

The Rt Hon the Lord Lang of Monkton
Chair
Constitution Committee
House of Lords,
London,
SW1A 0PW

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12th December 2016

Dear Sir

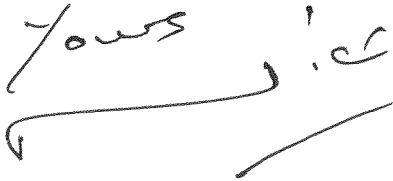
Thank you for the Constitution Committee's report on the Wales Bill. I am grateful to the Committee for its consideration of the Bill. I enclose a copy of the Government's response to your report.

The Wales Bill delivers the Government's commitments in the St David's Day Agreement to put in place a clear, strong and lasting devolution settlement for Wales. It makes devolution stronger by devolving significant new powers to the National Assembly for Wales in areas such as energy, transport and elections. This is delivered within the new reserved powers model that establishes a clear boundary between the responsibilities of Parliament and the UK Government, and the responsibilities of the National Assembly and the Welsh Government.

The Government has given careful consideration to the Committee's report and has listened to the debate on the Bill more widely. We have made a number of changes to the Bill in its passage through the Lords where we have been persuaded of the case for change, including the devolution of teachers' pay and conditions. The Government is tabling further amendments for debate at Lords Report stage, including the replacement of Secretary of State powers of intervention in relation to water with a statutory agreement (a "water protocol") between the UK Government and the Welsh Government.

The Bill's Lords stages have also enabled me to clarify how the Government sees the new reserved powers model working in practice, helping to allay a number of concerns in respect of the model, and in particular the "relates to" test.

I believe the Wales Bill, in light of the amendments the Government is bringing forward at Report stage, stands in good stead to deliver a clear and lasting devolution settlement for Wales.

A handwritten signature in black ink, appearing to read "Lord Bourne". The signature is written in a cursive style with a long horizontal stroke extending to the left.

Lord Bourne
Parliamentary Under Secretary of State for Wales

***House of Lords Select Committee on the Constitution
5th Report of Session 2016-17: Wales Bill***

UK GOVERNMENT RESPONSE

The Wales Bill: An overview

1. We welcome the decision to move the Welsh devolution settlement to a reserved powers model. This will place the Welsh settlement on the same footing as Scotland's devolution settlement, while allowing for variation which reflects the differing circumstances in each nation. (Paragraph 6)

2. Setting up a reserved powers settlement and determining which powers should be devolved and which should be reserved to the centre is a complicated and challenging process. Unfortunately, as we discuss in the rest of this report, the current implementation of the reserved powers model in the Wales Bill undermines its key advantages: namely providing the devolved legislature with constitutional space to legislate and allowing for a relatively clear and simple division of powers. (Paragraph 7)

The Government's key aim in introducing the new reserved powers model is to make the Welsh devolution settlement clearer by delineating those powers which are reserved and those which are devolved. This will hopefully put an end to the squabbles over competence between Cardiff and Westminster that has characterised Welsh devolution in recent years. We expect the new model to enable the Welsh Government to focus on the job of improving the Welsh economy; securing more Welsh jobs; and improving public services in devolved areas.

The list of reservations in new Schedule 7A for the most part reflects the current devolution boundary, supplemented by the significant further devolution of powers on which there is political consensus under the St David's Day Agreement. Amendments made to the Schedule to date, and the further modifications that will be debated at Report stage, reflect the detailed discussions the Government has had with the Welsh Government, the Assembly Commission and other interested parties about how the reservation model will work in practice. The Government has been open to consider changes to the list where effective arguments have been made that certain subjects should be devolved; for example, teachers' pay and conditions and the Community Infrastructure Levy.

The rationale for each reservation included in the list is set out in the accompanying Explanatory Notes, and these have been supplemented and improved during the Bill's parliamentary passage. The Government is confident that the list, as we hope it will be amended at Report stage, reflects a broad consensus on where the Welsh devolution boundary lies.

