

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

Report on the UK Government's Draft Wales Bill

December 2015

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership:



David Melding (Chair)
Welsh Conservatives
South Wales Central



Alun Davies
Welsh Labour
Blaenau Gwent



Suzy Davies
Welsh Conservatives
South Wales West



William Powell
Welsh Liberal Democrats
Mid and West Wales



Dafydd Elis-Thomas
Plaid Cymru
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1. Terms of reference and approach

Background

1. The draft Wales Bill (“the draft Bill”) was published by the UK Government on 20 October 2015. We agreed to undertake this inquiry to ensure the National Assembly for Wales was given the opportunity to contribute to the Bill’s pre-legislative scrutiny. The UK Government stated that the draft Bill “sets out in detail how the Government plans to deliver the St David’s Day commitments to create a stronger, clearer and fairer devolution settlement for Wales that will stand the test of time”.¹

Terms of reference

2. We examined in particular:
- the extent to which the proposed reserved powers model of legislative competence is clear, coherent and workable, and will provide a durable framework within which the Assembly can legislate;
 - the tests for determining competence as set out in clause 3 and Schedules 1 and 2 to the draft Bill;
 - the extent to which the proposed new framework changes the breadth of the Assembly’s competence to make laws;
 - the proposed legislative powers available in specific subject areas as a consequence of Schedules 1 and 2 to the draft Bill;
 - the proposals for the Assembly to gain powers over its functioning (for example in relation to its name, number of Assembly Members and electoral powers for the Assembly);
 - the additional powers to be given to the Welsh Ministers, especially to make subordinate legislation;
 - the proposals included in relation to the permanence of the Assembly and Welsh Government;
 - the proposals included in relation to the convention about the UK Parliament legislating on devolved matters;
 - the implications of the draft Bill for the constitution of the United Kingdom; and

¹ Wales Office, *Draft Wales Bill*, Cm 9144, October 2015, [Foreword](#)

- any other matter related to the legislative powers needed for effective law-making by the Assembly.

Approach to the inquiry

3. On 25 September 2015, we held an event to help stakeholders prepare for the publication of the draft Bill and aid the submission of evidence. Attendees are listed at Annex 1.
4. Following the draft Bill's publication we issued a call for evidence seeking views based around our terms of reference. The consultation exercise ran from 23 October 2015 until 20 November 2015. A list of those who responded is at Annex 2. Further details of the consultation and responses can be found on the [Committee pages](#) of the Assembly website.
5. The Committee held oral evidence sessions in November 2015. Details are available at Annex 3.
6. We held a concurrent evidence session with the House of Commons Welsh Affairs Select Committee on 9 November 2015.
7. We held a second stakeholder event on 13 November 2015 aimed at canvassing views on the draft Bill from stakeholders including representatives of the legal profession in Wales. A list of attendees is at Annex 4.
8. We are very grateful to all those who have contributed to our work.
9. On 25 November 2015, the Business Committee decided to hold a debate on the draft Bill on 13 January 2016. This report has been prepared in order to inform that debate.

2. Introduction

10. The Secretary of State for Wales (“the Secretary of State”) has been very clear that he wishes the Bill to provide a lasting settlement and this objective has received widespread support. We have considered whether the draft Bill meets the Secretary of State’s aim of a “stronger, clearer and fairer devolution settlement for Wales that will stand the test of time”.²

Process

Development of the draft Bill

11. The draft Bill was produced following the then UK Government’s decision to seek political consensus in relation to the recommendations made by the Silk II report³ and following the independence referendum in Scotland. In addition to looking at the Silk II recommendations, the “St David’s Day Process” also looked at whether there was any political consensus to apply to Wales elements of the Smith Commission proposals for Scotland.⁴

12. Following these political discussions, the Secretary of State published the command paper *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales*⁵ (“*Powers for a Purpose*”) which outlined the areas in which political consensus had been reached. The draft Bill is based on the areas outlined in *Powers for a Purpose*.⁶

13. One of the key areas of agreement was that there should be a move from the current conferred powers model of devolution to a reserved powers model as in Scotland and Northern Ireland.

14. In June 2015, we considered *Powers for a Purpose* and took evidence from an expert panel (Professor Thomas Glyn Watkin, Emyr Lewis and Professor Adam Tomkins), the Presiding Officer and the First Minister. We published a short report in advance of the publication of the draft Bill. We recommended that the principle of subsidiarity should be adhered to when

² *Draft Wales Bill*, Cm 9144, October 2015, [Foreword](#)

³ Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014

⁴ *Draft Wales Bill*, Cm 9144, [Explanatory Notes](#), paragraph 6

⁵ Wales Office, [Powers for a Purpose: Towards a Lasting Devolution Settlement](#), February 2015

⁶ *Draft Wales Bill*, Cm 9144, [Explanatory Notes](#), paragraph 7

drawing up the draft Bill, with other core principles being clarity, simplicity and workability.⁷

15. In developing the draft Bill, the Secretary of State told us that all Whitehall departments were asked to produce a list of the areas that they believed were reserved:

“In terms of the specifics of the reservations, it was an iterative process right across Whitehall; the first time, actually, that every single Government department across Whitehall has been engaged in an exercise thinking about devolution in a structured and coherent way. The request that we put out to our colleagues in Whitehall was, ‘What is your interpretation of the current devolution boundary in your departmental areas given the existing legislation?’ Now, some of information we had back—I took a decision to push back on them, saying, ‘Do you really think that’s reserved?’ So, there was a bit of, you know, to-ing and fro-ing. So, the list that has been arrived at is not a fresh draft list, it has been worked through a bit, but I accept that there’s probably quite a lot of scope for looking at that again and simplifying it...”⁸

16. Following on from this work, the Secretary of State shared elements of the draft Bill over the summer with both the Presiding Officer and the First Minister, and discussions were then on-going in relation to those particular clauses of the Bill.

17. The First Minister told us that the Welsh Government:

“would have been happy to have been involved in that process at the beginning.”⁹

18. He highlighted that the Welsh Government had more staff, resources and legal capacity than the Wales Office.¹⁰

19. The First Minister said he had been very concerned when he first saw elements of the draft Bill and he had offered the Secretary of State the opportunity to make a “joint statement” delaying the publication of the draft

⁷ Constitutional and Legislative Affairs Committee, [The UK Government’s proposals for Further Devolution to Wales](#), July 2015

⁸ CLA Committee, RoP paragraph [29], 23 November 2015

⁹ CLA Committee, RoP paragraph [215], 16 November 2015

¹⁰ CLA Committee, RoP paragraph [215], 16 November 2015

Bill, in order for more time to work through some of the areas of concern for the Welsh Government.¹¹

Impact of the draft Bill development process

20. The process described above has been identified by a number of witnesses as a significant factor influencing the content of the draft Bill, in particular in relation to its complexity and the lengthy list of reservations.

