

Agenda – Constitutional and Legislative Affairs Committee

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| Meeting Venue: | For further information contact: |
| Committee Room 1 – Senedd | Naomi Stocks |
| Meeting date: Monday, 31 October 2016 | Committee Clerk 0300 200 6565 |
| Meeting time: 14.30 | SeneddCLA@assembly.wales |

1 Introduction, apologies, substitutions and declarations of interest
(14.30)

**2 Instruments that raise no reporting issues under Standing Order
21.2 or 21.3**

(14.30 – 14.35)

(Page 1)

CLA(5)–09–16 – Paper 1 – Statutory Instruments with clear reports

Negative Resolution Instruments

**SL(5)019 – The Local Authorities (Calculation of Council tax Base) (Wales)
(Amendment) Regulations 2016**

3 Paper(s) to note

(14.35 – 14.40)

**Land Transaction Tax and Anti–avoidance of Devolved Taxes (Wales) Bill:
Correspondence from the Cabinet Secretary for Finance and Local Government**

(Pages 2 – 3)

**CLA(5)–09–16 – Paper 2 – Correspondence from the Cabinet Secretary for Finance
and Local Government, 18 October 2016**



Wales Bill: Correspondence from the Llywydd (Presiding Officer) to Welsh Peers

(Pages 4 – 26)

CLA(5)–09–16 – Paper 3 – Correspondence from the Llywydd to Welsh Peers, 20 October 2016

CLA(5)–09–16 – Paper 4 – Briefing paper on the Llywydd’s proposed amendments, 20 October 2016

Wales Bill: Correspondence from the First Minister to the Secretary of State for Wales

(Pages 27 – 29)

CLA(5)–09–16 – Paper 5 – Correspondence from the First Minister to the Secretary of State for Wales, 20 October 2016

Wales Bill: Report by the House of Lords Delegated Powers and Regulatory Reform Committee

(Pages 30 – 42)

CLA(5)–09–16 – Paper 6 – Report by the House of Lords Delegated Powers and Regulatory Reform Committee on the Wales Bill

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

(14.40)

(ix) any matter relating to the internal business of the Committee, or of the Assembly is to be discussed.

5 Constitutional and Legislative Affairs Committee: Inter-Government and Inter-Parliamentary working inquiry

(14.40 – 15.10)

(Pages 43 – 52)

CLA(5)-09-16 – Paper 7 – Research Service Briefing

CLA(5)-09-16 – Paper 8 – Terms of reference

Date of the next meeting

Monday 7 November 2016

Statutory Instruments with Clear Reports Agenda Item 2

31 October 2016

SL(5)019 - The Local Authorities (Calculation of Council Tax Base) (Wales) (Amendment) Regulations 2016

Procedure: Negative

These regulations amend the Local Authorities (Calculation of Council Tax Base) (Wales) Regulations 1995 in respect of a financial year beginning on or after 1 April 2017. The regulations are amended to ensure the council tax premiums are reflected in the calculation of the council tax base. The Housing (Wales) Act 2014 amends the Local Government Finance Act 1992 by inserting a new section 139 which enables a billing authority in Wales to apply a council tax premium in respect of long-term empty homes and second homes. The amendments in these regulations are made as a consequence of the above amendments to the Act.

Parent Act: Housing (Wales) Act 2014; Local Government Finance Act 1992

Date Made: 5 October 2016

Date Laid: 7 October 2016

Coming into force date: 28 October 2016



Agenda Item 3.1

Mark Drakeford AM/AC

Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol
Cabinet Secretary for Finance and Local Government



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

18 October 2016

Dear Huw

Following the Constitutional and Legislative Affairs Committee's evidence session on 3 October in relation to the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill ("the Bill"), I thought it might be helpful to provide you with some further information to aid your scrutiny of the Bill.

1. Paragraph 2(3) of Schedule 14 – power to prescribe a person as a relevant public body for right to buy transactions

In response to Lord Elis-Thomas's question about the procedure adopted for regulations made under paragraph 2 of Schedule 14, I explained that the relief concerned transactions where the buyer and seller are both public bodies.

The relief for right to buy transactions will inevitably involve cases where the seller is a relevant public body, and the buyer is a resident of that dwelling, rather than a public body. The purpose of the regulation-making power is to enable the Welsh Ministers to add to the list of public sector bodies who can dispose of a dwelling in a right to buy transaction.

In line with the general approach I have taken throughout the Bill, I remain satisfied that the negative procedure is appropriate. This is because the effect of the regulations – if made – would be to extend the scope of the relief to a greater number of transactions, reducing tax liability.

For completeness, it is worth also noting that the relief for right to buy operates in a slightly different way to most other reliefs in this Bill as it provides partial relief from tax, rather than the full relief offered in most other cases. Where this relief is claimed, the calculation of the amount of tax payable ignores the possibility that the 'discount' available to the buyer as a result of exercising their right to buy might be clawed-back under existing right to buy legislation.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh and correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

2. Section 34(6) – power to provide that a scheme of a particular description is to be treated as not being a unit trust scheme

Section 34 of the Bill provides a general rule that the Bill and the Tax Collection and Management (Wales) Act 2016 will apply to unit trust schemes in a similar way as it does to companies, except in a small number of specified cases. In practice, this means that the trustees of a unit trust scheme will be treated as though they are a company, while the rights of unit holders in the scheme will be treated as though they are shares in that company.

The power conferred by subsection (6) enables the Welsh Ministers to disapply this general rule in relation to schemes of a particular description, if it becomes inappropriate for these rules to apply. This might be exercised in the future if it becomes apparent that the rules are being exploited by avoidance schemes, or as a result of the creation of a new type of unit trust scheme for which the unit trust rules are not appropriate.

In my evidence to the Committee (at paragraph 38-39), I noted that regulations made under this section could only have the effect of reducing tax liability. I think it is important to clarify that the regulations made under this section could nevertheless have the effect of changing the person who is liable for that tax. While the quantum of tax taken will not be increased, liability for individuals and companies could alter as they would be liable for the tax rather than the trustees of the unit trust.

3. Paragraph 2 of Schedule 10 – power to make further provision about the relief for alternative finance investment bonds

As highlighted by my official during your scrutiny session (at paragraph 75 of the transcript), the power conferred by this paragraph would be exercised by the Welsh Ministers in response to changes to Sharia financing. I would like to confirm that I consider these changes to be technical or administrative in nature, and therefore appropriate for such regulations to be subject to the negative procedure.

I hope your Committee finds this information useful.



Mark Drakeford AM/AC

Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol
Cabinet Secretary for Finance and Local Government

To: Welsh Peers

20 October 2016

Dear Colleague

Wales Bill 2016 – proposed amendments

Following the second reading debate on the Wales Bill in the House of Lords last week, I wish to draw your attention to my recommendations for amendments that I have published today. I hope you may consider tabling these in Committee stage over the coming weeks.

As I outlined in my letter of 5 October, whilst I welcome the progress that has been made on the Bill to date, some outstanding issues remain. The amendments I have published today are focused on ensuring the legislative competence of the Assembly is clear, workable and does not roll back on the current settlement.

Specifically, the amendments address the statutory expression of the convention requiring Assembly consent; reinstate the Assembly's ability to remove or modify a function of a UK Minister, where to do so is incidental or consequential (in line with the Supreme Court's decision on the Local Government Byelaws (Wales) Act 2012); remove the new consent requirements imposed by the Bill where the Assembly wishes to affect the functions of non-devolved public bodies; and allow the Assembly to add to the list of 'relevant persons' who receive funding directly from the Welsh Consolidated Fund.

I am pleased to see that the Assembly's Constitutional and Legislative Affairs Committee's excellent report, published on 6 October also expresses the view that these issues must be addressed and amongst its significant recommendations, endorses specific amendments I have published previously.