3. Given the complexity of the law in this area, it is a pity that the opportunity was not taken to bring forward a consolidated bill to set out clearly the Welsh devolution settlement in a single Act of Parliament. We intend to return to the issue of consolidation bills in our forthcoming inquiry on the legislative process. (Paragraph 8)

This Bill is amending only a limited number of distinct parts of the Government of Wales Act 2006 (GoWA), mostly to implement the new reserved powers model. We are also giving the Assembly the power to amend many of its own processes which were prescribed by the 2006 Act.

GoWA, as amended by the Wales Bill, provides the broad framework for the new devolution settlement for Wales, and is essentially a single Act of Parliament setting out the Welsh devolution settlement. A root and branch rewriting of the GoWA is unnecessary, would be time consuming and would delay the implementation of the new settlement.

GENERAL CONSTITUTIONAL MATTERS

'Permanence'

4. This provision simply echoes an identical provision that Parliament has but recently chosen to enact in relation to Scotland. On that basis, this clause has the merit of bringing the Welsh devolution settlement into line with Scotland's and bringing a degree of consistency to the otherwise disparate and asymmetrical approaches taken to date. (Paragraph 13)

5. However, in our report, *The Union and devolution*, we concluded that the devolution settlements should be designed with a clear eye to their implications for the coherence and stability of the Union itself. Against this background, legislation which creates uncertainty about the lynchpin principle of parliamentary sovereignty could be considered unhelpful and damaging to the stability of the constitution of the Union as a whole. (Paragraph 14)

Clause 1 is a statement in law of the acknowledged position that a National Assembly for Wales and a Welsh Government are permanent parts of the UK's constitutional arrangements. The clause also provides that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum. Clause 1 does not seek to have any (and indeed has no) effect on the sovereignty of Parliament.

The Sewel Convention

6. In our previous report on the Scotland Bill, we asked the Government about the disparity between the scope of the Sewel Convention in the Bill and how the Convention is commonly understood. We did not

receive a clear answer. We ask the Government again to address this question in relation to the Wales Bill. (Paragraph 19)

7. We recognise that identical provisions have already been passed by Parliament in relation to Scotland. Nonetheless, we draw to the attention of the House once again our concern that setting the Sewel Convention in statute risks inappropriately drawing the courts into areas which have previously been within the jurisdiction of Parliament alone, namely its competence to make law. (Paragraph 20)

This clause delivers on the St David's Day commitment to place the convention on legislative consent on a statutory footing in the same manner as the Sewel Convention for Scotland. The convention was never intended to change the sovereignty of Parliament, nor was it intended to prevent Parliament from making laws for all constituent parts of the United Kingdom. The provision at clause 2 of the Bill merely reflects the current constitutional arrangements. The position before clause 2 is enacted, and the position after it is enacted, will remain the same: section 107(5) of GoWA expressly protects the sovereignty of Parliament to make laws for Wales on any matter.

Where a Parliamentary Bill relates to a devolved matter the consent of the National Assembly will normally be obtained to the provision before it is enacted. The use of the word "normally" in the provision replicates the language of the convention in relation to Wales, and the language in section 2 of the Scotland Act 2016. The Government has always sought a legislative consent motion in the Assembly before Westminster passes a Bill applying in Wales in relation to matters we consider to be devolved. This has been part of the routine working arrangements between the UK Government and the Welsh Government, as reflected in Devolution Guidance Note 9 (DGN 9), and we expect this to continue. We also expect to draft new guidance, in consultation with the Welsh Government, to reflect the new Welsh settlement before the reserved powers model commences.

The effect of clause 2 is to place existing practice on a statutory footing. We believe it is important to spell out this commitment in the context of Wales's new constitutional framework. This commitment does not, however, create new legal rights or obligations or in any way effect the sovereignty of Parliament.