21. Witnesses highlighted two areas of potential weakness in the process:

- the need for political consensus during the St David's Day discussions;¹² and
- the amount of power given to individual Whitehall departments to drive the debate about the reservations.¹³

22. Looking at the first area, witnesses including Professor Richard Wyn Jones described a political process which put consensus above ensuring a coherent, logical approach:

“I think the process that's led to the draft Bill has created the ambiguity that we're currently dealing with.....

.... The parties didn't have to explain why they took those positions. They didn't have to explain how what they suggested was going to lead to a settlement that would appear to be permanent and provided clarity, and so on. It was a lowest common denominator approach. So, the aim of the process was consensus rather than a sensible approach.”¹⁴

23. As regards the second area of weakness, we share the concerns about the nature of the process following the publication of *Powers for a Purpose* and the fact that this appears to have been very much driven by Whitehall departments. We believe that an approach which effectively gave individual Whitehall departments the initiative in defining the devolution settlement has not been helpful. Whitehall departments have a varied level of knowledge and understanding of Welsh devolution. We believe this has been a factor in the subsequent breakdown of the consensus in this process. It has

¹¹ CLA Committee, RoP paragraph [215], 16 November 2015

¹² CLA Committee, RoP paragraph [173], 9 November 2015

¹³ CLA Committee, RoP paragraph [170], 16 November 2015

¹⁴ CLA Committee, RoP paragraph [172-173], 9 November 2015

produced, in part at least, a draft Bill made *for* Wales rather than one made *with* Wales.

24. This view has been affected by the fact we have been unable to take evidence from the UK Civil Service on this matter. We invited a senior official in the Cabinet Office to give evidence to us at a session in early November,¹⁵ but we have received no response to our invitation, a matter of considerable regret to us.

25. We believe that a “made with Wales” approach with joint working across UK Government departments and with the major players in Wales would help to restore the consensus and ensure a Bill that both Westminster and Wales would be satisfied with. This is an approach that is surely required for constitutional development and was intimated in the St David’s Day Process.

Other factors shaping the Bill

26. In seeking to understand the shape the draft Bill has taken, we have considered other key influencing factors.

27. One such factor is the single legal jurisdiction of England and Wales. The Secretary of State was clear that the Bill has been shaped by the need to implement a “reserved powers model within the single legal jurisdiction of England and Wales”.¹⁶ We discuss the issue of the jurisdiction further in Chapter 3 of this report.

28. Another influence was the referral of Assembly Bills to the Supreme Court three times since the 2011 referendum when the Assembly gained primary law-making powers.¹⁷ The Secretary of State told us that these referrals and rulings had played a part in the decision to move to a reserved powers model:

“... one of the early decisions I took was to move to a reserved powers model precisely because of some of the Supreme Court judgments.”¹⁸

29. In particular, the ruling on the Agricultural Sector (Wales) Bill gave a very broad interpretation of the devolution settlement as set out in the

¹⁵ Letter from the Chair of the Constitutional and Legislative Affairs Committee, 7 October 2015

¹⁶ DWB 18 – Secretary of State for Wales

¹⁷ Local Government Byelaws (Wales) Bill, Agricultural Sector (Wales) Bill and Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

¹⁸ CLA Committee, RoP paragraph [16], 23 November 2015

Government of Wales Act 2006. The evidence we have received from a range of legal experts has been that the draft Bill as currently drafted rolls-back from these Supreme Court rulings.¹⁹ We recognise that this is, of course, Parliament's prerogative.

30. However, we note that this was never expressed publicly as a factor in moving towards the reserved powers model. Had it been, the level of consensus that marked the early part of the process would probably have been absent. Much of the discord that has surrounded the debate on the draft Bill is a result of different responses to the Supreme Court rulings.

Timetable for consideration of the draft Bill

31. Following on from the process of developing the draft Bill, we heard a very clear message from civic society²⁰ about the timeframe for considering the draft Bill prior to the Bill's introduction in 2016. Professor Richard Wyn Jones said:

“...the timetable set out for this process does make it extremely difficult for civic society organisations such as universities to make a sensible response to what is going on. The timetable is so challenging.”²¹

32. He also added that the timetable effectively means the discussion about the content of the Bill is left to the two governments:

“If we want this debate to move beyond an argument between governments, then we have to delay the process, because, in a context where we have something which is so incredibly complex and the timetable is so brief, it is only governments that can participate in that discussion.”²²

33. Professor Laura McAllister and Dr Diana Stirbu highlighted that it was “highly unlikely” that “clear, strategic constitutional solutions in the Bill's provisions” would emerge from the scrutiny process, and highlighted that a factor in this was the limited time for pre-legislative scrutiny.²³

¹⁹ DWB1 – Thomas Glyn Watkin, DWB3 – Keith Bush QC, DWB16 – YourLegalEyes

²⁰ DWB15 – Professor Laura McAllister and Dr Diana Stirbu, DWB19 – Chwarae Teg, DWB32 – Electoral Reform Society Cymru and CLA Committee workshop, Strengthening the draft Wales Bill, 13 November 2015

²¹ CLA Committee, RoP paragraph [178], 9 November 2015

²² CLA Committee, RoP paragraph [183], 9 November 2015

²³ DWB15 – Professor Laura McAllister and Dr Diana Stirbu

34. We note the Secretary of State's view that the publication of the draft Bill is the start of the process and that there is still ample time for civic society to feed into the draft legislation:

"I don't think the timetable is particularly tight. There's already been quite a long gestation period leading up to the publication of the draft Bill ... I think there's bags and bags of time available for changes to be made if they improve on the draft that we have in front of us."²⁴

35. We accept that this is the start of the process, but once a Bill has been introduced in the UK Parliament, wider public engagement and the ability of civic society to influence and effect substantial change becomes more difficult. Given that people in Wales have not had much time to consider the many complexities of the draft Bill, this is an issue the Secretary of State may wish to reflect on further.

