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Chair  
Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
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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.

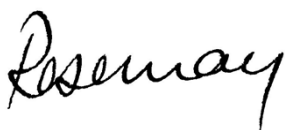
The draft Bill falls short in these respects. However, I am pleased that it addresses other commitments within the St David's Day agreement to provide the Assembly with the powers to determine its own operational and electoral matters.

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.<sup>1</sup> 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.**<sup>2</sup> 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,<sup>3</sup> 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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<sup>1</sup> National Assembly for Wales, Constitutional and Legislative Affairs Committee, [The UK Government’s Proposals for Further Devolution to Wales](#), July 2015

<sup>2</sup> 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

<sup>3</sup> [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.<sup>4</sup>

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**.

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<sup>4</sup> 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 it 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.<sup>5</sup>

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<sup>5</sup> 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.<sup>6</sup>

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,<sup>7</sup> 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.<sup>8</sup> 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’.<sup>9</sup> 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.<sup>10</sup> I consider that either of these suggestions would be preferable to the current drafting in relation to Wales.

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<sup>6</sup> 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](#)

<sup>7</sup> House of Commons, [Scotland Bill: Notices of Amendments given up to and including 2 November 2015](#)

<sup>8</sup> 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

<sup>9</sup> HoC, Scotland Bill, [Notice of Amendments given up to and including 22 October 2015](#)

<sup>10</sup> 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.<sup>11</sup> 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,<sup>12</sup> 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:

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<sup>11</sup> As set out in Standing Orders of the Scottish Parliament, Chapter 98

<sup>12</sup> 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 is 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> I believe that the Assembly should have maximum flexibility to legislate on such financial

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<sup>13</sup> 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<sup>16</sup> - 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,<sup>17</sup> 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

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<sup>16</sup> With the exception of an understandable reference to the National Audit Office and Comptroller and Auditor General (Schedule 7A paragraph 12)

<sup>17</sup> 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<sup>18</sup> - 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,<sup>19</sup> 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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<sup>18</sup> Secretary of State for Wales’s introduction to *Powers for a Purpose*, Cm 9020.

<sup>19</sup> 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<sup>20</sup> 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<sup>21</sup>. 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”<sup>22</sup>. 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

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<sup>20</sup> European Convention on Human Rights and Fundamental Freedoms agreed at Rome, 4/11/1950

<sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup>

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*<sup>24</sup>, contrasted with *R (ota Tigere) v Secretary of State for Business, Innovation and Skills*<sup>25</sup>. 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<sup>26</sup> 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 section 108A(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

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<sup>23</sup> 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.

<sup>24</sup> [2015] 1WLR 1449.

<sup>25</sup> [2015] UKSC 57.

<sup>26</sup> [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<sup>27</sup>. 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

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<sup>27</sup> 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<sup>28</sup>. 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”<sup>29</sup>.

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).

#### 4.17 Test 6 – effect on the criminal law

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;

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<sup>28</sup> [2015] UKSC 3.

<sup>29</sup> 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.

#### "Reserved authorities" restriction – comparison with Scotland

5.13 The Scotland Act 1998 deals with 3 kinds of authority<sup>30</sup>, expressly or implicitly:

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

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<sup>30</sup> 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*<sup>31</sup>; *Imperial Tobacco Ltd v Lord Advocate (Scotland)*<sup>32</sup> and *Salvesen v Riddell & Anor*<sup>33</sup>).

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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<sup>31</sup> [\[2010\] UKSC 10](#)

<sup>32</sup> [\[2012\] UKSC 61](#)

<sup>33</sup> [\[2013\] 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” (Schedule 2: 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. ~~and~~

~~(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**

- 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 to 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.~~

~~(32) ***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.~~

~~(63) 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.***

~~(84)~~ 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.~~

~~(96)~~ 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.

~~(97)~~ 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.

~~(108)~~ 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.<sup>34</sup>

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<sup>34</sup> 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.