The principles underlying the devolution settlement for Wales

8. In our report, *The Union and devolution*, we concluded that any further devolution should take place on the basis of appropriate principles, to ensure that the devolution settlements evolve "in a coherent manner", rather than "in the reactive, ad hoc manner in which devolution has been managed to date". (Paragraph 32)

9. There is no evidence of a clear rationale underlying the scope of the powers devolved by the Wales Bill. We would welcome an explanation

from the Government as to the principles that underpin the devolution settlement set out in the Wales Bill. (Paragraph 33)

The Government is committed to putting in place a clearer, more stable and long-term devolution settlement for Wales. We believe that implementing a reserved powers model is crucial to achieving this. A reservation model for Welsh devolution was the underpinning recommendation in the Silk Commission's second report, and the St David's Day process found a strong political consensus to implement that recommendation.

The list of reservations in new Schedule 7A in most part reflect the current devolution boundary, supplemented by the significant further devolution of powers on which there is political consensus under the St David's Day Agreement. Amendments made to the Schedule to date, and the further modifications that will be debated at Report stage, reflect the detailed discussions the Government has had with the Welsh Government, the Assembly Commission and other interested parties about how the reservation model will work in practice. The Government has been open to consider changes to the list where effective arguments have been made that certain subjects should be devolved; for example, teachers' pay and conditions and the Community Infrastructure Levy.

The rationale for each reservation included in the list is set out in the accompanying Explanatory Notes, and these have been supplemented and improved during the Bill's parliamentary passage. The Government is confident that the list, as amended at Report stage, will reflect a broad consensus on where the Welsh devolution boundary should lie.

The complexity of the devolution settlement for Wales

10. We believe that there is a strong constitutional interest in legislation - particularly constitutional legislation such as the Wales Bill - being as clear as possible. The lack of clarity in the Wales Bill increases the likelihood of demarcation disputes regarding the extent of the Welsh Assembly's powers, and thus risks not only future litigation but the need for further legislation to clarify the Welsh devolution settlement. (Paragraph 40)

The Government considers the boundaries of the Assembly's legislative competence to be very clearly defined under the new reservation model. We simply do not agree with the Committee's conclusion that it lacks clarity and will this lead to more disputes. Indeed, we believe the very opposite to be the case. The Supreme Court has provided guidance in a number of cases on how to interpret the reserved powers model in Scotland. We expect that guidance to be applicable to the reserved powers model in Wales and therefore useful in avoiding disputes.

The Government contends that this new model provides clarity and precision in terms of subjects which are reserved, together with a test for determining

when a matter relates to a reserved matter and is thus not within the Assembly's competence. The current *conferred* powers model of Welsh devolution lacks the certainty the new model provides, in large part because it is silent on a wide range of subjects, leading to uncertainty as to the extent that they are reserved or devolved.

The scope of Assembly's legislative competence

11. The "relates to" test in Clause 3 of the Wales Bill mirrors an identical provision in section 29 of the Scotland Act 1998. However, the list of reserved matters set out in Schedule 1 of the Wales Bill is so broad, compared to the reservations contained in the Scotland Act, that the restrictions following from this test are far greater in the context of the Wales Bill. (Paragraph 49)

12. As a result, we are concerned that this test may have the effect of reducing the scope of the Welsh Assembly's legislative competence, and perhaps lead to further referrals to the Supreme Court. We would welcome an explanation from the Government as to whether this was the intent of the legislation and, if not, what steps they intend to take to ensure that the competence of the Welsh Assembly is not inadvertently reduced. (Paragraph 50)

13. The House may also wish to note that the Welsh Assembly's Constitutional and Legislative Affairs Committee has proposed two amendments that would restore the existing limits on the Welsh Assembly's jurisdiction by allowing it to legislate in an ancillary way in relation to reserved matters. We have reproduced these amendments above in paragraph 48. (Paragraph 51)

As the Committee notes, the "relates to" test (the so-called "purpose test") in the Bill mirrors the same provision which operates in Scotland. Similar issues have arisen in the context of Scotland because both in Scotland and Wales we are relying on the purpose test to help define the scope of the relevant legislature's legislative competence. We have the benefit of guidance from the Supreme Court on the proper interpretation of these provisions. As mentioned above, that guidance, although given in a Scottish case, will be highly relevant to the new Welsh settlement.

