

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chyngor i Aelodau'r Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cyngor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partïon.

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Culture, Welsh Language and Communications Committee

Briefing on the implications of the Wales Bill for the work of the Committee

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PART 1

INTRODUCTION

1. The Wales Bill proposes a number of significant and complex changes to the constitutional law of Wales. It provides for the recognition of an Assembly for Wales and a Welsh Government as permanent parts of the United Kingdom's constitutional arrangements; gives statutory recognition to the existing convention that the United Kingdom Parliament will not "normally" legislate with regard to devolved matters without the consent of the Assembly.

2. The Wales Bill also gives the Assembly legislative competence to change important matters such as its name, the number of Assembly Members, the manner in which Assembly Members are elected, including the franchise and the electoral system, disqualification of Assembly Members, and the length of Assembly terms (though some of these changes would require the agreement of two-thirds of all Assembly Members).

3. The Wales Bill proposes to transform the Assembly's existing legislative competence from a conferred powers model to a reserved powers model. While the current conferred powers model sets out what the Assembly can do, the proposed reserved powers model sets out what the Assembly cannot do.

4. The proposed reserved powers model sets out what the Assembly cannot do by reference to ten tests (see Part 2). The cumulative effect of these tests is very significant, raising concerns that the Assembly's competence is being rolled back in significant areas. Examples are given in each Part below.

5. Also, the Wales Bill confers new executive functions on the Welsh Ministers.

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PART 2

THE WALES BILL COMPETENCE TESTS

1. The Wales Bill proposes 10 tests of competence (as opposed to 9 currently). The tests are set out below. Some of them are the same as current tests (e.g. compatibility with the European Convention on Human Rights and EU law). Some are new, but flow inevitably from the change to a reserved powers model.

2. The 10 proposed tests for competence are summarised in the table below. The most significant tests are then considered further in Parts 3 to 8.

3. A provision of an Act of the Assembly will be **outside competence** if:

Test 1	It extends beyond the England and Wales jurisdiction .
Test 2	It applies otherwise than in relation to Wales , unless— <ul style="list-style-type: none">- the provision is ancillary to another provision of an Act of the Assembly or a devolved provision in a UK Act of Parliament, and- it has no greater effect beyond Wales than is necessary to give effect to the purpose of that other provision.
Test 3	It relates to reserved matters listed in Schedule 7A.
Test 4	It modifies the law on reserved matters , unless— <ul style="list-style-type: none">- the modification is ancillary to a provision which does not relate to a reserved matter, and- has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision.

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Test 5	<p>It modifies the private law, unless the modification has a purpose which does not relate to a reserved matter.</p> <p>“The private law” is defined broadly as meaning the law of: contract; agency (acting on someone else’s behalf); bailment (a form of temporary transfer of property); tort (civil wrongdoing, such as medical negligence); unjust enrichment and restitution (the return of property to its owner); property; trusts; succession (i.e. inheritance).</p>
Test 6	<p>It modifies or creates a criminal offence in a “listed category”.</p> <p>The listed categories are—</p> <ul style="list-style-type: none"> - treason and related offences, - homicide offences (including offences relating to suicide) and other offences against the person (including offences involving violence or threats of violence) that are triable only on indictment (i.e. the most serious offences against the person), - sexual offences (including offences relating to indecent or pornographic images), - perjury offences. <p>Also, a provision of an Act of the Assembly cannot modify the law about—</p> <ul style="list-style-type: none"> - criminal responsibility and capacity (e.g. mental capacity to commit a crime, or the age at which a child can be prosecuted for an action), - the meaning of intention, recklessness, dishonesty and other mental elements of offences, - inchoate and secondary criminal liability (this covers matters such as what constitutes an attempt, or a conspiracy, to commit an offence), - sentences and other orders in respect of criminal conduct, and their effect and operation.