36. The Secretary of State has also said that if the scheduled parliamentary slot for the Bill is not used, there is a risk that another slot may not be found.²⁵ We do not believe that a substantial piece of constitutional legislation should be compromised merely to fit a particular parliamentary slot. One stakeholder suggested that because it was a piece of constitutional legislation, an opportunity should be found for further parliamentary time, if it was considered necessary.²⁶ We share this view.

37. We also acknowledge Professor Richard Wyn Jones' view that some of the political heat would be taken out of the debate once the Assembly elections have taken place in May 2016.²⁷

38. The Presiding Officer has suggested options for amending the draft Bill²⁸ and when we asked the Secretary of State for an initial view on them, he told us:

"I've had a quick read through; I'm not in a position to give a definitive view right now, but what I would say is that what we won't be doing, I think, is changing the wording of things to such an extent that you end up making some of the principles meaningless. The principles that I was describing earlier about clarity, about a clear

²⁴ CLA Committee, RoP paragraph [6], 23 November 2015

²⁵ CLA Committee, RoP paragraph [124], 23 November 2015

²⁶ CLA Committee workshop: Strengthening the Draft Wales Bill, 13 November 2015

²⁷ CLA Committee, RoP paragraph [214], 9 November 2015

²⁸ DWB5 – Presiding Officer

understanding of the separation of powers between what the UK Government's responsible for, what the Welsh Government's responsible for..."²⁹

39. We believe it would have been useful if the Secretary of State had been able to respond more fully to the Presiding Officer's suggested amendments. This illustrates why a longer period of time for consideration of a draft Bill of such fundamental constitutional importance would have been preferable.

General responses to the Bill

40. The striking feature of the evidence we have received from a range of different stakeholders has been its consistency both with regards to those areas of the draft Bill which are welcomed and those areas where serious concern has been expressed.

41. We note and welcome the Secretary of State's tone and openness to substantial changes being made to the draft Bill:

"I do expect the final piece of legislation that gets Royal assent to be significantly different from the draft..."³⁰

Provisions relating to elections and the internal organisation of the Assembly

42. There has been unanimity from consultees regarding the positive aspects of the Bill; in particular sections 4 to 6 (provisions about elections) and sections 19, 23 and 24 (provisions about the internal organisation of the Assembly). Professor Roger Scully told us:

"My own view is that, certainly, the detailed provisions on National Assembly elections, including the super-majority requirement, are sensible and coherent; they certainly allow for significant flexibility."³¹

43. This overall view on elections was supported by other stakeholders such as the Wales Council for Voluntary Action,³² the Electoral Reform Society³³ and Professor Laura McAllister and Dr Diana Stirbu.³⁴

²⁹ CLA Committee, RoP paragraph [132], 23 November 2015

³⁰ CLA Committee, RoP paragraph [7], 23 November 2015

³¹ CLA Committee, RoP paragraph [219], 9 November 2015

³² DWB26 – Wales Council for Voluntary Action

³³ DWB32 – Electoral Reform Society Cymru

³⁴ DWB15 – Professor Laura McAllister and Dr Diana Stirbu

44. The Presiding Officer broadly welcomed the changes relating to the internal arrangements of the Assembly, but highlighted that there were a number of areas which she felt needed further development and / or clarification.³⁵ We hope that the Secretary of State considers these areas carefully when preparing the Bill for introduction.

New areas of responsibility

45. There has also been a broad welcome for the other new areas being devolved to the Assembly.³⁶ However, we note that concerns have been expressed about some of the details, such as:

- Dŵr Cymru Welsh Water told us that Clause 7 (Intervention in case of serious adverse impact on the sewerage services etc) “creates a degree of unwelcome potential uncertainty” for their business and recommended that its inclusion be reconsidered.³⁷
- the First Minister said that the devolution of the remaining executive functions in relation to Welsh harbours are subject to the inclusion of a reservation for certain trust ports (clauses 13 and 14). If a trust port has a turnover above a certain threshold, the UK Government is responsible. The First Minister regarded this as “an incentive for ports not to grow”;³⁸
- the Royal Town Planning Institute Cymru believed that the 350MW limit (clause 17) should be removed so that all energy decisions should be devolved to the Welsh Government because “it would facilitate the ability to deliver comprehensive renewable energy strategy in Wales and would bring Wales in line with Scotland and Northern Ireland”.³⁹

46. We hope that the Secretary of State gives serious consideration to these and other concerns expressed in the evidence we have received and works with the Welsh Government and others to resolve issues relating to the new areas of powers before the introduction of the Bill.

³⁵ DWB 5 – Presiding Officer

³⁶ DWB 10 – Chair, Enterprise and Business Committee, DWB 12 – Chair, Environment and Sustainability Committee, DWB 15 – Professor Laura McAllister and Dr Diana Stirbu, DWB17 – Bishops of the Church in Wales and DWB 21 – Wales Environment Link

³⁷ DWB33 – Dŵr Cymru Welsh Water

³⁸ CLA Committee, RoP paragraph [279], 16 November 2015

³⁹ DWB20 – Royal Town Planning Institute Cymru

A clear and lasting settlement?

47. Putting these positive areas aside, the overwhelming response to our call for evidence on the draft Bill has been that it does not meet the Secretary of State's stated aims of creating a "stronger, clearer and fairer devolution settlement for Wales that will stand the test of time".⁴⁰

48. We have received clear and lucid evidence from a range of stakeholders across civic society who have expressed their concerns about some of the fundamental architecture of the Bill, and the lengthy list of reservations. The overwhelming majority of our consultees and witnesses have expressed grave concerns about the complexity of the draft Bill.

49. We hope that the Secretary of State will take the opportunity, as he has repeatedly highlighted, to take on board views and amendments at this stage, and use this evidence as a basis to reconsider the current draft very carefully both in terms of fundamental provisions and specific wording.

The importance of clarity

50. Consultees and witnesses regularly highlighted the importance of legislation being clear to the citizen. The Presiding Officer told us:

"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."⁴¹

51. We agree with this view, and we highlighted this issue in our report on *Making Laws in Wales*.⁴²

52. The Institute for Welsh Affairs also highlighted the broader implications of such a complex settlement:

"...the opaque nature of the settlement will make it harder to hold a Welsh Government to account for any policy failures."⁴³

⁴⁰ Draft Wales Bill, Cm 9144, [Foreword](#)

⁴¹ DWB5– Presiding Officer

⁴² Constitutional and Legislative Affairs Committee, [Making Laws in Wales](#), October 2015

⁴³ DWB23 - Institute of Welsh Affairs

53. As elected members who hold the Welsh Government to account, we consider this to be a particularly strong and resonant argument.

