales, July 2015

[2] National Assembly for Wales, Constitutional and Legislative Affairs Committee, UK Government's proposals for further devolution to Wales, Evidence from the Presiding Officer of the Assembly, June 2015

[3] DP-1481-11-16: Letter and supporting material dated 2 September 2015 from Rosemary Butler AM to Stephen Crabb MP, Secretary of State for Wales, regarding the draft Wales Bill

1.4 The first concern is **the number of tests of legislative competence.** The draft Bill actually **increases the number of tests from nine to ten by comparison to the current model**. Moreover, four of the ten are "double tests" – so, arguably, there would now really be **13 tests** for competence. These have to be applied to each provision of an Assembly Bill (see section 2 of annex A), which, like Parliamentary Bills, may run to several hundred sections and numerous Schedules. This in itself increases the **complexity** of the settlement, which in turn reduces its **workability**.

1.5 Secondly, there is the **internal complexity** of the tests. The draft Bill introduces four completely **new tests** based on the word "necessary" (see section 3 of annex A). These are the "double" tests referred to above, i.e. they each set out two tests that each Assembly Bill provision must pass. This creates complexity, compounded by the use of the term 'necessary', which is **capable of a range of meanings in law** and therefore creates a new area of legal **uncertainty** in the settlement. In turn this will, inevitably require elucidation by the Supreme Court.

1.6 It is true that the Scotland Act 1998 contains one similar "necessity test". However, (as discussed in annex A), it has a much more limited impact in Scotland due to fundamental differences in the nature of the devolution settlement; and it is just one test, not four.

1.7 The complexity is increased further by the **overlapping nature** of tests and reservations in the draft Bill. For example, the Assembly's competence to create "criminal law" provisions is constrained by three separate restrictions.[4]

1.8 So, in all these respects, the proposals **reduce clarity and workability**, contrary to their stated aim.

1.9 Other elements of the proposed model also create new areas of uncertainty in the settlement, making it vulnerable to challenge. For example, the proposed concept of 'Welsh public authority', in proposed Schedule 7B to GOWA 2006, is extremely **unclear** and will be **very difficult to operate in practice with legal certainty.**

[4] The restriction in paragraph 4 of proposed new Schedule 7B to GOWA; the reservation of "The prevention, detection and investigation of crime"; reservation 38, in Section B5 of proposed new Schedule 7A to GOWA; and the general reservation relating to the single legal jurisdiction of England and Wales contained in paragraph 6 of that proposed Schedule.

1.10 While the draft Bill offers the Assembly important new areas of legislative competence, it also **rolls back** competence in very significant, though not immediately obvious, ways.

1.11 Of foremost concern are the **new restrictions on the Assembly modifying "the private law" and "the criminal law"** (see sections 4 and 5 of annex A). Private law – contract law, property law etc. – and criminal law underpin all other areas of law. It is impossible to legislate effectively in any way that affects rights and obligations without using aspects of private or criminal law to enforce obligations and make rights effective. The Assembly has done so in numerous pieces of legislation, from its very first Measure, on an NHS redress scheme, through the ground-breaking Human Transplantation (Wales) Act, to the current Renting Homes Bill, which is largely based on Law Commission recommendations. The severe constraints which the draft Bill would place on the Assembly's use of these key levers is a **very significant backward step** in our status and powers as a legislature.

1.12 There is also **significant roll-back** of the Assembly's ability to legislate free of UK Ministerial consent. The draft Bill extends the need for such consents in five new and far-reaching ways. It greatly increases the number of bodies in relation to which UK consent will be needed; it extends the need for consent so that is also covers recently-created and future functions; and it takes away the Assembly's ability to remove or modify functions in a merely incidental way. It is notable that this last restriction reverses the effect of the Supreme Court judgment in the case of the Local Government Byelaws (Wales) Bill.

1.13 Finally, there is significant **roll-back in the reservations themselves**. A large number of **matters which are not exceptions from the Assembly's current competence have been made into reserved matters** in the draft Bill. This in itself represents roll-back and a reversal of the Supreme Court judgment in the Agricultural Sector (Wales) Bill case. Moreover, at present, the Assembly can legislate in relation to excepted topics in limited ways, including to make other provisions enforceable or effective. This ancillary competence is **rolled back** in the draft Bill by the introduction of the "necessity tests", referred to above.

1.14 These concerns are expanded upon in annex A. Taken together, this means that the proposed model will, sadly, not improve the clarity and workability of the current settlement, and many elements will result in a significant roll-back of the Assembly's current competence

1.15 Given that a key area of concern relates to the tests for legislative competence, particularly the new 'necessity' tests and the increased need for Minister of the Crown consents, I have asked my officials, in collaboration with a former Parliamentary Counsel, to consider how the new section 108A (clause 3) and new Schedule 7B may be simplified. I include the suggested amendments, with accompanying commentary to explain their intended purpose, at annex B.

1.16 I am also concerned about the practical implications of clause 32(4) regarding the proposed commencement of the eventual Bill. This suggests that the new competence arrangements will come into force two months after the passage of the Act. This will mean that Assembly Acts not passed prior to that date will have to be checked under the new competence provisions, as they could be outside the new competence. This would entail considerable preparation and planning on the part of both the Welsh Government and the Assembly to ensure that legislative timetables allow for this. I suggest that the draft Bill should provide for a transitional arrangement, to ensure that the Assembly's legislative programme in the Fifth Assembly is not disrupted in this way.

1.17 I believe that the Secretary of State is sincere in his ambition to deliver a stable and sustainable settlement, and I am committed to work with him to achieve this aim. However, to do so the proposals in the draft Bill need significant revision.

2. Permanence of the Assembly

2.1 The draft Bill provides for statutory recognition of the Assembly and Welsh Government as permanent parts of the UK's constitutional arrangements (clause 1). I welcome this attempt to implement a recommendation of the Silk Commission and acknowledge the Assembly as an accepted part of the political landscape. However, I retain concerns about the weakness of the provision as a way of achieving genuine permanence for the devolved institutions, given the doctrine of UK Parliamentary sovereignty. I am aware that similar concerns have been raised in relation to the corresponding clause in the Scotland Bill.[5]

[5] House of Commons, Political and Constitutional Reform Committee, Ninth Report of Session 2014-15, Constitutional implications of the Government's draft Scotland clauses, HC 1022, 16 March 2015, House of Lords, Constitution Committee, Tenth Report of Session 2014-15, Proposals for the devolution of further powers to Scotland, HL Paper 145, 24 March 2015 and Scottish Parliament, Devolution (Further Powers) Committee, New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, May 2015

2.2 Such a provision in an Act of Parliament is a strong political signal of the permanence of the devolved institutions and the strength of this should not be underestimated. However I support the view that additional safeguards could be incorporated to entrench that permanence, such as making abolition of the Assembly conditional on one or both of the consent of the devolved legislature, or the electorate.[6]

2.3 At the time of writing amendments to the corresponding clause in the Scotland Bill have been proposed by the Secretary of State for Scotland,[7] proposing that the term 'recognised' is removed from the clause, and adding the requirement for a referendum to abolish either of the devolved institutions. I would expect that any such amendments made to strengthen the position of the Scottish Parliament in this respect should also be reflected in a future Wales Bill.

3. Legislative consent procedure

3.1 The draft Bill provides for statutory recognition of the current legislative consent convention (clause 2). This is something I have called for on many occasions. The clause sets out that '...it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly'. While I welcome the spirit of the provision, I have two concerns with its current form.

3.2 Firstly, I share the concern of others that this clause will not achieve a robust statutory basis for the legislative consent convention.[8] Rather than making the convention a judicially enforceable rule, it merely enshrines a political guideline. The use of the word 'normally' in the clause is of particular concern. I note that, at the time of writing, an amendment to the Scotland Bill is pending to omit the word 'normally'.[9] An alternative approach has been proposed, retaining the term 'normally' but clarifying it by setting out explicitly the circumstances where consent would not be required.[10] I consider that either of these suggestions would be preferable to the current drafting in relation to Wales.

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[6] Scottish Parliament, Devolution (Further Powers) Committee, 3rd Report, 2015 (Session 4): New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals

[7] House of Commons, Scotland Bill: Notices of Amendments given up to and including 2 November 2015

[8] House of Commons, Political and Constitutional Reform Committee, Ninth Report of Session 2014-15, Constitutional implications of the Government's draft Scotland clauses, HC 1022, 16 March 2015

[9] HoC, Scotland Bill, Notice of Amendments given up to and including 22 October 2015

[10] House of Commons, Political and Constitutional Reform Committee, Ninth Report of Session 2014-15, Constitutional implications of the Government's draft Scotland clauses, HC 1022, 16 March 2015

3.3 Secondly, in relation to the scope of the clause, under the current convention, the range of situations in which the Assembly's consent is sought remains narrower than is the case for Scotland.[11] As recommended by the Silk Commission, I would wish to see this convention – and any statutory expression of it – apply at least as broadly to Wales as is currently the case in Scotland.

3.4 In summary, this means that a statutory legislative consent mechanism should cover at least any UK Bill, or any statutory instrument amending primary legislation applying to Wales for any purpose:

- within the legislative competence of the Assembly; or
- which alters the legislative competence of the Assembly; or
- which alters the executive competence of the Welsh Ministers.

3.5 Most importantly, the clause as currently drafted deals only with the UK Parliament's ability to legislate on matters within devolved competence. It does not deal with the situation where a UK Bill seeks to amend that competence. In that respect, it would reduce the scope of the current convention relating to Wales, which would, in my view, be unacceptable.

3.6 I also agree with the conclusions of the Assembly's Constitutional and Legislative Affairs Committee,[12] that there is a case for going beyond the current Scottish convention, so as to require Assembly consent for UK Bills which alter the functions of the Assembly, without altering its legislative competence.

4. Operational arrangements of the Assembly

4.1 In my contribution to the St David's Day process I raised concerns regarding the constraints on the operation and management of the Assembly's affairs. These are currently set out in Westminster legislation and so I offered proposed alternatives so that the Assembly can manage its own affairs, like any other mature legislature.

4.2 I am pleased to see that, in the main, the draft Wales Bill makes provision for the Assembly to have control over its internal operations, and addresses most of the existing constraints in the Government of Wales Act (GOWA) 2006 in relation to our operational arrangements, including for example:

[11] As set out in Standing Orders of the Scottish Parliament, Chapter 98

[12] National Assembly for Wales, Constitutional and Legislative Affairs Committee, Report on the Legislative Consent Memorandum, Wales Bill, June 2014

- the ability to change the name of the Assembly (subject to a super-majority);
- rules relating to the position of Presiding Officer and Clerk;
- participation of Secretary of State in Assembly proceedings;
- the ability to determine the composition of the majority of the Assembly's committees.

4.3 However, there are some important areas where I would like to see the draft Bill go further to remove specific constraints remaining in the GOWA 2006. These specific issues are detailed in annex C.

4.4 Although the draft Bill provides for many operational arrangements to be brought within the Assembly's competence, it would still require the Assembly to pass primary legislation immediately in order to make provision and take over the management of its own affairs. I do not believe this would be a sensible use of legislative time. To ensure that the Assembly has real flexibility over its operational arrangements and that this can be utilised as soon as possible, I would propose that some provisions could be amended to allow the Assembly both competence to legislate and the ability to make provision in Standing Orders (subject to basic safeguards).

4.5 For example, section 25 of the GOWA 2006 provides for the office of Presiding Officer and Deputy Presiding Officer. The draft Bill brings this within competence, which is very welcome. However, my preference would be that the draft Bill be amended to give the Assembly freedom to decide whether to make provision via legislation or Standing Orders.

4.6 Arrangements for the Assembly Commission in section 27 (and Schedule 2) of GOWA 2006 are mostly brought within competence in the draft Bill (but see annex C for further discussion of Schedule 2 paragraph 5). Again, I very much welcome this; but I consider that it would be more appropriate and practical for the Assembly to be able to decide on the number of Commissioners and the criteria and method of their appointment via its own Standing Orders, rather than having to resort to legislation to deal with such matters. I appreciate that, in that legislation, the Assembly could itself provide for these matters to be left to Standing Orders; but that would still cause considerable delay before the Assembly could modify this entirely internal matter, and that delay is what I wish to avoid.

4.7 Similarly, sections 30, 34 and 38 of the GOWA 2006 relating to the audit committee, Counsel General participation and Clerk's notification of witnesses have all been brought within competence (with the exception of

section 30 (1)). I believe that these could be more appropriately dealt with via Standing Orders rather than requiring immediate legislation.

4.8 A further area of concern to me relates to the lesser privileges for AMs in relation to defamation and contempt of court, as compared with those applicable to MPs (as provided for in sections 42 and 43 of GOWA 2006). This is an area I have previously raised with the Secretary of State, and I am pleased to see that the draft Bill brings these clauses within the Assembly's competence. However, I will need to consider further the potential implications of the general restrictions and reservations in Schedule 7 of the draft Bill on this new competence.

5. Electoral arrangements

5.1 I am pleased that the draft Bill would provide the Assembly with legislative competence over electoral arrangements, including important factors such as the number of Assembly Members, the manner in which Assembly Members are elected, the franchise, electoral system and the length of Assembly terms.

5.2 Competence is provided in three distinct ways, not all of which are consistent with arrangements in other devolved areas and in some cases are likely, in my view, to cause further uncertainty.

5.3 **Clauses 4, 5 and 6 transfer current functions of the Secretary of State to the Welsh Ministers**: I welcome the transfer of power in relation to making provision for the conduct of elections (section 13 of GOWA 2006) is welcome. However, I consider that transfer of the Secretary of State's power to change the date of the election by one month (section 3 of GOWA 2006) to the Welsh Ministers in not entirely appropriate. I believe that this, and the corresponding power relating to the minimum period for dissolution, should sit with the Presiding Officer, as is the case in Scotland.

5.4 **Schedule 7A Section B1 sets out specific reservations from the Assembly's competence in relation to electoral matters**: I am particularly concerned regarding the specific reservation relating to the Boundary Commission for Wales. I foresee that this may prove problematic, when considering the Assembly's ability to legislate in respect of constituency and regional boundaries. For example, if the Assembly were to legislate to dissociate Assembly and Westminster constituency boundaries, it may well need to seek advice from the Boundary Commission for Wales. Thus, I would consider it appropriate that an exception is introduced to enable the

Assembly to confer functions on the Commission in relation to the Assembly's electoral arrangements, to allow for this.

5.5 **Schedule 7B paragraph 7 specifically excludes from competence the power to modify the GOWA 2006, with certain exceptions**: I welcome the transfer of competence in relation to electoral arrangements. However, I am concerned that the Assembly has not been given competence relating to the term of office, resignation and disqualification of AMs (sections 14-19 of GOWA 2006). The Constitutional and Legislative Affairs Committee have previously identified significant problems with the current law relating to disqualification that could not be amended without UK primary legislation.[13] In my view, the draft Bill presents an opportunity to give the Assembly the power to address this, and I am disappointed to see that this has not been dealt with.

6. Financial provisions in legislation

6.1 The majority of provisions pertaining to finance, accountability and audit (finance provisions) are set out in Part 5 of GOWA 2006, with others contained in GOWA 1998, Public Audit (Wales) Act 2013, Wales Act 2014, and relevant founding legislation for other public bodies. The prescriptive nature of these provisions has made it impossible for the Assembly to legislate holistically for a comprehensive financial framework, and has made it difficult to keep pace with developments, for example Treasury's alignment project and best practice in relation to resource accounting and budgeting.[14] Furthermore, with the pending devolution of further fiscal powers, these provisions are likely to lose currency going forward.

6.2 Most legislatures have a framework enactment to govern their financial provisions – for example the Public Finance and Accountability (Scotland) Act 2000 and the UK Government's Resources and Accounts Act 2000. No such comprehensive legislation is possible for Wales within our current competence.

6.3 The Assembly's Finance Committee has recommended that, given the competence to do so, the Assembly should enact such financial framework legislation, to modernise the budget process and create common, up-to-date accounting and audit provisions for all Welsh public bodies. [15] I believe that the Assembly should have maximum flexibility to legislate on such financial

[13] National Assembly for Wales Constitutional and Legislative Affairs Committee, Disqualification of Membership from the National Assembly for Wales July 2014

provisions. Thus, allowing such a financial framework Bill to be an early candidate for legislation in the Fifth Assembly.

6.4 The draft Bill sets out no specific reservations in Schedule 7A pertaining to finance and accountability provisions[16] - thus it might appear that the Assembly has wide-ranging legislative competence over such matters. However, Schedule 7B sets out a number of specific restrictions making it clear that this is not the case and that the current prescriptive provisions remain in force. This appears to go against the spirit of a reserved powers model - the limited powers of the Assembly in relation to financial provisions remain of a conferred nature.

6.5 I have provided a suggested model (see annex D) to rectify this and provide the Assembly with fiscal powers appropriate for a mature legislature. This outlines the basic safeguards which rightly need to remain in Westminster legislation, and proposes a series of amendments to schedule 7B which would facilitate these changes.

7. Wider implications for the Union

7.1 As I stated in evidence to the House of Lords Constitution Committee,[17] I believe that a stable constitutional basis for devolution requires a coherent vision for the future of the Union as a whole. Our constitution is developing in a piecemeal fashion, with a focus on what the devolved institutions can be permitted to do, rather than considering the wider impact on, and purpose of, the Union.

7.2 The fundamental organising principle for the devolved settlements should be subsidiarity: the centre should reserve to itself only what cannot be effectively done at a devolved level. The principle of parliamentary sovereignty as our organising principle will appear increasingly inappropriate in a UK where devolved institutions enjoy equal standing and equivalent powers, albeit in more limited fields. Basing all the settlements on subsidiarity would still allow for a different pace and pattern of devolution, where appropriate in the light of history, popular appetite or other factors.

7.3 I believe we need a genuinely collaborative process, to which all four nations of the Union contribute on an equal footing to develop an agreed constitutional framework. Such a framework could recognise areas of

[16] With the exception of an understandable reference to the National Audit Office and Comptroller and Auditor General (Schedule 7A paragraph 12)

[17] HoL Constitution Committee, The Union and Devolution, Evidence from the Presiding Officer of the National Assembly for Wales

commonality and difference, and consider the impact of devolution on the Union as a whole. It would also enable us to move beyond the current focus on process and Whitehall driven administrative preference to a more principled, stable solution.

7.4 In conclusion, I wish to reiterate that an immediate practical step for Wales would be a new Wales Act which delivers a clear, workable, principled approach to determining the future devolution settlement for Wales. As outlined above, I do not believe that the draft Bill meets this aim. However I remain committed to working with partners to achieve this. The Wales Bill 2016 will be the fourth piece of Welsh devolution legislation – therefore I believe that we should take the time to ensure it is right and meets our shared ambitions for a stable and sustainable settlement.

ANNEX A: ANALYSIS OF THE PROPOSED RESERVED POWERS MODEL (Replacement clause 108A and Schedules 7A and 7B) AGAINST PRESIDING OFFICER'S TESTS OF CLARITY, WORKABILITY AND NO ROLL-BACK OF COMPETENCE

Introduction

This analysis does not focus on individual reservations. The National Assembly for Wales Commission sees those as primarily a matter for discussion between the Welsh and UK Governments (save for any which might touch on the Assembly as an institution). Instead, it concentrates on the tests for competence, which are of key interest to the Assembly and to the Presiding Officer, who has a statutory duty to apply those tests and to reach a view on whether each provision of an Assembly Bill is within the Assembly's competence or not.

However, the Presiding Officer's tests of clarity, workability and no roll-back of competence do, of course apply to individual reservations and the Assembly Commission may make submissions on the reservations, or certain of them, for that reason – whether before or after publication of the draft Bill.

Clause 1 – new section 108A GOWA 2006 – the test for legislative competence

1. **Overview**

1.1 Initially, clause 1 appears to introduce 5 tests for competence – as compared to 9 currently. This would suggest a significant, and welcome, simplification of the settlement.

1.2 However, the fourth test (contained in new section 108A (2)(d) of the Government of Wales Act 2006 (GOWA 2006)) itself contains 5 separate tests – all set out in new Schedule 7B. And the fifth test (contained in new section 108A (2) (e)) contains 2 tests.

1.3 Therefore, in fact, the Bill sets out 10 tests for competence, as opposed to 9 now. This in itself does not accord well with the principles of clarity and workability. Moreover, most of the tests are not straightforward to apply.

1.4 Some of these complex tests are the same as, or similar to, current tests (e.g. the meaning of the words "relates to", and compliance with the European Convention on Human Rights and EU law). **But some of them are new – in particular, the four new "necessity" tests.**

1.5 The 10 tests are set out below. As mentioned, some of them are the same as current tests. Others are new, but flow inevitably from the change to

a reserved powers model. But there are other tests – or elements of tests – that are new, that do not flow inevitably from a reserved powers model and which would constrain the Assembly more than at present – in other words, that **roll back competence.** These are marked in bold in the list. There then follows an analysis of the new tests/elements, with worked examples referring to clarity, workability and whether there is roll-back of the Assembly's current competence.

2. The 10 tests

2.1 The 10 proposed tests for competence are that a provision of an Assembly Bill:

(i) Must not extend beyond the England and Wales jurisdiction.

(ii) Must not apply otherwise than in relation to Wales or confirm, impose, modify or remove functions exercisable otherwise than in relation to Wales (or give the power to do so), unless the modification:
(a) is incidental to a Welsh provision, or
(b) is consequential on a core competence provision, or
(c) provides for enforcement of a core competence provision, or
(d) is appropriate for making a core competence provision effective;
AND
has no greater effect beyond Wales than is necessary to give effect to the purpose of the core competence provision.

(iii) Must not "relate to" reserved matters listed in Schedule 7A.

(iv) Must not modify the law on reserved matters, unless the modification:
(a) is incidental to a core competence provision, or
(b) is consequential on a core competence provision, or
(c) provides for enforcement of a core competence provision, or
(d) is appropriate for making a core competence provision effective;
AND
has no greater effect on reserved matters than is necessary to give effect to the purpose of the core competence provision.

(v) Must not modify private law (contract, tort, property law, trusts etc – see definition), unless the modification:
(a) is necessary for a devolved purpose, or
(b) is incidental to a provision made for a devolved purpose, or
(c) is consequential on a provision made for a devolved purpose, or
(d) provides for enforcement of a provision made for a devolved purpose, or
(e) is appropriate for making a provision made for a devolved purpose effective;
AND

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

(vi) must not modify the criminal law (or civil penalties), unless the modification:

(a) is incidental to a provision made for a devolved purpose, or

(b) is consequential on a provision made for a devolved purpose, or

(c) provides for enforcement of a provision made for a devolved purpose, or

(d) is appropriate for making a provision made for a devolved purpose effective;

AND

has no greater effect on the general application of the criminal law/civil penalties than is necessary to give effect to that devolved purpose,

AND

is not a road traffic offence.

(vii) Must not modify a protected enactment (listed in Schedule 7B – some are provisions of GOWA 2006, some of other legislation).

(viii) Must not affect Minister of the Crown functions, government departments or other "reserved authorities" in prohibited ways. **(This test is similar to an existing one but has been significantly widened, i.e. has been made more restrictive of competence).**

(ix) Must not be incompatible with the Convention rights.

(x) Must not be incompatible with EU law.

3. Analysis of the new "necessity" tests – clarity and workability

3.1 The new "necessity" tests, which appear in clause 1 (new section 108A(3) of GOWA 2006) and in paragraphs 2, 3 and 4 of new Schedule 7B, constrain the Assembly's competence to make provisions affecting England, or modifying the law on reserved matters, or modifying "private law" (contract, tort, property law etc) or criminal law. Such provisions are not unusual or tangential, judging from experience of the conferred powers model. In particular, provisions that could be said to modify private law or criminal law arise in every Assembly Bill that modifies the rights or obligations of individuals or private bodies.

3.2 In terms of clarity and workability, the first issue that arises is that "necessary" is a concept capable of a range of meanings. This is a very practical issue, as it means that there will be uncertainty about the breadth of the Assembly's competence, at least until the Supreme Court has first pronounced on the meaning of the term. Indeed, that uncertainty could well lead to repeated legal challenges, as the Supreme Court's first judgment

might well be confined to a particular legal context or the wording of a particular reservation.

3.3 A key aim of the new proposals is to create a "clear, robust and lasting" settlement for Wales[18] - one that would not need elucidation by the Supreme Court. The existence of a range of meanings of the word "necessary" immediately contradicts this. Further problems will be created, depending on which of the available meanings is chosen by the courts as the correct one.

Strict interpretation

3.4 The courts might interpret "necessary" in an objective way, according to its normal dictionary meaning in English. The Shorter Oxford English Dictionary,[19] for instance, defines it as "that cannot be dispensed with … requisite, essential, needful … requiring to be done, that must be done". The drafting of the Schedule appears to point quite strongly to this interpretation, in that the wording of the test is (in each case where it appears), that the Assembly Bill provision must:

> *have no greater effect on [the protected concept] than is necessary to give effect to [the devolved purpose].*

3.5 The concept of "no greater than is necessary" appears to call for a rigorous scrutiny of precisely what was "essential" in the context and what would go beyond that essential minimum.

3.6 This interpretation would have the advantage of clarity. It would also facilitate workability in a narrow sense, because there would be greater certainty and predictability as to the meaning of the term.

3.7 However, in a more important sense, this objective interpretation of the word would very much undermine the workability of the settlement. This is because the threshold for competence would be very difficult to cross, wherever the necessity test came into play. Ministers developing legislation, the Presiding Officer deciding competence, and Members scrutinising an Assembly Bill, would have to be satisfied that the manner in which the Bill affected England, or the law on reserved matters, or private law, or criminal law, was absolutely the least impactful way of doing so while still achieving the purpose of a "core competence" provision (a provision which is within competence without needing to be subjected to any of the "necessity" tests).