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	<p>And modifying the law relating to defences to an offence counts as a modification of the offence.</p>
Test 7	<p>It modifies a protected enactment (listed in Schedule 7B, including some provisions of the Government of Wales Act 2006 and some other legislation, such as the Human Rights Act 1998).</p>
Test 8 (Part 1)	<p>It confers or imposes functions on a reserved authority without UK Government consent.</p> <p>It modifies the constitution of a reserved authority without UK Government consent.</p> <p>It confers, imposes, modifies or removes functions specifically exercisable in relation to a reserved authority without UK Government consent.</p> <p>“Reserved authority” means a Minister of the Crown or UK government department and any other public authority other than a Wales public authority (WPA). A WPA, generally speaking, is a public authority whose functions apply only within Wales and only to non-reserved matters. But bodies with wider functions can be defined as WPAs by listing them in the new Schedule 9A to the Government of Wales Act 2006.</p> <p>This test does not apply in relation to a few specified bodies that may otherwise be reserved authorities, such as the Electoral Commission, the Food Standards Agency and the Water Services Regulation Authority.</p>
Test 8 (Part 2)	<p>It removes or modifies any function of a public authority without UK Government consent.</p> <p>But this test does not apply to—</p>

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	<ul style="list-style-type: none"> - a Wales public authority, - a Minister of the Crown, - a few specified bodies such as the Electoral Commission, the Food Standards Agency and the Water Services Regulation Authority.
Test 8 (Part 3)	<p>It removes or modifies certain specified functions of a Minister of the Crown without UK Government consent.</p> <p>The specified functions are—</p> <ul style="list-style-type: none"> - Minister of Crown functions that are exercised concurrently or jointly with the Welsh Ministers, - any Welsh language functions of a Minister of the Crown, - some specific water, sewerage, marine and railway functions of a Minister of the Crown.
Test 8 Part 4)	<p>It removes or modifies any other Minister of the Crown function (i.e. a function not covered by Part 3 of Test 8) without the Welsh Ministers having first consulted UK Government.</p>
Test 9	<p>It is incompatible with the European Convention Human Rights (as incorporated into UK law by the Human Rights Act 1998)</p>
Test 10	<p>It is incompatible with EU law.</p>

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PART 3

THE “RELATES TO” TEST

Current settlement

1. The current settlement is based on the conferred powers model. This means that Assembly legislation must **relate to a devolved subject** listed in Schedule 7 to the Government of Wales Act 2006. For example, the following devolved subjects are listed in Schedule 7 under the heading ‘Culture’:

- Arts and Crafts
- Museums and galleries
- Libraries
- Archives and historical records
- Cultural activities and projects

2. And the following devolved subjects are listed in Schedule 7 under the heading ‘Ancient monuments and historic buildings’:

- Archaeological remains
- Ancient monuments
- Buildings and places of historical or architectural interest
- Historic wrecks

3. “Welsh language” is also listed in Schedule 7 under a heading of the same name.

4. The words “relates to” have a specific meaning in the Government of Wales Act. Whether or not an Assembly Act “relates to” a devolved subject depends primarily on the **purpose** of that Act. However, the **effect** of the Act, and other factors, can also be taken into account. So “relates to”, in our settlement, does not simply equate to “deals with”, or “touches on”.

5. Assembly Acts such as the Historic Environment (Wales) Act 2016, the Renting Homes (Wales) Act 2016, the Human Transplantation (Wales) Act 2013, the National

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Health Service Finance (Wales) Act 2014 and the Social Services and Well-being (Wales) Act 2014 all relate to one or more devolved subjects listed in Schedule 7.

6. Schedule 7 also lists **exceptions**, and Assembly legislation **must not relate to an exception** (even if it also relates to a devolved subject). For example, the following exceptions are listed in Schedule 7:

- Public lending right
- Broadcasting
- Classification of films, and video recordings
- Government indemnities for objects on loan
- Use of Welsh Language in courts
- Intellectual property
- Sunday trading
- Use of the Welsh language in courts

7. No Assembly Acts relate to an exception.

8. Then there are subjects that are not listed in Schedule 7, neither as devolved subjects nor exceptions. For example, 'defence of the realm', 'immigration' and 'employment' are not listed in Schedule 7. Schedule 7 is silent on these subjects, and they have come to be known as **silent subjects**.