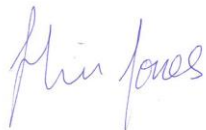
The attached documents contain briefing and explanatory notes on the changes I am suggesting, alongside the draft amendments themselves.

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English



I hope that these suggestions will contribute to the important debate on the future of Wales' constitutional settlement. If you would like to discuss or receive any more details please contact my office.

Yours sincerely

A handwritten signature in blue ink that reads "Elin Jones". The signature is written in a cursive style with a large initial 'E'.

Elin Jones AM
Llywydd



Outstanding Issues

Assembly Consent: Convention on Parliament legislating on devolved matters – clause 2

This is an important constitutional principle: the Assembly should consent to any change in its powers.

Clause 2 as written will not achieve a robust statutory basis for the legislative consent convention. Clause 2 contains a provision that Parliament will not “normally” legislate with regard to devolved matters without the consent of the Assembly. The use of the word “normally” is unsatisfactory as it is potentially open to a broad interpretation. Parliament should only legislate on the Assembly’s behalf without its consent in exceptional circumstances and it would be preferable for those circumstances to be specifically defined.

The scope of the statutory legislative consent arrangements between the Assembly and Parliament should be no narrower than the scope of the inter-governmental convention currently in place.

Likewise, the Assembly should give its consent before the power to vary the income tax rate is devolved.

Consent should be required when matters:

- (a) are within the legislative competence of the Assembly,
- (b) modify the legislative competence of the Assembly,
- (c) modify functions of the Assembly, and
- (d) modify functions of members of the Welsh Government (mainly the Welsh Ministers) where such functions are within devolved areas.

I would therefore like to see greater assurance as to when Assembly consent is required, including a commitment that the UK Government will continue to comply with the current non-statutory requirements for consent as set out in the UK Government devolution guidance notes.



Minister of Crown Consents – Schedule 2 paragraphs 8 -11

Schedule 2 of the Wales Bill proposes a new Schedule 7B to the Government of Wales Act which sets out general restrictions on the Assembly's legislative competence. Included within this are areas for which UK Government – or Minister of the Crown - consent is required before the Assembly can affect the functions of “reserved authorities”, i.e. UK Ministers, UK government departments and other public authorities (other than Wales Public Authorities).

There has been considerable improvement since the draft Bill was published last year and many of the requirements for consent under the current settlement have been removed. However there are some areas where the changes proposed under the Bill roll back on the Assembly's current competence and I believe these should be further considered.

The Bill would withdraw the Assembly's ability to remove or modify functions of a UK Minister, where to do so is incidental or consequential. I am particularly concerned that the effect of this would be a roll-back of the Assembly's current competence. Moreover, it would, effectively, reverse the Supreme Court's decision, in the case concerning the Local Government Byelaws (Wales) Act 2012 that Secretary of State consent was not needed, because removal UK Ministerial powers was merely a consequence of the main purpose of the Bill.

The Bill would also take away the Assembly's ability to remove or modify specified functions of a UK Minister in devolved areas exercisable after May 2011 – notably the Welsh Language functions of UK Ministers. One example of the effect of this roll-back is that, under this Bill many aspects of the Welsh Language (Wales) Measure 2011 would require UK Government consent before it could be passed by the Assembly.

In addition, the Bill will introduce a new restriction, preventing the Assembly from affecting the functions of other reserved authorities (other than Wales Public Authorities), e.g. the DVLA, Crown Prosecution Service, the BBC, police in any way. Currently, no such restriction applies and, as drafted, I am concerned that the Bill could prevent the Assembly from requiring reserved authorities to comply with the general law applicable in Wales. For example the Assembly could currently impose a duty that all workplaces in Wales should display “no e-cigarette” signs and a reserved authority such as the DVLA which is based in Swansea would have to comply with that duty, but under the proposed new settlement it would, arguably, not have to do so unless the UK Government consented.



Financial Provisions – To amend Schedule 2 in relation to Clause 13

Schedule 7B paragraph 7 sets out the sections of the Government of Wales Act 2006 which the Assembly will have competence to modify. Paragraph 7(2)(d) specifically refers to those sections of Part 5 of the 2006 Act which are amendable without restriction.

As it stands this does not include sections 120(1) or 124(3) of the 2006 Act, which provide for ‘relevant persons’ – otherwise known as ‘direct funded bodies’ such as the Wales Audit Office and Public Services Ombudsman for Wales – which receive funding directly from the Welsh Consolidated Fund.

The ability to modify the list of direct funded bodies would allow the Assembly to enable a body, which is independent of Welsh Government, to also be financially independent, where this is deemed appropriate. Any use of such competence to amend these GOWA 2006 clauses to add to the ‘relevant persons’ would require an Act of the Assembly, and therefore would not be a decision taken lightly. It would be subject to consultation and rigorous scrutiny.



Briefing on Presiding Officer’s proposed Amendments for House of Lords consideration of the Wales Bill

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Summary table of amendments

| Clause / Schedule | Purpose and effect of proposed amendments |
|--------------------------|--|
| Clause 2 | <p>The amendments include provision for Parliament to legislate on devolved matters in “exceptional circumstances” and specifies what those circumstances are. They include matters relating to public safety or national security, or urgent economic issues where there is not sufficient time to seek the Assembly’s consent.</p> <p>The amendments also define “devolved matters”, to provide that the statutory expression of the convention applies at least as broadly to Wales as is currently the case in Scotland’s Standing Orders.</p> |
| Schedule 2, paragraph 7 | <p>These amendments enable the Assembly to amend sections 120(1) and 124(3) of the Government of Wales Act 2006, which provide for ‘relevant persons’ who receive funding directly from the Welsh Consolidated Fund.</p> |
| Schedule 2, paragraph 8 | <p>These amendments give the Assembly competence to impose or confer functions on reserved authorities in an incidental or consequential way without the need for UK Government consent. But Ministers of the Crown and government departments are carved out from the meaning of reserved authorities in these amendments.</p> |
| | <p>This amendment clarifies that paragraph 8(1)(a) of proposed new Schedule 7B only applies when the Assembly imposes or confers functions that apply only to reserved authorities.</p> |
| Schedule 2, paragraph 10 | <p>This amendment allows the Assembly to remove or modify the functions of certain public bodies in an incidental or consequential way without the need for UK Government consent.</p> |
| Schedule 2, paragraph 11 | <p>This amendment limits the scope of the Minister of the Crown functions specified in paragraph 11(1) to pre-commencement functions / powers (i.e. functions / powers that were exercisable before 5 May 2011).</p> |
| | <p>This amendment gives the Assembly competence to modify the Minister of the Crown functions specified in paragraph 11(1) in an incidental or consequential way without UK Government consent.</p> |
| | <p>This amendment removes the need for UK Government consent before the Assembly removes or modifies the Welsh language functions of a Minister of the Crown.</p> |

Clause 2 - Convention about Parliament legislating on devolved matters

Circumstances in which the Assembly's consent is not required

This clause as written will not achieve a robust statutory basis for the legislative consent convention. Clause 2 contains a provision that Parliament will not “normally” legislate with regard to devolved matters without the consent of the Assembly. The use of the word “normally” is unsatisfactory as it is potentially open to a broad interpretation.

The proposed amendments provide that Parliament should only legislate on devolved matters without Assembly consent in exceptional circumstances and those circumstances are specified. The word “normally” is deleted because it is unclear – there is no definition of what is a “normal” situation.

The UK Parliament should only legislate on devolved matters when: (a) there is an imminent risk of serious harm to national security, public safety, the health of the public, plants and animals and economic stability in the UK, (b) the UK Parliament legislation specifically addresses the risk, (c) the imminence of the risk in relation to Wales means that it is not practical to seek consent, **and** (d) the Assembly has not already introduced legislation to specifically address the risk.

Combined, these amendments provide greater clarity as to when the UK Parliament should seek consent from the Assembly, by establishing a proper statutory recognition of how consent should work. They also recognise the maturity of the Assembly as a legislature and that its consent should be obtained before UK Parliament legislates on devolved matters.