Flexible interpretation – Human Rights Act-type approach

3.8 If, on the other hand, the concept of what is "necessary" were applied more flexibly, different issues would arise. The courts might, for instance,

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[18] Secretary of State for Wales's introduction to *Powers for a Purpose,* Cm 9020.

[19] Sixth edition

decide to interpret “necessity” in the way in which they do when considering cases under the Human Rights Act 1998.

3.9 The word “necessary” appears in a number of the Convention[20] rights set out in the Act. Case-law of the Court of Human Rights in Strasbourg has established that, in that context, it means "proportionate". Interference by a State with a human right can be justified as “necessary” if it is proportionate to the importance of the legitimate aim pursued. So, even a severe interference may be accepted as “necessary” if the aim is important enough.

3.10 The courts may look at the question of whether the aim could have been achieved by a less severe interference[21]. If they do, there would be little or no difference between the objective, dictionary-based meaning (essential to achieve the purpose of the core competence provision) and the “Human Rights Act meaning” (a proportionate way of achieving the purpose of the core competence provision).

3.11 However, there is another element in the UK courts’ approach to the concept of "necessity" in the Convention, an element which creates greater flexibility in some cases. This element is often described as the concept of “margin of appreciation”, “margin of discretion” or “deference”. Essentially, the courts accept that there are often a number of options that could achieve a particular policy aim; that it is for governments and legislatures to decide which of them to pursue; and that, in certain contexts, the courts should interfere with that choice only if it is “manifestly without foundation”[22]. In other words, the courts should not second-guess that choice by analysing minutely whether one option would have had slightly less impact on a particular human right than the option that was in fact chosen.

3.12 The context in which the courts have applied this flexible interpretation of what is “necessary” is the context of social and economic policy choices – a complex context in which the interests and rights of certain groups are almost inevitably being balanced against those of others.

3.13 However, in other contexts, the courts tend to set a higher threshold for proof of necessity. This approach reaches its apogee in contexts where judges consider themselves to be expert: i.e. impact on the administration of justice or on the law itself. If the courts followed this approach in the case of the proposed Welsh settlement, the likelihood is that they would scrutinise very closely any Bill’s impact on private or criminal law, and would allow the

[20] European Convention on Human Rights and Fundamental Freedoms agreed at Rome, 4/11/1950

[21] See the four-stage approach to assessment of the legality of interferences with human rights set out by the Supreme Court in the case of *Bank Mellat v. Her Majesty's Treasury (No 2)* [2013] UKSC 39. This approach is not always taken by the Strasbourg Court itself but is becoming increasingly established in the UK courts.

[22] See, for instance, the decision of the Grand Chamber of the European Court of Human Rights in the case of *Stec v United Kingdom* (2006) 43 EHRR 47.

Assembly very little or no latitude in deciding whether that impact was "necessary" or not.[23]

3.14 Thus, the "human rights" approach to the concept of "necessity" would be more workable in the sense of allowing more freedom of action to the Assembly to make holistic legislation, in certain policy contexts. However, it would not be wholly predictable how widely the courts would interpret the word "necessary" in any particular case. The uncertainty is vividly illustrated by the disagreement within the Supreme Court itself in very recent cases such as *R (SG and others) v Secretary of State for Work and Pensions*[24], contrasted with *R (ota Tigere) v Secretary of State for Business, Innovation and* Skills[25]. And in some contexts, past experience suggests that the courts would allow little or no discretion to the legislature.

Flexible interpretation – EU-law based approach

3.15 The lack of clarity and legal certainty (and therefore workability) caused by the introduction of a necessity test is highlighted by the fact that the Supreme Court has recently delivered a landmark judgement[26] stating that the approach to proportionality (i.e., the concept of justification or necessity) is different depending on whether the case concerns the European Convention on Human Rights or European Union law.

3.16 One such difference concerns the contexts in which the courts will construe necessity strictly, versus where they will allow the government/legislature considerable discretion as to what is "necessary". The EU-law approach requires the courts to apply a "necessity" test strictly to any derogation from general EU rights (e.g. in the case of a national law limiting the free movement of goods on the grounds of public health, there would be a high threshold of proof of the "necessity" for the restriction). It is possible that the courts might take a similar approach to the necessity test for competence. In other words, they might interpret new section108A(3) and paragraphs 2(1), 3(4) and 4(2) of Schedule 7B, as "derogations" from the "normal" position that an Assembly Bill cannot affect England, the law on reserved matters, private law or criminal law. And they might then follow the EU-law approach of construing derogations narrowly – i.e. against competence. As noted above, the way in which the necessity tests are drafted tends to support this way of interpreting them: they prohibit any "greater effect [on the protected concept] than is necessary to give effect" to the

[23] The likelihood of this high threshold for necessity where a Bill impacts on private law or criminal law is also suggested by Lord Mance's remarks on competence to affect the law of tort and contract in the Supreme Court's judgment in the case of *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill,* [2015] UKSC 3,paras. 27 and 57 in particular.

[24] [2015] 1WLR 1449.

[25] [2015] UKSC 57.

[26] R (on the application of Lumsdon) v Legal Services Board; Bar Standards Board (Intervener) [2015] UKSC 41

devolved purpose being pursued.

Problem of inconsistent results between different tests for competence

3.17 It must be remembered that compatibility with Convention rights and with EU law are separate tests for competence. As highlighted above, they will very frequently raise issues of whether a Bill provision is "necessary" or not.

3.18 Until the uncertainty about the meaning of the new "necessity" tests is resolved, it is possible that the Presiding Officer might consider that a Bill provision is "necessary" in human rights terms (i.e. is proportionate to the legitimate public-interest aim pursued) but modifies the law on reserved matters (or private law, or criminal law) in a manner that goes beyond what is "necessary", because the same aim could be achieved in a different way. That different way might not necessarily affect human rights less severely; it might simply affect reserved matters (etc.) less. The same could apply in the context of the test for EU-law compatibility.

3.19 Strictly speaking, this does not give rise to a legal "problem"; if the two tests of "necessity" are different, they can produce different results without any legal incompatibility arising. However, that will feel counter-intuitive and be extremely difficult for members of the public, and even Assembly Members, to understand. In other words, it will make the Welsh devolution settlement even more opaque than at present – which is the opposite of the Secretary of State for Wales's aim.

Comparison with the "necessity" test in the Scotland Act 1998

3.20 Although there is a 'necessity test' within the Scotland Act 1998 (Schedule 4, paragraph 3), this has a much more limited effect. There are several reasons for this, not least of which is that there is only one such test in the Scotland Act, as opposed to four in the proposed Welsh settlement.

3.21 This Scottish test is very similar to the test in Schedule 7B, para 2(1); i.e. it relates to competence to modify the law on reserved matters. Indeed, it appears, at first sight, more constraining than the Welsh test, because it allows the Scottish Parliament to modify the law on reserved matters only in incidental or consequential ways, and where "necessary". The Welsh equivalent, on the other hand, would also allow competence for enforcement and effectiveness purposes, where "necessary".

3.22 **However, this impression that the Scots test is stricter is largely false. This is because, crucially, Scots private law and Scots criminal law are not reserved matters.** Therefore, almost any modification of Scots private law or criminal law is within competence and so the Scottish Parliament does not need to confine itself to incidental or consequential modifications, and the "necessity" test does not apply. So the Scottish

Parliament can modify Scots private or criminal law to enforce other provisions, or to make them effective, without needing to pass any necessity test. In other words, it does not need an express exception for enforcement and effectiveness provisions.

3.23 Of course, there are many other reserved matters where the test does come into play. But it is private and criminal law that, overwhelmingly, provides a legislature with ways of enforcing the rights and duties it creates, or making them practically effective.

3.24 The Scottish Parliament can also, of course, make substantive changes to Scots private and criminal law (not merely modify these areas of law). Indeed, paragraph 2(3) of the same schedule to the Scotland Act 1998 makes clear that Acts of the Scottish Parliament can make changes to rules of Scots private law or criminal law that themselves affect reserved matters, subject only to a short list of exceptions.

4. Analysis of the new necessity tests – roll-back

4.1 Test 4 – effect on the law on reserved matters

A provision of an Assembly Bill must not modify the law on reserved matters, unless the modification:

(a) is incidental to a core competence provision, or

(b) is consequential on a core competence provision, or

(c) provides for enforcement of a core competence provision, or

(d) is appropriate for making a core competence provision effective;

AND

has no greater effect on reserved matters than is necessary to give effect to the purpose of the core competence provision.

4.2 This test rolls back competence in two ways.

4.3 The first way relates to the fact that many of the "silent subjects" in the current settlement will become reserved matters – e.g. employment. Under the current settlement, the Assembly can legislate on these, provided that the purpose of that legislation also relates, "fairly and realistically", to a subject in Schedule 7 GOWA 2006[27]. In contrast, under the proposed settlement, it will be able to do so only in the very limited ways set out in Test 4. The whole of Test 4 - in so far as it relates to reservations that are currently exceptions - therefore rolls back competence, not merely the introduction of a necessity test.

4.4. Example

[27] See the judgment of the Supreme Court in the case of *Agricultural Sector (Wales) Bill, Reference by the Attorney General for England and Wales* [2014] UKSC 43, para. 67.

An Assembly Bill might seek to legislate on wages, conditions and training in the social care sector (a notoriously low-pay sector) in a similar manner to the way in which the Agricultural Sector (Wales) Act 2014 did in the agricultural industry. The aim of that Bill might be, as in the case of the 2014 Act, to ensure a sustainable care sector in Wales, a country with a high proportion of elderly, sick and disabled residents. In the present settlement, it seems clear that, by analogy with the Supreme Court decision in the Agricultural Sector (Wales) Bill case, the Bill concerning social care would be within competence. But it is highly likely that the reservation of "employment rights and duties and industrial relations" under Head H, Section H1, of proposed Schedule 7A would take the same Bill outside competence. The single exception from Section H1, for the subject-matter of the 2014 Act, makes this even more likely: it is clear that agricultural wages, holidays and training are within competence; the implication is that these matters will be reserved for other sectors of the economy.

4.5 Secondly, the new necessity test also rolls back competence as regards topics which are currently exceptions from competence and which will become reserved matters under the proposed settlement (e.g. "Generation, transmission, distribution and supply of electricity"). Currently, the Assembly can legislate on excepted matters, provided that it does so only incidentally, consequentially, for enforcement, or in a way that is "appropriate" to make the legislation effective. In other words, competence is currently subject to the first part of Test 4. But it is not currently subject to the second part – the "necessity test". And that necessity test narrows the Assembly's competence considerably.

4.6 Example

An Assembly Bill introduced by the Welsh Government seeks to reduce marine pollution (which will not be a reserved matter). The Welsh Government consider that the Bill should regulate certain shipping routes, as part of achieving its aim. But "navigational rights and freedoms" will be a reserved matter. They are also currently covered by an exception in Schedule 7 GOWA. Currently, the Bill would be within competence if its effect on navigational rights and freedoms was "appropriate" to make the legislation effective. In other words, it may not be the least impactful option, but it is an appropriate option. It could also be one of a suite of measures included in the Bill, to tackle marine pollution in a number of ways.

There is no doubt that the existence of the exception would make this a difficult competence issue, currently. However, there is also no doubt that the words "no greater than necessary" are capable of setting a much higher threshold for competence than the word "appropriate". Therefore, the

likelihood is that, under the proposed settlement, it would be considerably harder to show that there was competence for this part of the Bill.

4.7 It is noteworthy that the Welsh Government normally canvasses a number of different options for achieving its aims in legislation. This is part of evidence-based and transparent policy-making, which, in modern times, is generally regarded to be a desirable way for governments and legislatures to proceed. These options– or at least the main ones considered - will be set out in consultation documents and in the Explanatory Memorandum accompanying a Bill. The public availability of these options will give ammunition for challenges to competence based on the "necessity" tests. This is another factor pointing to the proposed settlement being subject to even more court challenges than the present one.

4.8 Test 5 – effect on private law

This test provides that an Assembly Bill must not modify private law (which is defined as contract, tort, property law, trusts, succession and some other related areas of law), unless the modification:

(a) is necessary for a devolved purpose, or
(b) is incidental to a provision made for a devolved purpose, or
(c) is consequential on a provision made for a devolved purpose, or
(d) provides for enforcement of a provision made for a devolved purpose, or
(e) is appropriate for making a provision made for a devolved purpose effective;

AND

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

4.9 This test is wholly new and so constitutes a significant roll-back of competence. Currently, "contract", "tort" etc. can be seen as silent subjects – meaning that the Assembly can legislate on them as it wishes, provided that the legislation in question also "fairly and realistically" "relates to" a subject in Schedule 7 GOWA.

4.10 Alternatively, "contract", "tort" etc. can be seen, not as separate subjects in themselves, but simply as "the law" – the infrastructure that underpins all the specific law on subject areas. Under this view, again, the Assembly is currently free to modify the rules of contract, tort, etc., if it is doing so as a genuine part of legislating on a subject listed in Schedule 7.

4.11 A third interpretation is that "contract", "tort" etc. are simply ways of making substantive provisions enforceable or effective. If seen in that way, the Assembly's current competence to modify them is set out in section

108(5) GOWA – which is similar to Test 5, but, crucially, contains no "necessity" test.

4.12 Whichever analysis is adopted, it is clear that Test 5 rolls back the Assembly's competence in relation to cross-cutting areas of law.

4.13 It may be argued that the Assembly's competence in relation to the private law was narrowed by the judgment of the majority in the Supreme Court in the case of the Recovery of Medical Costs of Asbestos Diseases (Wales) Bill[28]. In that case, Lord Mance, delivering the judgment of the majority, states that a particular conferred subject of competence, "organisation and funding of national health service" does not cover "rewriting the law of tort and breach of statutory duty by imposing [a liability] on third persons …, having no other direct connection in law with the NHS"[29].

4.14 We would argue that this judgment is confined to its facts and says very little about the Assembly's competence in general terms. It is confined:

(a) to the particular conferred subject in question; and

(b) to the particular type of liability imposed, on the particular category of persons in question.

4.15 In other words, the Supreme Court might have found that the Assembly had competence, even under "organisation and funding of National Health Service", to create a new quasi-tortious liability on a person having a more "direct connection" with the NHS. In addition, or alternatively, it might have found that the Assembly had competence to alter the law of tort under a different subject of competence: "environmental protection", perhaps.

4.16 It is also of concern that Schedule 7A includes a specific reservation for "civil proceedings" (Schedule 7A, paragraph 6(1) and (2). The combined ambit of this reservation and of the restriction in Schedule 7B appears very wide, and it is not clear what the boundary between them is (given that "civil proceedings" is not fully defined, but only glossed as "including" certain things).

<u>4.17 Test 6 – effect on the criminal law</u>

This provides that an Assembly Bill must not modify the criminal law (or civil penalties), unless the modification:

(a) is incidental to a provision made for a devolved purpose, or

(b) is consequential on a provision made for a devolved purpose, or

(c) provides for enforcement of a provision made for a devolved purpose, or

(d) is appropriate for making a provision made for a devolved purpose effective;

[28] [2015] UKSC 3.

[29] Ibid, paragraph 27.

AND

has no greater effect on the general application of the criminal law/civil penalties than is necessary to give effect to that devolved purpose;

AND

is not a road traffic offence.

4.18 This test is wholly new and so represents a significant roll-back from the present settlement. As with “civil proceedings”, there is also specific reservation for “criminal proceedings” in paragraph 6 of Schedule 7A. Equivalent remarks apply as to Test 5.

5. New elements in Test 8 - the test regarding modification etc of Minister of the Crown functions and effects on reserved authorities.

5.1 This test is contained in paragraph 8 of Schedule 7B. It rolls back competence in a number of significant ways and is of considerable concern.

5.2 Currently, the Assembly is prohibited from removing or modifying a "pre-commencement" function of a "Minister of the Crown", unless the Secretary of State consents, or the removal/modification is incidental or consequential. "Pre-commencement" means existing before 5 May 2011.

5.3 The first way in which the proposed new test rolls back competence is that it applies to all functions of UK ministers – not merely pre-commencement ones (see paragraph 8(1)(a)). Thus, the Assembly will not be able to remove or modify any function of a UK Minister that was created between 5 May 2011 and the date of coming into force of the Bill.

5.4 Additionally, it appears that the provision is "ambulatory": in other words, the Assembly would be prohibited from removing or modifying a future function of a UK Minister.

5.5 It is true that it is unlikely that UK Ministers will have been given new functions in areas that are generally devolved, or that they will be in the future, because to do so would require the Assembly to pass a Legislative Consent Motion – at least in theory. However, there have been occasions when the Welsh Government (and the Assembly) has considered that a Legislative Consent Motion was necessary, and the UK Government has disagreed. In those cases, the UK Government has gone ahead and legislated against the wishes of the Welsh Government and Assembly. Therefore, this widening of the restriction on the Assembly's competence gives grounds for concern.

5.6 This roll-back of competence contrasts sharply with the position in Scotland. It is true that the Scottish Parliament cannot legislate to modify an enactment which relates to UK Ministerial powers (Schedule 4 paragraph 6 of the Scotland Act 1998). However, in reality, this restriction is of extremely narrow effect, since all UK Ministerial powers within the Parliament’s

competence were transferred to the Scottish Ministers when devolution took effect in 1999, apart from a very limited list of shared functions (set out in s. 56 of the Scotland Act 1998). It is only this very limited list that is outside the Parliament's competence.

5.7 The second way in which this new test rolls back competence is that it removes the ability of the Assembly to remove or modify a function of a UK Minister, where to do so is incidental or consequential. The fact that this is a roll-back of the Assembly's current competence is demonstrated by the fact that the provision reverses the effect of the Supreme Court judgment in the case of the Local Government Byelaws (Wales) Bill.

5.8 The third way in which this new test rolls back competence is that the prohibition now extends beyond functions of UK Ministers, to cover all "reserved authorities". The prohibition also bans the Assembly from conferring or imposing any function on such authorities (paragraph 8(1)(b)). "Reserved authority" is defined as meaning a Minister of the Crown or government department, and any other public authority, apart from a "Welsh public authority" (also defined). It is, therefore, very wide.

5.9 The fourth way in which the new test rolls back competence is that it introduces a new category of prohibition on the Assembly. This prohibits the Assembly from conferring, imposing, modifying or removing "any functions specifically exercisable in relation to a reserved authority" (paragraph 8(1)(c)).

5.10 Finally, and fifthly, the new test introduces a further new prohibition, banning the Assembly from making modifications of the constitution of a reserved authority (paragraph 8(1) (d)).

5.11 The many restrictions introduced by paragraph 8 will constrain the Assembly from making effective legislation, as it could require the Assembly to dis-apply its legislation from many bodies. This could very much weaken the introduction of policies that require concerted action, such as provisions to protect the environment or to promote public health.

5.12 Paragraph 8 of Schedule 7B is also extremely problematic in terms of clarity and workability. Its complexity is perhaps illustrated by the fact that it contains four separate restrictions on competence and four definitions of terms that appear in it. It alone takes up roughly a page of legislation.

<u>"Reserved authorities" restriction – comparison with Scotland</u>

5.13 The Scotland Act 1998 deals with 3 kinds of authority[30], expressly or implicitly:

(a) Bodies/offices/office-holders that are part of the Scottish Administration – these are all wholly within competence (implicitly);

[30] Not counting the Parliament itself and the SPCB

(b) Bodies/offices/office-holders which have only functions which are exercisable in or as regards Scotland and do not relate to reserved matters – these are also wholly within competence (implicitly);
(c) Bodies/offices/office-holders with mixed functions – i.e., some functions which are exercisable in or as regards Scotland and do not relate to reserved matters, and some other functions – either functions that extend beyond Scotland (even though relating to non-reserved matters) or functions that relate to reserved matters. These authorities will not normally be within competence (unless the provision is consequential/incidental), and the Scottish Ministers' executive powers to establish, maintain or abolish them must be exercised jointly with the relevant Minister of the Crown (section 56 Scotland Act 1998).

5.14 The Assembly's proposed competence would appear to be wider than that of the Scottish Parliament. It would cover bodies, offices or office-holders whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters. The first condition is the same as the first Scottish condition under (b) above. But the second condition is less strict than the second Scottish condition under (b).

5.15 Nevertheless, the proposed restriction represents a roll-back from the present settlement as regards public authorities.

5.16 Moreover, the Welsh test is less clear (and therefore potentially less workable) than the Scottish one. A definition that depends on the concept "wholly or mainly" is ripe for dispute – especially in this area of financial and political responsibility for public bodies, which is likely to be hotly contested. It is true that similar wording has been used in other legislation (e.g. GOWA 2006 itself, and the Public Bodies Act 2011) to draw the boundary between individual devolved and UK responsibilities. However, that does not make it suitable for a piece of legislation that aims to create a clear and lasting devolution settlement across the board.

5.17 Furthermore, the reservation of named bodies (dealt with in paragraph 216 of Schedule 7A) again represents a roll-back of competence by comparison with the present situation, in which the Assembly could (for instance) impose a function on a body named in an exception in Schedule 7 GOWA 2006, provided that doing so was incidental to or consequential on a "core competence" provision, or enforced such a provision, or was appropriate to make it effective (s. 108(5) GOWA 2006).

6. Conclusion

6.1 Taken as a whole, the proposals do not look clearer and more workable than the current settlement. Indeed, the "necessity" tests make the new proposed competence both less clear and less workable. Less clear, because it is going to be very difficult to assess whether a provision is within

competence or not. This means also less workable, because it suggests that there will be numerous references to the Supreme Court (and/or other legal challenges, after Royal Assent, as has happened in Scotland in cases such as *HM Advocate v. Martin and Miller*[31]; *Imperial Tobacco Ltd v Lord Advocate (Scotland)*[32] and *Salvesen v Riddell & Anor*[33]).

6.2 It will also be less workable in that it will be more difficult to legislate seamlessly across related areas and to provide for enforcement and effectiveness of the substantive legislative provisions.

6.3 The new tests might be acceptable if the reservations were not numerous or wide, because the net effect might still be an extension of competence, and more workable competence (although the restrictions concerning private law and criminal law would continue to be problematic, as they are so cross-cutting).

6.4 However, the reservations in Schedule 7A appear to be numerous. The width of them cannot be properly assessed at this time due to the Commission's limited resources and the restrictions on the number of Commission lawyers who can have access to the documents. We understand that the Welsh Government is carrying out an in-depth analysis of Schedule 7A.

6.5 The greater restriction of competence when modifying Minister of the Crown functions, and the introduction of a new restriction in relation to "reserved authorities", also represents roll-back of competence.

ELISABETH JONES
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[31] [2010] UKSC 10
[32] [2012] UKSC 61
[33] [2013] UKSC 22

ANNEX B – SUGGESTED AMENDMENTS TO DRAFT WALES BILL TO SIMPLIFY LEGISLATIVE COMPETENCE TESTS

Introduction

The Presiding Officer is committed to working constructively with the Secretary of State on the draft Wales Bill to achieve her aims of clarity, workability and no roll-back of Assembly competence.

To this end, she has requested Daniel Greenberg, a former Parliamentary Counsel and internationally-recognised expert in legislative drafting, to work with Assembly lawyers to produce alternative drafts of those tests of Assembly competence which are new or are more restrictive than the present ones.

The resulting options are set out below. First of all, three alternative options are offered (A, B, C) in relation to the following;

- 1: Legislative Competence test (clause 3: new s.108A);
- 2: Scope of reservation in "the law on reserved matters" (Schedule 2: new Schedule 7B, paragraphs 1 and 2);
- 3: Scope of reservation on "private law" (Schedule 2: new Schedule 7B, paragraph 3); and
- 4: Scope of reservation on "criminal law" (Schedule2: new Schedule 7B, paragraph 4).

The options are organised into sets – A, B and C. Each set contains a version of all the provisions that have been reworked in a particular way. Option A sets out revised versions of five different provisions of the Bill; Option B sets out another alternative version of those provisions; as does Option C.

All the options seek to simplify the tests for legislative competence and make their outcome more predictable – i.e. to reduce legal uncertainty and the associated constraint on policy development and risk of court challenges.

- Option A is the Presiding Officer's preferred option, as it goes the furthest towards maintaining the current scope of Assembly competence.
- Option B is a middle option which restores less Assembly competence, retaining more of the intention of the draft Bill in a clearer and more workable fashion.
- Option C is the option which restores least Assembly competence and so is closest to the intention of the draft Bill as it currently stands. The wording of this Option, however, varies most noticeably from the draft Bill. This demonstrates that greater clarity is possible within the confines that the draft Bill sets out.

There is a final set of options relating to circumstances in which an Assembly Bill requires UK Government consent - 5: Minister of the Crown, government departments and other reserved authorities (Schedule 2: new Schedule 7B, paragraph 8). Again two alternatives are presented: Options 5A and 5B.

More detailed explanations of the legal effect of the different options are given in each section.

OPTION A

Commentary: The effect of these Option A amendments would be as follows.
First, they would **simplify** the draft Bill by **reducing the number of tests for competence**. One test would completely disappear – the restriction on the Assembly "modifying the law on reserved matters" (see suggested amendment 2A to proposed new Schedule 7B, paras. 1 and 2, of the draft Bill, below). That restriction appears to overlap with the restriction on the Assembly legislating in a way that "relates to reserved matters" and so we have proposed removing the duplication.
Option A would also reduce the number of tests by rationalising the four new "necessity" tests. In the draft Bill. All these tests are double-headed – they each require an Assembly Bill provision to pass two tests. Option A reduces each of these to a single test, based purely on whether the Assembly is legislating on a devolved issue or not.
To do this, Option A removes the concept of "necessity" in the four tests. This has the added advantage of removing a concept that is capable of a range of legal meanings. Removing it makes it easier to predict with certainty whether an Assembly Bill will be within competence or not.
Option A restores Assembly competence to its current level in terms of its ability to touch, in a minor way, on England or on "reserved matters". Of course, there are no "reserved matters" as such in the current settlement. But the reserved matters in the draft Bill are based on exceptions and "silent subjects" in the current settlement. It is the competence to touch on these topics that Option A seeks to restore.
The Assembly's current competence to affect England and to legislate on topics that are exceptions is contained in section 108(5) GOWA 2006. Its competence to affect "silent subjects" (topics that are neither subjects nor exceptions in the current settlement) was established in a Supreme Court judgment.
Finally, but very importantly, Option A goes some way to restore the Assembly's ability to use the criminal law and the civil law as the underpinning of policy provisions in its legislation. (Civil law is called "the private law" in the draft Bill, and defined as covering, amongst other things, the law of contract, tort and property). Civil and criminal law are two of the three foundations of English and Welsh law, along with public law. The proposed amendments ensure that the Assembly would be able to use those foundations in building legislation on devolved policy in the same way as at present, rather than having its competence in this respect rolled back by the application of a new "necessity" test.