9. There used to be a question as to whether the Assembly could pass legislation that related to both a devolved subject **and** a silent subject. In 2014, the Supreme Court clarified that the Assembly can pass legislation that relates to both a devolved subject **and** a silent subject. The classic example is the Agriculture Sector (Wales) Act 2014 which relates to both agriculture (a devolved subject) and employment (a silent subject).

10. Therefore, **provided Assembly legislation fairly and realistically relates to a devolved subject** it does not matter that it also relates to a silent subject. But it will matter if it relates to an exception, because Assembly legislation must not relate to an exception.

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The Wales Bill

11. The Wales Bill turns the current settlement into a reserved powers model. This means that Assembly legislation must **not relate to a reserved matter** (i.e. a matter which is reserved to the UK Parliament). Therefore, the list of reserved matters is important – the longer the list of reservations, the fewer things the Assembly will be able to do. Schedule 1 to the Wales Bill contains a list of reservations running to 200 paragraphs, many of which contain more than one reservation, and spreading across 35 pages.

12. The meaning of “relates to” in the Wales Bill is the same as in the current settlement: it depends on the **purpose** of the Assembly Act, but the **effect** of the Bill, and other factors, can also be taken into account in deciding whether an Assembly Act provision “relates to” a reserved matter or not.

13. If Assembly legislation relates to a reservation then it will be outside competence, **even if it also relates to a devolved subject** such as ancient monuments.

14. All of the exceptions listed above have been turned into reservations. So they are outside the Assembly’s reach currently and they will remain outside the Assembly’s reach under the Wales Bill.

15. However, there are areas where there is reduction in the Assembly’s legislative competence. Here are two examples of a reduction in the Assembly’s competence and the complexity of navigating a way around all the reservations.

Example 1: employment as a reservation

The Wales Bill turns employment from a silent subject into a reservation. So, matters like employee rights and the minimum wage are reserved under the Wales Bill. Therefore, under the Wales Bill the Assembly would not be able to pass legislation which relates to employee rights and the minimum wage even if it also relates to, say, social welfare.

To give a hypothetical example: the Assembly wishes to legislate on wages and working times in the social care sector. Under the current settlement, this would be within competence if it fairly and realistically related to social

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welfare (i.e. if the purpose and effect of the legislation was to improve the care of vulnerable persons and older persons by, for example, ensuring that care-workers were not incentivised to cut care visits short by the way in which their wages or working hours were calculated). It would not matter if the legislation also related to employment.

However, under the Wales Bill, if the legislation had more than a **loose or consequential** connection with employment, then it would relate to a reserved matter and would be **outside competence**. Further, it would not matter if the legislation also related to a non-reserved area such as social welfare; provided it related to a reserved matter then it would be outside competence. In the example above, it is likely that the Assembly legislation would fail the “relates to” test because it relates to the reservation of employment. In other words, the new settlement would produce a **reduction in competence**.

That conclusion is supported by the inclusion of “the subject-matter of the Agricultural Sector (Wales) Act 2014” as an **exception** to the employment reservation. This suggests that while wages etc are within competence in the context of agriculture, they would be reserved in other sectors.

Example 2: police powers under the Mental Health Act 1983

The Policing and Crime Bill amends the powers of the police under the Mental Health Act 1983. The police already have powers under the 1983 Act to enter premises in order to remove people who suffer from a mental disorder and to take them to a place of safety. The Policing and Crime Bill extends those powers in several ways; it also provides certain safeguards as a check on those extended powers, including greater controls over what kind of place can be used as a ‘place of safety’.