54. The Secretary of State also emphasised the importance of the legislation being understandable:

“This needs to be understood not just by the legal practitioners, who will have great fun, whatever legislation you bring forward, in arguing about what it means, because that’s what they are paid to do; but in terms of the practitioners—the politicians themselves—and, even more importantly, civil society, and the people of Wales, to be able to understand it.”⁴⁴

55. The overwhelming evidence we have received is that this legislation as currently drafted is not clear. If it is not easily comprehensible to legal practitioners, it certainly will not be to citizens; as such it has failed one of the Secretary of State’s key tests. This is not to say that the draft Bill cannot be amended to make it clearer.

Legal challenges

56. We have heard a clear, unanimous voice from legal experts and practitioners that the complexities of this Bill will lead to references to the Supreme Court. In addition to Supreme Court references, Assembly legislation could be regularly challenged in general courts. Emyr Lewis told us:

“The main concerns expressed so far have been about further references by the Attorney General or Counsel General to the Supreme Court...My concern is broader. It arises from the fact that the question of determining whether an Act of the Assembly is within competence or not can be raised in *any proceedings*....This means that in any private or criminal proceedings, it is possible to challenge rights, obligations, offences etc, created by an Act of the Assembly.....”⁴⁵

Assembly consideration

57. We give considerable weight to the substantial body of evidence that has been received from other Assembly committees, which have considered the draft Bill in relation to their own subject areas. They have provided us

⁴⁴ CLA Committee, RoP paragraph [117], 23 November 2015

⁴⁵ DWB 2 – Emyr Lewis

with clear examples of how they believe the Bill as currently drafted will add complexity and difficulty to the Assembly's ability to legislate holistically and simply.⁴⁶

58. We note that each of the Assembly committees is cross-party and the Chairs come from all of the political parties in the Assembly. The committee members have substantial policy and legislative expertise. It is clear that the concerns reach across the political spectrum in Wales. Such a broad-based consensus should not be ignored.

59. With these general views and background in mind, we will now turn to the specific issues and clauses of the Bill.

⁴⁶ DWB 6 – Chair, Finance Committee, DWB8 – Chair, Public Accounts Committee, DWB10 – Chair, Enterprise and Business Committee, DWB11 – Chair, Communities, Equality and Local Government Committee, DWB12 – Chair, Environment and Sustainability Committee, DWB13 – Chair, Health and Social Care Committee and DWB 14 – Chair, Children, Young People and Education Committee

3. Specific clauses and issues for consideration

Clause 3 – Legislative competence

60. Clause 3(1) of the draft Bill replaces section 108 of the *Government of Wales Act 2006* with new section 108A (Legislative Competence).

61. Clause 3(2) replaces Schedule 7 of the *Government of Wales Act 2006* with two new schedules: Schedule 7A (Reserved Matters) and Schedule 7B (General Restrictions).

62. The purpose of Clause 3 is to “set out the limits on the legislative competence of the Assembly”.⁴⁷

63. We wish to focus on the following broad aspects that have been raised with us as particular matters of concern:

- the application of the draft Bill to the single jurisdiction of England and Wales (see proposed new section 108A(2)(a) and paragraph 6 of proposed new Schedule 7A);
- the tests of necessity (proposed new section 108A(3) and new Schedule 7B, paragraphs 2, 3 and 4) and the ability to modify private and criminal law (proposed new Schedule 7B, paragraphs 3 and 4);
- Minister of the Crown consents (proposed new Schedule 7B, paragraph 8); and
- general and specific reservations (proposed new Schedule 7A).

64. In light of the evidence we have received, we believe the Secretary of State should consider a number of changes to the Bill.

Single jurisdiction of England and Wales

65. As we have already indicated, we consider that the express policy intention of the UK Government to retain a single jurisdiction has been one of the key drivers in shaping the draft Bill. The Secretary of State told us:

“We’ve committed to preserving the integrity of the England-and-Wales jurisdiction. Now, if you’re going to do that, if you are going to preserve that single jurisdiction, you actually do need to build into legislation a way to give freedom to Welsh Government to be able to legislate and enforce its legislation, but also some kind of boundary

⁴⁷[Draft Wales Bill](#), Cm 9144, [Explanatory Notes, paragraph 13](#)

that preserves the fundamental underpinnings of the single England-and-Wales jurisdiction.”⁴⁸

66. Professor Thomas Glyn Watkin told us that:

“For the people of Wales to have chosen to have a primary law-making body which the UK Parliament recognizes as a permanent part of the UK’s constitutional arrangements only for that body’s work to be restricted so as to protect a unified legal system which was not designed to deal with the current arrangements is fundamentally misplaced. Structures for the administration of justice should keep pace with developments within the society which they serve. This does not mean that the administration of justice in Wales needs to be entirely separate from that in England, but it does mean that as the law is no longer completely unified, the legal system which administers it needs to develop so as to reflect that new reality not restrict it.”⁴⁹

67. He also felt that:

“... the restrictions with regard to private and criminal law are counterproductive ... They send out the signal that you assume that the law of England and Wales is the same ... That ... is the wrong signal. The professions need to be told, and students need to be told, that the law of Wales is not now always the same as the law of England, and they need to be aware of that, and the structures need to reflect that.”⁵⁰

68. The First Minister expressed similar sentiments to those of Professor Watkin and said:

“The retention of the existing England and Wales jurisdiction will result in a measure of complexity for the Welsh settlement which is incompatible with the Secretary of State’s aspirations for clarity and workability.”⁵¹

⁴⁸ CLA Committee, RoP paragraph [57], 23 November 2015

⁴⁹ DWB 1 – Thomas Glyn Watkin

⁵⁰ CLA Committee, RoP paragraph [150], 9 November 2015

⁵¹ DWB7 – First Minister

69. He added:

“The Lord Chief Justice recently said that “*it is right for me to say that there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions*”. As an interim measure, this could mean the creation of a Welsh legal jurisdiction that is distinct but not separate from that of England – a Welsh legal jurisdiction supported by a shared Courts system, run by the Ministry of Justice with the same judiciary and administrative system, buildings, etc as now. The Welsh Government will be undertaking further work with regard to the thoughts of the Lord Chief Justice over the coming weeks.”⁵²

70. The creation of a *distinct* jurisdiction was seen by Professor Richard Wyn Jones as a pragmatic approach⁵³ to addressing the issue of the jurisdiction, which was clearly described by Emyr Lewis:

“I believe that the root of the problem is not the jurisdiction of the courts, but it is that, on the one hand, we have the concept of the laws of England and Wales, and, on the other, we have laws that are different in Wales and in England. We have the laws that apply in Wales and the laws that apply in England. They are diverging more and more. But, simultaneously, we are trying to retain this concept that there is only one law of England and Wales ...