Option 1A: Suggested amendment to Clause 3 (new section 108A)
3 Legislative competence
(1) For section 108 of the Government of Wales Act 2006 (legislative competence) substitute—
"108A Legislative competence
(1) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.
(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it extends otherwise than only to England and Wales,

(b) it applies otherwise than in relation to Wales or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales,

(c) it relates to reserved matters (see Schedule 7A),

(d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions, or

(e) it is incompatible with the Convention rights or with EU law.

(3) But ***neither*** subsection (2)(b) ***nor (2)(c)*** ~~does~~ not apply ***applies*** to a provision which ~~(a)~~ is ancillary to a provision which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly)~~., and~~

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

(4) In determining what is necessary to give effect to the purpose of that provision, any power to make laws other than that of the Assembly is to be disregarded.

(5) The question whether a provision of an Act of the Assembly relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(6) For the purposes of this Act ~~a~~ ***one*** provision ***("the minor provision")*** is ***"***ancillary***"*** to another provision ***("the main provision")*** if ~~it~~—

(a) ***the minor provision is a reasonable consequence of the major provision, or*** ~~provides for the enforcement of the other provision or is otherwise appropriate for making that provision effective, or~~

(b) ***the minor provision is designed to enforce, or otherwise give full effect to, the major provision***. ~~is otherwise incidental to, or consequential on, that provision.~~

(2) For Schedule 7 to the 2006 Act (Acts of the Assembly) substitute—

(a) the Schedule 7A set out in Schedule 1 to this Act, and

(b) the Schedule 7B set out in Schedule 2 to this Act.

Option 2A: Suggested amendment to Schedule 2 (new Schedule 7B) Law on reserved matters

~~*The law on reserved matters*~~

~~1 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters.~~

~~(2) "The law on reserved matters" means—~~

~~(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and~~

(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter, and in this sub-paragraph "Act of Parliament" does not include this Act.

2 (1) Paragraph 1 does not apply to a modification which is ancillary to a provision made (whether by the Act in question or another enactment) which does not relate to reserved matters. , and

(b) has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision.

(2) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.

Additional Commentary:
This option is dependent on the adoption of Option 1A above. It should not be used unless 1A is also being put forward.
It would remove one of the 10 new proposed tests for competence, thus simplifying the reserved powers model proposed in the Bill to a modest extent.

Option 3A: Suggested amendment to Schedule 2 (new Schedule 7B) Private law
Private law

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

(2) "The private law" means the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession.

(3) In sub-paragraph (2) the reference to the law of property does not include intellectual property rights relating to plant varieties or seeds.

(4) Sub-paragraph (1) does not apply to a modification which—

(a) is necessary for a devolved purpose or is ancillary to a provision made (whether by the Act in question or another enactment) which has a devolved purpose., and

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

(5) "Devolved purpose" means a purpose, other than modification of the private law, which does not relate to a reserved matter.

(6) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.

Option 4A: Suggested amendment to Schedule 2 (new Schedule 7B) Criminal law and civil penalties
Criminal law and civil penalties

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

(2) Sub-paragraph (1) does not apply to a modification which—

(a) is ancillary to a provision made (whether by the Act in question or another enactment) which has a devolved purpose~~., and~~

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

(3) But sub-paragraph (2) does not permit the creation of, or any other modification of the criminal law relating to, road traffic offences.

(4) In this paragraph "devolved purpose" means a purpose, other than modification of the criminal law, which does not relate to a reserved matter.

~~(5) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.~~

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

OPTION B

***Commentary*:** The effect of these Option B amendments would be as follows.

Like Option A, Option B would simplify the four new "necessity" tests for legislative competence. In the draft Bill, all those tests are double-headed – they each require an Assembly Bill provision to pass two tests. Option B reduces each of these to a single test, based purely on whether the Assembly is legislating on a devolved issue or not.

To do this, Option B removes the concept of "necessity" in the four tests. This has the added advantage of removing a concept that is capable of a range of legal meanings. Removing it makes it easier to predict with certainty whether an Assembly Bill will be within competence or not. This is, again, similar to Option A.

Option B also restores Assembly competence to its current level in terms of its ability to touch, in a minor way, on England (Assembly competence to so at present is contained in s. 108(5) GOWA 2006).

However, Option B is less radical than Option A. It does not restore the Assembly's current competence to touch on exceptions and silent subjects, when these are converted into reserved matters by the draft Bill. And it does not reduce the overall number of new tests for competence – it retains the two separate restrictions that appear to overlap (one of which prevents the Assembly from legislating in a way that "relates to reserved matters", and the other of which restricts the Assembly from "modifying the law on reserved matters"). However, in relation to the latter restriction, Option B does restore Assembly competence to its current level as set out in section 108(5) GOWA 2006.

Option B is also less radical than Option A in relation to the Assembly's ability to use the civil law as the underpinning of policy provisions in its legislation. (For "civil law", see Option A commentary, above). The difference between Option A and Option B in this respect is subtle, but important. Option A would allow the Assembly to use civil law concepts in its legislation, subject only to the requirement that the provision had a devolved purpose, or was ancillary to another provision that had a devolved purpose. An example of the former might be revising tenancy contracts,

where the purpose was to make renting legally simpler and safer. An example of the latter might be using the law of tort to enforce a new prohibition on polluting. Option B would allow the Assembly the same latitude in terms of "ancillary" provision, but if the Assembly wanted to use the civil law in a non-ancillary way – as in the example concerning tenancy contracts, above – the Assembly would have to show that its Bill provision was "necessary" for the devolved purpose – not simply the best way of achieving it, or even just a good way of achieving it. This would place an additional constraint on the Assembly by comparison with the current settlement - but less of a constraint than the draft Wales Bill as currently worded. Option 4B is the same as Option 4A and restores the Assembly's current ability to use the criminal law to enforce substantive provisions in its Bill, or to make them effective.

Option 1B: Suggested amendment to Clause 3 (new section 108A)

3 Legislative competence

1) For section 108 of the Government of Wales Act 2006 (legislative competence) substitute—

"108A Legislative competence

(1) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it extends otherwise than only to England and Wales,

(b) it applies otherwise than in relation to Wales or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales,

(c) it relates to reserved matters (see Schedule 7A),

(d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions, or

(e) it is incompatible with the Convention rights or with EU law.

(3) But subsection (2)(b) does not apply to a provision which ~~(a)~~ ***is ancillary to a provision which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly).*** ~~and~~

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

(4) In determining what is necessary to give effect to the purpose of that provision, any power to make laws other than that of the Assembly is to be disregarded.

(5) The question whether a provision of an Act of the Assembly relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

6) For the purposes of this Act ~~a~~ ***one*** provision ***("the minor provision")*** is ***"***ancillary***"*** to another provision ***("the main provision") if*** ~~it~~—

(a) ***the minor provision is a reasonable consequence of the major provision, or*** ~~provides for the enforcement of the other provision or is otherwise appropriate for making that provision effective, or~~

(b) ***the minor provision is designed to enforce, or otherwise give full effect to, the major provision.*** ~~is otherwise incidental to, or consequential on, that provision~~.

(2) For Schedule 7 to the 2006 Act (Acts of the Assembly) substitute—

(a) the Schedule 7A set out in Schedule 1 to this Act, and

(b) the Schedule 7B set out in Schedule 2 to this Act.

Option 2B: Suggested changes to Schedule 2 (new Schedule 7B) Law on reserved matters

The law on reserved matters

1 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters.

(2) "The law on reserved matters" means—

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and

(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter, and in this sub-paragraph "Act of Parliament" does not include this Act.

2 ~~(1)~~ Paragraph 1 does not apply to a modification which is ancillary to a provision made (whether by the Act in question or another enactment) which does not relate to reserved matters. ~~, and~~

~~(b) has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision.~~

~~(2) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.~~

Option 3B: Suggested amendment to Schedule 2 (new Schedule 7B) Private law

Private law

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

(2) "The private law" means the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession.

(3) In sub-paragraph (2) the reference to the law of property does not include intellectual property rights relating to plant varieties or seeds.

(4) Sub-paragraph (1) does not apply to a modification which ~~(a)~~ is necessary for a devolved purpose or is ancillary to a provision made (whether by the Act in question or another enactment) which has a devolved purpose. ~~.~~

~~(b) has no greater effect on the general application of the private law than is necessary~~

(5) “Devolved purpose” means a purpose, other than modification of the private law, which does not relate to a reserved matter.
~~(6) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.~~

Option 4B: Suggested amendment to Schedule 2 (new Schedule 7B) Criminal law and civil penalties

This is the same as for Option 4A above.

OPTION C

Commentary:

Overall, the proposed effect of these Option C amendments is to seek to draw the boundary between what the Assembly can and cannot do in the same place as the current draft Bill - but in a way which is simpler to understand and apply, and more predictable in its effect. The intention is to produce greater stability and workability in the settlement.

It is not the Presiding Officer’s preferred option but is put forward in good faith to illustrate that it is possible to simplify the model proposed in the draft Bill.

Like Options A and B, it simplifies the model by rationalising the four double-headed tests of competence based on the concept of “necessity” into a single test in each case. Also like them, it removes the concept of “necessity”, with its inherent legal uncertainty, from the draft Bill.

The difference lies in the single test proposed in Option C. Whereas Options A and B retained the concept of “ancillary” from the draft Bill (albeit rewording it slightly), Option C proposes a new test based on the concept of “reasonable consequence”. In summary, an Assembly Bill would not be able to affect England except in a way that was a “reasonable consequence” of another provision of that Bill – a provision that, itself, would need to be squarely within the Assembly’s normal competence. The same would apply to the Assembly’s ability to modify “the law on reserved matters”, civil law and criminal law.

The word “consequence” in the proposed test is intended to cover both legal consequences and practical consequences, such as the need for enforcement or effectiveness. So the scope of the proposed new test is equivalent to the scope of the concept of “ancillary” in the original drafting – but phrased in a shorter and simpler way.

A deliberate choice has been made to avoid the word “consequential”, which, arguably, has a narrower meaning in legislation. If this proposed test is adopted, it would be highly desirable for its intended scope to be spelled out in the Explanatory Notes to the Bill as introduced, and in a Ministerial statement in Parliament during the passage of the Bill, to provide the courts with guidance as to its interpretation.

As mentioned above, the replacement of the concept of necessity with the concept of reasonableness would remove legal uncertainty from the new settlement. The word “necessary” is capable of a range of meanings in law, as set out in Annex A. In contrast, the word “reasonable” is one of the most established, tried and tested

concepts in English and Welsh public law and represents a single, objective standard.

Option 1C: Suggested amendment to Clause 3 (new section 108A)

3 Legislative competence

1) For section 108 of the Government of Wales Act 2006 (legislative competence) substitute—

"108A Legislative competence

(1) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it extends otherwise than only to England and Wales,

(b) it applies otherwise than in relation to Wales or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales,

(c) it relates to reserved matters (see Schedule 7A),

(d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions, or

(e) it is incompatible with the Convention rights or with EU law.

(3) But subsection (2)(b) does not apply to a provision which ***is a reasonable consequence of a provision which is within the Assembly's legislative competence.***

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

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

~~(4) In determining what is necessary to give effect to the purpose of that provision, any power to make laws other than that of the Assembly is to be disregarded.~~

(5) The question whether a provision of an Act of the Assembly relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

~~(6) For the purposes of this Act a provision is ancillary to another provision if it—~~

~~(a) provides for the enforcement of the other provision or is otherwise appropriate for making that provision effective, or~~

~~(b) is otherwise incidental to, or consequential on, that provision.~~

(2) For Schedule 7 to the 2006 Act (Acts of the Assembly) substitute—

(a) the Schedule 7A set out in Schedule 1 to this Act, and

(b) the Schedule 7B set out in Schedule 2 to this Act.

Option 2C: Suggested amendment to Schedule 2 (new Schedule 7B) Law on reserved matters

The law on reserved matters

1 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters.

(2) "The law on reserved matters" means—

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and

(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter, and in this sub-paragraph "Act of Parliament" does not include this Act.

2 ~~(1)~~ Paragraph 1 does not apply to a modification which ***is a reasonable consequence of a provision which does not relate to reserved matters.*** ~~(a) is ancillary to a provision made (whether by the Act in question or another enactment) which does not relate to reserved matters, and~~

~~(b) has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision.~~

~~(2) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.~~

Option 3C: Suggested amendment to Schedule 2 (new Schedule 7B) Private law

Private law

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

(2) "The private law" means the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession.

(3) In sub-paragraph (2) the reference to the law of property does not include intellectual property rights relating to plant varieties or seeds.

(4) Sub-paragraph (1) does not apply to a modification which ***is a reasonable consequence of a provision which has a devolved purpose.***

~~(a) is necessary for a devolved purpose or is ancillary to a provision made (whether by the Act in question or another enactment) which has a devolved purpose, and~~

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

(5) "Devolved purpose" means a purpose, other than modification of the private law, which does not relate to a reserved matter.

~~(6) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.~~

Option 4C: Schedule 2 (new Schedule 7B) Criminal law and civil penalties

Criminal law and civil penalties

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

(2) Sub-paragraph (1) does not apply to a modification which ***is a reasonable consequence of a provision which has a devolved purpose.***

~~(a) is ancillary to a provision made (whether by the Act in question or another enactment) which has a devolved purpose, and~~

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

(3) But sub-paragraph (2) does not permit the creation of, or any other modification of the criminal law relating to, road traffic offences.

(4) In this paragraph "devolved purpose" means a purpose, other than modification of the criminal law, which does not relate to a reserved matter.

~~(5) In determining what is necessary for the purposes of this paragraph, any power to make laws other than the power of the Assembly is to be disregarded.~~

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

MINISTER OF CROWN FUNCTIONS – Options 5A and 5B

Option 5A: Suggested amendment to Schedule 2 (new Schedule 7B) Minister of Crown, government departments and other reserved authorities

Ministers of the Crown~~, government departments and other reserved authorities~~

8 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a Minister of the Crown which was exercisable by such a Minister immediately before 5 May 2011, unless-

(a) the Secretary of State consents to the provision, or

(b) the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) A provision of an Act of the Assembly cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown, unless the Secretary of State consents to the provision.

~~cannot~~ ***may, subject to sub-paragraph (1A)—***

~~(a) remove or modify, or confer power by subordinate legislation to remove or modify, any function of a reserved authority,~~

~~(b) confer or impose, or confer power by subordinate legislation to confer or impose, any function on a reserved authority,~~

~~(c) confer, impose, modify or remove (or confer power by subordinate legislation to confer, impose, modify or remove) functions specifically exercisable in relation to a reserved authority, or~~

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

unless the appropriate Minister consents to the provision.

((2) In this paragraph "reserved authority" means—

(a) a Minister of the Crown or government department;

(b) any other public authority, apart from a Welsh public authority.

(3) In this paragraph—

(a) "public authority" means a body, office or holder of an office which has functions of a public nature (other than the First Minister, the Welsh Ministers, the Counsel General or the Assembly Commission);

(b) "Welsh public authority" means a public authority whose functions—

(i) are exercisable only in relation to Wales, and

(ii) are wholly or mainly functions that do not relate to reserved matters.

(4) In determining for the purposes of sub-paragraph (3)(b)(i) whether functions of a public authority are exercisable only in relation to Wales, ignore any function which—

(a) is exercisable otherwise than in relation to Wales, and

(b) could (apart from this paragraph) be conferred or imposed by provision falling within the Assembly's legislative competence (see section 108A(3)).

(5) In this paragraph references to modifications of the constitution of an authority include its establishment and dissolution, and modifications relating to its assets and liabilities and its funding and receipts.

(6) In this paragraph "the appropriate Minister" means—

(a) where the reserved authority in question is Her Majesty's Revenue and Customs, the Treasury;

(b) otherwise, the Secretary of State.

(7) In the application of this paragraph to the traffic commissioners, sub-paragraph (1)(a) has effect as if the references to removal of a function were omitted.

(8) In determining whether a provision of an Act of the Assembly is outside the Assembly's legislative competence, assess whether a public authority is a Welsh public authority for the purposes of this paragraph as at the date of introduction of the Bill for the Act.

***Commentary*:** Option 5A restores the current scope of the Assembly's competence to affect functions of UK Ministers, government departments or other public bodies. The current wording of the draft Wales Bill would require UK Government consent for a much larger number of Assembly Bill provisions than at present. The redrafted provision reverses that roll-back of competence.

It can be seen that it is also significantly simpler than the draft Bill provision. This is for a number of reasons. Amongst other things, the redrafted provision avoids a very complicated set of definitions about public authorities, which will be extremely

difficult t operate in practice. Also, the triggering of the restriction on competence is tied to a single date (5 May 2011, when the Assembly's current legislative competence took effect), whereas the draft Bill would require competence to be assessed anew in relation to each public authority affected by each Assembly Bill, looking at that authority's functions on the date of introduction of that individual Assembly Bill. A public body might move in and out of competence, over time, which reduces legal certainty and undermines the stability of the settlement.

Option 5B: Suggested amendment to Schedule 2 (new Schedule 7B) Minister of Crown, government departments and other reserved authorities
Ministers of the Crown, government departments and other reserved authorities

8 (1) ***An Act of the Assembly may confer or impose a function on a Minister of the Crown or government department only if the appropriate Minister consents to the imposition of the function.***
(2) An Act of the Assembly may confer or impose a function on a reserved authority only if –
(a) the function is imposed on the public in general, or on public authorities in general, as well as on the reserved authority; or
(b) the appropriate Minister consents to the imposition of the function on the reserved authority.
~~A provision of an Act of the Assembly cannot—~~
~~(a) remove or modify, or confer power by subordinate legislation to remove or modify, any function of a reserved authority,~~
~~(b) confer or impose, or confer power by subordinate legislation to confer or impose, any function on a reserved authority,~~
~~(c) confer, impose, modify or remove (or confer power by subordinate legislation to confer, impose, modify or remove) functions specifically exercisable in relation to a reserved authority, or~~
~~(d) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority,~~
~~unless the appropriate Minister consents to the provision.~~
(*3*~~2~~) ***A provision of an Act of the Assembly may not remove or modify a pre-commencement function of a Minister of the Crown or government department, unless—***
(a) the appropriate Minister consents to the provision, or
(b) the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.
(4) In sub-paragraph (3), "pre-commencement function" means a function exercisable by a Minister of the Crown or government department, as applicable, immediately before 5 May 2011.
(5) In this paragraph "reserved authority" means a public authority which is not a Minister of the Crown, a government department or a Welsh public authority.
(*6*~~3~~) In this paragraph—

(a) “public authority” means a body, office or holder of an office which has functions of a public nature (other than the First Minister, the Welsh Ministers, the Counsel General or the Assembly Commission);
(b) “Welsh public authority” means a public authority whose functions—

(i) are exercisable only in relation to Wales, and

(ii) are wholly or mainly functions that do not relate to reserved matters.

(7) In this paragraph, references to conferring, imposing, removing or modifying a function include references to conferring power by subordinate legislation to do any of those things.

(*8*4) In determining for the purposes of sub-paragraph (*6*)(b)(i) whether functions of a public authority are exercisable only in relation to Wales, ignore any function which—

(a) is exercisable otherwise than in relation to Wales, and

(b) could (apart from this paragraph) be conferred or imposed by provision falling within the Assembly’s legislative competence (see section 108A(3)).

~~(5) In this paragraph references to modifications of the constitution of an authority include its establishment and dissolution, and modifications relating to its assets and liabilities and its funding and receipts.~~

(*9*~~6~~) In this paragraph “the appropriate Minister” means—

(a) where the government department in question is Her Majesty’s Revenue and Customs, the Treasury;

(b) otherwise, the Secretary of State.

(*9*~~7~~) In the application of this paragraph to the traffic commissioners, sub-paragraph (2) has effect as if the references to removal of a function were omitted.

(*10*~~8~~) In determining whether a provision of an Act of the Assembly is outside the Assembly’s legislative competence, assess whether a public authority is a Welsh public authority for the purposes of this paragraph as at the date of introduction of the Bill for the Act.

***Commentary*:** Option 5B would go some way to restore Assembly competence to the current level, in terms of its ability to remove or modify functions of UK Ministers and other “reserved authorities”. However, it is much less radical than Option 5A – in other words, it accepts some roll-back of the Assembly’s freedom to legislate without UK Government consent.

Subparagraph (1) mirrors the existing restriction on the Assembly’s competence in relation to **giving UK Ministers new duties or powers.** It also adds a new restriction on the Assembly imposing duties or powers on UK **government departments** without UK consent.

Subparagraph (2) also adds a new restriction on the Assembly. Under it, the Assembly would not be able to impose new duties or powers on **other reserved public bodies** unless the responsible UK Minister consented - or unless the

Assembly provision was one which applied generally to all persons and bodies in Wales, or all public authorities in Wales.

In terms of **modifying or removing functions of UK Ministers, government departments or other reserved public bodies,** the redrafted provision again largely mirrors the current level of Assembly competence, which the draft Bill would reduce, but accepts that UK government departments should be treated in the same way as UK Ministers – a small extra restriction by comparison with the current position.

The redrafted provision removes two of the new restrictions that the draft Bill would place on the Assembly. These would require UK Government consent for an Assembly Bill which sought to confer, impose, modify or remove functions "specifically exercisable in relation to a reserved authority", and for an Assembly Bill that sought to change the constitution of a reserved authority. We consider that the other restrictions on the Assembly's competence – most importantly, the restrictions concerning "reserved matters" and the requirement that Assembly legislation must essentially apply only to Wales – already provide sufficient safeguards for the UK Government.

Those other restrictions on the Assembly's competence would also apply to the creation of new duties on UK bodies, and the removal or modification of their functions.

Moreover, the UK Parliament can impose duties on "Welsh public authorities" without any legal restriction. Indeed, even the convention whereby the Assembly's consent is needed for UK legislation would not apply when Parliament is creating such new duties in relation to reserved matters. Therefore it appears illogical for the Assembly to be unable to impose duties that apply equally to "reserved" and "Welsh" authorities, where those duties have a devolved purpose.

We continue to consider that the definition of "Welsh public authority" is too complex to be workable. An alternative, which would have the advantage of certainty, would be for applicable Welsh public authorities to be listed in a Schedule to the draft Bill, with an appropriate power to amend that list from time to time. However, this lack of workability would become less serious if the suggested changes were adopted, as the restriction would operate in fewer cases.

ANNEX C: OPERATIONAL ARRANGEMENTS – REMAINING CONSTRAINTS AND SUGGESTED ACTIONS

Operational arrangements

Role for Assembly Commission in Supreme Court proceedings: Section 112 of GOWA 2006 should be amended so as to provide a role for the Assembly Commission (on behalf of the Assembly) in any challenge to an Assembly Bill in the Supreme Court. Where legislation of the Assembly is referred to the Supreme Court before Royal Assent, the Assembly still has functions in relation to the Bill and should therefore be able to participate in the proceedings, via the Assembly Commission, as of right. This would be particularly important should a reference be made on a Member, Committee or Commission Bill (rather than Government legislation) or by the Counsel General in respect of an aspect of legislation lacking Welsh Government support. Clause 22 of the draft Bill does nothing to alter the existing position. It merely replaces references to the Clerk with references to the Presiding Officer. I acknowledge that the draft Bill would create parity with the provisions for the Scottish Parliament – however this has never arisen as an issue as, unlike the Assembly, the Parliament's legislation has never been challenged in this manner by the UK Government, only by private parties, which can only happen after Royal Assent, at which time the Parliament's (or Assembly's) functions in relation to the legislation have ceased.

Secretary of State power of intervention and to block Royal Assent of Assembly Bills: Section 114 of GOWA 2006 should be amended to narrow the power of the Secretary of State to intervene and block Royal Assent of Assembly Bills under certain circumstances. This provision should be narrowed to bring it into line with the equivalent provision in the Scotland Act 1998 (section 35). In fact, the draft Bill widens the power to allow the Secretary of State to intervene in order to protect sewerage systems in England against adverse impact as a result of Assembly legislation. I also consider that any Order to block Royal Assent should be subject to the affirmative procedure, (not the negative as is currently the case) in both Houses of Parliament.

Powers to remedy ultra-vires acts: Section 151 provides an Order in Council power to remedy a lack of legislative competence or an ultra vires action, including the power to modify any Welsh or UK legislation. This is a useful provision that should be retained, but amended so that section 151(4) would require Assembly consent as a pre-requisite for an Order modifying

legislation passed by the Assembly (or secondary legislation passed under an Assembly Act or Measure).

Secretary of State power to block the exercise of Welsh Ministers' functions: Section 152 of GOWA 2006 should be amended to narrow the power of the Secretary of State to block the exercise of Welsh Ministers' functions affecting water. I believe this current power is overly restrictive. Although not directly related to the Assembly itself, it may impact on functions the Assembly has conferred in an Act – thus allowing the Secretary of State to override the Assembly.