For example, the Policing and Crime Bill allows the police to enter a wider range of premises to remove people suffering from mental disorder, but at the same time it requires the police to consult a health professional before removing a person (if such consultation is practicable). Further, a police

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station could never be a place of safety for a child under the Policing and Crime Bill.

These provisions are currently within the legislative competence of the Assembly because they fairly and realistically relate to the following Schedule 7 subjects:

- the prevention, treatment and alleviation of mental disorder
- the care of vulnerable persons

There are no relevant exceptions (for example, policing is not an exception). Therefore, these parts of the Policing and Crime Bill are clearly within the legislative competence of the Assembly and the Assembly's consent is needed before the UK Parliament can legislate in this area.

Under the Wales Bill, policing is a reservation. Therefore, if these parts of the Policing and Crime Bill relate to (i.e. have more than a loose or consequential connection with) policing, then they would be outside the Assembly's competence (even if they also relate to prevention of mental disorders or care of vulnerable persons). While the main purpose of these parts of the Bill seems to be to protect people suffering from mental disorders, the police element is significant. Also, the long title to the Policing and Crime Bill says, in respect of the mental health parts, that it is "a Bill...to amend the powers of the police under the Mental Health Act 1983".

Given the purpose and effect of these parts of the Policing and Crime Bill, there is likely to be more than a loose or consequential connection with policing, therefore these parts of the Bill are likely to relate to policing and to be outside competence under the Wales Bill.

If these parts of the Policing and Crime Bill were judged to be outside Assembly competence under the Wales Bill, no legislative consent motion would be needed.

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PART 4

MODIFYING THE LAW ON RESERVED MATTERS

1. Not only must Assembly legislation not relate to a reserved matter, it also must not modify the law on reserved matters. There is a very fine distinction between the two tests.

2. For example, Assembly legislation could pass the “relates to test” because the purpose and effect of the Assembly legislation means it’s not really about a reserved matter. But the Assembly legislation could still be modifying the law on reserved matters.

3. This can be demonstrated by looking again at the example of the Policing and Crime Bill which amends the powers of the police under the Mental Health Act 1983. If Assembly legislation sought to amend the powers of the police under the Mental Health Act 1983 and a court said that, given that the dominant purpose of the Assembly legislation is to address mental health concerns, the Assembly legislation is not really about policing, then it would pass the “relates to” test.

4. However, the Assembly legislation will still be modifying the law on reserved matters because it is **modifying the law on policing** (i.e. that part of the law on policing that is in the Mental Health Act 1983). And in order to pass the test on modifying the law on reserved matters, the Assembly would have to show that its legislation modified the law on policing only in an **ancillary**¹ way and that its legislation **had no greater effect on policing than was necessary** to give effect to the purpose of addressing mental health concerns.

¹ It will be ancillary if: (a) it provides for enforcement of Assembly legislation or is otherwise appropriate for making Assembly legislation effective, or (b) it modifies the law on reserved matters in an incidental or consequential way.

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5. The “law on reserved matters” encompasses **all** the law on reserved matters.

Given the great number of reservations, this test captures a huge amount of law, and Assembly legislation will only be able to modify that huge amount of law if it is doing so in an ancillary way and there is no greater effect than necessary to give effect to the purpose of the Assembly legislation.

6. Note that even if tests 3 and 4 are satisfied in the above police example, the police will very likely be a “reserved authority” and therefore UK Government consent will be needed before the Assembly can impose functions on the police or modify the functions of the police (see Part 8 for further details on UK Government consent). This is a good example of how the cumulative effect of the Wales Bill tests can amount to a significant restraint on the Assembly’s ability to legislate.

7. For a different example of how Assembly legislation could pass the “relates to” test but fail the “modifies the law on reserved matters” test, see paragraph 414 of the Explanatory Notes to the Wales Bill.