Finally, it is worth noting that there is no attempt to interfere with Parliamentary sovereignty here, as section 107(5) of the Government of Wales Act 2006 makes clear.

Provisions which require consent

Secondly, in relation to the scope of the clause, the purpose of this amendment is to provide that the statutory expression of the convention applies at least as broadly to Wales as is currently the case in Scotland's Standing Orders.¹

The clause as currently drafted deals only with the UK Parliament's ability to legislate on matters within devolved competence. It should also deal with the situation where a UK Bill seeks to amend that competence.

The amendments also reflect the conclusions of the previous Assembly's Constitutional and Legislative Affairs Committee,² that consent should go beyond the current Scottish

¹ Chapter 98 of the Standing Orders of the Scottish Parliament

² National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Report on the Legislative Consent Memorandum, Wales Bill](#), June 2014

convention, so as to require Assembly consent for UK Bills which alter the functions of the Assembly, without altering its legislative competence.

Devolved matters are therefore defined to include matters that:

- (a) are within the legislative competence of the Assembly,
- (b) modify the legislative competence of the Assembly,
- (c) modify functions of the Assembly, and
- (d) modify functions of members of the Welsh Government (mainly the Welsh Ministers) where such functions are within devolved areas.

Text of the clause as amended

2 Convention about Parliament legislating on devolved matters

In section 107 of the Government of Wales Act 2006 (Acts of the National Assembly for Wales), after subsection (5) insert—

“(6) But 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 unless all of the following conditions apply—

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

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

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

(b) the legislation specifically addresses that risk,

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

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

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

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

(a) are within the legislative competence of the Assembly;

(b) modify the legislative competence of the Assembly;

(c) modify a function of the Assembly;

(d) modify any functions of any member of the Welsh Government exercisable within devolved competence (and “within devolved competence” is to be read in accordance with section 58A).”

Text of 3 amendments

Amendment 1

Page 2, line 12, leave out “normally”

Amendment 2

Page 2, line 13, after “Assembly” insert “unless all of the following conditions apply—

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

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

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

(b) the legislation specifically addresses that risk,

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

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

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

Amendment 3

Page 2, line 13, at end insert—

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

(a) are within the legislative competence of the Assembly;

(b) modify the legislative competence of the Assembly;

(c) modify a function of the Assembly;

(d) modify any functions of any member of the Welsh Government exercisable within devolved competence (and “within devolved competence” is to be read in accordance with section 58A).”

Schedule 2 - Paragraph 7(2) (d) of New Schedule 7B

Allowing the Assembly to add to the list of relevant persons who receive funding directly from the Welsh Consolidated Fund

Paragraph 7 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) sets out the sections of the Government of Wales Act 2006 which the Assembly will have competence to modify. Paragraph 7(2)(d) specifically refers to those sections of Part 5 of the Government of Wales Act 2006 which are amendable without restriction.

As it stands this does not include the ability to amend sections 120(1) or 124(3) of the Government of Wales Act 2006 which provide for 'relevant persons' – otherwise known as 'direct funded bodies' – which receive funding directly from the Welsh Consolidated Fund i.e. Welsh Government, the Assembly Commission, the Auditor General and the Public Services Ombudsman for Wales.

The proposed amendments to paragraph 7(2)(d) would allow the Assembly competence to add to, but not remove from, the list of 'relevant persons'. This would allow the Assembly to enable a body which is independent of Welsh Government to also be financially independent, where this is deemed appropriate. Any use of such competence to add to the 'relevant persons' would require an Act of the Assembly.

Text of paragraph 7(2)(d) of Schedule 2 as amended

- (d) the following provisions in Part 5 (finance)—
- (i) section 120(1) as regards a modification that adds a person or body;
 - (ii) section 120 (2);
 - (iii) section 124(3) as regards a modification that adds a person or body;
 - (iv) sections 125 to 130;
 - (v) sections 131 to 135;
 - (vi) sections 137 to 143;
 - (vi) any provision of Schedule 8;

Text of the amendments

Amendment 1

Page 84, line, 41, at end insert—

“() section 120(1) as regards a modification that adds a person or body;”

Amendment 2

Page 84, line 42, at end insert –

“() section 124(3) as regards a modification that adds a person or body;”

Schedule 2 – Paragraph 8 of new Schedule 7B – UK Government consent requirements for reserved authorities

Providing ability to confer or impose functions in a consequential or incidental way

Paragraph 8 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) prevents the Assembly from conferring or imposing functions on reserved authorities, unless the UK Government consents.

These amendments say that the Assembly could confer or impose functions on reserved authorities in a **consequential or incidental** way without UK Government consent.

Example

For example, the Assembly wishes to pass legislation encouraging equal opportunities (which is an exception to the reservation of equal opportunities). The Assembly legislation would seek to encourage equal opportunities generally across Wales.

To aid understanding of equality issues, the Assembly legislation wants the Equality and Human Rights Commission to have a discretionary power (not a duty) to advise the Welsh Government about the effectiveness of equality legislation.

This would be conferring a discretionary power on the Equality and Human Rights Commission in an incidental way – it is a relatively small part of the overall scheme to encourage equality, it is merely incidental to the main thrust of the Assembly legislation.

Under the current settlement, there are no restrictions on the Assembly's power to confer or impose functions on reserved authorities like the police, DVLA and Land Registry (provided the Assembly legislation relates to a devolved subject and doesn't breach human rights and EU law etc.).

Therefore this amendment is intended as a modest and reasonable proposal which would allow the Assembly some flexibility to confer or impose functions in a purely incidental or consequential way in future.

But the proposed power to make incidental or consequential provision does not extend in relation to conferring or imposing functions on Ministers of the Crown or government departments. This is because including such an incidental or consequential power would be giving the Assembly more power in this area than it has under the current settlement.

Text of paragraph 8 (1) & (2) as amended

8 (1) A provision of an Act of the Assembly cannot—

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

(b) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority, including modifications relating to its assets and liabilities and its funding and receipts, or

(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,

unless the appropriate Minister consents to the provision or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) Sub-paragraph (1) is subject to the exceptions in paragraph 9.

(3) In this paragraph “reserved authority” means—

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

(b) any other public authority apart from a Wales public authority;

but the Assembly’s legislative competence to make incidental or consequential provision in sub-paragraph (1) does not apply in relation to a Minister of the Crown or government department.

Text of amendments

Amendment 1

Page 86, line 16, at end insert “or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly”

Amendment 2

Page 86, line 21, at end insert “;

but the Assembly’s legislative competence to make incidental or consequential provision in sub-paragraph (1) does not apply in relation to a Minister of the Crown or government department”

Schedule 2 – Paragraph 8 of new Schedule 7B – UK Government consent requirements for reserved authorities

Ensuring application of functions generally across Wales

Paragraph 8 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) prevents the Assembly from conferring or imposing functions on reserved authorities, unless UK Government consents.

This amendment says that, if the Assembly chooses to confer or impose functions generally across Wales or generally across the public sector in Wales, thereby catching reserved authorities, then the Assembly can do that without UK Government consent.

Example

For example, if the Assembly prohibited the use of e-cigarettes in all workplaces in Wales and required those workplaces to put up signs and take steps to stop the use of e-cigarettes in their workplaces, then that would capture workplaces such as the offices of the police, DVLA and Land Registry (all of which are reserved authorities).

This amendment clarifies that imposing such functions on those reserved authorities would not require consent; the law on e-cigarettes would need to apply consistently across workplaces in Wales, so it would be inappropriate to require UK Government consent.

However, if the Assembly seeks to confer or impose functions that apply **only** to reserved authorities (including just one reserved authority), the amendment says that UK Government consent will be required.