... in order to try and maintain what I believe is a paradox, there is a great deal of complexity and a great deal of very complex drafting going on in order to try and maintain that paradox.”⁵⁴

71. The First Minister identified a distinct jurisdiction as his preferred approach⁵⁵ and in supplementary evidence set out his further thinking on this issue.⁵⁶

Our view

72. The prominent role that the maintenance of a single legal jurisdiction has had in shaping the Bill has been reflected in the concerns raised with us

⁵² DWB7 – First Minister

⁵³ CLA Committee, RoP paragraph [244], 9 November 2015

⁵⁴ CLA Committee, RoP paragraphs [130-131], 9 November 2015

⁵⁵ CLA Committee, RoP paragraph [225], 169 November 2015

⁵⁶ DWB7 – First Minister (Supplementary evidence); Letter to David Melding AM, Chair of the Constitutional and Legislative Affairs Committee from the First Minister, *Making Progress on the Wales Bill: A Welsh Legal Jurisdiction*, 26 November 2015

that it has hampered the clarity and workability of the proposed reserved powers model. This suggests to us that it may not meet the needs of our growing Welsh legal identity and indeed may be frustrating the developing consensus that led up to the St David's Day announcement.

73. We believe there would be merit in exploring further the concept referred to by witnesses above of a distinct Welsh jurisdiction as a means of delivering a clearer, more workable settlement. Theory would then catch up with practice: the axiom that all law extends to England and Wales but Welsh law is only applied in Wales would be superseded. Indeed, distinct bodies of Welsh and English laws would be administered within a unified court system in England and Wales.

74. This would have the benefit of recognising that there is a body of Welsh law that is distinct from English law. It will also highlight that distinction to the legal profession throughout the UK for the benefit of citizens who from time to time need access to legal advice.

75. We also believe that such an approach would be consistent with our report on a separate Welsh jurisdiction,⁵⁷ in particular as it would help provide greater clarity to Welsh citizens about the laws to which they are subject.

The tests of necessity and modification of the private and criminal law

76. The new necessity tests,⁵⁸ part of a wider set of tests to determine legislative competence, appear in clause 3 (inserting new section 108A(3) into the *Government of Wales Act 2006*) and in paragraphs 2, 3 and 4 of the new Schedule 7B. In effect, they would restrict 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.

77. In his evidence the Secretary of State explained that:

"The Assembly will continue to be able to enforce its legislation by modifying the private law and criminal law, in the same way as it does now. The model recognises that the Assembly has a legitimate need to modify the law in respect of devolved matters in order to give full and proper effect to its legislation. It will continue, for example, to be

⁵⁷ Constitutional and Legislative Affairs Committee, *Inquiry into a Separate Welsh Jurisdiction*, December 2012

⁵⁸ The necessity test applies in four places within the draft Bill

able to create offences and impose penalties to enforce the laws that it makes.

The no greater effect than necessary test is designed to address occasions where the Assembly seeks to enforce its laws by legislating in relation to England, the law on reserved matters and the general principles of private law and criminal law.”⁵⁹

78. He clearly identified the influence of a single jurisdiction in helping to shape these tests by adding:

“The model enables the Assembly to modify the general principles of the private law and criminal law if that is needed to give effect to its laws. But we do not want to see those modifications lead to significant divergence in the fundamental legal landscape of England and Wales. Any modification of private law and criminal law should be proportionate to the devolved provision the Assembly is seeking to enforce.”⁶⁰

79. He also said:

“For me, one of my underlying principles behind this draft legislation is that I don’t want this legislation to do anything that prevents Welsh Government or the Welsh Assembly from legislating freely in devolved areas. I also don’t want to stop the Welsh Government or the Welsh Assembly being able to modify the law in order to give full effect to the measures that they’re creating. On the other hand, you do need to create some kind of boundary and safeguarding around the extent to which the Welsh Assembly changes law that then impacts across the devolution boundary. So, this is where the so-called necessity test kicks in—the four areas: the way that changes to the law might affect England, reserved matters, criminal and private law. You do need to create some kind of boundary there if you’re to maintain the integrity of a single jurisdiction, which we’re committed to.”⁶¹

⁵⁹ DWB18 – Secretary of State for Wales

⁶⁰ DWB18 – Secretary of State for Wales

⁶¹ CLA Committee, RoP paragraph [39], 23 November 2015

80. The Secretary of State also told us that the necessity test “has operated with no difficulty as part of the reserved powers model in Scotland since the start of devolution”⁶² although he subsequently said:

“Of course, it is not in exactly the same form as it appears in the draft Wales Bill, because, of course, they have a separate jurisdiction—so, the necessity test in the Scottish legislation doesn’t refer to criminal or private law. So, the necessity test is there, it’s already in existing devolution legislation, and that’s why we’ve used that. Now, if people think that the hurdle that that is creating for Welsh legislation is too high, then let’s look at that. If there are other forms of legal definition that could be used that are not so problematic, then let’s look at that ... But, if people think that the necessity test as it’s structured or as it’s framed in this draft legislation creates too much of a problem, then I’d be really keen to understand that.”⁶³

81. The Secretary of State also said:

“... if the Bill becomes an Act, it would be for the Welsh Assembly to decide whether an Assembly Bill is necessary.”⁶⁴

82. Emyr Lewis told us the “the test is very complex, and ... it is far broader than what happens in Scotland”.⁶⁵ Professor Thomas Glyn Watkin also explained how the necessity tests impacted on the reserved matters in the proposed new Schedule 7A and in so doing compared the situation in Scotland:

“The reason, in my view, that there have been fewer problems in Scotland is that the number of reservations is far smaller, so the space left in which you can legislate is much greater. That operates also with regard to this necessity test, because the number of things that can be hit by the test is very small. If you have a large number of reserved matters, the chances of being hit by the test become much greater. So, therefore, the greater the number of reserved matters, the greater the risk that you will fall foul of this test...”⁶⁶