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PART 5

THE WELSH LANGUAGE

1. Although the Wales Bill includes a list of reserved matters upon which the Assembly cannot legislate, if the Wales Bill becomes law the creation, removal or change of the Welsh language functions of a person other than a court (see paragraphs 2 and 3 below) will not be reserved. However, other provisions in the Bill require the UK Government's consent if the Assembly wishes to legislate to remove or modify a UK Ministerial function in relation to the Welsh Language (see paragraph 4 below).

2. Schedule 1 of the Wales Bill proposes to insert a new Schedule 7A into the Government of Wales Act 2006. Schedule 7A contains the list of reserved matters; i.e. the list of topics on which the Assembly will not be able to legislate. However, paragraph 200 of proposed Schedule 7A makes specific provision for Welsh language functions. This states that Schedule 7A does **not** reserve:

- (a) conferring or imposing (or giving power to confer, impose) a Welsh language function on a person other than a court;
- (b) modifying or removing (or giving power to modify or remove) any Welsh language function of a person other than a court.

3. A Welsh language function is defined as a function in relation to the Welsh language.

4. Schedule 2 of the Wales Bill inserts a new Schedule 7B into the Government of Wales Act 2006. Schedule 7B contains additional restrictions on the Assembly's legislative competence, on top of the reservations in Schedule 7A. Paragraph 11(1)(b) of Schedule 7B relates to the Welsh Language. This states that a provision of an Assembly Act cannot remove or modify (or confer power by subordinate legislation to remove or modify) any function of a Minister of the Crown exercisable in relation to the Welsh language unless the UK Government consents to the

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provision. This represents a **reduction** in the Assembly's competence, as, currently, the Assembly is able to make legislation modifying or removing any function of a Minister of the Crown which came into force on or after 5 May 2011. It is also currently able to remove or modify older functions of a Minister of the Crown where the removal or modification is merely consequential or incidental. In other cases, the UK Government's consent is needed.

5. The Wales Bill will not affect existing Assembly legislation on the Welsh language, notably the Welsh Language (Wales) Measure 2011 and the Official Languages (Wales) Act 2012. Specifically, the Welsh Language Commissioner's powers in the Measure to impose standards will remain in force. (See Schedule 6, paragraphs 1 and 5 of the Wales Bill).

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PART 6

PRIVATE LAW

1. This test is set out in the Table above (Test 5).
2. Using the private law is a very important way to make legislation effective; private law can be used to enforce obligations and secure rights.
3. The Assembly has used the private law in many pieces of legislation. For example, the Renting Homes (Wales) Act 2016 used contract law to reform the legal basis for renting a home. The Mobile Homes (Wales) Act 2013 used contract law to modernise the relationship between mobile home owners and site operators.
4. The Human Transplantation (Wales) Act 2013 used the law of agency to deal with issue of consent. For example, a person with parental responsibility for a child could, in certain circumstances, provide express consent for transplantation activities on behalf of the child.
5. The Wales Bill does not define the meaning of “agency”, but on the basis that it means acting on someone else’s behalf then the Human Transplantation (Wales) Act 2013 modified the law of agency. Under the current settlement, there was no need to consider the law of agency because: (a) the legislation related to a devolved subject, and (b) there is no “private law” exception.
6. However, under the Wales Bill, the Assembly would have to consider whether its legislation modified the private law; in particular, the Assembly would not be able to modify the private law if the purpose of the legislation related to a reserved matter. Again, this re-enforces the point that the list of reservations is important.
7. While the Human Transplantation (Wales) Act 2013 would not relate to a reserved matter and would pass the private law test, other tests under the Wales Bill are relevant. In particular, because the Human Transplantation (Wales) Act 2013 confers functions on the Human Tissue Authority (which would be a reserved authority

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under the Wales Bill) then UK Government consent would be needed (see Part 7 for more on UK Government consent).

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PART 7

CRIMINAL LAW

1. This test is set out in the Table above (Test 6). The example below demonstrates how the proposed new settlement would reduce the Assembly's competence in relation to the criminal law.