Under the current settlement, there are no restrictions on the Assembly's power to confer or impose functions on reserved authorities like the police, DVLA and Land Registry (provided the Assembly legislation relates to a devolved subject and doesn't breach human rights and EU law etc.).

Therefore this amendment is intended as a modest and reasonable proposal which would allow the Assembly some flexibility to confer or impose functions on reserved authorities that apply generally across Wales.

Text of paragraph 8 as amended

8 (1) A provision of an Act of the Assembly cannot—

(a) confer or impose, or confer power by subordinate legislation to confer or impose, any function ~~on a reserved authority~~ specifically on one or more reserved authorities,

(b) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority, including modifications relating to its assets and liabilities and its funding and receipts, or

(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,

unless the appropriate Minister consents to the provision.

(2) Sub-paragraph (1) is subject to the exceptions in paragraph 9.

(3) In this paragraph “reserved authority” means—

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

(b) any other public authority apart from a Wales public authority.

Text of the amendment

Page 86, line 6, leave out “on a reserved authority” and insert “specifically on one or more reserved authorities”

Schedule 2 – Paragraph 10 of new Schedule 7B UK Government consent requirements for public bodies

Providing ability to remove or modify functions in a consequential or incidental way

Paragraph 10 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) prevents the Assembly from removing or modifying the functions of certain public authorities (excluding Wales Public Authorities and Ministers of the Crown) without UK Government consent. Examples of bodies caught by paragraph 10 include the DVLA, Land Registry, Crown Prosecution Service, BBC, and police.

This amendment says that the Assembly could remove or modify the functions of such reserved authorities in a **consequential or incidental** way without UK Government consent.

Example

The Public Services Ombudsman (PSOW) has a discretionary power to investigate matters relating to “listed authorities” under the Public Services Ombudsman (Wales) Act 2005. A police and crime commissioner for a police area in Wales is a listed authority under the 2005 Act.

Currently, if an investigation is conducted in respect of a listed authority and the PSOW sends a copy of the report to the listed authority, the listed authority must make copies of that report available for three weeks.

If, for example, the Assembly wished to legislate with regard to PSOW investigations, including a requirement that listed authorities must make copies of such reports available for four weeks instead of three weeks, that would be modifying the duty of all listed authorities.

The great majority of listed authorities are Wales Public Authorities, and therefore would not be captured by paragraph 10. However, the Welsh police and crime commissioners are reserved authorities under the Wales Bill. In order for the PSOW legislation to operate effectively across all listed authorities, the duty to publicise reports for four weeks should apply to all listed authorities, including Welsh police and crime commissioners.

As the Wales Bill is drafted, the Assembly would not be able to modify the functions of that reserved authority in this consequential way.

Currently, there are no restrictions on the Assembly’s power to remove or modify the functions of reserved authorities (provided the Assembly legislation relates to a devolved subject and doesn’t breach human rights and EU law etc.). In other words, the Bill reduces the Assembly’s competence.

The reasons for this are, to an extent, understandable: reserved authorities are wholly or largely funded by UK Ministers and are accountable to them. Therefore this amendment is intended as a modest and reasonable proposal which would allow the Assembly some

flexibility to remove or modify their functions in a purely incidental or consequential way in future.

Text of paragraph 10 as amended

10 (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 public authority other than a Wales public authority, unless the appropriate Minister consents to the provision or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) This paragraph does not apply in relation to—

- (a) a Minister of the Crown (as to which, see paragraph 11);
- (b) the Electoral Commission;
- (c) the Food Standards Agency;
- (d) the Water Services Regulation Authority;
- (e) a water or sewerage undertaker;
- (f) the Consumer Council for Water;
- (g) the Chief Inspector of Drinking Water for Wales or any other person appointed by the Welsh Ministers under section 86 of the Water Industry Act 1991 (assessors for the enforcement of water quality).

(3) This paragraph does not apply to the removal or modification of a function of the traffic commissioners relating to—

- (a) the registration of local bus services, or
- (b) the application and enforcement of traffic regulation conditions in relation to those services.

(4) This paragraph does not apply to—

- (a) the removal or modification of a devolved function (within the meaning of paragraph 6 of Schedule 7A) of a court;
- (b) the removal or modification of a function of a tribunal involving, or connected with, making a decision in relation to a matter that is not a reserved matter.

(5) In this paragraph “public authority” and “appropriate Minister” have the same meaning as in paragraph 8.

Text of the amendment

Page 87, line 11, at end insert “or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly”

Schedule 2 Paragraph 11 of New Schedule 7B – UK Government consent requirements for Ministers of the Crown functions

Three groups of amendments to paragraph 11

Group 1 Amendments

Restoring ability to remove or modify functions exercisable after 5 May 2011

Paragraph 11 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) lists certain Minister of the Crown functions that the Assembly could not remove or modify without UK Government consent.

These amendments limit the scope of those Minister of the Crown functions that require consent to those functions that were exercisable by Ministers of the Crown **before** 5 May 2011. The significance of the date 5 May 2011 is that it is the date when the Assembly first had powers to make Assembly Acts.

This means that, for any of those Minister of the Crown function that were exercisable **on or after** 5 May 2011, the Assembly would not require UK Government consent before removing or modifying them. Such functions would then fall into paragraph 11(2), so that removing or modifying those functions would only require the Welsh Ministers to consult UK Government.

Limiting the scope of paragraph 11(1) to pre 5 May 2011 functions would reflect the current settlement; UK Government consent is currently only needed to remove or modify **pre** 5 May 2011 functions, but it is not needed to remove or modify **post** 5 May 2011 functions.

Text of paragraph 11 as amended

11 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify—

- (a) any pre-commencement function of a Minister of the Crown that relates to a qualified devolved function,
- (b) any pre-commencement function of a Minister of the Crown exercisable in relation to the Welsh language,
- (c) any pre-commencement function of a Minister of the Crown exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection,
- (d) any pre-commencement function of a Minister of the Crown under the Marine and Coastal Access Act 2009 or the Marine Works (Environmental Impact Assessment)

Regulations 2007 (S.I. 2007/1518), or

(e) any pre-commencement power of the Secretary of State under section 6 of the Railways Act 2005 (financial assistance relating to railway services etc),

unless the appropriate Minister consents to the provision.

(2) In this paragraph—

“pre-commencement function” means a function which was exercisable by a Minister of the Crown immediately before 5 May 2011;

“pre-commencement power” means a power which was exercisable by a Minister of the Crown immediately before 5 May 2011.

Text of the amendments

Amendment 1

Page 87, line 38, after “any” insert “pre-commencement”

Amendment 2

Page 87, line 40, after “any” insert “pre-commencement”

Amendment 3

Page 87, line 42, after “any” insert “pre-commencement”

Amendment 4

Page 87, line 47, after “any” insert “pre-commencement”

Amendment 5

Page 88, line 3, after “any” insert “pre-commencement”

Amendment 6

Page 88, line 6, at end insert—

“() In this paragraph—

“pre-commencement function” means a function which was exercisable by a Minister of the Crown immediately before 5 May 2011;

“pre-commencement power” means a power which was exercisable by a Minister of the Crown immediately before 5 May 2011.”

Group 2 Amendment

Restoring ability to remove or modify functions in an incidental or consequential way

Paragraph 11 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) lists certain Minister of the Crown functions that the Assembly could not remove or modify without UK Government consent.

This amendment provides that such consent is not required to remove or modify Minister of the Crown functions in an incidental or consequential way. This reflects the current settlement, as the Assembly currently has power to remove or modify pre 5 May 2011 Minister of the Crown functions in an incidental or consequential way. (That incidental / consequential power is being taken away under the Wales Bill; this means that the Assembly would not, under the Wales Bill, have been able to pass the Local Government Byelaws (Wales) Act 2012 which removed certain Minister of the Crown functions in an incidental way.)

The significance of the date 5 May 2011 is that it is the date when the Assembly first had powers to make Assembly Acts.