83. As well as highlighting that the draft Bill has four necessity tests as opposed to the single test in the *Scotland Act 1998*, the Presiding Officer

⁶² DWB18 – Secretary of State for Wales

⁶³ CLA Committee, RoP paragraph [53], 23 November 2015

⁶⁴ CLA Committee, RoP paragraph [65], 23 November 2015

⁶⁵ CLA Committee, RoP paragraph [32], 9 November 2015

⁶⁶ CLA Committee, RoP paragraph [39], 9 November 2015

explained in more detail the practical effect of these differences between their application in the two devolved nations, noting in particular that:

“... 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.”⁶⁷

84. We note the Presiding Officer’s analysis regarding the multiple ways in which the word “necessary” could be interpreted⁶⁸ and the First Minister’s suggestion that the potentially variable meaning makes the settlement “unstable, unclear, and, ripe for further legal challenge”.⁶⁹ As we have already noted, other stakeholders and witnesses have suggested that these tests could result in more legal challenges.⁷⁰

85. This is of particular concern in light of the evidence of Professor Thomas Glyn Watkin who told us:

“This begs the question of who is to decide whether a modification to private law is necessary for a devolved purpose, and more generally whether proposed modifications to private or criminal law have no greater effect than is necessary to give effect to a provision’s purpose. In that this is a statutory test concerning the powers of the Assembly, it would appear that it would be for the courts to determine these issues. The effect on policy development and the choice of means for giving effect to policies will probably be dire, as the risk of exceeding competence is likely in practice to further restrict the choices made regarding the enforcement or implementation of provisions. The purpose of the legislative process for making primary legislation is to allow the democratically-elected representatives of the people to decide what is necessary to achieve their aims. To restrict their choice undermines their rôle as primary law-makers.”⁷¹

86. The First Minister expressed similar views:

“The choice about whether it is necessary, appropriate or expedient to modify the private or criminal law for a devolved purpose is one

⁶⁷ DWB5 – Presiding Officer

⁶⁸ DWB5 – Presiding Officer

⁶⁹ DWB7 – First Minister

⁷⁰ For example Draft Wales Bill workshop, 13 November 2015; CLA Committee, RoP paragraph [31], 9 November 2015; CLA Committee, RoP paragraph [180], 9 November 2015

⁷¹ DWB1 – Professor Thomas Glyn Watkin

properly for the National Assembly, not for the courts, but this new limitation dramatically increases the likelihood of Assembly legislation being challenged in the courts.”⁷²

87. Professor Thomas Glyn Watkin also highlighted a more general point regarding the modification of private and criminal law:

“The function of a legislature is to make laws. The function of legislation is to make modifications to the law. To propose that a legislature may not make modifications to the law strikes at the heart of the reason for its existence. Legislation makes modifications to the law as a means of giving effect to policies. The choice of means is part of the choice of policy ... The proposed restrictions would limit that choice. This reduces the Assembly’s legislative competence.”⁷³

88. We share his concerns that the limitations on modifying private and criminal law open up the ground for a set of challenges on new issues⁷⁴ and that:

“... what we are dealing with here is not a legal challenge to the competence of the Assembly in terms of its legislative competence, but rather a different sort of power of intervention whereby there would be a power to intervene where it is felt that the Assembly has gone further than someone else thinks is necessary in order to carry out a policy by amending private law or criminal law.”⁷⁵

89. When asked whether the private citizen in Scotland has the basis to challenge on the necessity test that is there, Professor Watkin said:

“Well, in relation to whether or not a reserved matter has been trespassed upon, yes, but not in relation to private law and criminal law—not in relation to the means by which the Scottish Parliament chooses to give effect to its policies, other than in terms of whether or not human rights have been affected.”⁷⁶

Our view

90. The necessity tests have elicited considerable reaction amongst those who have provided us with evidence and it is fair to say that these tests have

⁷² DWB7 – First Minister

⁷³ DWB1 – Professor Thomas Glyn Watkin

⁷⁴ CLA Committee, RoP paragraph [82], 9 November 2015

⁷⁵ CLA Committee, RoP paragraph [82], 9 November 2015

⁷⁶ CLA Committee, RoP paragraph [84], 9 November 2015

received very little support. We have highlighted some of the concerns, as expressed above.

91. We welcome the Secretary of State's willingness to consider alternative approaches and welcome his intention to allow the Assembly to determine what is necessary but point out that the current draft Bill does not achieve this aim.

92. We believe that a suitable solution to overcoming the issues raised by the introduction of the four necessity tests, would be to amend the draft Bill to reflect the Secretary of State's view that it is a matter for the Assembly to decide what is necessary.

93. Even better would be to allow the Assembly to legislate in the four areas (i.e. legislation which applies otherwise than in relation to Wales, legislation which modifies the law on reserved matters, legislation which modifies private law, and legislation which modifies criminal law) as the Assembly considers appropriate to achieve policy objectives in devolved areas.

94. Such an approach would make it clear that it is the Assembly rather than the courts that is responsible for determining the legislative choices to deliver specific policy objectives. It would also ensure that the Assembly retains its accountability to the electorate.

95. That approach would also reflect the current competence of the Assembly under section 108(5) of the *Government of Wales Act 2006*, which provides (among other things) that Assembly legislation is within competence if it provides for the enforcement of Assembly legislation or it is otherwise appropriate for making Assembly legislation effective. This seems to chime with the Secretary of State's view (see paragraph 81) that decisions in these four areas should be left to the Assembly.⁷⁷

Minister of the Crown consents

96. Paragraph 8 of Schedule 7B to the draft Bill provides that a provision of an Assembly Act cannot remove or modify any function of a reserved authority, defined as a Minister of the Crown, government department or other public authority (other than a Welsh public authority).