The starting point is that whether a provision in an Assembly Bill could be said to "relate to" a reserved matter is dependent on its purpose. As has been pointed out in the Supreme Court, "the expression 'relates to' indicates more than a loose or consequential connection".

The application of the purpose test in a reserved powers model should be interpreted as meaning that a provision that merely refers to a reserved matter, or has an incidental or consequential effect on a reserved matter, will not relate to that reserved matter. In other words, to fail the "relates to" test, an Assembly Act provision must have a reserved matter as its purpose. The

purpose of a provision must be established by having regard to its legal, practical and policy effects in all the circumstances. The Assembly Member bringing forward an Assembly Bill cannot simply assert such a purpose for one of its provisions. The purpose must be assessed by considering how the provision has been drafted and what it actually does, as well as the wider context, including the other provisions of the Bill of which the provision under scrutiny forms a part.

It is also important to say that the move from the current conferred powers model to one based on reserved matters reverses the operation of the purpose test. Whereas under the current settlement an Assembly Act provision needs to satisfy the purpose test by positively demonstrating that it relates to one of the subjects conferred in Schedule 7 to GoWA, the reserved powers model instead requires that such a provision must **not** relate to a reserved subject matter. In other words, the case would need to be made that an Assembly Act provision is outside competence because its purpose relates to a reserved matter. If such a case cannot be made, the provision would satisfy the requirements of the proposed new Section 108A(2)(c), inserted into GoWA by clause 3 of the Bill, and would be within competence, provided, of course, that it satisfied the other legislative competence requirements of new section 108A.

We are conscious that the list of reservations in new Schedule 7A does not make frequent use of the formulation, *subject matter of X Act*. We have sought to take account of the desire of the Welsh Government for the Wales Bill to explain in plain terms what the subject matter of the reservation is. They have expressed concerns to us that over time it could become harder to work out what the subject matter of a particular Act is, because it could be amended or repealed. There is a balance to be drawn between legal certainty and accessibility, and we consider that the reservations in the list at new Schedule 7A strike the right balance.

The Government does not believe that the new reserved powers model set out in the Bill will lead to further referrals to the Supreme Court. Indeed, we believe that the opposite will be the case given the clearer boundary between what is devolved and what is reserved which the new model puts in place. Further, we do not agree that the new model inadvertently reduces the Assembly's competence. The Assembly's competence will in fact be enhanced through the further devolution of powers we committed to in the St David's Day Agreement, including in areas such as transport, the environment, energy consenting and Assembly and local government elections in Wales.

The necessity test

14. The 'necessity test' in relation to the modification of the law on reserved matters corresponds to a similar provision in the Scotland Act. As with the "relates to" test, it is likely to have a disproportionate effect on the legislative competence of the Welsh Assembly, given the lengthy

list of reserved subjects set out in Schedule 7 of the Wales Bill. The House may wish to consider whether it is appropriate to include this provision, as it stands, in the Wales Bill, when its effect is likely to differ so widely from the equivalent provision in the Scotland Act. (Paragraph 56)

15. We note that the Welsh Assembly Constitutional and Legislative Affairs Committee has proposed an amendment removing the necessity test in relation to the law on reserved matters, which we reproduce above for the convenience of the House. (Paragraph 57)

The Government welcomes the Committee's acknowledgement that the "necessity test" in relation to the law on reserved matters (paragraphs 1 and 2 of new Schedule 7B to GoWA, inserted by Schedule 2 to the Bill) operates in the Wales context in the same way as it does in the Scotland settlement.