Power of Secretary of State to determine the definition of 'Wales' and 'Welsh zone': Section 158 of the GOWA 2006 should be amended to require the consent of the Assembly as a pre-requisite to any order narrowing the geographical limits of the Assembly's and Welsh Government's powers over British waters. Although I agree it was appropriate for the UK Government to determine the original geographical limits of the Assembly's and Welsh Government's powers over British waters, there is currently no mechanism to prevent an Order narrowing the geographical limits of those powers. I consider that it would be appropriate to amend this provision to require the consent of the Assembly to any Order which had such an impact (in a similar way to the consent currently required for Orders under section 109 of GOWA).

***Powers of Assembly Commission to promote public awareness*:** Most of the provisions in Schedule 2 of GOWA 2006 relating to the Assembly Commission have been brought within competence, with the exception of this power contained in Schedule 2 paragraph 5. I believe that not only should this be brought within competence, but that it should be broadened. The existing power to promote awareness of '*the current or pending*' systems for the election of Assembly Members is out-dated and limited. I feel strongly that this should be amended to put beyond doubt the ability of the Presiding Officer and Commission to promote public awareness of matters relevant to the operation of our democracy in Wales such as referenda and future electoral arrangements. Clearly such a power should be accompanied by a prohibition on using it for the interests of any particular political group. However, as the power would be conferred on the Commission, its cross-party nature would provide a safeguard against this. The following suggests a form of words for the amended power I would like to see (paragraphs 5 and 6 of Schedule 2 to the GOWA 2006).

Promotion of public awareness of and participation in democratic processes and public life in Wales

5

(1) The Assembly Commission may promote public awareness of and participation in—

(a) democratic processes in Wales, and

(b) public life in Wales.

(2) The Assembly Commission may promote public awareness of and engagement with the Assembly, including promoting public awareness of the role and purposes of the Assembly.

(3) The Assembly Commission may exercise its powers under sub-paragraphs (1) and (2) in such manner as it thinks fit but may, in particular, do so by—

(a) carrying out programmes of education or information to promote public awareness, participation and engagement, or

(b) making grants to persons or bodies for the purpose of enabling them to carry out such programmes.

(4) But nothing in this paragraph allows the Assembly Commission to promote public awareness of, participation in or engagement with—

(a) a party registered under Part II of the Political Parties, Elections and Referendums Act 2000 (c 41), or

(b) campaigns which promote a particular result in a referendum to which Part VII of that Act applies.

(5) Any grant under sub-paragraph 3(b) may be made subject to such conditions as the Assembly Commission considers appropriate.

6

(1) The Assembly Commission may provide financial assistance to the Electoral Commission for the purpose of enabling it to carry out its functions under section 13(1) of the Political Parties, Elections and Referendums Act 2000 (c 41) so far as relating to the promotion of public awareness of—

(a) the current or any pending system for the election of Assembly members, and

(b) the current or any pending system of devolved government in Wales.

(2) For the purposes of this paragraph a system is "pending" if arrangements for giving effect to it have been made by any enactment but the arrangements are not yet in force.

ANNEX D – Proposed model for to enable the Assembly to pass comprehensive financial framework legislation.

It is recognised that some basic safeguards would need to remain in Westminster legislation setting out some minimum requirements, such as:

- The appointment, removal and operational independence of the Auditor General;
- The requirement for a Welsh Consolidated Fund (WCF) from which funds can only be issued in accordance with legislation or Assembly approval, with credits being granted by the Auditor General;
- Requirement for Assembly legislation to include provision for the authorisation of the use of resources, designation of accounting officers, preparation and audit of accounts and value for money audit examinations; and
- A requirement for Assembly legislation or Standing Orders to make provision for the consideration and scrutiny of accounts and reports laid by the Auditor General (and the auditor of the Wales Audit Office).

For the remainder of the financial provisions the Assembly should be given legislative competence to enable coherent and comprehensive framework legislation to be passed which, for illustrative purposes, should cover:

- The requirement for an annual budget act to authorise taxation, borrowing and use of resources – provision would also be required for in-year changes and a default position in the event that there is no budget passed prior to the start of the financial year.
- Provision for the designation of principal accounting officers – similar to those set out in sections 14-18 of the Public Finance and Accountability (Scotland) Act 2000.
- Provision for the Welsh Government Principal Accounting Officer to designate Accounting Officers of other bodies it finances – such as NHS bodies and sponsored bodies – and specify their duties.
- Provision relating to the operation of the WCF – including a requirement for credits to be sanctioned by the auditor General – the preparation of its annual accounts by Welsh Ministers and their audit by the auditor General.
- Provision for public bodies (to be listed in an amendable schedule) to prepare accounts in a form directed by the Welsh Ministers – taking account of relevant Treasury guidance. Provision for those accounts to be audited by the Auditor General and laid before the Assembly.[34]

[34] Public Audit (Wales) Act 2013 already makes such provision for the Wales Audit Office.

- Powers of the Auditor General to conduct economy, efficiency and effectiveness examinations to be consolidated and cover all public bodies (contained in the schedule referred to above) and any body, or class of bodies, whose income from public funds is more than 25 per cent of its total.
- Preserving the Auditor General's rights to documents and information.

The Assembly's Standing Orders could provide for more detailed arrangements relating to financial provisions – for example the procedure for Budget Bills, etc.

To facilitate this, the following amendments are suggested amendments to Schedule 7B:

- To bring within competence sections 30(1) and 143 of GOWA 2006 (and section 147(7) of GOWA 1998) in relation to the requirement for an audit committee and its function
- Remove paragraphs 7(5) and (6) and replace with a general unamendable provision requiring that resources can only be used if authorised by the Assembly.
- Repeal section 119 of GOWA 2006 which requires the Secretary of State to present a statement of estimated [payments – this was appropriate prior to the advent of resource budgeting, but is now of little relevance.
- Allow for amendment of sections 129 and 130 regarding approvals to draw and payments in error – subject to the protection provided in section 124 being retained in Westminster legislation
- Allow for removal of restrictions on sections 135 and 140 of GOWA 2006 and section 145 to 145D of GOWA 1998 relating to the Auditor General's value for money/performance audit functions.
- Allow for the repeal/amendment of sections 131-134, 137-139 and 141-142 of GOWA 2006 relating to the appointment of accounting officers, preparation and audit of accounts for the WCF, Welsh Government, Assembly Commission and whole of government accounts.

Additional recommendations:

That the Assembly is empowered to modify/repeal any provision in relation to functions exercised by Treasury in relation to designating and specifying functions of accounting officers and giving direction in preparation of accounts. This should be apart from the general restriction on Minister of the Crown functions contained in Schedule 7B paragraph 8.

That the provisions giving the Comptroller and Auditor General (C&AG) the power to examine the use of resources by Welsh public bodies, set out in section 136 of the GOWA 2006 are no longer necessary. The draft Bill should be amended to remove these powers, which would entail repeal of the following provisions:

- Section 136 of GOWA 2006;
- Section 145(6) and Schedule 6 paragraph 9 of GOWA 1998;
- Schedule 1 paragraph 20 of Public Services Ombudsman Act 2005;
- Schedule 2, paragraph 12 of Care Standards Act 2000;
- Schedule 1 paragraph 14 of Commissioner for Older People (Wales) Act 2006; and relevant entries in Sections 6, 8 and 9 of National Audit Act 1983. It would also be necessary to specifically repeal Sections 6 and 7 of the 1983 Act to Welsh public bodies as was done in Scotland by the Scotland Act 1998, Schedule 8 para 20.

Document is Restricted

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

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA-C/FM-/0014/15

David Melding AM
Chair
Constitutional & Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff

11th November 2015

Dear David

Draft Wales Bill Inquiry: written evidence

Further to my letter of 30th October please find attached my written evidence on the draft Wales Bill to assist the Committee with its work.

In the Welsh Government's view, this Bill will be one of great constitutional significance, both for Wales and for the Union; it will redefine the role and place of the Welsh devolved institutions in the governance of the United Kingdom. As the Secretary of State himself said in his speech on 17 November 2014 launching what became the St David's Day process, "We have a unique opportunity to reshape the future of our Union". The content of the Bill should therefore be approached from the standpoint of constitutional principle, with a view both to strengthening Welsh devolution and securing the place of Wales within a reformed Union. We have set out our views on some of the broader questions on the future of the Union in Written Evidence to the House of Lords Constitution Committee in respect of its Inquiry into "The Union and Devolution", and our Evidence to your Committee in respect of the Wales Bill needs to be seen in that context.

I am copying this to other Committee Chairs.

I look forward to meeting you and your colleagues on 16th November.

Yours sincerely

CARWYN JONES

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THE DRAFT WALES BILL
Written Evidence submitted to the Constitutional and Legislative Affairs Committee by the Welsh Government

Introduction

1. The Welsh Government welcomes this opportunity to set out its views on the draft Wales Bill which was published on 20 October 2015.
2. The Independence referendum in Scotland, just over a year ago, marked a turning point in the constitutional governance of the United Kingdom. At that time the UK Government committed to developing a new and fair settlement that applies to all parts of the United Kingdom, stating that they wanted Wales to be at the heart of the debate on how to make our United Kingdom work for all our nations. For Wales this commitment manifested itself in the St David's Day process and the subsequent publication of the draft Wales Bill we have in front of us today.
3. It is with regret that the Welsh Government cannot agree that this draft Bill is either balanced or fair. The inquiry your Committee conducted earlier this year on the UK Government's proposals for further devolution to Wales identified four main principles that needed to be reflected in any new constitutional settlement. We continue to support your call for a Bill that enshrines the principles of subsidiarity, clarity, simplicity and workability. This Bill, as currently drafted, provides for none of these. The Welsh Government takes no pleasure in saying this, but this proposed Bill will be the third constitutional settlement for Wales in less than twenty years and neither of its predecessors has provided the long-term stability that devolution in Wales so richly deserves.
4. As this Committee has seen in the past, the frequency of questions arising as to the competence of the National Assembly to legislate in a number of areas is all too common. This was one of the reasons why we advocated moving from a conferred powers model to a reserved powers model. However, the reserved powers model proposed by the UK Government is, to all intents and purposes, a mirror of the current model and therefore proposes for us what is merely a technical change. Our call for a reserved powers model was not a call for a technical change in the drafting of the settlement. In calling for a reserved powers model, we have consistently advocated that decisions should be based on the principle of subsidiarity through which everything should be devolved unless there is a good reason for it to be retained at the UK level.
5. Furthermore, the draft Bill introduces a number of new constraints either by way of Ministerial consents or complex legal tests. All of these would result in a multiplication of the number of 'problem' areas within the devolution settlement.
6. We therefore believe that the draft Wales Bill does not offer a solution as currently drafted.

Principles to underpin the reserved powers model

7. As the Secretary of State for Wales himself said in his speech on 17 November 2014 launching what became the St David's Day process, *"We have a unique opportunity to reshape the future of our Union".* The content of the Wales Bill should therefore be approached from the standpoint of constitutional principle, with a view both to strengthening Welsh devolution and securing the place of Wales within a more coherent and therefore stronger Union.

8. This position is underpinned by the clear view of the people of Wales expressed in the 2011 referendum which gave a mandate for an effective Welsh legislature and confirmed the electorate's wish that the National Assembly should have primary legislative powers of broad scope.

9. The comparatively narrow nature in UK terms of the Welsh devolution settlement, and the single legal jurisdiction of England and Wales, have led in the past to the drawing of an incoherent boundary between reserved and devolved areas of activity. Disagreements about where the boundary lies (as has repeatedly happened, for example in relation to local government and the police service) hinders the development of joined-up policy and leads to tensions between administrations. This is in marked contrast to the position in Scotland and Northern Ireland where the devolved administrations have genuine coherent autonomy within the devolved areas.

10. The UK Government's proposal for resolving the issues that arise when there are significant connections between what is devolved and what is not, is to limit further the powers of the National Assembly. This would be done by maintaining a narrow settlement and by making more powers subject to Ministerial consent or by introducing new complex legal tests. Our solution is to move the boundary so that these tensions can be avoided and a more coherent and stable, and therefore long-lasting settlement, can be developed.

11. The Welsh Government considers that, as was agreed by the National Assembly on 7 October 2015, "*the creation of a Welsh legal jurisdiction would be the most desirable and effective legal framework to accompany the implementation of a reserved powers model for devolution*". The retention of the existing England and Wales jurisdiction will result in a measure of complexity for the Welsh settlement which is incompatible with the Secretary of State's aspirations for clarity and workability. The reservation of policing also introduces complexity into the delivery of emergency services in Wales, as does the executive reservation of civil contingencies.

12. As stated during the First Minister's response to the debate in the National Assembly:

> "The jurisdiction goes further than simply the way the law is actually administered; jurisdiction is at the heart of the drafting of the Wales Bill. If you don't have a separate jurisdiction, you make it far harder to draft a Bill that defines powers. And so we are in a situation where we're the only legal jurisdiction anywhere in the world where there are two legislatures within the same jurisdiction. It means that defining the powers of each legislature becomes progressively more difficult because of that issue."

13. The Lord Chief Justice recently said that *"it is right for me to say that there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions*". As an interim measure, this could mean the creation of a Welsh legal jurisdiction that is distinct but not separate from that of England – a Welsh legal jurisdiction supported by a shared Courts system, run by the Ministry of Justice with the same judiciary and administrative system, buildings, etc as now. The Welsh Government will be undertaking further work with regard to the thoughts of the Lord Chief Justice over the coming weeks.

14. As a Government we believe that the Lord Chief Justice's comments are worthy of further consideration by the UK Government. If that is not to be the case then a number of issues highlighted in the following sections will need to be addressed.

Assessment of the proposed Reserved Powers Model

15. At present, the National Assembly's legislative competence is founded in s.108 of and Schedule 7 to, the Government of Wales Act 2006. The new Bill replaces s. 108 with a proposed new s.108A, and Schedule 7 is replaced by two new Schedules, 7A and 7B.

16. It is a matter of public record that the Secretary of State for Wales shared a draft of the proposed s.108A and Schedules 7A & B with the Welsh Government and the National Assembly for Wales on 31 July 2015. The Welsh Government responded formally with two letters which it has subsequently published, one on 7 August and another on 7 September setting out our initial views and latterly our more detailed position.

17. This paper does not fully re-rehearse the arguments made in these letters but sets out the key areas where further discussions with the UK Government are of paramount importance to the Welsh Government before we can consider supporting the Wales Bill as proposed in draft.

18. In a Report published earlier this year, your Committee argued that the proposed new reserved powers model should be assessed against the principles of subsidiarity, clarity, simplicity and workability. Accepting that there is some measure of overlap between the last three of those principles, the Welsh Government agrees with that conclusion.

19. So far as subsidiarity is concerned, this is principally relevant to the proposed new Schedule 7A, which lists, at some length, the individual reservations proposed by the Secretary of State. The First Minister set out his views on this in his letter of 7 September to the Secretary of State. In the Welsh Government's view, the list of reservations the Secretary of State has proposed in Schedule 7A includes a significant number which either do not seem to us to be appropriate for inclusion in a document of constitutional importance such as the Wales Bill will be, or which cover matters far better suited to National Assembly rather than Parliamentary attention, being only of particular significance internally to Wales. **We therefore believe that the number of reservations in Schedule 7A can and should be significantly reduced, without impact on the UK Government's legitimate interests in respect of Wales.**

20. We also draw attention to a drafting aspect of the proposed Schedule 7A. In very many places, individual reservations are stated as "*The subject-matter of [specified Acts of Parliament*]". **In the Welsh Government's view, this drafting approach is defective; the reservation as drafted does not explain on its face exactly what is being reserved**, and so does not achieve the simplicity and clarity which both we and the Secretary of State are seeking in the new settlement. Furthermore, it is not always clear why particular Acts have been specified in this way; for example, the list of such Acts in the 'Employment and Industrial Relations' field is considerably longer than the equivalent for Scotland, but we have had no explanation as to why that should be so.

21. Schedule 7B needs to be assessed by reference to the principles of clarity, simplicity and workability. **The Welsh Government has considerable difficulty with what is proposed in this Schedule**. One way of assessing the impact of the provisions is to compare the tests required for deciding whether a provision in a Bill is within competence under the existing settlement with the tests that would have to be applied if the new Bill's provisions were in place. Annex 1 sets out, in text form, flow charts identifying the questions that have to be asked in respect of each Bill provision under each settlement. **The current settlement presents its own complexities, but it will be seen from Annex 1 that the settlement proposed in the Wales Bill, far from resolving any of these, imposes new layers of complication entirely at odds with the Secretary of State's aspiration for a clear and robust settlement.**

22. We have a number of concerns with the detail of Schedule 7B. At present, the National Assembly can modify the law of contract, common law and other areas of private law and criminal law wherever those modifications *relate to* a devolved subject. This might include, for instance, simplifying how contracts work in, or creating a criminal offence in relation to, areas of devolved life where that is appropriate to make Assembly legislation effective. **The draft Bill significantly curtails this ability, by limiting the National Assembly's power to modify the private law to provisions which are either '*necessary for* a devolved purpose' or 'ancillary' to another provision within competence, and limiting the National Assembly's power to modify the criminal law solely to provisions which are ancillary to another provision within competence.** In both cases, the provisions are further prohibited from having any greater effect on 'the general application [whatever that might mean] of the private or criminal law' than is *necessary*. But preventing the Assembly from modifying the criminal law for a devolved purpose is too restrictive**. The choice about whether it is necessary, appropriate or expedient to modify the private or criminal law for a devolved purpose is one properly for the National Assembly, not for the courts, but this new limitation dramatically increases the likelihood of Assembly legislation being challenged in the courts.**

23. There is then an entirely new and very broad general restriction on the National Assembly's power – i.e. the inability to modify 'the law on reserved matters'. **The need, in the Welsh context, for this restriction has not been adequately explained; what is it about a reserved powers framework that requires it when it was not required under the conferred powers model?** A reserved powers model means that the National Assembly cannot legislate in relation to reserved matters unless doing so is consequential or incidental. The restriction will, therefore, bite only on such provisions and it is not clear why such an

elaborate and complex restriction is needed. It applies a 'no greater effect… than is *necessary…*' test. 'Necessity' can mean different things in different contexts; this makes it very difficult to predict how the test will be interpreted by a court, and makes the settlement unstable, unclear, and, ripe for further legal challenge. Under these provisions decisions about how best to give effect to Welsh laws would therefore shift inexorably from elected Assembly Members, accountable to the electorate, to unelected judges.

24. **The draft Bill significantly extends the requirement for Ministerial consents to Assembly legislation.** UK Government consent would be required for the Assembly to be able to modify:

    - *any* UK Minister function, even if it is within the Assembly's devolved competence. It is hard to see how this can be reconciled with the Secretary of State's aspiration for a clearer boundary between devolved and reserved spheres?
    - *any* UK government department function, again even if within devolved competence,
    - *any* function of a reserved authority (the definition of which is extremely wide: for example, it includes the water industry regulator, OfWAT, notwithstanding that the activities of this body are of fundamental importance to Wales).

25. **The practical effect of these new consent requirements is that Assembly legislation will be vulnerable to delay, or worse still, frustration, by Whitehall.** This is irreconcilable with the Secretary of State's expressed desire for "*a settlement that fosters co-operation not conflict between either end of the M4*", and for "*Welsh laws to be decided by the people of Wales and their elected representatives*."

Other Bill Provisions

26. As noted above, the Welsh Government has had sight of 31 of the 33 clauses of the draft Bill only since the afternoon before publication on the 20 October 2015. Our comments must therefore be of an interim character until we have had time to analyse the detailed drafting. That said:

    - We welcome clause 1, confirming that the devolved institutions form a permanent part of the UK's constitutional arrangements, but we are aware that the equivalent provisions in the Scotland Bill are being considered for strengthening, and we believe that the two sets of devolved institutions for Scotland and Wales should be treated equally in this respect in the two Bills;
    - So far as the statutory underpinning of the Sewel Convention (clause 2) is concerned, we believe that the clause provides an incomplete statement of the convention. It needs to be stated explicitly that Parliament will not, without the Assembly's consent, legislate in a way which impinges on the Assembly's legislative competence. This lacuna needs to be corrected (as it should also be in the Scotland Bill);
    - We strongly support the provisions which will enable the Assembly to become, in effect, a self-governing institution (with its procedures largely

specified in its Standing Orders rather than by statutory provision), enable it to decide on its own electoral system and, if it wishes, to choose a new name (and we are content with the proposal that super-majorities should be required in the Assembly in respect of those latter matters); and

- We will be giving careful consideration to the drafting of the clauses providing various enhancements to the Assembly's and the Welsh Ministers' respective competences, and Welsh Government officials will be discussing these as necessary with the Secretary of State's officials before the Bill is made ready for formal Introduction into the House of Commons next year.

An Incomplete Bill

27. As the Secretary of State has made clear, inter-governmental discussions about the Bill will continue in parallel with the Committee's pre-legislative scrutiny process. The Committee should therefore be aware that in those discussions we will be seeking additional Bill provision, as follows:

    - The First Minister has written to the Secretary of State, identifying certain matters in respect of which the Smith Commission made recommendations for additional powers for Scotland and which the First Minister considers should equally be made available to Wales. Examples include provision that public sector bodies should be able to operate rail franchises in Wales, devolution of responsibility for road signs, and new powers to regulate Gaming Machines. Devolution to Scotland of each of these is now provided for in the Scotland Bill, and we will be seeking equivalent provision for Wales;
    - There is then a set of issues, some of which were referred to in our Evidence to the Silk Commission but on which the Commission made no recommendation, in respect of which we believe devolution would now be appropriate. Examples here are that the Assembly should have legislative competence in respect of Alcohol Licensing and the Community Infrastructure Levy (both of which are designated as reserved in the draft Wales Bill), and executive competence in respect of Civil Contingencies, where transfer of these responsibilities would reflect the reality that in emergency situations in Wales, it will usually be the First Minister who will be expected to take the political lead in the handling of the matter.

Conclusion

28. The Welsh Government believes that the draft Wales Bill on which the Committee is undertaking this review as part of the UK Government's pre-legislative scrutiny process is not fit for purpose in its current form. The Welsh devolution settlement would continue to be incoherent and unstable. Importantly, it would also be extremely difficult to understand. This all impacts upon democracy in Wales and the respect that people have for institutions of Government in London and Cardiff. The Welsh Government will continue to work with the UK Government to deliver a Wales Bill that reflects the mandate given by the people of Wales in the 2011 referendum and consolidates the work of the Silk Commission.

Welsh Government
November 2015

Annex 1

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

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

If yes, go to question 2

If no – the provision is outside competence unless:

(*a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;*
or
(b) it is otherwise incidental to, or consequential on, such a provision.

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

If no, go to question 3.

If yes – the provision is outside competence unless:

(a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;
or
(b) it is otherwise incidental to, or consequential on, such a provision.

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

If no, go to question 4.

If yes –the provision is outside competence unless:

(a) it provides for the enforcement of a competent provision of a Assembly Act or Measure or it is otherwise appropriate for making such provision effective;
or
(b) it is otherwise incidental to, or consequential on, such a provision.

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

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

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

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

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

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

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

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

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

If yes, the provision is outside competence.

If no:

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

If yes – the provision is outside competence.

If no:

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

If yes – the provision is outside competence.

If no – the provision is within competence.

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

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

If yes – the provision is outside competence.

If no:

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

If no, go to question 3:

If yes, is the provision:

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

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

If no – the provision is outside competence.

If yes:

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

If yes – outside competence.

If no:

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

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

If no, go to question 6.

If yes:

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

If yes, go to question 6.

If no, the provision is outside competence.

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

If no, go to question 7

If yes:

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

If yes, go to question 7.

If no, the provision is outside competence.

7. Does the provision modify the criminal law?

If no, go to question 8.

If yes:

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

If yes, go to question 8.

If no, the provision is outside competence.

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

If yes, the provision is outside competence

If no, go to question 9

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

If yes, the provision is outside competence

If no, go to question 10.

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

If yes, the provision is outside competence,

If no, go to question 11.

11. Does the provision:

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

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

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

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

If no, go to question 12.

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

If yes, go to question 12.

If no, the provision is outside competence.

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

If yes, the provision is outside competence.

If no, the provision is within competence.

National Assembly for Wales
Constitutional and Legislative Affairs Committee

Statutory Instruments with Clear Reports
16 November 2015

CLA604 - The Care and Support (Review of Charging and Determinations) (Wales) Regulations 2015

Procedure: Negative

The purpose of the Regulations is to enable those persons who are subject to a determination of their ability to pay a charge, contribution or reimbursement for the care and support they receive, or for direct payments they receive to secure this care, to seek a review of this determination and of the level of any charge, contribution or reimbursement.

The Regulations also provide for the process to be followed by local authorities in undertaking a review.

The right to request a review is available to persons in receipt of both non-residential and residential care.

A Code of Practice on the exercise of social services functions in relation to charging will accompany these Regulations.

CLA605 - The Care and Support (Direct Payments) (Wales) Regulations 2015

Procedure: Negative

These Regulations set out the circumstances when a local authority is under a duty to make a direct payment towards the cost of meeting a person's needs for care and support, or, in the case of a carer, for support.

CLA606 - Care and Support (Charging) (Wales) Regulations 2015

Procedure: Negative

These Regulations govern local authorities' determination of a charge for providing or arranging care and support (or, in the case of a carer, support) and for providing or arranging preventative services assistance. They also govern determinations about contributions or reimbursement of direct payments.

CLA607 - The Care and support (Deferred Payment) (Wales) Regulations 2015

Procedure: Negative

These Regulations apply to a person entering, or who is in, residential care and who has a property deemed as eligible capital for the purpose of financial assessment for a charge for this care. Such a person may enter into a "deferred payment agreement" with the local authority. A "deferred payment agreement" delays the sale of the property where the sale is required to meet the charge imposed for the care. The Regulations enable the local authority to meet the full cost of the care whilst placing a charge on the property. The costs of care will be repaid or met from the eventual sale of the property at a later date.

CLA608 - The Care and Support (Choice of Accommodation) (Wales) Regulations 2015

Procedure: Negative

These Regulations enable a person, assessed in need of care and support in a care home, to exercise choice as to their preferred care home. The Regulations provide that a person's preferred choice must meet conditions set out in the Regulations to ensure that the chosen home can meet the person's assessed care and support needs in full.