⁷⁷ Decisions of the Assembly as to what is appropriate would always be subject to human rights law and EU law

97. The Secretary of State said:

“The Assembly will continue to be able to legislate in devolved areas without the need for any consent. The Assembly will be able to legislate in any area not specified as a reservation in Schedule 1 to the draft Bill and in those areas specified as exceptions to reservations. The Assembly will need the consent of UK Ministers to legislate about reserved bodies. It is surely right that UK Ministers consent when an Assembly Bill imposes functions on reserved bodies, just as Assembly consent is obtained when Parliament legislates in devolved areas.”⁷⁸

98. The Secretary of State developed these arguments further in evidence to the Committee,⁷⁹ although the views he put forward were not shared by the First Minister,⁸⁰ Professor Richard Wyn Jones⁸¹ or the Presiding Officer’s Chief Legal Advisor.⁸²

99. The Secretary of State also said:

“I accept there’s a lot of critique about the way the Minister of the Crown consents mechanism works, and also the necessity test, and I’ve said, ‘Look, I’m happy to look at those again.’. And if we can find alternative ways of delivering that, while preserving the principles that I feel are important to preserve in this Bill, around clarity, but also about respect”⁸³

and that if it was the strong view of the Committee he would be willing to look again at the issue, although it may not solve all the issues around consents.⁸⁴

100. Keith Bush QC highlighted that the approach being adopted is different from the existing situation in the *Government of Wales Act 2006* in three ways would:

- extend the protection beyond Ministers to include government departments and other public authorities (other than Welsh public authorities);

⁷⁸ DWB18 – Secretary of State for Wales

⁷⁹ CLA Committee, RoP paragraphs [83, 88-89], 23 November 2015

⁸⁰ CLA Committee, RoP paragraph [237], 16 November 2015

⁸¹ CLA Committee, RoP paragraphs [209-211], 9 November 2015

⁸² CLA Committee, RoP paragraphs [92-93], 16 November 2015

⁸³ CLA Committee, RoP paragraph [82], 23 November 2015

⁸⁴ CLA Committee, RoP paragraph [93], 23 November 2015

- remove the limitation to pre-commencement functions (i.e. those which existed before May 2011);
- remove the exception to the restriction which currently applies to provisions which are “incidental to, or consequential on, any other provision contained in the Act of the Assembly”.⁸⁵

101. Keith Bush QC went on to describe the potential impact of these differences as “far-reaching” for three reasons, all of which, in our view, give cause for concern.

102. First, they would prevent the Assembly imposing duties relating to devolved matters on government departments and other UK public authorities unless the UK Government provided the consent to do so.⁸⁶

103. Secondly, the protection of UK Government functions in devolved fields would apply not only to pre-commencement functions but also to ones re-enacted or even created under new legislation, thereby entrenching the protection.⁸⁷

104. Thirdly, it would no longer be possible for the Assembly to remove or modify Minister of the Crown functions in ways which were merely incidental or consequential to legislation on devolved matters, without the consent of the UK Government.⁸⁸

105. He indicated that an alternative approach, which in his view would be more logical, would be to replicate section 53 of the *Scotland Act 1998*. This model confers executive powers on Scottish Ministers throughout the devolved fields. Similar provisions exist in the *Northern Ireland Act 1998* so that in both cases:

“... (subject to a very small number of specific exceptions which are set out clearly in each devolution statute) the devolved governments exercise executive functions on exactly the same matters as those on which the devolved legislatures can legislate.”⁸⁹

106. The desire to see devolved legislative competence match devolved executive functions (as in other reserved models in the UK) was expressed by

⁸⁵ DWB3 – Keith Bush QC

⁸⁶ DWB3 – Keith Bush QC

⁸⁷ DWB3 – Keith Bush QC

⁸⁸ DWB3 – Keith Bush QC

⁸⁹ DWB3 – Keith Bush QC

others including the First Minister,⁹⁰ YourLegalEyes,⁹¹ Professor Laura McAllister and Dr Diana Stirbu.⁹²

107. Keith Bush QC also told us that, as well as having a Welsh model of devolution that was unnecessarily complex, difficult to operate and understand:

“Fundamental constitutional principles will continue to be undermined (and will, indeed, be further damaged) by the existence of a power for the UK *executive* (Government) to interfere in the affairs of the Welsh *legislature* (Assembly).”⁹³

108. Professor Richard Wyn Jones emphasised this point:

“What the business in relation to consent does is give power to the executive, and one of the things that has been characteristic of the devolution process in Wales, in my opinion, is that it’s placed too much power in the hands of the executive at the expense of the legislature. This business about consent—it’s power to Ministers, ... power that isn’t accountable.”⁹⁴

Our view

109. It is clear to us that the cumulative effect of the approach being adopted in relation to the Minister of the Crown consents is to reduce the Assembly’s legislative competence. This is because the draft Bill requires Ministerial consents to be provided in connection with functions that are not currently required under the existing devolution settlement.

110. We have noted the way the Secretary of State has compared the convention by which the Assembly must consent to the UK Parliament legislation on devolved matters⁹⁵ with the requirement in the draft Bill for the UK Government Ministers to consent to Assembly legislation affecting reserved authorities (i.e a Minister of the Crown, government department or other public authority (other than a Welsh public authority)).

⁹⁰ Letter from the First Minister to the Secretary of State for Wales, *Wales Bill: Ministers’ Powers*, 23 June 2015

⁹¹ DWB16 – YourLegalEyes

⁹² DWB15 - Professor Laura McAllister and Dr Diana Stirbu

⁹³ DWB3 – Keith Bush QC

⁹⁴ CLA Committee, RoP paragraph [210], 9 November 2015

⁹⁵ In essence the principle set out in clause 2 of the draft Bill

111. We do not see this as a fair comparison. The convention of Parliament legislating on devolved matters is based on legislature to legislature consent. It is different from the Assembly (legislature) having to seek the consent of the UK Government Ministers (executive) to legislate in an area that is already devolved. If the UK Government Ministers refuse consent, it amounts to an executive over-ruling a legislature in an area that is already devolved, which is constitutionally unacceptable. We accept that it would be appropriate to seek UK Ministerial consent in relation to non-devolved areas.

112. The particular problem arises because in Wales, unlike in Scotland and Northern Ireland, the extent of devolved legislative competence does not match the extent of devolved executive competence. Resolving this anomaly, by replicating sections 53 to 56 and 58 of the *Scotland Act 1998*, within the *Government of Wales Act 2006* would be a simple solution, which would contribute greatly to improving the clarity, simplicity and workability of the devolution settlement, as well as being in line with the principle of subsidiarity. It would ensure that the Welsh Government's legislative programme was not conditional on the consent of an executive in the form of UK Government Ministers.

113. The approach we suggest would also fit with the Secretary of State's underlying principle behind the draft Bill of not preventing the Assembly or the Welsh Government (in relation to secondary legislation) from legislating freely in devolved areas.

General and specific reservations and restrictions

114. We received considerable evidence on the general and specific reservations contained in the proposed new Schedule 7A to the 2006 Act, as well as the overlapping restrictions in the proposed Schedule 7B.