Example: sexual exploitation of children

In the context of sexual exploitation of a child, the definition of “sexual exploitation” in the Sexual Offences Act 2003 includes “recording” indecent images of a child. The Policing and Crime Bill amends that definition to clarify that “streaming” and “transmitting” indecent images of a child are included in the definition.

This is within the legislative competence of the Assembly because it relates to the following Schedule 7 subject:

- the protection and well-being of children.

There are no relevant exceptions (for example, sexual offences is not an exception). Therefore, this part of the Policing and Crime Bill is currently within the legislative competence of the Assembly and the Assembly's consent is needed before the UK Parliament can legislate in this area.

Under the Wales Bill, Assembly legislation will not be able to modify or create a sexual offence. The Policing and Crime Bill's amendment to the definition is modifying (or possibly creating) a sexual offence, therefore under the Wales Bill it would be outside the Assembly's competence and no LCM would be needed.

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PART 8

MINISTER OF THE CROWN (UK GOVERNMENT) CONSENT

1. This is a long and complicated series of tests, which are summarised in the Table above, as Test 8, parts 1 to 4. The example below illustrates just one way in which the new settlement would reduce the Assembly's ability to legislate without UK Government consent.

Example: UK Government (UKG) consent needed to impose e-cigarette duties on reserved authorities with workplaces in Wales

The Public Health (Wales) Bill was originally intended to prohibit the use of e-cigarettes generally across workplaces in Wales. As part of that prohibition, it imposed certain duties on managers of workplaces, for example, it required managers to take steps to stop persons using e-cigarettes and required them to put up signs in the workplace. Currently this is within competence because it relates to health and there are no relevant exceptions. Also, no UKG consent is currently needed to impose such duties on workplace managers generally across Wales.

But under the Wales Bill, UKG consent would be needed to impose such duties on reserved authorities with workplaces in Wales (such as the DVLA, Crown Prosecution Service, Land Registry). This is because those duties would amount to imposing functions on reserved authorities, and paragraph 8 of new Schedule 7B makes it very clear that UKG consent is needed before the Assembly can impose functions on reserved authorities.

If UKG consent was not given, the duty to take steps to stop persons using e-cigarettes and the duty to put up signs would not apply to reserved authorities. This would result in an inconsistent application of those duties across Wales.

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2. The example in paragraph 6 of Part 4 provides another example where, under the Wales Bill, UKG consent would be needed to modify the mental health functions of the police. No such consent would be needed under the current settlement.

3. The example in paragraph 7 of Part 6 provides another example where, under the Wales Bill, UKG consent would be needed to impose functions on the Human Tissue Authority. No such consent was needed under the current settlement.

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ANNEX - TABLE OF RESERVATIONS WHICH ARE OF MOST RELEVANCE TO THE COMMITTEE

Reservation - Section and number	Description	Impact of the reservation on the Assembly's legislative competence
B16, 54 and 55	54 Classification of films and video recordings (including video games) 55 Licensing of- the provision of entertainment, and late night refreshment.	Wording slightly different from current exception; slight reduction in competence. "Video games" is not currently included as an exception.
B17, 56	The sale and supply of alcohol	Wording slightly wider than current exception but effect likely to be equivalent.
B18, 57	Betting, gaming and lotteries	Unchanged.
B22, 61-62	Charities and fund-raising	Not currently an exception from competence so appears to produce a reduction in competence.

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J6, 153–155	Reservations concerning Health and safety – including fire safety (save for the promotion of fire safety otherwise than by prohibition or regulation).	Wording wider than current exception; effect in practice unclear , especially when combined with another restriction on competence.
K1, 156 and 157	Broadcasting and other media; the BBC.	Wording wider than current exception; effect in practice unclear .
K2, 158	Public lending right	Unchanged.
K3, 159	Government indemnity scheme for objects on loan	Unchanged.
K4, 160	Property accepted in satisfaction of tax and the disposal of such property	Wording wider than current exception – reduction in competence.
K5, 161	Safety of sports grounds	Not currently an exception from competence – reduction in competence.