CLA609 - Care and Support (Financial Assessment) (Wales) Regulations 2015

Procedure: Negative

These Regulations govern local authorities' financial assessments when exercising their discretion to charge for providing or arranging care and support (or support for a carer) and their discretion to set a reimbursement or contribution for a person reviving direct payments to secure their care and support (or support in the case of carers). A Code of Practice on the exercise of social services functions in relation to financial assessment will accompany these Regulations.

CLA615 - The Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015

Procedure: Negative

These Regulations amend the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012 ("the 2012 Regulations") which set out the procedures and fees for hearings undertaken by the residential property tribunal (RPT). These Regulations amend the 2012 Regulations to take account of new applications which may be made to the RPT under the Housing (Wales) Act 2014 and the Consumer Rights Act 2015.

CLA601 - The Code of Practice on the Exercise of Social Services Functions in relation to Part 4 (Meeting Needs) of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA602 - The Code of Practice on the Exercise of Social Services Functions in relation to Part 3 (Assessing the Needs of Individuals) of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA603 - The Code of Practice on the Exercise of Functions in relation to Part 6 (Looked After and Accommodated Children) of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA611 - Code of Practice and Guidance on the Exercise of Social Services Functions and Partnership Arrangements in relation to Part 2 (General Functions) of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA612 - Code of Practice on the Exercise of Social Services Functions in relation to Advocacy under Part 10 and Related Parts of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA613 - Code of Practice on the Exercise of Social Services Functions in Relation to Part 11 (Miscellaneous and General) of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

CLA614 - Code of Practice on the Exercise of Social Services Functions in relation to Part 4 (Direct Payments and Choice of Accommodation) and Part 5 (Charging and Financial assessment) of the Social Services and Well-being (Wales) Act 2014

Procedure in accordance with the Social Services and Well-being (Wales) Act 2014

These codes of practice are laid before the Assembly pursuant to Standing Orders 27.1 and 27.14.

The powers enabling the making of these codes are contained in Sections 145 and 146 of the Social Services and Well-being Act (Wales) 2014.

Section 145 of the Act permits Welsh Ministers to issue, and from time to time revise, one or more codes of practice on the exercise of social services functions.

Section 146 of the Act lays down the procedure, which includes consultation on draft or revised codes) to be followed when issuing or revising a code under Section 145. Draft Codes are laid before the Assembly for a period of 40 days. A draft code must not be issued in the form of the draft if, before the end of that period, the Assembly resolves not to approve the draft code..

WELSH STATUTORY INSTRUMENTS

2015 No. 1821 (W. 263)

HOUSING, WALES

The Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015

EXPLANATORY NOTE

(This note is not part of these Regulations)

These Regulations amend the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012 ("the Principal Regulations") in light of sections 17(4) and 27(1) of the Housing (Wales) Act 2014 ("the 2014 Act") and the Consumer Rights Act 2015 ("the 2015 Act"). The Principal Regulations are amended to include provision in respect of new appeals which may be made to a residential property tribunal under the 2014 Act and the 2015 Act.

In relation to sections 17(4) and 27(1) of the 2014 Act, these are appeals against a decision to place certain conditions on a licence, appeals against the revocation of registration as a landlord, appeals against the amendment of a licence, appeals against the revocation of a licence and appeals against a decision not to grant a licence.

In relation to the 2015 Act, these are appeals made by letting agents against financial penalties imposed against them by a local weights and measures authority.

Part 1 of the 2014 Act relates to the regulation of private rented housing. Part 1 includes a requirement for most landlords of dwellings let, or to be let, under domestic tenancies, as defined in section 2(1) of the 2014 Act, to register with the relevant licensing authority. Similarly, persons engaged in letting or managing such dwellings, are required to obtain a licence from the relevant licensing authority.

Licensing authorities have the power to refuse a licence; grant a licence with a condition that the licence holder complies with any code of practice issued by the Welsh Ministers and any other conditions they consider appropriate; amend a licence

and revoke a licence of a landlord or agent. Part 1 of the 2014 Act also makes provision for landlords or the holder of a licence to appeal to a residential property tribunal against the decision of a licensing authority to grant a licence subject to a condition other than a condition that the licence holder complies with any code of practice issued by the Welsh Ministers; refuse a licence; amend a licence or revoke a licence.

Chapter 3 of Part 3 of the 2015 Act places a duty on a letting agent to publicise their fees and deals with enforcement of that duty. It provides that it is the duty of every local weights and measures authority to enforce the duty in its area. It also provides that a local weights and measures authority may impose financial penalties against a letting agent found to be in breach of their duties under Part 3 of the 2015 Act.

Schedule 9 to the 2015 Act deals with the procedure which a local weights and measures authority must follow before imposing financial penalties on a letting agent.

Schedule 9 to the 2015 Act sets out the process to be followed by a local weights and measures authority in taking enforcement action and includes provision for letting agents to make representations in relation to this. Schedule 9 also makes provision for appeals which may be brought by a letting agent on whom a final notice imposing a financial penalty has been served.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, it was not considered necessary to carry out a Regulatory Impact Assessment as to the likely costs and benefits of complying with these Regulations.

WELSH STATUTORY INSTRUMENTS

2015 No. 1821 (W. 263)

HOUSING, WALES

The Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015

Made	*21 October 2015*
Laid before the National Assembly for Wales	*4 November 2015*
Coming into force	*23 November 2015*

The Welsh Ministers make the following Regulations, in exercise of the powers vested in them(**1**) by section 250(2) of, and Schedule 13 to, the Housing Act 2004(**2**).

Title, commencement and application

1.—(1) The title of these Regulations is the Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015 and they come into force on 23 November 2015.

(2) These Regulations apply to proceedings of residential property tribunals for determining applications(**3**) in respect of premises in Wales.

Amendment of the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012

2. The Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012(**4**) are amended in accordance with the Schedule.

(**1**) The functions conferred on the National Assembly for Wales by the Housing Act 2004 are exercisable by the Welsh Ministers by virtue of section 162 of and paragraph 30(2)(c) of Schedule 11 to the Government of Wales Act 2006 (c. 32).

(**2**) 2004 c. 34.

(**3**) The term "applications" is defined in regulation 2 of the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012, as amended by these Regulations.

(**4**) S.I. 2012/531 (W. 83).

Lesley Griffiths
Minister for Communities and Tackling Poverty, one of the Welsh Ministers
21 October 2015

SCHEDULE Regulation 2

Amendment of the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012

1. In regulation 2—

(a) at the appropriate places insert—

""the 2015 Act" ("*Deddf 2015*") means the Consumer Rights Act 2015(**1**);";

""the 2014 Act" ("*Deddf 2014*") means the Housing (Wales) Act 2014(**2**);";

(b) in the definition of "application"—

(i) at the end of paragraph (c) omit "or";

(ii) at the end of paragraph (d), for "," substitute ";"; and

(iii) after paragraph (d), insert—

□(e)sections 17(4) or 27(1) of the 2014 Act; or

(f) the 2015 Act,";

(c) at the appropriate places insert—

□"landlord" ("*landlord*"), for the purposes of applications under sections 17(4) or 27(1) of the 2014 Act, has the same meaning as in section 2(1) of that Act;";

""letting agent" ("*asiant gosod*"), in respect of an application made under the 2015 Act, has the same meaning as in section 84 of the 2015 Act;";

""licensing authority" ("*awdurdod trwyddedu*") has the same meaning as in section 49(1) of the 2014 Act;";

""local weights and measures authority" ("*awdurdod pwysau a mesurau lleol*") in respect of an application made under the 2015 Act, has the same meaning as in section 69(2) of the Weights and Measures Act 1985;□; and

(d) in the definition of "premises"—

(i) in paragraph (a) after "the 2013 Act" insert "or the 2015 Act" and at the end of paragraph (a) omit the word "and";

(ii) at the end of paragraph (b) insert the word "and"; and

(iii) after paragraph (b) insert—

(**1**) 2015 c 15.
(**2**) 2014 anaw 7.

(c)in an application made under the 2015 Act, any premises at which the letting agency fee, to which an application relates, should have been publicised;.

2. In regulation 4(1), after "2013 Act," insert "the 2014 Act".

3. In regulation 14(1)—

(a) at the end of sub-paragraph (b)(ii) for "." substitute ";";

(b) after sub-paragraph (b)(ii) insert—

(c)in the case of an application made under the 2014 Act—

(i) involve related issues concerning the same landlord;

(ii) involve related issues concerning the same dwelling; or

(iii) involve related issues concerning the same agent licensed under section 9 or section 11 of the 2014 Act;

(d) in the case of an application made under the 2015 Act involve related issues concerning the same letting agent."

4. In regulation 40(5), after "the 2013 Act" insert ", the 2014 Act, the 2015 Act".

5. After regulation 47, insert—

47A. Fees for applications made under the 2014 Act

Subject to regulation 49(2) a fee of £155 is payable for an application to a tribunal under the following provisions of the 2014 Act—

(a) section 17(4) (revocation of registration);

(b) section 27(1) (licensing appeals).

47B. Fees for applications made under the 2015 Act

Subject to regulation 49(2) a fee of £155 is payable for an application to a tribunal under paragraph 5 of Schedule 9 to the 2015 Act.

6. In regulation 48, for "or 47" substitute ", 47, 47A or 47B".

7. In regulation 49—

(a) in paragraph (1), for "or 47" substitute ", 47, 47A or 47B"; and

(b) in paragraph (2), for "or 47" substitute ", 47, 47A or 47B".

8. In regulation 50(1), for "or 47" substitute ", 47, 47A or 47B".

9. In the Schedule, after paragraph 72 insert—

Applications made under the 2014 Act

Applications relating to revocation of landlord registration

73.—(1) This paragraph applies to an application made under section 17(4) of the 2014 Act (appeal against revocation of registration).

(2) The specified documents are—

(a) a copy of the notice of the licensing authority's intention to revoke registration and the reasons for that decision;

(b) any representations made by the landlord in response to the licensing authority's notice of intention to revoke registration;

(c) a copy of the notice revoking the registration of the landlord and the reasons given by the licensing authority; and

(d) any other relevant documents supporting the application.

(3) The specified respondent is the licensing authority.

Applications relating to licensing appeals

74.—(1) This paragraph applies to an application under section 27(1) of the 2014 Act.

(2) The specified documents are—

(a) a copy of the notice of the licensing authority's intention to amend or revoke the licence or to make the licence subject to a condition, as the case may be and the reasons for its decision;

(b) any representations made in response to the licensing authority's notice of intention to amend or revoke the licence;

(c) a copy of the notice making the licence subject to a condition (other than a requirement to comply with a code of practice issued by the Welsh Ministers), refusing to grant, amending or revoking the licence as the case may

be and the reasons given by the licensing authority; and

(d) any other relevant documents supporting the application.

(3) The specified respondent is the licensing authority.

Applications made under the 2015 Act

Applications relating to final notices

75.—(1) This paragraph applies to an application under paragraph 5 of Schedule 9 to the 2015 Act (appeal against financial penalty).

(2) The specified documents are—

(a) a copy of the notice of intent served on the letting agent by the local weights and measures authority under paragraph 1(1) of Schedule 9 to the 2015 Act;

(b) a copy of any written representations made by the letting agent following receipt of the notice of intent issued under paragraph 2 of Schedule 9 to the 2015 Act;

(c) a copy of the final notice served on the letting agent by the local weights and measures authority under paragraph 3 of Schedule 9 to the 2015 Act; and

(d) any other relevant documents supporting the application.

(3) The specified respondent is the relevant local weights and measures authority.

EXPLANATORY MEMORANDUM TO THE RESIDENTIAL PROPERTY TRIBUNAL PROCEDURES AND FEES (WALES) (AMENDMENT) REGULATIONS 2015

This Explanatory Memorandum has been prepared by the Housing Policy Division 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 Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015

Lesley Griffiths
Minister for Communities and Tackling Poverty
21 October 2015

Description

1. These Regulations amend the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2012 (S.I. 2012/531) ("the 2012 Regulations") which set out the procedures and fees for hearings undertaken by the residential property tribunal (RPT). These Regulations amend the 2012 Regulations to take account of new applications which may be made to the RPT under the Housing (Wales) Act 2014 ("the 2014 Act") and the Consumer Rights Act 2015 ("the 2015 Act").

2. Sections 17(4) and 27(1) of the 2014 Act introduce applications to the RPT to appeal against certain decisions of a Licensing Authority. In addition, the 2015 Act introduces new grounds for an application to the RPT by a letting agent to appeal against a financial penalty imposed by a local weights and measures authority. These Regulations will ensure that details regarding the procedures, fees and documents which need to be lodged in relation to applications, which can be made to the RPT under the 2014 Act and the 2015 Act, are included in the 2012 Regulations, as amended.

Matters of special interest to the Constitutional and Legislative Affairs Committee

3. None.

Legislative Background

4. The 2012 Regulations are made under section 250(2) of and Schedule 13 to the Housing Act 2004 ("the 2004 Act") and regulate the procedures and the fees to be set by the RPT for hearings which it undertakes.

5. Paragraph 1 of Schedule 13 to the 2004 Act gives the "appropriate national authority" powers to make Regulations in relation to the procedures of the RPT and these powers have been transferred to the Welsh Ministers by virtue of section 162 of and paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

6. These Regulations follow the negative resolution procedure.

Purpose & Intended Effect of the Legislation

7. These Regulations amend the 2012 Regulations following the introduction of the 2014 Act and the 2015 Act.

<u>The 2014 Act:</u>

8. Part 1 of the 2014 Act sets out new requirements for landlords to be registered and agents and landlords to be licensed in order to carry out certain activities in relation to rental properties in Wales, such as property management and letting.

9. As part of this new requirement, provisions have been made to allow applications to the RPT to deal with appeals against the Licensing Authority's decision in the following circumstances:

- Section 17 of the 2014 Act allows for a Licensing Authority to revoke a landlord's registration in certain circumstances. Section 17(4)allows a person whose registration is revoked to appeal that decision;

- Section 27 of the 2014 Act allows a licence holder or applicant for a licence to appeal the following decisions of the Licensing Authority, made under sections 25 and 26:
    a. Granting a licence subject to a condition, other than the requirement to comply with any code of practice issued by Welsh Ministers
    b. Refusing an application for a licence
    c. Amending a licence
    d. Revoking a licence.

10. These Regulations provide for applications to be made to the RPT to appeal in these circumstances and setting the fee in each case at £155.00 which is consistent with other RPT applications.

<u>The 2015 Act:</u>

11. Section 83 of the 2015 Act requires letting agents to publicise relevant fees at their premises and on their website. Section 87 of the 2015 Act provides that, where a local weights and measures authority is satisfied that a letting agent has breached a duty imposed by section 83, it may impose a financial penalty on the agent in respect of that breach. Under paragraph 5 of Schedule 9 to the 2015 Act, where a local weights and measures authority has served a final notice on a letting agent in respect of a financial penalty, the letting agent may appeal against that notice to the RPT.

12. These Regulations provide for applications to be made to the RPT to appeal in these circumstances and setting the fee at £155.00 which is consistent with other RPT applications.

Consultation

13. When the 2012 Regulations were made, the Administrative Justice and Tribunal Council (AJTC) were consulted in writing on the proposed Regulations. However, the AJTC was formally abolished by the UK

Government in August 2013 and the requirement to consult under the Tribunals, Courts and Enforcement Act 2007 was repealed. The non-statutory body that replaced the AJTC, the Committee for Administrative Justice and Tribunals Wales (CAJTW) and the Lord Chief Justice for England and Wales were formally written to and invited to comment on these proposed Regulations. Wider consultation was not considered necessary as the changes are technical and the impact of them is considered to be of a relatively minor nature. The consultation ended on 25 August 2015 and no issues were raised regarding the draft Regulations.

Regulatory Impact Assessment (RIA)

14. No separate RIA has been prepared as the Impact Assessment prepared for the 2014 Act is relevant and a copy may be obtained from the Housing Policy Division, Welsh Government, Rhydycar Business Park, Merthyr Tydfil, CF41 1UZ.

Jane Hutt AC / AM
Y Gweinidog Cyllid a Busnes y Llywodraeth
Minister for Finance and Government Business

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA-L-LG-0156-15

Dame Rosemary Butler AM
Presiding Officer
National Assembly for Wales

4 November 2015

Dear Rosemary,

Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations 2015

I am writing to notify you, pursuant to section 11A(4) of the Statutory Instruments Act 1946, that the Residential Property Tribunal Procedures and Fees (Wales) (Amendment) Regulations were not laid at least 21 days before they will come into force.

Due to an unfortunate administrative oversight, the Regulations were not sent for laying as planned, which means that they will breach the “21 day” rule. They will, though, come into force on 23 November 2015.

Please accept my apologies for this oversight. Appropriate steps have been taken to prevent a similar problem from happening again.

Jane

Jane Hutt AC / AM
Y Gweinidog Cyllid a Busnes y Llywodraeth
Minister for Finance and Government Business

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

English Enquiry Line 0300 0603300
Llinell Ymholiadau Cymraeg 0300 0604400
Correspondence.Jane.Hutt@wales.gsi.gov.uk

National Assembly for Wales
Constitutional and Legislative Affairs Committee

CLA610 - The National Independent Safeguarding Board (Wales) (No 2) Regulations 2015

Procedure:

Negative

Background

These Regulations revoke and replace the National Independent Safeguarding Board (Wales) Regulations 2015 (the original Regulations).

The original Regulations set out the arrangements for appointments to, and proceedings of, the National Safeguarding Board.

Technical Scrutiny

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

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument.

These Regulations have been made to correct an administrative error. As a consequence of the Social Services and Well-being (Wales) Act 2014 (Commencement No.2) Order 2015 naming the appointed day for commencement of sections 132 and 133 of the Act as 21 October 2015, the National Independent Safeguarding Board (Wales) Regulations 2015 were not only made, but came into force in advance of the relevant powers in the Act.

While it may be considered that section 13 of the Interpretation Act 1978, regarding the anticipatory exercise of powers, provides a sufficient legal basis, it is considered prudent to place the matter beyond doubt by revoking and remaking the regulations with a coming into force date after the appointed day for the coming into force of the enabling power in the Act.

Legal Advisers
Constitutional and Legislative Affairs Committee
05 November 2015

WELSH STATUTORY INSTRUMENTS

2015 No. 1803 (W. 258)

SOCIAL CARE, WALES

The National Independent Safeguarding Board (Wales) (No. 2) Regulations 2015

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations relate to the National Independent Safeguarding Board which was established under section 132 of the Social Services and Well-being (Wales) Act 2014.

Regulation 3 provides that the National Board is to consist of up to 6 members appointed by the Welsh Ministers.

Regulation 4 provides for proceedings at the National Board meetings.

Regulation 5 provides for the National Board to set up supplementary groups to consider and report on certain matters.

Regulation 6 requires the National Board to arrange to meet the chairs of Safeguarding Boards at least twice every year.

Regulation 7 requires the National Board to hold annual consultation meetings.

Regulation 8 provides for the information to be included in the National Board's annual report and the times for making and publishing the report.

Regulation 9 revokes the National Safeguarding Board (Wales) Regulations 2015.

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 by contacting the Health and Social Services Group, Welsh Government, Cathays Park, Cardiff CF10 3NQ.

W E L S H S T A T U T O R Y
I N S T R U M E N T S

2015 No. 1803 (W. 258)

SOCIAL CARE, WALES

The National Independent Safeguarding Board (Wales) (No. 2) Regulations 2015

Made *30 October 2015*

Laid before the National Assembly for Wales *3 November 2015*

Coming into force *25 November 2015*

The Welsh Ministers, in exercise of the powers conferred by section 133(1) and (2) of the Social Services and Well-being (Wales) Act 2014(**1**), make the following Regulations.

Title, commencement and application

1.—(1) The title of these Regulations is the National Independent Safeguarding Board (Wales) (No. 2) Regulations 2015.

(2) These Regulations come into force on 25 November 2015.

(3) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

"the Act" ("*y Ddeddf*") means the Social Services and Well-being (Wales) Act 2014;

"Board member" ("*aelod o'r Bwrdd*") means a member of the National Board;

"the National Board" ("*y Bwrdd Cenedlaethol*") means the National Independent Safeguarding Board;

"Safeguarding Board" ("*Bwrdd Diogelu*") means a safeguarding board established under section 134 of the Act.

(**1**) 2014 anaw 4.

Constitution

3.—(1) The National Board is to consist of up to six members appointed by the Welsh Ministers.

(2) The Welsh Ministers must appoint one of the Board members as chair of the National Board.

(3) The Welsh Ministers must determine the terms under which Board members will be appointed.

(4) The Welsh Ministers may provide staff and other resources to assist the National Board to carry out its functions.

Proceedings at meetings

4.—(1) The National Board must elect one of its members as vice-chair.

(2) The chair or the vice-chair is to preside at National Board meetings.

(3) The National Board is to take decisions by a simple majority vote of the Board members present; the person presiding is to have a second or casting vote in the event of a tie.

(4) The quorum for National Board meetings is 3 Board members, including the person presiding.

(5) The National Board must keep minutes of its meetings and a register of Board members' interests.

Supplementary groups set up by the National Board

5.—(1) The National Board may set up supplementary groups to consider—

(a) specific matters,

(b) matters concerning only the safeguarding of children, or

(c) matters concerning only the safeguarding of adults,

and report back to the National Board.

(2) Such a group may consist of—

(a) Board members only,

(b) non-members and one or more Board members, or

(c) non-members only.

Meetings between members of the National Board and chairs of Safeguarding Boards

6. One or more Board members must invite, and make arrangements to meet, the chairs of the Safeguarding Boards at least twice a year.

Consultation with people affected

7. The National Board must arrange to meet, at least once a year, a group of persons representative of those who may be affected by arrangements to safeguard children and adults in Wales.

Annual report

8.—(1) The National Board must make its annual report to the Welsh Ministers no later than 31 October each year, in respect of the year ending with the preceding 31 March.

(2) The annual report must contain information about—

(a) any support and advice provided by the National Board to Safeguarding Boards;

(b) any other work undertaken by the National Board, or by supplementary groups set up by the National Board, and the outcomes achieved;

(c) the adequacy and effectiveness of arrangements made by Safeguarding Boards to safeguard children and adults in Wales, including—

(i) lessons learnt from child practice reviews and adult practice reviews carried out by Safeguarding Boards and from other reviews and investigations;

(ii) examples where learning, information and resources have been shared between Safeguarding Boards within a Safeguarding Board area or between Safeguarding Boards across Wales;

(iii) examples of effective measures which Safeguarding Boards have taken to give affected children and adults the opportunity to participate in a Safeguarding Board's work;

(d) any recommendations which the National Board wishes to make to the Welsh Ministers.

(3) The National Board must make the annual report publicly available no later than 31 December in the year in which it was made.

(4) In this regulation—

(a) "child practice review" ("*adolygiad ymarfer plant*") means a review carried out by a Safeguarding Board in accordance with regulation 4 of the Safeguarding Boards (Functions and Procedures) (Wales)

Regulations 2015(**1**) which relates to a child; and

(b) "adult practice review" ("*adolygiad ymarfer oedolion*") means a review carried out by a Safeguarding Board in accordance with regulation 4 of the Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015 which relates to an adult.

Revocation

9. The National Safeguarding Board (Wales) Regulations 2015(**2**) are revoked.

(**1**) S.I. 2015/1466 (W. 160).
(**2**) S.I. 2015/1358 (W. 132).

Mark Drakeford
Minister for Health and Social Services, one of the Welsh Ministers
30 October 2015

Explanatory Memorandum to the National Independent Safeguarding Board (Wales) (No.2) Regulations 2015

This Explanatory Memorandum has been prepared by the Health and Social Services Group 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 National Independent Safeguarding Board (Wales) (No.2) Regulations 2015. I am satisfied that the benefits outweigh any costs.

Mark Drakeford
Minister for Health and Social Services
30 October 2015

Part 1 – OVERVIEW

Description

1. The Social Services and Well-being (Wales) Act 2014 brings together local authorities' duties and functions in relation to improving the well-being of people who need care and support and carers who need support, in a single Act. The Act provides the statutory framework to deliver the Welsh Government's commitment to integrate social services to support people of all ages, and support people as part of families and communities.

2. These Regulations relate to the National Independent Safeguarding Board ('the National Board') which is established under section 132 of the Social Services and Well-being (Wales) Act 2014 and set out arrangements for appointments to, and the proceedings of, the National Board.

Matters of special interest to the Constitutional and Legislative Affairs Committee

3. These Regulations revoke and replace the National Independent Safeguarding Board (Wales) Regulations 2015 as they are considered to be technically flawed for the reasons set out below. The Regulations have a coming into force date of 25 November 2015. There are no other changes to bring to the Committee's attention.

Legislative background

4. The powers enabling these Regulations to be made are contained in section 133(1) of the Social Services and Well-being (Wales) Act 2014 ('the Act').

5. This instrument is subject to the negative resolution procedure.

Purpose and intended effect of the legislation

6. These Regulations have been made to correct an administrative error. As a consequence of the Social Services and Well-being (Wales) Act 2014 (Commencement No.2) Order 2015 naming the appointed day for commencement of sections 132 and 133 of the Act as 21 October 2015, the National Independent Safeguarding Board (Wales) Regulations 2015 were not only made, but came into force in advance of the relevant powers in the Act.

7. While it may be considered that section 13 of the Interpretation Act 1978, regarding the anticipatory exercise of powers, provides a sufficient legal basis, it is considered prudent to place the matter beyond doubt by revoking and remaking the regulations with a coming into force date after the appointed day for the coming into force of the enabling power in the Act.

8. The Regulations provide for the National Board to consist of up to six members, appointed by the Welsh Ministers, with one of the members to be appointed as chair. The Regulations make further provision about the proceedings of the National Board, the establishment of supplementary groups, consultation by the National Board with those affected by its work, and set out arrangements for the National Board's annual report to the Welsh Ministers.