Text of paragraph 11 as amended

11 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify—

- (a) any function of a Minister of the Crown that relates to a qualified devolved function,
- (b) any function of a Minister of the Crown exercisable in relation to the Welsh language,
- (c) any function of a Minister of the Crown exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection,
- (d) any function of a Minister of the Crown under the Marine and Coastal Access Act 2009 or the Marine Works (Environmental Impact Assessment) Regulations 2007 (S.I. 2007/1518), or
- (e) any power of the Secretary of State under section 6 of the Railways Act 2005 (financial assistance relating to railway services etc),

unless the appropriate Minister consents to the provision or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

Text of the amendment

Page 88, line 6, at end insert “or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly”

Group 3 Amendment

Providing ability to remove or modify Welsh Language functions

Paragraph 11 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) lists certain Minister of the Crown functions (including Welsh language functions) that the Assembly could not remove or modify without UK Government consent.

At the moment UK Government consent is not required to remove any post 5 May 2011 functions, no Welsh Language functions – or any others - are currently specified.

This amendment removes all reference to the Welsh language functions of UK Ministers so that no UK Government consent would be needed before the Assembly could remove or modify any Welsh language functions of UK Ministers.

Removing the Welsh language functions of Ministers of the Crown from this list means that those Welsh language functions fall into paragraph 11(2) instead, in which case there is only a requirement to consult UK Government before the Assembly can remove or modify them.

This would bring Welsh language functions in-line with the vast majority of Minister of the Crown functions in devolved areas, i.e. by bringing them within paragraph 11(2) of proposed Schedule 7B.

Text of paragraph 11 as amended

11 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify—

(a) any function of a Minister of the Crown that relates to a qualified devolved function,

~~(b) any function of a Minister of the Crown exercisable in relation to the Welsh language,~~

(c) any function of a Minister of the Crown exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection,

(d) any function of a Minister of the Crown under the Marine and Coastal Access Act 2009 or the Marine Works (Environmental Impact Assessment) Regulations 2007 (S.I. 2007/1518), or

(e) any power of the Secretary of State under section 6 of the Railways Act 2005 (financial assistance relating to railway services etc),

unless the appropriate Minister consents to the provision.

Text of the amendment

Page 87, line 40, leave out paragraph (b)

Rt Hon Alun Cairns MP
Secretary of State for Wales
Wales Office
Gwydyr House
London
SW1A 2NP

20th October 2016

Dear Alun

Wales Bill Lords Committee Stage

Now that the House of Lords has given the Bill its Second Reading, I thought it important to write to set out my views on how matters should go forward, and to avoid any misunderstandings arising between us.

Legislative Consent

As the UK Government has publicly acknowledged, the Bill can only proceed to Royal Assent if the Assembly has resolved to give its Legislative Consent to the UK Parliament legislating along these lines. For Consent to be given, there will first need to be a process of scrutiny by the relevant Assembly Committee, with no doubt a published report. This process will need to be informed by a Legislative Consent memorandum laid before the Assembly by the Welsh Government under Standing Order 29, and a parallel Standing Order 30 statement about the additional executive functions envisaged for Welsh Ministers under the Bill.

My expectation is that, following the detailed discussions your officials and mine have pursued over the last four months, the UK Government will bring forward a significant number of amendments to the Bill at Lords Committee and Report stages. I understand that Committee stage is to begin towards the end of this month. My intention therefore is to lay the Legislative Consent memorandum and SO 30 statement as soon as possible after that Committee stage has been completed, so that the memorandum can present, for scrutiny purposes, as up-to-date as possible an account of the Bill; if there are then further amendments at Report stage, a supplementary memorandum will be laid. It will be essential that Lords consideration, up to and including Third Reading, should not be completed until the Assembly has had the chance to consider the outcome of the scrutiny process and has made its decision on Legislative Consent.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

It is also essential that the UK Government understands what is implied, and more importantly not implied, by the Welsh Government laying its memorandum. That action is required by Standing Orders, to facilitate scrutiny; it must not be taken as indicating any view on the part of the Welsh Government as to whether we will or will not be recommending that the Assembly give its consent. That is a decision to be taken later, in light of all the relevant information becoming available. As you are aware, the necessary information will be in relation to two sets of matters, the proposed fiscal framework, and of course the Bill itself in its amended form. In respect of each matter, the Welsh Government will need to be satisfied that it can properly recommend to the Assembly that consent be given.

Fiscal Framework

I am pleased that our governments have made a positive start to the negotiations on a fiscal framework, but there is much to be resolved and agreed. The methodology for adjusting the Welsh Block Grant (including interaction with the Barnett formula and funding floor) is central, but the Welsh Government's capital borrowing ceiling and budget management practices also need to be reviewed and addressed.

Discussions are currently planned until early December, which would suggest the Assembly will not be in a position to decide on Legislative Consent until the New Year.

The amended Bill

I refer you to my letter of 9 June, written shortly after the Bill was published. In that letter I noted a number of matters on which I was expecting to see progress made. These included:

- Improvements to the devolution model, particularly in order to enable the Assembly to make its legislation fully effective, and to address the issues around a Welsh jurisdiction
- The number and breadth of reservations. I specifically mentioned those on CIL, on Teachers' Pay and Conditions, and on Alcohol licensing, sale and supply, all of which I wanted to see removed. And I also urged that other reservations should be narrowed in scope, mentioning as examples Compulsory Purchase and Buildings as ones either for removal or considerable narrowing
- Ministerial consents: here I referred to the fact that, under the Bill, there is no 'incidental or consequential' exception when the consent requirement bites, so that the legislation in issue in the Byelaws case could not have been passed without UK Ministers' consent
- Water, where I identified several specific issues and said that there needed to be substantial movement by the UK Government on all of these, given the acute sensitivity of the subject-matter. This is a vitally important matter.

It is a matter of considerable concern that, four months on, all of these issues remain for remedial action by way of amendment to the Bill. Amendments will be coming forward in respect of each of them, and on other important issues, for consideration at Lords Committee stage. I will be looking for a positive and constructive response from the UK Government. The judgement on whether to recommend that the Assembly should give its Legislative Consent will inevitably be heavily influenced by the way the UK Government deals with these matters at Committee and Report stages in the Lords.

In this context, I underline the importance I attach to making tangible progress on the jurisdiction issue. The Assembly plenary debate yesterday on the Constitutional and Legislative Affairs Committee's report on the Bill reaffirmed that the interaction of the reserved powers model with the joint jurisdiction is a fundamental problem and barrier to a lasting settlement. It is essential to put in a place a credible, independent process for keeping this under active review and bringing forward constructive solutions. Without this, we are in danger of replacing one unstable settlement with another.

In considering whether to recommend Legislative Consent, protecting the Assembly's current competence will be a central concern: the CLA report highlights major risks in this regard. In particular, in the absence of a suitable exception, the reservation of employment rights and duties, will amount to a clear rowback of competence, and I have no doubt this will be a key issue in the Lords, as well as in the Assembly itself at the LCM stage.

Conclusion

We are now moving towards the endpoint for this Bill. Our officials should continue to discuss and so far as possible resolve the many technical issues the Bill still presents. But I will be looking to you to use your influence within the UK Government to secure the necessary amendments so that the Welsh Government can commend the Bill to the Assembly. We are certainly not yet in that position, but I stand ready to discuss further with you as necessary.

I am copying this letter to the Presiding Officer; to Leanne Wood AM, Andrew RT Davies AM, Kirsty Williams AM and Neil Hamilton AM; and to Huw Irranca Davies AM (Chair, Constitutional and Legislative Affairs Committee) and Eluned Morgan AM.