The law on reserved matters is, by definition, an area of the law that should not be open to wide-ranging modification by the Assembly. However, the Government recognises that the Assembly will need to make some modifications of the law on reserved matters in order to make its legislation effective. Indeed, it is because the Assembly is likely to need to modify the law on reserved matters more than the Scottish Parliament (because of paragraph 6 of new Schedule 7A to GoWA, inserted by Schedule 1 to the Bill, which reserves single legal jurisdiction matters such as courts, judges and civil and criminal proceedings), that paragraph 1 of new Schedule 7B goes further than its Scotland Act equivalent by allowing not only incidental/consequential modifications, but also enforcement-type provisions.

We believe it is appropriate that the Assembly is able to modify the law on reserved matters in an ancillary way, but is constrained in its ability to do so by any such modification being subject to having no greater effect on reserved matters than is necessary to give effect to the purpose of the provision. Amendments that the Assembly wishes to make law on reserved matters, but which go no further than necessary, can instead be made by Order under section 150 of GoWA, in agreement with the UK Government.

We believe this represents an appropriate and balanced limitation on the Assembly's competence when considered in the wider context of the purpose test. It is also important to note that there are a number of potential outcomes in applying the "no greater effect than necessary" test; fulfilling that test does not mean that a lowest common denominator option would be the only option which could meet the test.

Private and criminal law

16. We would welcome a statement from Government as to whether the Wales Bill is intended to roll back the competence of the Welsh Assembly as regards certain matters relating to criminal law, and in particular the Welsh Assembly's current competence in relation to the

protection and well-being of children and of young adults. (Paragraph 60)

The Government recognises the need for the Assembly to be able to enforce its legislation in order to make it effective. The private law restriction at paragraph 3 of new Schedule 7B to the GoWA (inserted by Schedule 2 to the Bill) enables the Assembly to continue to modify private (civil) law for a devolved purpose

For criminal liability, the Assembly can continue to create criminal offences to enforce devolved purposes. The Assembly can also make other provision in relation to those offences such as which court should hear the case and the setting of appropriate sentences in relation to devolved matters. In order to ensure consistency across the single legal jurisdiction, paragraph 4 of new Schedule 7B reserves a small number of the most serious, indictable-only offences, as well as the fundamental architecture of the criminal law including matters such as criminal responsibility and capacity. The Assembly will continue to be able to apply the existing criminal law framework to its own enforcement provisions and to choose which elements of the existing criminal law apply to the offences it creates. However, the Assembly will not be able to alter that framework.

The Government does not believe that the new model rolls-back the Assembly's powers in relation to the protection and well-being of children and of young adults. We intend to bring forward amendments to the Bill at Lords Report stage to further clarify the devolution boundary in this respect, and in particular in relation to the disciplining of children.

Executive functions

17. If the Government's intention is to align, as far as possible, the executive and legislative competence of the Welsh Assembly and Government, we question why it is doing so via secondary legislation rather than in primary legislation—as was the case in Scotland. We would welcome an explanation from Government as to why it intends to use a Transfer of Functions Order to pass executive competence to the Welsh Government, rather than simply amending the Wales Bill so as to transfer all functions currently exercisable by Ministers of the Crown within devolved competence to the Welsh Government (taking into account the exceptions it listed in its response to the Commons Welsh Affairs Committee). (Paragraph 64)

It is a basic principle that devolved legislative competence should include the ability for the legislature to confer functions on the executive in relation to all aspects of that devolved subject and to hold the executive, the Welsh Ministers, to account in exercising those functions. This principle applies to the vast majority of devolved subjects but given the unique development of the Welsh settlement there are a number of instances where the boundary is not the same.

Currently, Ministers of the Crown exercise a limited number of functions in devolved areas; these are commonly known as “pre-commencement functions”. The Government has reviewed these functions with the intention of clarifying who will exercise each function in future under the reserved powers model. Our aim in reviewing the pre-commencement functions has been to devolve as many as we can. Many such functions have already been transferred by Transfer of Function Orders made since 1999.

The Government published a list of functions to be included in a Transfer of Functions Order in September, listing those “pre-commencement” Minister of the Crown functions we intend to transfer to Welsh Ministers. We are currently working with the Welsh Government to review this list, with the aim of capturing any functions that may not have been included in the first draft.