9. An evaluation of Local Safeguarding Children Boards in 2011 highlighted[1]:-

> "there is a need for clear strategic direction at a national level with well defined objectives and outcomes, which also facilitate local decision making to meet the needs of children in their local communities".

10. The National Board will provide this strategic direction for the new Safeguarding Children Boards and the Safeguarding Adults Boards as part of its primary function to provide support and advice to the those Boards.

11. Proposals to establish a National Independent Safeguarding Board were outlined in 'Sustainable Social Services for Wales: A Framework for Action', published by the Welsh Government in February 2011[2] which stated:-

> "we will establish, on a permanent basis, an independently chaired National Safeguarding Board for Adults and Children. This Board will provide national leadership across all stakeholders, will develop and promote high quality standards, and be a focus for learning from experience".

12. The main responsibility of the members of the National Board will be to ensure that the duties of the National Board are effectively delivered. The National Board will receive information from local Safeguarding Boards and others to assist it to assure the Welsh Ministers that safeguarding and protection are being appropriately led, developed, challenged and promoted in Wales.

13. These proposals are in line with the initial report of the Safeguarding Advisory Panel, established by the then Deputy Minister for Social Services in July 2013 to provide expert advice to the Welsh Government on strengthening safeguarding arrangements for adults and children in Wales. The Panel recommended that a National Board of five members plus the Chair is established, with quoracy expressed as two members alongside the Chair.

14. The Safeguarding Advisory Panel's final report further noted that the National Board should:

- complement, not duplicate, Safeguarding Boards or Regulator functions;
- advise, support, challenge, identify concerns and failings by advising the Welsh Ministers;

[1] The Joint Inspection of Local Safeguarding Children Boards 2011overreview report October 2011
[2] http://gov.wales/topics/health/publications/socialcare/guidance1/services/?lang=en

- not have an inspectorial or scrutiny role with Safeguarding Boards;
- raise awareness - public, workforce and organisational;
- promote and celebrate good safeguarding and protection policy and procedures in Wales;
- undertake specific children and adult work streams within the National Board;
- use a public appointment process to appoint the National Board members;
- ensure the National Board has a clear role and structure, and access to legal, public relations and expert advice;
- ensure it clarifies outcomes - annual report identifies its response to safeguarding themes, challenges and supports Safeguarding Board improvement; and
- promote and raise public awareness of safeguarding using public engagement events.

Consultation

15. The National Independent Safeguarding Board (Wales) Regulations 2015 were subject to a 12 week consultation that ran between 6 November 2014 and 2 February 2015. Further details on the consultation process are set out in the Regulatory Impact Assessment in Part 2. No further consultation has been undertaken on these Regulations as they simply revoke and remake the National Independent Safeguarding Board (Wales) Regulations 2015[3].

[3] S.I. 20151466 (W.160)

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option 1: Do nothing

1. In the event of these Regulations not being made, the existing provision about the constitution, membership, proceedings or reporting arrangements of the National Independent Safeguarding Board ('the National Board') would be technically flawed.

Option 2: Bring Regulations into Force

2. Making the Regulations will enable the establishment of the National Board with a remit to provide national leadership, advise Ministers on the adequacy and effectiveness of safeguarding arrangements; and advise on action to help strengthen policy and improve practice.

Costs & benefits for Option 1

3. There would be no costs associated with not making these Regulations. However, the proposed role of the National Board to provide national leadership, advise the Welsh Ministers on the adequacy and effectiveness of safeguarding arrangements; and advise on action to help strengthen policy and improve practice would be incapable of being performed in the manner envisaged in the Social Services and Well-being (Wales) Act 2014 without the risk of challenge.

Costs & benefits for Option 2

4. Appointment of the Chair and Members of the National Board is subject to a public appointments exercise, the costs of which were estimated at £17,000.

5. Running costs of the National Board once established, including remuneration for members, are estimated at £150,000 per annum. Secretariat support will be provided by the Welsh Government at an estimated cost of £30,000 per annum. These costs must be seen as indicative to the extent that the Board will wish to determine its own priorities in the light of experience.

6. These costs should be seen in the context of an overall reduction in the number of Safeguarding Boards and the global effect of ~~this~~ the package of regulations made under Part 7 of the Social Services and Well-being(Wales) Act 2015. The National Board will provide renewed expert national leadership, advice to Ministers on matters relating to safeguarding arrangements, and on action to strengthen and improve practice.

Consultation

7. The National Independent Safeguarding Board (Wales) Regulations 2015 were subject to a 12 week consultation that ran between 6 November 2014 and 2 February 2015. Further details on the consultation process are set out in the

Regulatory Impact Assessment in Part 2. No further consultation has been undertaken on these Regulations as they simply revoke and remake the National Independent Safeguarding Board (Wales) Regulations 2015[4].

8. The Report and a list of respondents can be found at:

   http://gov.wales/consultations/healthsocialcare/part7/?status=closed&lang=en

9. The consultation responses did not raise any issues in respect of the establishment or constitution of the National Board. As part of the consultation, the Welsh Government took the opportunity to gather views as to what should be the priority areas for action by the National Board and these will be used to inform the remit of the National Board once it is established.

10. In addition to that formal consultation, the Safeguarding Advisory Panel was appointed in July 2013 by the then Deputy Minister for Social Services to engage with stakeholders to strengthen the safeguarding proposals in the Social Services and Well-being (Wales) Bill. The Safeguarding Advisory Panel liaised with a range of statutory independent and third sector agencies while the Regulations and Statutory Guidance were being developed.

11. Once developed the draft Regulations and statutory guidance were discussed at two Welsh Government consultation events held on 26 November 2014 and 9 December 2014.

Competition Assessment

Competition Filter Test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulations do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisations?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No

[4] S.I. 20151466 (W.160)

Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

12. The filter test shows that it is not likely that the regulation will have any detrimental effect on competition; therefore a detailed assessment has not been conducted.

13. We do not consider it necessary to undertake a competition assessment for these Regulations since they will not affect the business sector in any significant way

Post implementation review

14. The Social Services and Well-being (Wales) Act 2014 contains provisions to allow the Welsh Ministers to monitor functions of the Act carried out by local authorities and other bodies. The Welsh Ministers may require these bodies to report on their duties in implementing these Regulations.

15. Additionally, the Welsh Government will continue to monitor the impact of the Regulations on areas such as the Welsh language, equality, tackling poverty and the United Nations Principles for Older Persons.

16. As required by the Rights of Children and Young Persons (Wales) Measure 2011, the Welsh Ministers will have due regard to the United Nations Convention on the Rights of the Child (UNCRC) when exercising relevant functions under the Act.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Cyllid
National Assembly for Wales
Finance Committee

David Melding AM
Chair
Constitutional and Legislative Affairs Committee

11 November 2015

Dear David

Implications of the draft Wales Bill for the Finance Committee

Members of the Finance Committee have considered the implications of the draft Wales Bill in relation to the work of the Committee. We have attached, as an annex, a summary of all the issues we considered, but we would particularly refer your attention to the following main points:

Welsh public authorities (paragraphs 6-11 of the annex) - The draft Bill creates confusion in relation to Assembly's ability to legislate, e.g. to confer, remove or modify the functions of the Wales Audit Office, the Auditor General for Wales and the Public Services Ombudsman for Wales (PSOW). In this Assembly the Public Audit (Wales) Act 2013 has been passed, and the Finance Committee is currently consulting on a draft Bill in relation the extending the powers of the PSOW and it is not clear whether either of these pieces of work would be within the competence of the Assembly had this draft Bill already been passed in its current iteration.

Financial framework (paragraphs 12-25 of the annex) – We note that the Bill makes no change to the provisions inserted into the Government of Wales Act 2006 by the Wales Act 2014. Consequently, we are disappointed that the draft Bill does not provide the required competence to enable the Assembly to legislate in relation to the fiscal framework arising from the conferment of these new fiscal powers, particularly in relation to the devolved taxes. The need for such legislation was identified in our extensive inquiry into **best practice budget processes** and we think this is essential in affording

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the Assembly the ability to competently manage the new fiscal powers afforded by the Wales Act 2014.

Devolved taxes (paragraphs 26-27 of the annex) – The Wales Act 2014 conferred specific powers on the Assembly in relation to fiscal devolution and we are very concerned that some of the provisions in the draft Bill will make legislating in relation to specific taxes problematic.

I hope you find the committees consideration of the draft Bill useful. As a Committee we would like to acknowledge the assistance of Ian Summers, in preparing this response. Due to the far reaching implications of the financial considerations of the draft Bill, I am copying this letter to David Davies MP, Chair of the Welsh Affairs Committee.

Yours sincerely,

Jocelyn Davies AM

Chair

Annex 1

Further details of the implications of the draft Wales Bill for the Finance Committee

Specific Reservations

1. Schedule 7A Part 2 identifies reservations in relations to Financial and Economic Matters, specifically relevant to the Finance Committee are:

A1 Fiscal, economic and monetary policy (with exceptions relating to devolved taxes, including their collection and management, and local taxes to fund local authority expenditure (for example council tax and non-domestic rates)

A2 The currency

A5 Dormant accounts

2. *Silent Subjects:* The A1 Reservations relating to the control over UK public expenditure, the exchange rate, the Bank of England and the Office of Budget responsibility do not appear as exceptions in the Government of Wales Act (GOWA) and may have been regarded as 'silent subjects'. In addition Reservations A2 and A5 do not equate to current exceptions under GOWA and may also be regarded as 'silent' subjects. The Assembly can currently legislate on subjects that are neither subjects nor exceptions in Schedule 7 to GOWA, (as explained by the Supreme Court in the *Agricultural Sector (Wales) Bill* judgment). Therefore, where these silent subjects have been converted into reservations, there is a reduction of competence.

3. *The National Audit Office and the Comptroller and Auditor General*: In Schedule 7 to GOWA the restriction on modifying enactments relating to the Comptroller and Auditor General or the National Audit Office is excepted where the Secretary of State consents. There is no equivalent exception to this provided for in the draft Bill arguably widening the protection afforded to these bodies and a consequent loss of competence.

4. Additionally, the A1 reservations relating to the National Audit Office, the Comptroller and Auditor General and the Office of Budget Responsibility do not

have an equivalent Scottish reservations. Similarly, there is no Scottish equivalent to reservation A5. We are interested in why the Assembly has not been afforded the same competence as Scotland in relation to these reservations.

5. *Government borrowing and lending*: Reservation A1 contains a specific reference to 'government borrowing and lending'. We would like to recommend that clarification is provided in relation to this, as it is not immediately apparent whether 'government' is a reference to the Welsh Government or to the UK Government.

Restrictions

6. *Auditable bodies:* Currently, heading 14 of GOWA confers competence on the Assembly to legislate, subject to the general restrictions set out in Part 2 of Schedule 7 to GOWA, in relation to the audit, examination and inspection of auditable public bodies. Auditable bodies are:
   a) the Assembly,
   b) the Assembly Commission,
   c) the Welsh Government,
   d) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions,
   e) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers, and
   f) persons established by enactment and having power to issue a precept or levy.

7. The draft Bill provides that a matter would be outside the Assembly's legislative competence if it relates to a reserved matter or breaches any of the restrictions in Part 1 of Schedule 7B. Whilst the expression "auditable bodies' is not expressly referred to being reserved, the Assembly's ability to legislate in respect of bodies which may be considered to be "auditable bodies" is potentially subject to the caveats included in Paragraph 8 of Schedule 7B in respect of "reserved authorities". The definition of "reserved authorities" refers to "public authorities" and "Welsh public authorities", with the Assembly only having competence in relation to Welsh Public Authorities, which are defined as follows:

"Welsh public authority" means a public authority whose functions—

(i) are exercisable only in relation to Wales, and

(ii) are wholly or mainly functions that do not relate to reserved matters."

8. The definition of "Welsh public authority" is potentially more restrictive than the definition of "auditable body" currently contained in GOWA and the restrictive nature of the test for "Welsh public authority", in particular the need to ascertain a body's functions in full as part of that test, makes it difficult to establish whether a body is a "Welsh public authority". The definition appears to be based on the assumption that devolved public bodies only have functions which are exercisable in relation to Wales. There are also difficulties around the requirement for a body's functions to be functions "wholly or mainly functions that do not relate to reserved markers". This gives rise to a significant evidential burden and the potential that a body could fall out of this requirement over time.

9. We think this confusion over a Welsh public authority is particularly relevant to some aspects of the Finance Committee work, in relation to the WAO/Auditor General for Wales and the Public Services Ombudsman for Wales (PSOW) as it is not possible to categorically state that the WAO and/or the Auditor General and the PSOW are or are not "Welsh public authorities".

10. If the definition applies and they are not "Welsh public authorities" there will a loss of competence e.g. to confer, remove or modify their functions, as they will be either be reserved or be beyond the scope of the Assembly's powers in the absence of consent from a UK Government Minister under paragraph 8(1) of Schedule 7B as they exercise some functions otherwise than only in relation to Wales and/or have a number of functions which relate to reserved matters.

11. We think this uncertainty could be overcome by expressly providing for the Auditor General for Wales, the WAO and the PSOW to be expressly stated to as "Welsh public authorities".

Issues relevant to Standing Order 19 – Finance

12. *Budgetary procedures*: The Wales Act 2014 amended Schedule 7 of GOWA by inserting a new paragraph 13 into Part 1 of Schedule 7 providing that budgetary procedures are within the Assembly's legislative competence. The current finance provisions in GOWA are not satisfactory for a mature legislator. In line with the Silk Commission's reports, we believe the Assembly should have maximum flexibility to legislate on finance and accountability provisions. Our inquiry into budget best practice has recommended a Bill should be introduced that would modernise the budget process and create common up to date accounting and audit provisions for all Welsh public bodies. We accept and agree that some safeguards need to be maintained by Westminster.

13. The current provisions for considering and approving budgets are:

- Existing provisions are Sections120(2) and 125 to 128 of the 2006 Act;
- The Wales Act 2014 conferred legislative competence on the Assembly to repeal or amend these provisions (and to a limited extent Section 119 which deals with information to be provided by the Secretary of State on estimated payments) so that the Assembly can modify its budget process.
- The draft Bill preserves the powers conferred by the 2014 Act (para 7(2)(d) and 7(5) & (6) of schedule 7B).

14. The enhanced competence conferred by the 2014 Act enables the Assembly to legislate in relation to procedures for scrutinising and setting the annual budget of Welsh Ministers, other relevant persons and any other body receiving payments from the Welsh Consolidated Fund by virtue of an enactment (either Parliamentary or Assembly), and would allow the Assembly to pass an annual Finance Act in place of the current annual budget motion. As the Assembly also has competence for devolved taxes, these procedures could include the determination of the tax rates in relation to such taxes, tax receipt forecasts, variances, borrowing for current and capital purposes and amounts for repaying borrowing in addition to authorising how much "relevant persons" may spend.

15. Sections 131 to 134, 137 to 139 and 141 to 142 of GOWA apply to the appointment of accounting officers and the preparation and audit of accounts for

the Welsh Consolidated Fund (WCF), the Welsh Ministers, the Assembly Commission and whole of government accounts. They are currently 'protected provisions' in that they cannot be amended by way of an Act of the Assembly. There are no exceptions to this prohibition. This position is replicated in Schedule 7B of the draft Bill.

16. The Bill makes no change to the provisions relating to financial provisions as currently contained in GOWA. These provisions are in the nature of conferred powers. A general unamendable provision, providing that resources may only be used by Welsh Ministers, the Assembly Commission and other bodies financed directly from the Welsh Consolidated Fund, only if authorised by the Assembly, would better reflect the ethos of a reserved powers model.

17. Whilst the current provisions relating to the preparation of accounts is unchanged, these may be now be regarded as being unduly restrictive. As 'protected provisions' they are subject to the General Restriction 7 as set out in Schedule 7B and cannot be amended. Any ancillary provision would, depending on its purpose, be subject to the relevant test set out in section 108A potentially reducing the scope of the Assembly to legislate in relation to the designation of accounting officers, the preparation and audit of accounts and their laying before the Assembly.

18. We would make the following recommendations for changes to allow the Assembly the required competence over budgetary procedures:

a) Whilst the current provisions are satisfactory, we believe they are of a conferred nature and not within the spirit of a reserved powers model. We would recommend that paragraphs 7(5) and (6) of schedule 7B be removed and replaced with a general unamendable provision requiring that resources may only be used by the Welsh Ministers, Assembly Commission and other bodies financed directly from the WCF, only if authorised by the Assembly. This could be by the existing budget motion process or in accordance with any replacement legislation enacted by the Assembly.

b) With regard to the flow of funds in and out of the WCF, we agree that the Assembly should not be able to amend Sections 117 and 118 of GOWA 2006 (requirement for the WCF and payments into it by the Secretary of State and to Welsh Ministers by the UK government more generally). Section 118(2) could be could be combined with Section 120(1) with a requirement that Welsh Ministers, Assembly Commission and other direct funded bodies should be paid into WCF – subject to any provision of an Assembly Act for disposal of/accounting for such sums.

c) We think that the Bill should be amended to repeal Section 119. This section had a purpose in the early days of the Assembly before the advent of resource budgeting but is now of little relevance and should be removed.

d) We agree that Section 120(1) and (3) to (7) should not be capable of amendment by the Assembly but recommend that we press for an amendment to allow the Assembly to add to the list of relevant persons (but not remove any of the existing four entries).

e) We also agree that Section 124 should not be capable of amendment, except to amend references to a budget motion (should the Assembly legislate to change the budget approval mechanism), and to add to the list of relevant persons. This section would also benefit from an additional unamendable provision requiring that sums charged on or paid out of the WCF should not be applied for any purpose other than that for which they were charged/paid out.

f) In addition we recommend that the Assembly should be able to amend sections 129 and 130 subject to the protection of section 124 being retained in Westminster legislation.

19. Sections 131 to 134, 137 to 139 and 141 to 142 of GOWA are the existing provisions for the appointment of Accounting Officers and the preparation and audit of accounts for the WCF, Welsh Ministers, Assembly Commission and a whole of government account. Schedule 7B does not allow the Assembly to amend these provisions. The Assembly is, however empowered to make or amend provision for the appointment/designation of accounting officers and the preparation and audit of accounts for other devolved public bodies. These GOWA sections are prescriptive and the prevention on them being amended is an impediment to the

Assembly legislating for a modern common framework for the preparation and audit of accounts.

20. We would press for an amendment that would allow these provisions to be repealed or amended. In line with the spirit of the reserved powers model and the Silk Commission recommendations, the Bill should also contain an unamendable provision requiring the Assembly to ensure that legislative provision is made for the designation of accounting officers, the preparation and audit of accounts, and the laying of those accounts before the Assembly.

21. In relation to the above, we would also recommend that we should specifically request that the Assembly be empowered specifically to modify/repeal any provision in relation to functions currently exercised by the Treasury in relation to designating accounting officers, specifying responsibilities of accounting officers and giving directions in respect of the preparation of accounts. This is notwithstanding any general restriction on amending or repealing functions of Ministers of the Crown without consent. The reason for this request is to enable the harmonisation of accountability provisions and seek parity with Scotland in this regard where such functions are exercised locally rather than by the Treasury. In the future, we would envisage that such Treasury functions would be exercised by the Welsh Government. Devolution in Wales is now mature and the original reason for Treasury having these functions was in large measure due to the original constitution of the Assembly as corporate body without a legally separate executive – this has not been the case since GOWA 2006 took effect.

22. The provisions relating to the AGW's value for money audit and other performance audit functions are currently set out in sections 135 and 140 of GOWA 2006, Sections 145 to 145D and paragraph of 8 of schedule 6 to GOWA 1998, paragraph 11 of schedule 2 to the Care Standards Act 2000, paragraph 19 of schedule 1 to the Public Services Ombudsman Act 2005, and paragraph 13 of schedule 1 to the Commissioner for Older People (Wales) Act 2006. Assembly legislation has also include such provision for bodies established since 2006 (e.g. the Welsh Language Commissioner).

23. The 2006 provisions and sections 145, 145A and 146A(1) of GOWA 1998 cannot be amended by the Assembly (see paras 5 and 7 of the draft schedule 7B) which is inconsistent as the similar provisions in the other enactments are capable of amendment. It is also restrictive as it would prevent the Assembly from legislating to create a common set of VFM audit provisions that would apply to all devolved public bodies.

24. In line with the spirit of the reserved powers model and the Silk Commission reports, we recommend that an amendment is brought forward to remove these restrictions and the inclusion of an unamendable provision requiring the Assembly to ensure that legislative provision is made for the AGW to carry out and report on examinations into the economy, efficiency and effectiveness with which the Welsh Ministers, Assembly Commission and other devolved public bodies have used their resources in discharging their functions.

25. Paragraph 5 of schedule 7B prevents the Assembly from amending sections 2(1) to (3), 3(2) to (4), 6(2) to (3) and 8(1) of the Public Audit (Wales) Act 2013. These provisions relate to the appointment, removal and operational independence of the Auditor General and were originally in section 145 and schedule 8 to GOWA 2006. We agree that these provisions should remain unamendable.

26. *Issues relating to devolved taxes*: The Wales Act 2014 amended GOWA to confer competence on the Assembly in relation to devolved taxes. In the draft Bill Reservation A1 includes the exception of 'Devolved taxes, including their collection and management'. However, we believe the draft Bill, in its current form, raises significant questions in relation to the Tax Collection and Management Bill ("the TCM Bill") currently before the Assembly. The TCM Bill contains a number of provisions which could relate to reservations contained in the draft Wales Bill depending on the interpretation of *relates to* in section 108A(2) which is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. In particular:

- General Reservation 3: the Civil Service of the State – section 116B of GOWA currently permits the appointment of civil servants to a tax collection and management authority.

- General Reservation 6: Jurisdiction, courts and tribunals – the TCM Bill provides e.g. for certain matters to be referred to the First Tier Tribunal.
- General Restriction 4: criminal law and civil penalties – there is currently no restriction on the Assembly legislating on criminal matters as long as the legislative provision relates to a conferred subject. The creation of offences and sanctions will either form part of the conferred subject or come within competence as a result of section 108(5). The new restriction reduces the Assembly's competence by introducing a new necessity test.
- Specific Reservation 38: the prevention, detection and investigation of crime – such powers are to be included in the TCM Bill.
-

27. We are concerned that subsequent bills establishing particular devolved taxes will raise concerns similar to those above as the provisions of the TCM Bill will apply to each tax.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Cyfrifon Cyhoeddus

National Assembly for Wales
Public Accounts Committee

David Melding AM
Chair
Constitutional & Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
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11 November 2015

Draft Wales Bill

Dear David

I am writing with the Public Accounts Committee observations on the Draft Wales Bill which was considered at Committee on 3 November.

Whilst Members welcome a change from a conferred powers model of devolution to a reserved powers model, we are concerned that the legislative arrangements set out in the draft Bill would constrain the Assembly when legislating.

The Committee noted the 10 proposed tests for competence found in clause 3 of the Bill and noted that, while some of these tests exist currently, there are others that are new, or elements of those tests that are new, that do not flow inevitably from a reserves powers model and which would constrain the Assembly more than at present – for example the 'new necessity tests' – which in essence roll back competence. The Committee is not content with this potential reduction in the Assembly's legislative competence.

Concern was also expressed about the definition of Welsh public authorities (Clause 218 of Schedule 7A) within the draft Bill. These provisions appear to present scope for discussion as to whether public bodies that could be considered integral parts of the Welsh public sector are excluded from the definition of 'Welsh public authority'. Such an exclusion would seem to arise in the case of bodies with general or supplementary powers that are not confined to 'only in relation to Wales' and examples include local health boards and the Wales Audit

Office powers under the provision of services under section 19 of the Public Audit (Wales) Act 2013. The Committee feels that clarity would be desirable on this point.

With regard to the provisions of the draft Bill relating to the "audit" committee. The Committee agrees that the provision which requires the Assembly to have an audit committee should remain and also agree that arrangements for the Chair and membership of the audit committee should be within the competence of the Assembly, as proposed in the draft Bill. However, the Committee believes that the current restrictions on the Chair and membership of the Committee are appropriate and should remain.

The Committee notes that the draft Bill provides that the restrictions on the membership of a committee having oversight of the AGW/WAO remain unamendable. When Schedule 7 of GOWA was amended by the Budget Responsibility and National Audit Act in relation to oversight and supervision of the AGW, it inserted provisions relating to the membership and chairmanship of the committee to which such functions were delegated. Whilst we agree that the current arrangements for membership of the 'oversight' committee are appropriate, the Committee believes that there should be a consistent approach with regards to the treatment of the 'oversight' and audit committees and that both should be a matter for the Assembly to determine.

Section 136 of GOWA confers on the Comptroller and Auditor General the power to examine the use of resources (payments in and out of the Welsh Consolidated Fund) and report to the House of Commons. This provision was originally included in the Government of Wales Act 1998 as the Assembly was a single corporate body. Given the separation of the legislature and the executive in 2006, the fiscal powers contained in the Wales Act 2014 and the fact that these powers have never been used, there appears to be little justification for the retention of this power.

Yours sincerely,

Darren Millar AM
Chair
CC: Dame Rosemary Butler AM, Presiding Officer

Archwilydd Cyffredinol Cymru
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Mr Darren Millar AM
Chair of the Public Accounts Committee
National Assembly for Wales
Cardiff Bay
Cardiff CF99 1NA

Date: 29 October 2015
Our ref: HVT/2402/fgb

Dear Darren

THE DRAFT WALES BILL

Thank you for your letter of 20 October 2015 inviting me to comment on the draft Wales Bill.

It appears that the provisions currently contained in the 2006 Act that protect certain key aspects of existing legislation relating to the Auditor General's functions have been reproduced in the draft Bill, albeit in a re-arranged form. Those provisions protect the Auditor General's powers to undertake examinations and studies of the Welsh Government and related bodies, and the Auditor General's overall audit independence, and they are appropriate.