Yours sincerely

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

CARWYN JONES

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

5th Report of Session 2016–17

Wales Bill

House of Lords Bill [HL]

Lobbying (Transparency) Bill [HL]

Register of Arms Brokers Bill [HL]

Renters' Rights Bill [HL]

Ordered to be printed 19 October 2016 and published 25 October 2016

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

| | |
|-------------------------------------|-------------------------|
| Baroness Drake | Lord Lisvane |
| Baroness Fookes (<i>Chairman</i>) | Lord Moynihan |
| Lord Flight | Lord Thomas of Gresford |
| Baroness Gould of Potternewton | Lord Thurlow |
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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hlddelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Fifth Report

WALES BILL

1. The Wales Bill is aimed “at creating a clearer and stronger settlement in Wales which is durable and long-lasting”.¹ Assuming it proceeds to Royal Assent, it would be the fourth Act of Parliament providing for the devolution of powers to the National Assembly for Wales (“the Assembly”) or to the Welsh Ministers in the last 18 years.²
2. The Bill is intended to provide “a clearer separation of powers between what is devolved and what is reserved, enabling the Assembly to legislate on any subject except those specifically reserved to the UK Parliament”.³ It does this by changing the basis on which the Assembly has legislative competence from a “conferred powers” to a “reserved powers” model, broadly similar to the one that underpins the devolution settlement in Scotland.
3. The Wales Office have provided a memorandum about the delegated powers contained in the Bill,⁴ as well as a supplementary memorandum concerning clause 21.⁵ We wish to draw the following matters to the attention of the House.

Clause 3 and Schedules 1 and 2: legislative competence

4. Under section 108 of the Government of Wales Act 2006 (“the 2006 Act”) as it currently stands, the Assembly has power to make laws (called “Acts of the Assembly”) if they:
 - relate to one or more of the subjects listed in Schedule 7 to the 2006 Act (for example agriculture, education, environment, highways and housing);
 - do not fall within one of the exceptions specified in that Schedule;
 - apply only in relation to Wales;
 - do not breach a restriction referred to in subsection (6) (for example, because the law would be incompatible with the European Convention on Human Rights or with EU law).
5. Clause 3 of the Wales Bill redefines the basis upon which the Assembly has legislative competence. In broad terms, it will confer power on the Assembly to pass Acts relating to Wales on any subject that does not relate to a “reserved” matter unless it breaches a restriction: see the new section 108A and Schedules 7A and 7B.⁶

1 See the Explanatory Notes, para 1.

2 The previous Acts are the Government of Wales Act 1998, the Government of Wales Act 2006 and the Wales Act 2014.

3 See the Explanatory Notes, para 3.

4 Wales Office, *Wales Bill: Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-DPM.pdf><http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-DPM.pdf> [accessed 25 October 2016]

5 Wales Office, *Wales Bill: Supplementary Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-Supplementary-DPM.pdf> [accessed 25 October 2016]

6 Clause 3 replaces section 108 of the 2006 Act with new section 108A. New Schedules 7A and 7B (which are set out in Schedules 1 and 2 to the Bill) replace existing Schedule 7 to the 2006 Act.

6. Whether 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”: see new section 108A(6).
7. New Schedule 7A contains 200 paragraphs setting out a long list of the matters that are reserved to the UK Parliament. The rationale for many of the reservations is self-evident, for example: the constitution, foreign affairs, defence, the armed forces, nationality and immigration. In other cases, the rationale is much less obvious, for example: betting, hunting with dogs, Sunday trading.
8. Several reservations are subject to exceptions. In our view, the dividing line between certain reservations and exceptions is very fine and gives rise to difficult questions. For example:
 - Regulation of the sale and supply of goods and services to consumers is reserved, and so is the safety of, and liability for, services supplied to consumers; but food, food products and food contact materials are excepted.⁷ Does this mean that the Assembly will have power to regulate restaurants but only in relation to the provision of food to customers?
 - Job search and support is reserved but “education, vocational training and careers service” are excepted from the reservation.⁸ Does this mean that the Assembly will have power to legislate as regards the provision of a service to assist persons in choosing a career, but that service could not include helping persons find a job in their chosen career?
9. New Schedule 7B contains nine pages of detailed restrictions on the Assembly’s power to legislate, even in relation to matters that are not reserved. Some are relatively straightforward. So, for example, an Act of the Assembly may not confer functions on a Minister of the Crown without the consent of that Minister.⁹ However other restrictions in Schedule 7B are dauntingly complex, notably paragraph 7 which restricts the Assembly’s power to modify the 2006 Act.
10. It is unclear whether the combined effect of the changes will result in the Assembly gaining legislative competence in new areas, or losing competence in areas where it currently has competence. Neither the Explanatory Notes nor the delegated powers memorandum contain any analysis of the expected scope of the Assembly’s legislative powers under the proposed new provisions in comparison with those under the existing legislation.¹⁰ Much may depend on how the Courts interpret new section 108A(6), which specifies how the question whether a provision of an Act of the Assembly “relates to” a reserved matter is to be determined.
11. There have been several cases under the existing section 108 of the 2006 Act to determine whether proposed Assembly legislation “relates to” a subject expressly devolved to the Assembly. In particular, the Supreme Court was asked to rule in 2014 at the request of the Attorney General as to whether the Agricultural Sector (Wales) Bill was within the Assembly’s competence. The Bill contained provisions about the regulation of farm workers’ wages

7 See paras 70 to 74 of new Schedule 7A.

8 See para 139 of new Schedule 7A.

9 See Schedule 7B, para 8(1).

10 See para 4 above.

in Wales. The issue was whether this related to agriculture, which was specifically devolved, or to employment which was not. The Supreme Court held¹¹ that the Assembly Bill did “relate to” agriculture and thus was within devolved competence, even though it also related to the non-devolved subject of employment.¹²

12. It is not our role to speculate on whether the Courts would adopt a similarly broad interpretation of the “relates to” test in this new “reserved powers” model. However, we are concerned that there may have to be repeated further references to the Supreme Court to determine the limits of the Assembly’s legislative competence under the proposed new settlement.
13. Clause 3 and Schedules 1 and 2 fall within our remit given that they provide for the delegation of legislative power. We do not, however, express a view as to the appropriateness of delegating or devolving particular powers to the Assembly. We regard the devolution of powers to a legislative body such as the Assembly differently from the conferral of powers on the Executive. It is for the House as a whole to accept or reject the new settlement proposed in the Bill. We also anticipate that the Constitution Committee will wish to report on these provisions of the Bill in some depth.
14. **Nonetheless, we draw to the attention of the House:**
 - **the absence of an obvious rationale for the inclusion of certain reservations;**
 - **the difficult questions that may arise about how exceptions from reservations are intended to operate;**
 - **the uncertainty about the application of the “relates to” test under the new “reserved powers” model;**
 - **the lack of any analysis in the Bill’s explanatory material as to whether new section 108A and Schedules 7A and 7B are expected to result in the expansion or the contraction of the Assembly’s legislative competence.**
15. **In light of these points, the House may wish to press the Minister on whether the Bill will fulfil the objectives referred to in the Explanatory Notes of achieving “a clearer separation of powers between what is devolved and what is reserved” and of creating “a clearer and stronger settlement in Wales which is durable and long-lasting”.**
16. **It is also a matter of concern that the failure to spell out more clearly in the Bill the boundaries of the Assembly’s legislative competence could lead to repeated future references to the Supreme Court; and that this could sow the seeds of future discord between the Assembly and Welsh Ministers on the one hand and the UK Parliament and Government on the other.**

11 In Re Agricultural Sector (Wales) Bill [2014] UKSC 43, 1 WLR 2622.

12 The Bill does not reverse the effect of the Supreme Court’s judgment. While employment rights and duties, including the national minimum wage, are specifically reserved, the subject-matter of the Agricultural Sector (Wales) Act 2014 is excepted from the reservation: see para 139 of new Schedule 7A.