We believe that transferring the limited number of functions we have identified to date by order is appropriate. The order, made under s.58 of GoWA, must be approved by both Houses of Parliament and the National Assembly, providing an appropriate degree of scrutiny and oversight by both legislatures.

Some pre-commencement functions will in future be exercised jointly or concurrently by Ministers of the Crown and Welsh Ministers. These are listed in new Schedule 3A to GoWA, inserted by Schedule 4 to the Wales Bill. The limited number of functions listed in new Schedule 3A provide both UK Ministers and Welsh Ministers with the ability to exercise powers for the benefit of Wales, for example to pay grants and to work together across the devolution boundary.

Our review of pre-commencement Minister of the Crown functions has resulted in only a handful of functions in devolved areas being retained. These are listed in sub-paragraphs 11(b) to (f) of new Schedule 7B to GoWA, inserted by Schedule 2 to the Bill. The Assembly cannot legislate in respect of these functions unless UK Ministers consent.

A key outcome of our work on pre-commencement functions is that it is clear what each function is and who will exercise it in future. This clarity could not have been achieved through a blanket transfer of functions to Welsh Ministers.

18. The House may wish to consider whether the extension of the consent requirement beyond Ministers of the Crown to all ‘reserved authorities’ is appropriate, and whether it is appropriate to extend the consent requirement to merely incidental or consequential modifications or removals of relevant functions. In deciding this matter, the House may wish to consider the extent to which it is appropriate for the scope of a devolved assembly’s legislative authority to be determined through the exercise of discretion by UK Ministers, albeit in respect of what is likely to be a relatively limited range of matters. (Paragraph 71)

A key principle underpinning the new reserved powers model is a clear separation between devolved and reserved powers. The Government believes that this clarity is essential in order to be clear whether the Assembly and Welsh Government, or Parliament and the UK Government, exercise competence in relation to a particular subject.

The Wales Bill makes clear (through new section 157A of, and new Schedule 9A to, GoWA, inserted by clause 4 of, and Schedule 3 to, the Bill respectively) which bodies are devolved Welsh authorities and therefore within the competence of the Assembly and the Welsh Ministers. All other public authorities are reserved authorities, and therefore accountable directly or indirectly to Parliament or UK Ministers. Special provision has been made in relation to the small number of bodies which exercise a mix of reserved and devolved functions in new Schedule 7B to GoWA (inserted by Schedule 2 to the Bill).

Given these lines of accountability it is only right that UK Ministers should consent if the Assembly seeks to modify the functions of a reserved authority, given that such modifications could influence the priorities and spending of such authorities. We note, and concur, with the Committee's conclusion that the requirement for Ministers of the Crown consent for the Assembly to legislate on reserved authorities is likely to be in respect of a relatively limited range of matters.

It is important to note however that the consent of a Minister of the Crown is not required to subject reserved authorities in Wales to general duties imposed by provisions in an Act of the Assembly, for example planning permission or prohibiting smoking in public buildings.

OTHER MATTERS

Tax-varying power

19. We have previously concluded that referendums are “most appropriately used in relation to fundamental constitutional issues” and that “the drawbacks and difficulties of their use are serious.”⁸³ The imposition and removal of a referendum requirement in such rapid succession implies an unprincipled and tactical use of referendums which is inappropriate. (Paragraph 74)

The Silk Commission published its first report, on fiscal devolution to Wales, in 2012. It recommended a referendum before an element of income tax could be devolved to Wales.

The Government accepted that recommendation in responding to the Silk Commission in 2013, and the Wales Act 2014 provided for there to be a referendum before the Welsh Rates of Income Tax (WRIT) could be implemented, if the Assembly voted by two-thirds majority, to trigger one.

But the constitutional debate in Wales, and indeed across the United Kingdom, has moved on significantly since the Silk Commission made its recommendation in 2012, not least because of the wider debate across the UK on constitutional issues since the referendum on Scottish independence in 2014.