I do, however, have some general value for money-related concerns at the apparent effect of paragraph 218 of the new Schedule 7A and paragraph 8 of the new Schedule 7B proposed by the draft Bill. These provisions appear to present scope for argument as to whether public bodies that could be considered integral parts of the Welsh public sector are excluded from the definition of "Welsh public authority". Such an exclusion would seem to arise in the case of bodies with general or supplementary powers that are not confined to exercise "only in relation to Wales", which by virtue of subparagraphs 218(4) and (5) and subparagraphs 8(3) and (4) would seem to put the relevant bodies outside the definition. Examples of such powers may include the general powers of Local Health Boards (under paragraph 13 of Schedule 2 to the National Health Service (Wales) Act 2006, and the WAO's powers for the provision of services (under section 19 of the Public Audit (Wales) Act 2013). I think it would be desirable to have clarity on this point, as the present drafting seems to present potential for dispute and consequential expense.

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Another matter that is of relevance to the Wales Audit Office and the Welsh public sector in general is that the draft Bill seems to raise a need for a consequential amendment to the Public Contracts Regulations 2015 so as to allow Welsh public bodies to continue to advertise their requirements on "Sell2Wales" instead of "Contracts Finder". Regulation 1 of the 2015 Regulations provides that Part 4 of those Regulations (which concerns "Contracts Finder") does not apply to bodies that wholly or mainly exercise "Welsh devolved functions". However, "Welsh devolved functions" is defined in the Regulations as functions within the Assembly's competence under section 108 of the Government of Wales Act 2006. If the exemption from using Contracts Finder is to continue to have effect, the reference to section 108 will need to change to section 108A.

I believe that the normal means for making such an amendment to regulations is by statutory instrument, for which there is provision in the draft Bill. The UK Government may already have such an amendment in mind, but in any case it may be helpful for the Welsh Government to keep this matter in view.

I should also mention that I am concerned at the draft Bill's reduction in the protection of section 30 of the Government of Wales Act 2006. Under paragraph 7(2)(xv) of the new Schedule 7B, subsections (2) to (4) of section 30 of the 2006 Act are excluded from protection from modification by Assembly legislation. The effect of this is to allow the removal of the preclusion from PAC membership of Welsh Ministers and to allow the removal of the preclusion of a member of a government party from chairing the Committee. Such developments would not be conducive to good scrutiny and governance.

Given the Finance Committee's functions relating to the Wales Audit Office, I am copying this letter to Jocelyn Davies AM.

Yours sincerely

HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES

cc *Ms Jocelyn Davies AM, Chair, Finance Committee*

Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref LF CS 0887 15

Alun Ffred Jones AM
Chair of the Environment and Sustainability Committee
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

4th November 2015

Dear Alun Ffred

ENVIRONMENT (WALES) BILL

Thank you once again for your consideration of the Environment (Wales) Bill during Stage 1. I am pleased that the general principles of the Bill have been agreed, and I thank your Committee for their recommendations in this regard.

Following the Stage 1 debate on the General Principles on 20 October, I have set out below my response to the recommendations made by the Environment and Sustainability Committee, the Constitutional and Legislative Affairs Committee and Finance Committee in each of their reports. This includes details of where I agree there is need to put forward amendments to the Bill.

I look forward to working with Committee members on the finer details, not only to ensure that this Bill is fit for purpose, but also to deliver our Programme for Government commitment to introduce new legislation for the environment in addition to a number of other strategic commitments, including those in relation to positioning Wales as a low carbon, green economy.

As you're aware, I have already tabled a number of Government amendments to the Bill and expect to table further amendments in a second tranche of Governments amendments before the deadline.

I hope that the attached information helps to inform your further scrutiny as the Bill progresses through Stage 2.

I am copying this letter to the Chair of the Finance Committee and the Chair of the Constitutional and Legislative Affairs Committee.

Bae Caerdydd • Cardiff Bay
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Yours sincerely,

Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

Environment (Wales) Bill Stage 1 Committee Report recommendations

Recommendation 1

We recommend that the Minister publishes the full exchange of correspondence between the Welsh Government and the UK Government in relation to each of the Minister of the Crown consents that were sought for provisions in the Bill. In particular, we ask that the Minister confirms the date on which the Welsh Government first sought the Secretary of State's consent to the provisions in section 6.

I **accept** this recommendation. The exchange of formal correspondence between the Welsh Government and the UK Government to be published is included at Annex 1 to this letter.

The First Minister wrote to the Secretary of State on 1 April 2015 to formally request Minister of the Crown consents prior to the introduction of the Environment Bill on 11 May 2015. The letter of 7 August 2015, which has been referred to by some Members', was a follow up letter.

The formal request made in April followed many months of liaison between my officials and the UK Government. The process commenced in November 2014 when my department outlined the content of the Bill in writing to the UK Government and then met to discuss the Bill in December 2014. A draft of the Bill was shared with the Wales Office in January 2015 and Wales Office responded in March with their comments.

The First Minister received a formal response from the Secretary of State on 11 September and he replied to that letter on 13 October. We are waiting for a response to this letter and I will inform you of the outcome as appropriate.

Recommendation 2

If the Secretary of State has not granted consent by the end of Stage 2 of the Bill's consideration, then we recommend that the Minister brings forward amendments to section 6 of the Bill at Stage 3 to limit the biodiversity duty to public authorities in Wales.

This recommendation is dependent on the Secretary of State's decision to grant consent for section 6 of the Bill where it impacts on Ministers of the Crown and I therefore **accept in principle** this recommendation.

Recommendation 3

We recommend that the Assembly supports the general principles of the Bill.

I am grateful for all the input from the Assembly Committees who have contributed to the scrutiny of the Bill and I therefore **accept** this recommendation. I also welcome the support of the stakeholders and thank them for their contributions.

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Recommendation 4

We recommend that the Minister brings forward amendments to the Bill to insert the UN Convention's definition of 'biological diversity' as the definition of 'biodiversity'.

I accept the views of stakeholders, in particular, on the importance of creating a consistency with the definitions provided in the Bill with the UN Convention on Biological Diversity (CBD). However, 'biodiversity' is already a widely used and understood term used in existing international, EU, and UK legislation.

As it is an accepted legal term that follows internationally-recognised good practice, in drafting the Bill, it was not thought necessary to include it as a definition on the face of the Bill. I **accept in principle** this recommendation and am considering how the provisions in Part 1 of the Bill can better reflect what is meant by 'biodiversity'.

Recommendation 5

We recommend that the Minister brings forward amendments to the Bill to insert the UN Convention's definition of 'ecosystem' i.e. "Ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

The Bill enshrines into Welsh law the ecosystem principles adopted by the UN's CBD. Whilst the definition is strictly speaking not necessary on the face of the Bill, I am happy to consider how the provisions in Part 1 of the Bill can better reflect what is meant by 'ecosystems' and therefore, I **accept in principle** this recommendation.

Recommendation 6

We recommend that the Minister brings forward an amendment to section 3(2) of the Bill to leave the objective as drafted and to insert the Resilient Wales Goal, as set out under section 4 of the WFG Act 2015.

I am pleased with the level of support for the Resilience Goal and the need for clear links between the Environment Bill and Well-being of Future Generations (Wales) Act 2015.

I am happy to consider how the objective of sustainable management of natural resources in section 3(2) of the Bill may be enhanced to reflect closer links to all of the goals in the Well-being of Future Generations (Wales) Act. The objective relates to all of the goals provided in section 4 of the Well-being of Future Generations (Wales) Act. For example, a healthy, prosperous or globally responsible Wales would not be possible without sustainably managing Wales' natural resources. In effect, changing the definition to include the Resilient Goal could risk weakening the definition of the sustainable management of natural resources, in addition to narrowing the scope of the entire Bill.

The removal of the objective for the sustainable management of natural resources would take away many of the key components of the ecosystem approach, in particular the recognition of the benefits from ecosystems and their contribution to sustainable development – these elements are not covered by the goal for 'resilient Wales'.

I am however, happy to **accept in principle** the spirit of the recommendation in terms of how the Bill may be enhanced to reflect closer links to all of the goals in the Well-being of Future Generations (Wales) Act.

Recommendation 7

We recommend that the Minister brings forward amendments to the Bill that define the principles under section 4 to include reference to the 'precautionary principle' and to 'acting within environmental limits'.

The approach in the Bill already reflects the key elements of the precautionary approach. The principles of sustainable management of natural resources require that evidence is gathered on uncertainties and that such evidence be taken into account. This feeds into the considerations on the potential consequences of impacts in the short, medium and long-term.

As a government we fully recognise the principle of 'acting within global environmental limits' which is already reflected in the Well-being of Future Generations (Wales) Act. The way the Bill deals with this issue is to focus on resilience and align the objective of sustainable management of natural resources to building resilience within our ecosystems. This is both a more positive and evidence based approach than one which would be based on a determination of what is 'the maximum level of damage to a natural resource system that we are prepared to tolerate and accept'.

I would also highlight that the approach taken in the Bill is based on international best practice and fully aligned with the UN CBD and the proposals contained in the White Paper and Green Paper. It is for these reasons that I am **resisting** this recommendation.

Recommendation 8

We recommend that by the end of March 2016 the Welsh Government publishes the consultation arrangements that will apply to the production of the NNRP and the Section 7 biodiversity list.

I **accept** this recommendation and am happy to publish this information on this basis.

Recommendation 9

We recommend that the Minister brings forward amendments to the Bill that define the consultation arrangements that will apply to the production of SoNaRRs and area statements.

I agree with the Committee and stakeholders on the importance of consultation in relation to engaging with all the relevant sectors when producing SoNaRR and area statements.

NRW will be required to apply the principles of sustainable management of natural resources in both the preparation of SoNaRR and area statements as a result of the new general purpose provided in section 5 of the Bill. At present section 4(c) of the principles refers to collaboration and co-operation. I **accept in principle** this recommendation and I have already tabled an amendment (no. 2) to clarify that

section 4 includes making appropriate arrangements for public participation in decision-making, which could include consultation.

Recommendation 10

We recommend that the Minister brings forward amendments to leave out all uses of the phrase 'take such steps as appear to them reasonably practicable' and to insert 'take all reasonable steps' in their place.

I have considered carefully the call from some stakeholders to strengthen the language in certain sections of the Bill and I therefore **accept** this recommendation. I have tabled amendments (nos. 3, 4 and 5) to strengthen provisions where the phrase, *"take such steps as appear to them reasonably practicable"* will be replaced *"take all reasonable steps"*. These amendments relate to sections 7, 9 and 10 of the Bill. This will also ensure consistency with the language used in the Well-being of Future Generations (Wales) Act.

Recommendation 11

We recommend that the Minister brings forward an amendment to the Bill that leaves out 'seek to achieve' in section 5(2) and inserts 'to pursue'.

I **accept in principle** this recommendation and am considering how the language in section 5 of the Bill can be amended to reflect the Committee's findings.

Recommendation 12

We recommend that the Welsh Ministers produce statutory guidance on NRW's general purpose, to be consulted upon as soon as the Bill received Royal Assent.

I **accept** this recommendation and intend to bring forward guidance on NRW's general purpose following Royal Assent of the Bill.

Recommendation 13

We recommend that the Minister brings forward an amendment to section 6(1) of the Bill to leave out 'seek to' and insert 'take all reasonable steps'.

I note that some stakeholders have asked for the duty to be strengthened and I agree in principle with the overall aim of the recommendation. However, this section of the Bill is currently subject to discussions with the UK Government in relation to Minister of the Crown consent. On this basis, I **accept in principle** this recommendation and will give further consideration to this amendment when those discussions have progressed.

Recommendation 14

We recommend that guidance is issued by Ministers on the reporting requirements and should contain additional information on the activities that public bodies will be expected to undertake to demonstrate compliance with the duty.

I **accept** this recommendation. It is my intention to develop guidance to outline all of the relevant information in relation to the new biodiversity duty. Guidance is currently issued for the existing duty under section 40 of the Natural Environment and Rural Communities Act 2006, so it expected that this arrangement will continue with the new duty. In this way, a consistency in the way public authorities are expected to meet the new duty and subsequently report on it will be provided.

Recommendation 15

We recommend that the Minister brings forward amendments to:

- *Require public bodies carry out their duty under section 6 with reference to the list established under section 7;*
- *Require the State of Natural Resources Report to include an assessment of the status of habitats and species in the section 7 list; and*
- *Require the NNRP and area statements to include the actions that will be taken to maintain and enhance the species in the section 7 list.*

I will consider whether amendments can be made to the Bill in order to more clearly emphasise the importance of biodiversity, particularly in the State of Natural Resources Report (SoNaRR) and the National Natural Resources Policy (NNRP).

I agree with the Committee and stakeholders that the section 7 list is important. However, I believe it is important to recognise that the SoNaRR, the NNRP and area statements deal with the sustainable management of all of Wales' natural resources in its entirety, and not only the specific species or habitats that are covered by this list. I believe the current drafting of these provisions reflect this wider approach that needs to be taken. I therefore **accept in principle** this recommendation.

Recommendation 16

We recommend that the Welsh Government sets out the scope and timescale for its consultation on the biodiversity element of the Well-being of Future Generations indicators and a timescale for the introduction of these indicators. To allow this to be considered in the context of the Bill, we ask that this information is published before the conclusion of the Stage 2 proceedings, currently 27 November 2015.

I **accept** this recommendation. The Well-being of Future Generations (Wales) Act 2015 requires the Welsh Ministers to publish national indicators and lay a copy before the National Assembly for Wales. Before publishing national indicators the Welsh Ministers are required to consult with the Future Generations Commissioner, public bodies subject to the Act and other persons they consider appropriate.

The consultation on the national indicators begun on 19 October, and I wrote to Assembly Members on that date. The consultation will run to 11 January 2016 in order to keep to the timetable for consulting with the appointed Commissioner, and laying of the final indicators by March 2016.

The consultation includes indicators that reflect progress to achieving the well-being goals, including those relevant to healthy, functioning ecosystems and a bio-diverse

natural environment. In particular, I would draw the Committee's attention to proposed indicator 32 on healthy ecosystems, and indicator 33 on a bio-diverse natural environment. The consultation document will invite views on the proposed set of indicators, as well as specific consultation questions for certain indicators where needed. A working group is being set up to develop these further, through the Nature Recovery Plan.

A link to the consultation webpages is attached below.

http://gov.wales/consultations/people-and-communities/future-generations-act-how-do-you-measure-a-nations-progress/?lang=en

Recommendation 17

We recommend that the Welsh Government ensures that the State of Natural Resources Report includes an assessment of past and future trends (including risk and opportunities for sustainable natural resources management) in addition to an assessment of the current state of natural resources in Wales.

In addressing this recommendation, we ask that the Welsh Government considers the merit's or otherwise of specifying this on the face of the Bill.

I **accept in principle** this recommendation on the basis that I believe the recommendation is covered by the principles of the sustainable management of natural resources and already provided for on the face of the Bill.

The provision to produce a SoNaRR as provided under section 8 of the Bill includes the necessary criteria relevant to providing a full assessment of past, present and future data on the state of natural resources in Wales. The purpose of SoNaRR is to provide information that can be used to track progress towards achieving the sustainable management of natural resources i.e. identifying whether the state of natural resources will be able to continue to provide services over the long term.

The policy intent is to establish a process for the regular provision of an objective, scientifically credible evidence base which reports on the condition of Wales' natural resources i.e. establishing a data set that captures present day information on the state of natural resources. This will establish a regular evidence and reporting feedback loop which helps to inform future policy and delivery but also considers the long term impact of drivers and pressures on those resources.

As is standard process, a necessary requirement for producing a robust assessment requires that data is measured against a baseline. It is in producing a baseline set of data on state of natural resources where information that represents past trends will be captured.

Furthermore, under section 4(f) of the principles, a requirement is included to take account of the short, medium and long term consequences and actions.

Recommendation 18

We recommend that the Minister brings forward amendments to the Bill to provide detailed criteria for the minimum contents of a NNRP.

On the grounds that Section 9 of NNRP, as currently drafted, already provides criteria for its minimum content, I **accept in principle** this recommendation.

Section 9 sets out that the Welsh Ministers:

- Must set out their general and specific policies for contributing to achieving sustainable management of natural resources in relation to Wales (section 9(1));
- Must set out the key priorities and opportunities for sustainable management of natural resources in relation to Wales, including what they consider should be done in relation to climate change (section 9(2));
- May include anything which they consider relevant to achieving sustainable management of natural resources in relation to Wales.

Under section 9(8), the Welsh Ministers must apply the principles of sustainable management of natural resources in exercising their functions under section 9. In particular, they must:

- consider the appropriate scale for action;
- promote and engage in collaboration and co-operation;
- take account of all relevant evidence and gather evidence in respect of uncertainties;
- take account of the benefits and intrinsic value of natural resources and ecosystems; and
- take account of the short, medium and long term consequences of actions.

In addition, I am considering bringing forward an amendment to address the intention behind recommendation 20 (as covered below).

Recommendation 19

We recommend that the Minister clarifies how the NNRP will interact with Glastir and the Rural Development Plan.

I **accept** this recommendation. The NNRP will set out the priorities and opportunities for achieving the sustainable management of natural resources. This therefore will cover all of our biological and non-biological resources whether they are in rural, urban or coastal areas.

The NNRP will point to the Rural Development Plan 2014-2020 and Glastir as a means of contributing towards the key priorities and opportunities for agriculture and forestry, with the Glastir Monitoring and Evaluation Programme being an important tool in demonstrating its effectiveness in achieving results.

Recommendation 20

We recommend that the Minister brings forward an amendment to section 9(2) of the Bill to require Welsh Ministers to set out any challenges to sustainably managing natural resources, alongside the key priorities and opportunities.

I **accept in principle** this recommendation and will consider bringing forward an amendment which addresses the intention behind this recommendation.

Recommendation 21

We recommend that the Minister brings forward an amendment to section 9(6)(a) to place Welsh Ministers under a duty to review the NNRP within twelve months of an Assembly general election.

I **accept in principle** this recommendation. As currently drafted, the Bill requires that the first NNRP must be published within 10 months of section 9 coming into force. The Bill already makes clear that the Welsh Ministers can review the NNRP at any time but must review it following an Assembly election. This would also allow it to be reviewed if there was an extraordinary general election.

Reviewing the NNRP will be important to ensure that the policy is relevant. Under common law the Welsh Ministers would be expected to review the NNRP within a reasonable timeframe. In practice this is likely to be after an Assembly election and within a timeframe that would enable the other documents that link to it such as area statements to be produced. It is important that the NNRP is kept relevant, which is therefore why it should be kept under constant review.

For these reasons I do not believe it necessary to set a specific timescale for the review of NNRP.

Recommendation 22

We recommend that the Minister brings forward an amendment to the Bill to require NRW to produce Area Statements that collectively cover the whole of the terrestrial and coastal areas of Wales.

It is envisaged that every part of terrestrial and coastal Wales will be covered by an area statement in due course, and on this basis, I **accept in principle** this recommendation. Area statements will identify opportunities to deliver local level strategic commitments set out in the NNRP, which will look at the interface between air, land and sea at a local level.

In doing this, area statements will support the local delivery of the national priorities set out in both the Wales National Marine Plan and the NNRP, ensuring that the management of our land and sea is joined up in practice. It is not intended that the Bill will replace the framework established for the marine environment, but it will work with it to ensure that the management of natural resources in terrestrial and marine environments are integrated.

Recommendation 23

We recommend that the Minister, in responding to this recommendation in Plenary, set out the Welsh Government's intentions for Area Statements and whether they are to include actions for delivery as well as an evidence base.

I **accept** this recommendation. I provided some further detail on area statements during the Stage 1 general principles debate on 20 October.

The primary purpose of an area statement is to draw together evidence in relation to the natural resources in an area, and the key risks and opportunities associated with them. This will enable both NRW to prioritise and organise their activities, and inform wider public service delivery and the democratic governance at a local level within that area.

They will also provide evidence of opportunities within an area, which can be adopted by another party. For example evidence on biodiversity can be used by a public authority to help it deliver on its biodiversity duty.

Recommendation 24

We recommend that the Minister brings forward amendments to the Bill in order to place a duty on public bodies in Wales to take all reasonable steps to implement Area Statements.

The Welsh Ministers have the power to direct public bodies to implement area statements. In particular public bodies defined in section 11 of the Bill will be under a duty to assist NRW in implementing area statements.

I **accept in principle** this recommendation and am content to consider bringing forward an amendment in line with the Committee's recommendation. However, further consideration is needed on the wording to ensure this is in line with how other bodies can implement via local well-being plans.

NRW will also be required to engage and collaborate with other stakeholders and interested parties with an area (in applying the principles of sustainable management of natural resources).

Recommendation 25

We recommend that the Welsh Government publishes updated figures on the costs of implementing this legislation and the resources available to NRW to deliver the additional functions included within this Bill.

Fully implementing the Bill will take time, and I recognise that there will be short-term costs associated with that transitional period. The most up to date figures on the costs of implementing the Bill are contained in the Regulatory Impact Assessment (RIA). The costs of implementing the regulations will be set out in more detail within their accompanying RIA as required by standing orders.

There is significant potential for efficiency savings in the short and medium term, by taking advantage of the opportunity to integrate and rationalise planning and delivery functions using the framework set out in the Bill.

With regard to NRW's resources, we have worked closely with NRW during the development of the Bill and will continue to do so. I need to underline, however, that a key aspect of Part 1 of the Environment Bill relates to how NRW will be required to deliver its core purpose; and in that respect, these requirements should not be seen as 'additional' functions, but instead be seen as central to its remit.

On this basis I **resist** this recommendation.

Recommendation 26

We recommend that the Minister brings forward amendments to the Bill to place additional duties on NRW to:

- *Prepare and publish a risk assessment before making an application to Welsh Minister;*
- *Monitor, report and publish the impacts of any schemes undertaken.*

I believe the necessary safeguards are already in place in the current drafting in the Bill. NRW must submit a detailed application to the Welsh Ministers before the power can be used, where it is expected that this will include a risk assessment of the scheme. In particular, NRW would have to submit an application to provide a case for the use of this power and a risk assessment would form part of this case. I therefore believe that the first part of the recommendation is already captured in the Bill and **accept this recommendation in part**.

In response to the second part of the recommendation, NRW will be required under the application of the section 4 principles to monitor the impacts of any schemes undertaken. However, I will consider if the wording of the relevant provisions can better reflect this in the Bill.

Part 2 – Climate Change

Recommendation 27

We recommend that the Minister brings forward an amendment to the Bill to require the advisory body to review and report on the adequacy of the 2050 target every five years.

I agree that it is important to review and report on the target and it is for that reason that Part 2 of the Bill has been drafted to ensure that the targets represent up to date scientific knowledge as well as international agreements. I therefore **accept in principle** this recommendation.

The framework provided by the Bill, as drafted, puts this in place given that the requirement is for five year budgetary periods from 2016 up until 2050. At the end of each budgetary period there is a progress review from the Advisory Body including whether progress on the 2050 target is being met. The setting of the carbon budgets and the long term emission reduction pathway being developed will therefore be regularly reviewed, taking into account the latest evidence base and advice from the Advisory Body.

To include an amendment similar to this would duplicate the five year reporting progress on meeting carbon budgets.

Recommendation 28

We recommend that the Minister brings forward an amendment to the Bill to provide a power for Welsh Ministers to vary the 2050 target by regulations (subject to the affirmative procedure).

I **accept** this recommendation and will consider bringing forward an amendment that provides a power for the Welsh Ministers to vary the 2050 target by regulations, thus enabling a stronger structure for responding to developments in the global efforts to reduce emissions.

Recommendation 29

We recommend that the Minister brings forward an amendment to section 32(3) of the bill to insert the principle of keeping global warming within 2 degrees centigrade in the criteria that Ministers must consider when setting carbon targets and budgets.

In setting out the framework in legislation, it is important that a clear pathway for decarbonisation is set together with the flexibility to allow us in Wales to react to the latest evidence to inform our decision making.

The principle of keeping global warming within 2°C is already provided for in the current list of criteria as section 32(3) which requires that the Welsh Ministers must consider scientific knowledge in addition to EU and international policy relating to climate change.

However, as our knowledge on climate change continues to advance and new international agreements and commitments are made, the approach provided for in the Bill needs to be sufficiently flexible to allow for a changing evidence base.

The approach in the Bill allows this; it enables the criteria to be flexible to both advances in knowledge on scientific evidence and future developments on climate change policy and law at both the international and European level.

Whilst I **accept in principle** this recommendation, I believe that putting the principles of keeping global warming within 2°C on the face of the Bill would not allow Wales to respond to changing scientific evidence or to developments in international and European climate change policy and law. As a Government, we are one of the founding signatories to the global under 2° Memorandum of Understanding.

Recommendation 30

We recommend that the Welsh Government sets out the scope and timescale for its consultation on interim targets and a timescale for the introduction of these targets. To allow this to be considered in the context of the Bill, we ask that this information is published before the conclusion of Stage 2, currently 27 November 2015.

I understand the importance of monitoring progress toward the 2050 target and the role that interim targets will contribute to this and therefore **accept** this recommendation. As set out in the Statement of Policy of Intent for the Bill, the power to set an interim target will be used as soon as is reasonably practicable based on advice received from the advisory body and in conjunction with the development and setting of the first two carbon budgets to ensure consistency.

Any further use of the power to set any further interim targets will only be considered if scientific and technical evidence, advice from the advisory body or reviews of progress on meeting the 2050 target indicate that a further interim target is required.

I will therefore consider bringing forward an amendment to the Bill to set a timeline for interim targets.

In setting any interim targets, it is important that Welsh Ministers retain an ability to react to any changes in evidence and international and European law and policy. This flexibility is provided at section 32(2), which enables the Welsh Ministers to amend interim target years or an interim emission target if certain conditions are met, for example, as a result of significant developments in scientific knowledge or the developments with EU or International law or policy or due to a change recommended by the advisory body.