Schedule 5, paragraph 3—power to amend new Schedules 7A and 7B

17. Schedule 5, which is headed “minor and consequential amendments”, contains a long list of amendments to various enactments made in consequence of other provisions contained in the Bill.
18. Paragraph 3 amends section 109 of the 2006 Act. The amendment would allow for new Schedules 7A and 7B to be amended by Order in Council. This is, of course, a Henry VIII power of constitutional significance, but it is not mentioned in the delegated powers memorandum.
19. The House will be interested to note that section 109 (as amended) would reflect section 30 of the Scotland Act 1998, which allows for the list of reserved matters in that Act to be amended by an Order in Council approved in draft by the House of Lords, House of Commons and Scottish Parliament. In fact it was section 30 that was used to confer power on the Scottish Parliament to legislate for the Scottish independence referendum held in September 2014.¹³
20. Changes of considerable constitutional importance could similarly be made under the power in section 109 (as amended). For example, the Assembly could be given legislative competence to hold a Welsh independence referendum, or to create a separate legal jurisdiction for Wales, or to establish a Welsh currency.
21. Despite its significance, we do not consider the section 109 power (as amended) to be inappropriate. As observed above, new Schedules 7A and 7B to the 2006 Act are lengthy and complex. It seems likely that both Schedules will have to be amended regularly to clarify whether the Assembly has legislative competence in a particular context. We accept that it may be desirable for amendments to be made without waiting for further primary legislation to be passed in the UK Parliament.
22. We also recognise that no Order could be made under section 109 (as amended) unless it is first approved in draft under the affirmative procedure in each House of Parliament and in the Assembly.
23. **Nonetheless, we draw this Henry VIII power to the attention of the House, and express our surprise that such an important provision is paraded as a “minor” or “consequential” amendment in a Schedule to the Bill and not mentioned in the delegated powers memorandum.**

Clause 6—power over timing of elections

24. Clause 6 contains important provisions which would allow the date of an Assembly general election to be changed by the exercise of delegated powers. These will reflect similar powers which have already been conferred in relation to the date of a Scottish parliamentary general election.¹⁴
25. Clause 6(3) would prevent the poll for an Assembly general election from being held on the same day as a UK parliamentary general election (other than an early parliamentary general election¹⁵) or a European parliamentary general election.

¹³ See the Scotland Act 1998 (Modification of Schedule 5) Order 2013 (SI 2013/242).

¹⁴ See section 2 of the Scotland Act 1998, as prospectively amended by section 5 of the Scotland Act 2016.

¹⁵ “An early parliamentary general election” is one which takes place under section 2 of the Fixed-term Parliaments Act 2011 because the House of Commons either has resolved by a two-thirds majority of its members that there should be one, or has passed a motion of no confidence in the Government.

26. Where this scenario arises, the Welsh Ministers are given power to specify by order the day on which the poll for the Assembly general election is to be held, subject to the affirmative procedure in the Assembly. There is, however, nothing on the face of the Bill to prevent Welsh Ministers from choosing a day which resulted in delaying the poll—and extending the term of the Assembly—by many months or even into the following year: see section 3(1B) of the 2006 Act, inserted by clause 6(3).
27. This contrasts with the power which allows Her Majesty to make a proclamation under the Welsh Seal, upon the proposal of the Assembly’s Presiding Officer, to require an ordinary Assembly election to be held on a day which is not more than one month earlier, nor more than one month later, than the day on which it would otherwise take place: see section 4(1) to (2A) of the 2006 Act, substituted by clause 6(7).
28. **The House may wish to ask the Minister why no comparable limitation is included in the power to be conferred on Welsh Ministers by clause 6(3).**

Clause 21—power in relation to transferred Ministerial functions

29. Section 58 of the 2006 Act allows for functions conferred on UK Ministers to be transferred by Order in Council to the Welsh Ministers.
30. Clause 21 would allow an Order in Council to make in relation to “a previously transferred function”—
- provision “increasing or reducing (*whether geographically or otherwise*¹⁶) the extent of the previous transfer”; or
 - provision “to the effect that the function is exercisable—
 - concurrently or jointly with a Minister of the Crown, or
 - only with the agreement of, or after consultation with, a Minister of the Crown.”¹⁷
31. The term “previously transferred function” is defined (in broad terms) as a function exercised by Welsh Ministers by virtue of a previous Order in Council made under section 58 or new Schedule 3A.¹⁸
32. The exercise of the new power would be subject to the affirmative procedure in both Houses of Parliament and to the approval of Welsh Ministers (as with the existing powers in section 58.)
33. Paragraph 61 of the memorandum explains clause 21 in the following terms:
- “To provide greater scope for consolidation/restatement or modification of the transfer of functions, clause 21 further expands the kinds of provision that can be made by a [transfer of functions order] under section 58 of the [2006 Act]. That clause allows “previously transferred functions” (defined in new section 58(2B)) to be increased or reduced, or to be made concurrent, joint or subject to the agreement of, or consultation with, Welsh Ministers.”

16 Emphasis added.

17 See new section 58(2A) of the 2006 Act, inserted by clause 21.

18 New Schedule 3A is inserted by Schedule 4 to the Bill.

34. As the meaning of this paragraph was unclear, the Wales Office were asked for a supplementary memorandum to explain (i) why the existing provisions of section 58 are considered inadequate, and (ii) the inclusion in new subsection (2A) of a power to increase or reduce “geographically or otherwise” the extent of a previous transfer.

35. These are the key paragraphs in the supplementary memorandum:

“Clause 21 ... enables modification of functions previously conferred on Welsh Ministers to be transferred back to Ministers of the Crown, and to redefine functions already transferred so that they apply to different geographical areas than they do currently.

These modifications provide for the possibility of the functions of Welsh Ministers and/or Ministers of the Crown in relation to water to be modified in future. UKG¹⁹ is currently considering the outcomes of the Joint Government Review Programme on water established under the St David’s Day Agreement. The programme was established to examine the implications of aligning the legislative competence for water with the England-Wales border (the boundary is currently aligned to water catchment areas).

Subject to Parliament, if a decision is taken in future to align the legislative competence boundary with the national border, both Welsh Ministers and UK Ministers functions would need to be modified, including on a geographical basis. Clause 21 enables the modifications to be made through section 58 Orders, with Welsh Ministers’ consent ...”²⁰

36. As drafted, however, clause 21 would allow for *any* previously transferred executive function to be increased or reduced “whether geographically or otherwise”, not just a function in relation to water. For example, the new power might be exercised to allow for:

- planning powers already transferred to Welsh Ministers to be extended as regards the development of land just within in England but which might affect Wales; or
- Welsh Ministers’ powers regarding hospitals in Wales used mainly by patients who live in England to be transferred to UK Ministers.

37. **In our view, neither the original nor the supplementary memorandum explains adequately why the new power is needed apart from in relation to the specific issue of water catchment area boundaries. We consider that the power as drafted is inappropriately wide, and recommend that it be redrawn so that it reflects the narrow policy intention referred to in the supplementary memorandum.**

Clause 53—power to make consequential provision

Power to “otherwise modify” primary legislation

38. Clause 53(2) allows the Secretary of State by regulations to make consequential provision. Under subsection (3) this includes a power to amend, repeal or

¹⁹ We assume that this is a reference to the UK Government.

²⁰ Wales Office, *Wales Bill: Supplementary Delegated Powers Memorandum*: <http://www.parliament.uk/documents/lords-committees/delegated-powers/Wales-Bill-Supplementary-DPM.pdf> [accessed 25 October 2016]

otherwise modify an enactment contained in primary legislation. Subsections (6) and (7) deal with the procedures for Parliamentary scrutiny. Regulations under clause 53(2) are subject to the affirmative procedure if they amend or repeal any provision of primary legislation; but only the negative procedure applies if they “otherwise modify” primary legislation.