It has been clear for some time that there is a strong consensus in Wales that the Assembly should not have to call a referendum before the WRIT is implemented. The First Minister of Wales has stated publicly that income tax devolution is “the next logical step”, provided that agreement can be reached between the Government and the Welsh Government on how to adjust the Welsh Block Grant to take account of this. The Government has been discussing these adjustments with the Welsh Government in recent months, and we are confident that agreement will be reached shortly.

We do not therefore agree with the Commission’s conclusion that “the imposition and removal of a referendum requirement in such rapid succession implies an unprincipled and tactical use of referendums which is inappropriate”.

Rather, we would argue that we are now in different times. The constitutional landscape in the UK has changed, and views on fiscal devolution have changed. There is an appetite in Wales for more accountable devolved governance that the implementation of WRIT will help fulfil.

There is already precedent for fiscal devolution without the need for a referendum. The Wales Act 2014 provided for taxes on land transactions and landfill disposal to be devolved to the National Assembly without the need for a referendum. Business Rates are also fully devolved.

The Assembly is already set to become a tax-raising legislature and taking responsibility for WRIT is the next logical step in ensuring greater accountability for the Welsh Government to the people who elect them by becoming responsible for raising more of the money it spends.

The Government committed to remove the referendum at Autumn Statement 2015, having discussed the issue with stakeholders and interested parties across Wales. Clause 17 delivers this commitment, reflecting the evolution of the debate on fiscal devolution in Wales and across the UK.

Elections

20. The House may wish to seek clarification from the Government as to whether they consider that, should the National Assembly for Wales wish to exercise its powers over the franchise, it will have to do so in a way that enfranchises some prisoners so as to ensure that the law is compatible with Convention rights. (Paragraph 78)

In line with the Government's commitment in the St David's Day Agreement, the franchise for Assembly and local government elections in Wales is being devolved to the Assembly. As such, the franchise for elections within devolved competence will be a matter for the Assembly to decide.

A distinct or separate Welsh jurisdiction

21. The cases for and against a 'separate' or a 'distinct' Welsh jurisdiction are complex and we do not intend to express a view on them at this juncture. It is an issue that will grow in importance as the process of Welsh law-making becomes increasingly significant. (Paragraph 83)

22. The reality of a growing body of distinct Welsh law should, however, be reflected in the operation of a single England and Wales jurisdiction. For that reason, we welcome the formation of a 'Justice in Wales' working group, and we trust that the Government will keep this issue under review to ensure that a single jurisdiction can continue to operate effectively in the light of the deepening of the Welsh devolution regime. (Paragraph 84)

The Government has been clear throughout the passage of the Wales Bill that the single legal jurisdiction of England and Wales is the most efficient and effective way to administer the justice system in Wales. We are fully committed to maintaining it.

The overwhelming majority of law that applies in Wales is the same as that which applies in England, and the case has not been made to warrant the cost and complexity of establishing a separate or distinct jurisdiction in Wales. It would risk instilling uncertainty into the justice system in Wales at just the point when the new reserved powers model offers stability for the longer term.

The Government does however recognise the distinctiveness of Wales within the single jurisdiction given the growing body of law that applies in Wales made by the Assembly and the Welsh Ministers. It is for this reason that the body of Welsh law is being recognised in new section A2 of GoWA, inserted by clause 1 of the Bill) as part of the law that applies in Wales.

We consider it essential that the administrative arrangements for justice in Wales also fully reflect this.

As the Committee notes, the Government has established a *Justice in Wales* working group to examine the administrative arrangements for justice in Wales and recommend how those arrangements can be improved. The group is expected to report its findings to Ministers before the Christmas recess.

The Government agrees fully with the Committee that it is essential to ensure law made by the Assembly and Welsh Ministers is reflected in the justice system fully and in a timely manner. We recognise the need to continue to review the operation of the justice system in Wales as the administrative

arrangements evolve to reflect Wales's distinctiveness within the single jurisdiction.