Recommendation 31

We recommend that the Minister brings forward an amendment to the Bill to place a duty on Welsh Ministers to report on consumption as well as a production basis.

I am considering how greenhouse gas emissions are measured on a consumption basis as part of the national well-being indicators required under the Well-being of Future Generations (Wales) Act 2015 on which we are currently consulting.

I **accept in principle** this recommendation and will consider further the need to bring forward any necessary amendment to the Bill.

Recommendation 32

We recommend that the Minister brings forward amendments to the Bill to require the first carbon budget to be set earlier than the end of 2018 and for the second and third carbon budgets to be published before the end of 2018.

I recognise the overarching imperative to take forward this work as quickly as is possible. I therefore **accept in principle** and will consider the timeframes for introducing the first three carbon budgets.

For the first budgetary period, I would however underline the importance of the detailed work needed to be undertaken to inform the budgetary process which involves the quantification of our emissions and consideration of the key considerations such as the latest science, technology and the Future Trends reports, which may not be available until May 2017.

Making allowance for the importance of setting the decarbonisation pathway Wales, it is crucial that there is both sufficient time to complete the analysis and consider the implications. This includes taking the appropriate advice from the Advisory Body which will apply the same criteria as the Welsh Ministers, in addition to factoring in sufficient time to engage stakeholders.

Recommendation 33

We recommend that the Minister brings forward amendments to the Bill to change the power in section 33(2) to a duty.

Based on the accompanying text that supports this recommendation, I believe that the Committee are referring to section 33(3). On that premise, my response relates to section 33(3) and not section 33(2).

I **accept** this recommendation and have already tabled an amendment that addresses it (no.7). The amendment requires the Welsh Ministers to set a limit on the net amount of carbon units that may be used to reduce the net Welsh emissions account.

Recommendation 34

We recommend that the Minister brings forward amendments to the Bill to extend the parameters in section 32(3) to the advisory body.

I **accept** this recommendation and will consider bringing forward an amendment to ensure that the advisory body will consider the same criteria as the Welsh Ministers, when advising the Ministers on the setting and amending of interim targets and carbon budgets.

Recommendation 35

We recommend that the Minister brings forward an amendment to the Bill to place a duty on Welsh Ministers to produce an annual report on progress towards 2050 target.

In addition to reporting on the carbon budgets every five years under the Environment Bill, there will also be the provisions set out in the Well-being of Future Generations (Wales) Act, which includes a clear requirement for annual reporting.

Section 10 of the Well-being of Future Generations (Wales) Act requires the Welsh Ministers to publish national indicators on progress at achieving the well-being goals. The Welsh Ministers can then set milestones one of which could be on progress to the 2050 target. One of the indicators will measure greenhouse gas emissions for the whole of Wales. Progress against this indicator will be reported upon through the annual well-being report. Section 10(3) of the Act allows the Welsh Ministers to set milestones for the indicators, one of which could include greenhouse gas emissions.

The Welsh Ministers (along with the rest of the listed public bodies) will also have a duty to produce an annual report on their well-being objectives. Given the requirement to work towards all seven goals, I would fully anticipate that the annual report would include details on progress towards the 2050 target, thus, I **accept in principle** this recommendation.

The requirement being framed in this way recognises that action on climate change is not a stand alone issue, but one that must underpin all our action if reductions in emissions required are to be delivered, and must be at the centre of the action taken across the public service.

Recommendation 36

We recommend that the Minister provides greater clarity to the Assembly and stakeholders on how the reporting requirements in this Bill and the Future Generations Act will be coordinated.

I **accept** this recommendation and provide below information on the associated reporting requirements.

The Well-being of Future Generations (Wales) Act reporting arrangements fall into two key areas:

- National indicators – reported on through an annual well-being report; and
- Well-being objectives – reported on through an annual report by each public body

There are also periodic reports that will be produced by Welsh Ministers on future trends as well as one by the new Commissioner on what public bodies should do to achieve the well-being goals. The reporting arrangements under the Well-being of Future Generations (Wales) Act are inevitably broader than those under the Bill and could relate to objectives aimed at developing a skilled and well-educated population, encouraging participation in the arts, sports and recreation as well as efforts to maintain and enhance Wales' biodiverse natural environment. More specific reporting will come through the reporting arrangements under the Bill, for example, the State of Natural Resources Report (SoNaRR) will provide the evidence base used throughout Wales to inform national and local scale priority setting and will underpin the National Natural Resources Policy (NNRP) and also area statements.

The NNRP requires that the Welsh Ministers take into consideration all relevant evidence from the latest SoNaRR, which will also refer to evidence provided by the Future Trends Report.

As a public document, SoNaRR will be available to all interested parties on the state of Wales' natural resources and can assist public authorities in what actions may need to be taken to ensure that their well-being objectives are contributing to the well-being goals provided for in the Well-being of Future Generations (Wales) Act.

The reporting provisions in both the Act and Bill will complement one another and I would expect them to reduce the burden and complication for public bodies.

I my previous correspondence of 3 September 2015 to the Committee, I provided a timeline on the timings and interaction of products and reports required under this Bill, the Well-being of Future Generations (Wales) Act and the Planning (Wales) Act 2015 also communicated to the Committee.

Recommendation 37

We recommend that the Welsh Government engages with the Tyndall Centre with a view to further exploring the inclusion of aviation and shipping emissions in the setting of carbon budgets and targets and reports back to the Assembly on its consideration of the Tyndall Centre recommendations.

I **accept** that further consideration is needed to explore this issue and the relevant engagement with stakeholders will take place on the best way forward in determining how the aviation and shipping emissions could be included in the setting of carbon budgets and targets.

Recommendation 38

We recommend that the Minister sets out how the Commissioner for the Future Generations and the advisory body on climate change will interact.

I **accept** this recommendation and I have already asked the Climate Change Commission for Wales to consider this in the context of the role.

Section 19 of the Well-being of Future Generations (Wales) Act states that in carrying out her/his general duty, the Commissioner may provide advice and assistance to public bodies, which can include advice on climate change. Any advice provided should be at the discretion of the Commissioner. There are no powers available to the Welsh Ministers setting out how the Commissioner will fulfil this duty.

The advisory body on climate change may develop a working relationship with the Commissioner, but it is neither possible nor appropriate at this point for the Welsh Government to speculate on the details of how this interface is set out. The Commissioner may provide advice and assistance to public bodies, which can include advice on climate change. This is set out in the Act. The advisory body may provide independent advice on setting and meeting carbon budgets, monitor progress in reducing emissions and achieving carbon budgets, conduct independent analysis into climate change science, economics and policy and engage with a wide range of organisations to share evidence and analysis,

Climate change is one of our greatest long-term challenges and I would expect that the Commissioner would want to explore the implications of this for future generations. Consequently, I would anticipate there to be an effective working relationship with the advisory body.

Recommendation 39

We recommend that the Minister sets out how he sees the future of the Climate Change Commission for Wales.

I **accept** the Committee's recommendation. The Climate Change Commission for Wales will continue to run in its current form until March 2016. I have asked the Climate Change Commission for its views on how it believes the role should be taken forward in the context of the creation of the role of the Future Generations Commissioner.

Recommendation 40

We recommend that the Minister provides a list of the mechanisms he is referring to alongside a description of the aspects of adaptation that they cover so that we can assess the breadth and depth of their coverage.

In my letter to the Committee on 3 September, I set out the other mechanisms in place within the Bill to deal with adaptation and therefore I **accept** this recommendation. The Bill contains provisions covering adaptation such as the development of the national natural resources policy which must take in to consideration actions on climate change including mitigation and adaptation. Furthermore, the ecosystems approach, developed by the UN Convention on Biological Diversity and provided for by the Bill, includes the role that our natural resources can contribute to tackling the causes and consequences of climate change.

It is important to note that the Bill is designed to support the requirements of the Well-being of Future Generations (Wales) Act, which already has a number of provisions which are required to take adaptation into consideration. For example, the Future Trends report and Well-being assessments which must take into account the UK Climate Change Risk Assessment.

Part 3 – Charges for Carrier Bags

Recommendation 41

Notwithstanding our comments above, for any extension of the scheme e.g. bags for life, we recommend that these proceeds are directed to charities with an environmental remit. Further, where possible, they should only be directed to charities operating in Wales.

I believe that part of the success of the carrier bag charge has been due to the support it has had from retailers and the public. This is demonstrated by the fact that most retailers are already willingly donating their net proceeds to good causes.

However, I believe that by removing the retailers' discretion as to who they give their proceeds to, will not only result in money being taken away from those already benefitting, but will also undermine the existing support and relationships as well as jeopardising the success of the policy and therefore, I **resist** this recommendation.

I believe that there is flexibility in the existing regulations to limit where the net proceeds may be applied and when the regulations are made. I will of course take into account recommendations made by the Committee as well as the views of other interested parties.

Part 4 – Collection and Disposal of Waste

Recommendation 42

We recommend that the Welsh Government sets out the support it will provide to small business to help them meet any new separation requirements.

I recognise that businesses will need support and guidance in relation to meeting the new regulations and on this basis I **accept** this recommendation. Discussions with local authorities are now underway on the nature of support businesses need and further discussions will be on this with trade and business organisations.

Details of any support package will need to be developed in conjunction with the development of regulations and will be set out at the time, as the support will need to be tailored to the regulatory requirements.

I am considering a number of steps to help SMEs meet the separation requirements, including:

- the development of an industry "green growth prospectus" for the waste management sector covering collections, reprocessing of recyclates and energy from waste facilities to promote opportunities for job creation and investment.

- a detailed communications campaign before the Regulations come into force,

- the development of support activities such as business advice packages and

- a sufficient lead-in period to ensure businesses are able to make suitable arrangements.

Many SMEs are already separating out their wastes for collection and welcome the improved collection service that the proposals will promote and the consequent reduction in costs.

My officials will be working with service providers such as WRAP and stakeholders to develop a support package as part of the development of Regulations. It is not appropriate to set the support package out until Regulations are developed, as the support will need to be tailored to the regulatory requirements and future budgets.

Recommendation 43

We recommend that any regulations brought forward under section 45AA of the Environmental protection Act 1990 (inserted by section 66 of the Bill) include the TEEP test.

I will consider the appropriateness of TEEP in the development of Regulations, which will be subject to consultation and full scrutiny by the Assembly. The regulations themselves will need to be proportionate – whether this is achieved through TEEP or through other measures will be considered in developing the regulations, and on this basis I **accept in principle** the recommendation.

The current requirement, under the Waste (England and Wales) Regulations 2011 (as amended), is for waste collectors (i.e. waste management companies and local authorities) to collect certain materials separately – but not for the customer to present the waste separate for collection to facilitate this. The current requirement is

therefore one-sided, and collection companies often dictate how waste is collected, with a consequent drop in quality of material because of contamination.

This is the reason that I am proposing the new duty on businesses to present wastes separately – to match up the requirements. This will ensure that systems are fully aligned as regulations are developed.

Recommendation 44

We recommend that the Minister engages with the businesses and industry representatives that have made representations to us in relation to the ban.

We also recommend that the Minister revises the RIA to take account of the latest technologies that are being used - especially those that meet Water Research council standards.

I **accept in part** this recommendation. In response to the first part of this recommendation, I **accept** this and agree on the importance of engagement with business so as to ensure I get the provisions right and this has been done. The views of industry representatives have been carefully considered throughout the process. Meetings have been held with industry associations such as AMEDA and CESA, in addition to companies involved in manufacturing and supplying food waste treatment equipment in Wales. Engagement with the industry will continue as the appropriate regulations or guidance is developed.

With regard to the second part of the recommendation, I do not propose to revise the RIA for the Bill. In preparing the RIA for the Bill, we modelled the existing situation, whereby food waste is disposed to sewer largely via macerator, and an alternative option whereby this food waste is diverted to beneficial treatment. The appropriate time to consider the impacts on specific technologies will be in the preparation of the regulations under the Bill, which will be full consultation and scrutiny. I will ensure that these points are fully considered in the development of the accompanying RIA for the regulations. It is on these grounds that I **accept in principle** this part of the recommendation.

Recommendation 45

We recommend that the Minister considers the case for exempting equipment that meets the Water Research council (WRc) standards.

The WRc certification considers the functionality of the equipment. The primary purpose of the ban is to divert food waste from disposal to sewer to high quality fertiliser and energy generation.

As the Bill provides for exemptions from the ban, specific technologies can be considered during the development of the regulations, which will be subject to full consultation and scrutiny and on this basis I **accept** this recommendation.

Recommendation 46

We recommend that the Minister considers whether the exception in section 67 for waste mixed with water or any other liquid used for cleaning will allow oil, fat, and/or grease to be disposed in sewers simply by virtue of these standards being emulsified during a cleaning process. If there is any doubt, we recommend that he revisits the drafting of this exception.

The primary purpose of the ban is to divert food waste from disposal to sewer to high quality fertiliser and energy generation.

However, in view of the committees concerns, I **accept** this recommendation and will consider the drafting of this exception.

Recommendation 47

We recommend that the Welsh Government sets out its proposals for the enforcement of the ban in more detail; including the body that will be responsible for enforcement and that this includes the estimated costs of enforcing a ban.

I have considered carefully to the comments of stakeholders and the committee, and I **accept** this recommendation.

Proposals for the enforcement of the ban will be set out when the Welsh Government consults on the associated regulations. Once the Bill is passed, the potential regulators and industry will be further consulted to inform the development of proposals for the development of the ban. In addition to this, the regulations will also be subject to full scrutiny by the Assembly.

Precise costs, including training and enforcement costs will depend on the exact nature of any proposed ban or restriction and the level of regulation required. The will be considered in greater detail as part the RIA.

Recommendation 48

We recommend that the Welsh Government clarifies where the responsibility lies for separating waste i.e. with the waste carriers or the incinerator operators.

I **accept** this recommendation. Incinerator operators will not be required to carry out separation activities. The Bill allows the Welsh Ministers to spread the responsibility throughout the waste management chain. Waste producers will have a duty to present their waste separately, and waste carriers will have to keep it separate.

The detail of the ban will be set out in regulations and guidance . The regulations will be subject to full consultation and scrutiny by the Assembly.

Part 5 – Fisheries for Shellfish

Recommendation 49

We recommend that the Welsh Government publishes guidance for the industry on how the provisions in the Bill will be applied and interpreted.

Following discussions with the shellfish industry, and in response to the Committee, I **accept** this recommendation and plan to publish guidance explaining how the new shellfisheries provisions will be operated.

The new provisions are intended to take into account the needs of the applicants of Several or Regulating Orders as well as the Welsh Ministers' responsibilities under the Habitats Directive. The provisions do what is required from a European perspective – which includes being able to act on a precautionary basis.

Advice and guidance for applicants will be developed through further consultation and then published, once the Bill has received Royal Assent.

Recommendation 50

We recommend that the Minister considers whether the Bill should be amended to make failure to comply with a site protection notice a criminal offence and that he publishes his position to this.

Criminalisation of failure to comply with a Site Protection Notice was considered during the development of the Bill, and I concluded that this was unnecessary and disproportionate. In almost every case, it would be in the best interests of the affected person to observe the provisions of the Notice and avoid the damage to the European Marine Site. The available punishment of revocation of the order (which is a valuable asset of the operators involved) is considered a sufficient deterrent.

On this basis, I **resist** this recommendation.

Part 6 – Marine Licensing

Recommendation 51

In undertaking this consultation, we recommend the Minister includes consultation questions on:

- *Performance indicators (i.e. for the performance of the licensing authority) including timescales for processing applications;*
- *Establishing requirements around the publication of data;*
- *Ensuring a transparent mechanism for the setting of fees and*
- *Introducing an hourly rate for fees.*

I am glad that this Part of the Bill has received broad support and I **accept** this recommendation. I anticipate that the associated consultation will begin in June 2016.

There would be difficulties in setting statutory timescales, given the diverse nature of marine licence applications. However, it is recognised that having set timescales are beneficial to businesses. Therefore, where appropriate, expected determination timescales for marine licences will be established at a policy level as part of the fees review.

I recognise the points raised on the matter of publication of data. It is important that opportunities to improve the availability of data in the marine area are considered. A number of marine users are actively providing their marine data into data hubs - and this voluntary practice will continue to be encouraged.

The overall aim of the Marine Licensing Fees Review is to provide a fit for purpose, robust, proportionate, fair and transparent regime for charging for costs associated with marine licensing. The preferred fees model being explored through the Fees Review includes a strong element of hourly rate charging.

Constitutional and Legislative Affairs Committee (CLAC) Recommendations

Recommendation 1

We recommend that the Welsh Government should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 24.

The rationale behind applying the negative procedure to any regulations under section 24 is due to the technical nature to the changes of the timings for the production of the State of Natural Resources Report (SoNaRR) and the National Natural Resources Policy (NNRP), in order for them to be aligned with other statutory reporting requirements. These changes would therefore be administrative and relatively minor.

However, I **accept in principle** this recommendation and will consider amending the procedure to regulations this section so it applies the affirmative procedure to these regulations.

Recommendation 2

We recommend that the Welsh Government should table amendments to the Bill to require there to be a charge for carrier bags sold or delivered to persons in Wales, and for the net proceeds of that charge to be applied to charitable purposes. This would replace the discretionary power to impose a charge which is provided for in Section 55 of the Bill.

I welcome the Committee's recognition of the success of the single use carrier bag charge in Wales and acknowledge that this recommendation is intended to strengthen the policy. I believe that as the charge has now become widely accepted by the Welsh public, it is important that we continue to build on this success. This is why it is now on the face of the Bill that regulations must require retailers to apply their net proceeds from the charge to charitable purposes.

As the Committee has noted, there is a need to ensure that Welsh Ministers retain the flexibility to amend the regulations should future circumstances suggest a change to the existing policy is needed, for example extending the charge to other types of bags.

It is for this reason that I have decided to **resist** this amendment as I do not believe we should remove this flexibility and change the scope of the regulation making powers. I believe that the intent of this recommendation can be more effectively implemented via the secondary legislation amendment process.

Recommendation 3

We recommend that the Welsh Government should table an amendment to the Bill to remove section 63.

I previously stated in Committee that it is unlikely that we would wish to pursue a joint composite order with the UK Government in relation to the carrier bag policy as the UK Government's single use carrier bag legislation is significantly different from ours.

I have now considered this matter further and I **accept** the recommendation to remove section 63 from the Bill.

Recommendation 4

We recommend that the Welsh Government should table an amendment to the Bill to ensure that the appeals processes for both shellfishery and marine licensing are treated consistently in the Bill.

The powers under Part 5 (shellfisheries) and Part 6 (marine licensing) of the Bill apply to separate regulatory regimes. The marine licensing provisions will be inserted into the Marine and Coastal Access Act 2009, where the wider marine licensing regime is already set out and has been implemented in Wales since 2011.

Section 108 of the MCAA imposes a duty on Welsh Ministers to make, through regulations, provision for any person to appeal against certain notices. The notices covered by section 108 of the MCAA include notices to suspend, vary or revoke and are akin to the notices that may be issued under sections 72A(7) or 107(A)(4) that will be inserted into the MCAA by the Bill. The Bill provisions extend the scope of section 108 to apply to notices served under served under sections 72A (7) and 107(A)(4)

The procedure for setting the appeals mechanism is already set out within the Marine and Coastal Access Act 2009 for other marine licensing notices. The Bill is seeking consistency with the existing notice appeals powers under section 108 of the Marine and Coastal Access Act 2009. Section 108 allows an appeals mechanism to be established by regulations. It is preferable to avoid fixing the appeals mechanism for these new powers on the face of the Bill, mirroring the current flexibility for setting the appeals provisions for the rest of the regime.

In relation to shellfisheries (Part 5), there is no existing appeal mechanism and no available enabling power which would be used to construct such an appeal mechanism. Consequently, on this basis it is necessary to set out a new appeals mechanism on the face of the Bill.

In view of the independence of the regimes, I **resist** this recommendation.

Finance Committee Recommendations

Recommendation 1

The Committee recommends that the summary table showing the costs and benefits in the Regulatory Impact Assessment of this Bill is amended to show separate tables for costs and monetised environmental benefits.

I **accept in principle** this recommendation as I believe the RIA clearly sets out the costs and benefits for each part of the Bill separately and where possible, every effort has been made to include monetised benefits in addition to the non-monetised benefits in the RIA. For some aspects of the Bill it has been extremely difficult to estimate monetised benefits – where this is the case, no figure was included in the overall costs.

I intend to revise the Explanatory Memorandum and RIA at the end of Stage 2 and as is required by Standing Orders.

Recommendation 2

The Committee recommends that the Welsh Government do not present costs and benefits in this way in future legislation, we believe this approach to be confusing and unintentionally misleading.

We would like to see the Welsh Government work with the Auditor General for Wales to agree on the best way to present cost and benefit information in Regulatory Impact Assessments.

There are number of specific policy areas encompassed by the Bill within the overarching aim for this legislation. A separate RIA was therefore undertaken for each Part. I am convinced that this was a clearer and more transparent way of undertaking this assessment as it enables the costs and benefits to be considered for each Part individually.

The results of each RIA were however assimilated into an overall summary table setting out the quantified costs and benefits for each part of the Bill, together with figures for the Bill as whole. This approach enabled us to present the overall costs and benefits of all parts of the Bill.

Furthermore, indicative costs to illustrate the potential onward financial implications of the implementation of the Bill were provided, for example, in relation to the area statements in Part 1 of the Bill. It is on this basis that I **accept in principle** this recommendation.

I agree with the Committee's findings that we should continue to work with the Auditor General, in particular to link with the implementation of the Well-being of Future Generations (Wales) Act – to ensure that costs and benefits for Bills in the future are considered in line with the framework of that Act.

Recommendation 3

The Committee recommends that the Minister support the suggestion of a future Finance Committee undertaking post legislative scrutiny of the costs associated with the Bill, and that the Minister commits to ensuring that a review of the costs will be made available four/five years after the Bill is enacted.

I agree that the costs should be considered as part of the post legislative process. However it is not for me to comment on the future work of an Assembly Committee or appropriate for me to commit future Welsh Ministers to a recommendation on their behalf. I believe that this is a matter for the relevant Minister at the appropriate time.

On that basis, I **accept in principle** this recommendation.

Recommendation 4

The Committee are concerned about the accuracy of costings in relation to the preparation and production of area statements and the level of funding allocations for Natural Resources Wales to carry out current duties and those included within the Well-being of Future Generations (Wales) Act 2015, Planning (Wales) Act 2015 and Environment (Wales) Bill 2015. The Committee recommends that the Minister work closely with Natural Resources Wales to ensure this work is adequately funded.

Natural Resources Wales (NRW) has been fully involved in the development of the proposals and provisions. Preparatory work to implement the Bill's requirements is already underway, and the Welsh Government will continue to work with NRW. I need to underline, however, that a key aspect of Part 1 of the Environment Bill relates to how NRW will be required to deliver its core purpose; and in that respect, these requirements should not be seen as 'additional' functions, but instead be seen as central to its remit.

The implementation costs and benefits associated with provisions set out in Part 1, particularly those in relation to the development of area statements, will largely be determined by the operational approach NRW chooses to adopt, beyond existing transition work already underway to integrate its regulatory functions where this is possible under existing legislation.

To ensure that the most cost-effective implementation approach is selected, NRW and the Welsh Government are working together to build evidence, identify good practice operational methods through for example the area trials, as well as reviewing current delivery models to take advantage of opportunities for consolidating and streamlining planning and operational functions.

Given that the implementation costs will be determined by NRW's operational approach I **accept in principle** this recommendation. The RIA puts forward illustrative options for implementation covering possible operational approaches for area statement development. The provisions have been designed however to enable NRW to select the most cost-effective approach to deliver the area statements and to allow for flexibility in managing cost implications going forward.

Recommendation 5

The Committee recommends that the Minister review the Regulatory Impact Assessment to provide an indication of the costs associated with Marine Licensing.

Given the costs associated with marine licensing have already been set out in the RIA accompanying the Bill, I **resist** this recommendation. The Marine Licensing Fees Review is currently ongoing and will be accompanied by a separate RIA – building on the information already set out in the Environment Bill RIA.

In general, costs are anticipated to fall on users of the marine licensing regime and should be outweighed by the added benefits. The RIA outlines the costs at approximately £757,330 (over a 10-year period) transferred from NRW to the users of the marine licensing regime.

Recommendation 6

The Committee would like assurance that costs for these waste companies will be lower in the medium to long term and recommends the Minister work with these organisations to ensure they are able to continue operations throughout the transition period and that access to finance is available to these organisations.

The RIA indicates that waste management companies are expected to make considerable savings overall in the medium to long term, from recycling revenues and reduction in disposal costs (i.e. avoided landfill tax).

Work with waste management businesses will be undertaken as we develop the associated subordinate legislation to ensure that it is fit for purpose.. The RIA illustrates that waste management companies will accrue savings from the provisions set out in the Bill. On that basis, I am positive that they will not need additional support to fulfil the requirements. It is on these grounds that I **resist** this recommendation.

Recommendation 7

The Committee would like the Welsh Government to consistently follow the example of the Health Minister who indicated that the Explanatory Memorandum and Regulatory Impact Assessment for the Regulation and Inspection of Social Care (Wales) Bill 2015 would be updated as subordinate legislation was drafted and costed.

The Minister for Health and Social Services committed to produce separate RIAsat the point that subordinate legislation is brought forward. Similarly, it is my intention to publish separate RIAs for subordinate legislation made under the Environment Bill where needed, in line with standard practice and to ensure that the RIAs reflect the most up to date evidence available at the time.

While I agree with post-implementation review of the costs and benefits as a matter of good practice, it is important to guard against adding overly bureaucratic processes to this end, and the associated potential to incur significant costs in the context of the continuing challenges with respect to public spending constraints.

On the basis of our assessment, continual update of the detail set out in the RIA for each Bill each time subordinate legislation is produced would require significant

resources and I therefore, **resist** this recommendation. However, I will consider this as part of the post implementation review of this Bill.

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