39. We have in a series of reports expressed concern about Henry VIII powers such as this which allow regulations to make consequential amendments by amending, repealing or otherwise modifying a provision of primary legislation, but require the affirmative procedure only where the regulations amend or repeal a provision of primary legislation.
40. The “otherwise modify” issue is not addressed at all in the delegated powers memorandum, even though it was raised in our very recent reports about the Bus Services Bill²¹ and the Investigatory Powers Bill.²²
41. **Despite the Government’s negative response to those and earlier reports, we remain firmly of the view that:**
 - **a Bill should not as a matter of routine confer a Henry VIII power such as that in clause 53;**
 - **where a Henry VIII power is included in a Bill, it must be fully explained and justified in the delegated powers memorandum;²³**
 - **the affirmative procedure should apply to the exercise of a power to authorise any interference with the meaning of an Act—even if it is dressed up as a power to “otherwise modify”—save in very exceptional circumstances which again must be convincingly justified in the memorandum.**

Consequential amendments to Measures or Acts of the Assembly

42. The type of primary legislation that can be amended or modified by regulations in exercise of the power conferred on the Secretary of State by clause 53(2) is defined as:
 - an Act of Parliament; and
 - a Measure or an Act of the Assembly: see subsection (8).
43. Regulations which amend or repeal “primary legislation” as so defined are subject to the affirmative procedure in both Houses of the UK Parliament. However, there is no requirement in clause 53 for the Secretary of State to consult or seek the approval of the Assembly or Welsh Ministers before making regulations which amend a Measure or Act of the Assembly. We note with disappointment that *no* explanation is given in the memorandum.
44. **We draw this to the attention of the House.**

21 Delegated Powers and Regulatory Reform Committee (1st Report, Session 2016–17, [HL Paper 13](#)), paras 27 to 31.

22 Delegated Powers and Regulatory Reform Committee (2nd Report, Session 2016–17, [HL Paper 21](#)), paras 17 to 20.

23 See our Special Report on the *Quality of Delegated Powers Memorandum* (7th Report, Session 2014–15, [HL Paper 39](#)), Appendix 4, para 35.

HOUSE OF LORDS BILL [HL]

45. There is nothing in this bill which we would wish to draw to the attention of the House.

LOBBYING (TRANSPARENCY) BILL [HL]

46. This Private Member's bill had its Second Reading on 9 September 2016. Its purpose is to repeal and replace the whole of the provision in Part 1 of the Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 about the regulation of lobbying.
47. Clause 1 provides for a registrar who is, among other things, to establish and maintain a Register of Lobbyists. The expression "lobbyists" is defined in clauses 2 and 3; and clauses 4 and 5 make provision about their registration. A person who engages in lobbying activity without being registered commits a criminal offence, by virtue of clause 9.
48. Clause 7 provides for the registrar to prepare and publish, and from time to time revise, a Code of Conduct with which registered lobbyists must comply, or risk being suspended or removed from the register under clause 8(3). Potential ingredients for the Code are set out in clause 7(4). Subsection (3) requires the Code, and any revision of it, to be laid before both Houses in draft and to be approved by each House before it may come into force. We consider that affirmative procedure to be an appropriate level of scrutiny, because the contents of the Code will be important, and compliance with it is to be mandatory.
49. We are, however, concerned that the proposed commencement arrangements for the Code might cause uncertainty in practice, because it is to come into force as soon as the second House approves it under clause 7(3). In view of the significance of the Code, we consider that those to whom it is to apply should have notice of its provisions and that there should be certainty as to the date from which it is to apply. It therefore seems to us to be inappropriate that the activation of important new obligations should depend on the timetabling of a Parliamentary debate.
50. Timing difficulties of that kind can be overcome, for statutory codes where affirmative approval is required, by providing for the code, or revisions of it, to be laid before Parliament in draft and to come into force on a day specified by the Secretary of State in an order made by statutory instrument. Generally, it is the order, rather than the code itself, that requires affirmative approval in draft before it may be made. Such an approach was adopted for the commencement of the code of practice, and revisions of it, issued under section 195S of the Proceeds of Crime Act 2002.
51. **We recommend that clause 7(3) be amended to make similar provision in relation to the coming into force of the Code of Conduct under the bill.**

REGISTER OF ARMS BROKERS BILL [HL]

52. This Private Member's bill had its Second Reading on 10 June 2016. Clause 1 amends the Export Control Act 2002 ("the 2002 Act") to insert a new section 4A requiring provision to be made for the registration of "arms brokers", defined in subsection (2).
53. The Secretary of State is required to make provision by Order in Council for a Register of Arms Brokers. The Order must require that "criminal history" and "tax status" be considered when deciding whether a person should be registered.
54. We consider that the delegation of legislative power in new section 4A gives rise to a number of difficulties:
- It is not clear to us why the chosen form of subordinate legislation is an Order in Council, rather than an order, which is the form of statutory instrument used for the exercise of powers conferred elsewhere in the 2002 Act. In any event, an Order in Council must be made by Her Majesty in Council, not by the Secretary of State.
 - The undefined references to "criminal history" and "tax status" are too vaguely expressed to form a satisfactory basis to enable the obligation to be complied with in the Order in Council.
 - Section 13(4) of the 2002 Act requires the affirmative procedure for instruments made under that Act. It would appear from clause 1(3) that the same procedure is intended for this Order in Council. We agree that the affirmative is the appropriate level of scrutiny. It is therefore unfortunate that this objective is not achieved, because section 13 as it stands applies only on orders, but not to an Order in Council.
 - There are constitutional difficulties inherent in seeking to impose a statutory duty of this kind on Her Majesty. Moreover, conferring an affirmative power in the form of an obligation gives rise to a potential timing difficulty. The requirement to make the Order in Council takes effect immediately on the bill's enactment under clause 2(2). Yet that obligation cannot be complied with until a draft of the Order has been approved by each House and submitted to the Privy Council. Should it not prove possible to secure approval of the draft by both Houses, the breach of the statutory duty would continue indefinitely.
55. **We draw clause 1 of the bill to the attention of the House, and recommend that it be amended to remedy the difficulties and deficiencies described in our previous paragraph.**

RENTERS' RIGHTS BILL [HL]

56. This Private Member's bill had its Second Reading on 10 June 2016. It amends the Landlord and Tenant Act 1985 and the Housing and Planning Act 2016 ("the 2016 Act") to confer further rights on, and safeguards for, tenants of residential properties.
57. Section 122(1) and (3) of the 2016 Act as currently in force state that:
- “(1) The Secretary of State may by regulations impose duties on a private landlord of residential premises in England for the purpose of ensuring that electrical safety standards are met during any period when the premises are occupied under a tenancy.
- ...
- (3) The duties imposed on the landlord may include duties to ensure that a qualified person has checked that the electrical safety standards are met.”
- The regulations must be laid in draft and approved by both Houses before they may be made.
58. Under the current bill, “must” is substituted for “may” in each of those subsections, so that the Secretary of State becomes *obliged* to make regulations which contain a checking requirement of the kind described in subsection (3). The obligation will take effect immediately on the bill's enactment under clause 5(2).
59. The difficulty inherent in a power to make regulations that takes the form of a duty is that, if the regulations require affirmative approval (as these regulations will), the Secretary of State may be placed in breach of his statutory duty should he be unable to secure approval by both Houses for the draft of the regulations.
60. Where a requirement of this kind is being imposed, it is common for the minister's obligation to be confined to *laying a draft* of regulations before both Houses. Such an approach was adopted (for example) for regulations about the carbon budget under section 49 of the Infrastructure Act 2015.
61. **We recommend that the bill be amended so that the obligation to be imposed on the Secretary of State by virtue of clause 3 is an obligation to lay a draft of regulations before each House.**

APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 19 October 2016 Members declared the following interests:

Wales Bill

Lord Lisvane

Member of the Steering Committee of the Constitution Reform Group

Attendance

The meeting on the 19 October 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Lord Jones, Lord Lisvane, Lord Thomas of Gresford and Lord Tyler.

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