We intend therefore to establish a non-statutory committee to review the operation of the justice system within the settlement provided for by the Wales Bill. We will establish a small group with a focused remit, including representatives from both the UK Government and the Welsh Government. The group will report periodically to the Lord Chancellor, with both the First Minister of Wales and the Secretary of State for Wales receiving copies. Further consideration will be given to the terms of reference of the group and how practitioners and those working in the legal profession in Wales will provide input.

We believe establishing a non-statutory committee to review the justice system in Wales on a periodic basis provides an effective way of ensuring the justice system in Wales keeps pace with the dual influence of Assembly and parliamentary law-making within the single jurisdiction.

Henry VIII powers

23. Clause 53 would permit legislation passed by the National Assembly for Wales to be amended by statutory instrument at the behest of a UK Government minister without the consent, or indeed involvement, of the National Assembly or Welsh Government. The House may wish to consider whether it would be more appropriate for the consent of the National Assembly to be required as, for example, is the case for certain statutory instruments made under the Legislative and Regulatory Reform Act 2006 and the Public Bodies Act 2011. (Paragraph 88)

The power in (what is now) clause 60 of the Bill enables the Secretary of State to make regulations amending primary or secondary legislation which the Secretary of State considers appropriate in consequence of any provision in the Bill.

The Government believes that the power is proportionate and appropriate in order to implement the Wales Bill's provisions, in particular those relating to the reserved powers model. It reflects an equivalent power for the Secretary of State in the Scotland Act 2016. The power can be exercised only in the context of making consequential provision in relation to the Bill itself to ensure the wider statute book reflects the changes this Bill makes.

In regard to modifying parliamentary legislation, regulations laid under section 60(2), that includes provision amending or repealing any provision of primary legislation (made by Parliament or the Assembly) would be subject to the affirmative procedure in both Houses of Parliament. Other regulations made under section 60(2) would be subject to the negative procedure in both Houses. The Government considers this to be an appropriate level of scrutiny for consequential provision of this kind.

In regard to modifying primary or secondary legislation made by the Assembly or the Welsh Ministers, the power reflects well-established reciprocal arrangements. These Assembly regularly empowers Welsh Ministers to modify parliamentary legislation in consequence of Assembly legislation. Two-thirds of Acts passed by the Assembly in 2015 and 2016 include a power for Welsh Ministers to make consequential amendments to Acts of Parliament without any role for Parliament to scrutinise such secondary legislation.

To give an example, the Assembly has recently passed the Renting Homes (Wales) Act 2016. Section 255 of that Act includes a power for Welsh Ministers to make consequential amendments to *any enactment*. "Enactment" is defined in section 252 of the Renting Homes (Wales) Act to include Acts of Parliament and secondary legislation made under Acts of Parliament. There is no requirement for Parliamentary approval of such consequential amendments, so it seems inconsistent for there to be a role for the Assembly in an equivalent power in the Wales Bill.

These reciprocal arrangements allow consequential amendments to be made to other enactments. This ensures that the legislative programmes of both the Welsh Government and the UK Government run smoothly.

The Government understands the concerns expressed by the Committee in respect to the modification of legislation made by Assembly and Welsh Ministers. The Secretary of State for Wales has therefore written to the First Minister of Wales and the Presiding Officer of the National Assembly for Wales committing to early discussions between officials well in advance of regulations being laid which affect legislation made by either the Assembly or the Welsh Ministers. He has further committed to write formally to inform them of any intention to make regulations which affect legislation made by the Assembly or Welsh Ministers, again doing so at the earliest opportunity before regulations are laid.

An equivalent power to clause 60 was passed by Parliament in section 71 of the Scotland Act 2016, which included no role for the Scottish Ministers or the Scottish Parliament. In relation to Scotland, the Government intends to use the power to make consequential changes that are required as a result of the further devolution of elections in Scotland in the 2016 Act. We expect clause 60 to be needed for similar purposes given the devolution of Assembly elections and local government elections in Wales in this Bill.