115. We have already described how the Secretary of State approached the development of the draft Bill. He also told us:

“The starting point was what the previous legislation said, which spelt out 20 devolved areas. That is the starting point. So, in a sense, if an area is silent, it hasn't been devolved, so that gives you a kind of indication of where the boundary was being drawn.”⁹⁶

116. He also felt the list of reservations was “too long” and “can create some element of complexity”, expressing a willingness to “do some work on that

⁹⁶ CLA Committee, RoP paragraph [31], 23 November 2015

together to try and bring that down”⁹⁷ and to look at suggestions for improving the list of reservations,⁹⁸ also going so far as to express surprise at some of the matters being reserved.⁹⁹

117. Dr Elin Royles told us:

“... the reservations and exceptions and complexities in the model outlined in the draft Wales Bill suggests that it differs greatly from the clarity of the Scottish ‘reserved powers’ model. At the most basic level, this is illustrated in comparing Schedule 5 of the Scotland Act 1998 outlining Reserved Matters which is 18 pages in length and Schedules 7A and 7B in the draft Wales Bill which are 41 pages in length. The level of complexity is clear in their framing as general reservations and their exceptions and specific reservations in Schedule 7A and general restrictions and general exceptions to the general restrictions to the Assembly’s legislative competence in 7B. Interpretation is likely to be su[s]ceptible to conflicting interpretations and potentially a high level of judicial dispute.”¹⁰⁰

118. Professor Laura McAllister and Dr Diana Stirbu noted that:

“... the Bill demonstrates an absence of positive expression of the principles behind a reserved model. Rather than a clear, strategic overview and rationalisation of competences at each level, the overly-long and detailed list of reservations resembles more a collation of specific reservations requested by individual Whitehall departments, with no thought or consideration as to the wider implications for the Assembly and the Welsh Government.

... The reservations detailed in Schedule 7B are excessive, with the spirit seemingly based more on retention than subsidiarity.”¹⁰¹

119. The Electoral Reform Society Cymru expressed similar sentiments:

“On the surface at least, the list of reserved powers appears to be less led by clear rationale and principles, than a fairly ad-hoc list based on competing interests within the government machinery. This suggests that the judgement of what is devolved appears to have been made to

⁹⁷ CLA Committee, RoP paragraph [14], 23 November 2015

⁹⁸ CLA Committee, RoP paragraph [116], 23 November 2015

⁹⁹ CLA Committee, RoP paragraph [114], 23 November 2015

¹⁰⁰ DWB29 – Dr Elin Royles

¹⁰¹ DWB15 – Professor Laura McAllister and Dr Diana Stirbu

simply reflect asymmetrical power relations between the Welsh and UK Governments. It is important that the devolved institutions are able to participate in the constitutional building process on an equal footing.”¹⁰²

120. The Bishops of the Church in Wales considered that:

“... the sheer number of reserved matters, with the various exceptions and interpretation provisions, make for an extremely incoherent and unwieldy system. Its complexity risks undermining the democratic process in Wales as the vast majority of people will simply not understand what power their Government has and how, therefore, they can hold it to account.”¹⁰³

121. YourLegalEyes said:

“I regret that there is no uniformity of expression of the reserved matters. The extent of some of the reserved matters which are defined by reference to existing enactments is not clear and consequently open to challenge as to their extent. This creates unnecessary opacity which goes against the aim of the Draft Bill to clarify the settlement and the powers of the Assembly.”¹⁰⁴

122. YourLegalEyes highlighted their concerns with trying to ascertain the subject matter of reservations that refer to parts of an Act. They noted that with one such use—Parts 1 to 6 of the *Anti-social Behaviour, Crime and Policing Act 2014*—the reference runs to 106 sections, with each part dealing with different aspects of law and order. They also highlight that any of the Acts referenced in the draft Bill may be subsequently amended or repealed.¹⁰⁵

123. The First Minister made a similar point:

“In very many places, individual reservations are stated as “The subject-matter of [specified Acts of Parliament]”. In the Welsh Government’s view, this drafting approach is defective; the reservation as drafted does not explain on its face exactly what is being reserved, and so does not achieve the simplicity and clarity which both we and the Secretary of State are seeking in the new settlement.”¹⁰⁶

¹⁰² DWB32 – Electoral Reform Society Cymru

¹⁰³ DWB17 – Bishops of the Church in Wales

¹⁰⁴ DWB16 – YourLegalEyes

¹⁰⁵ DWB16 – YourLegalEyes

¹⁰⁶ DWB7 – First Minister

124. He subsequently expanded on these points¹⁰⁷ and provided examples of his concerns around certain reservations and where it appeared devolution was being curtailed.¹⁰⁸

125. Professor Thomas Glyn Watkin explained how the number of reservations had the effect of reducing the Assembly's competence:

“This loss of competence results from the interplay of two factors. The first is the large number of reservations. The second is the use of the ‘relates to’ test to determine whether provisions fall foul of reservations. Whereas the ‘relates to’ test broadens the scope of the Assembly’s legislative competence under the conferred-powers model, it narrows it under the reserved-powers model. The greater the number of reservations, the greater the narrowing achieved by the test. This also makes the task of those developing policy which may require legislation for its implementation all the more difficult. They will be asked to determine whether anything they wish to do may relate to any one or more of 200+ reserved matters, as opposed to being asked to determine that their proposals relate to any one conferred subject.”¹⁰⁹

126. He also highlighted that what this:

“... may end up producing is laws that have to steer very carefully around all these restrictions unless they’re going to be open to challenge, with the result that complex competence results in highly complex legislation ... I worry, therefore, that, if we are moving into an area where there is again a complex set of rules about competence, the ultimate result is legislation that is difficult to understand, complex, and inaccessible to the citizen and possibly even to the citizen’s legal advisers.”¹¹⁰

127. As highlighted in paragraphs 57-58, we received detailed analysis from Assembly committees about the individual reservations, highlighting a number of concerns including a loss of competence in certain areas.

128. Huw Williams noted that the main focus for practitioners will be on the reserved subjects themselves.¹¹¹ He highlighted the difficulties in reserving

¹⁰⁷ CLA Committee, RoP paragraph [179], 16 November 2015

¹⁰⁸ CLA Committee, RoP paragraphs [175-177], 16 November 2015

¹⁰⁹ DWB1 – Professor Thomas Glyn Watkin

¹¹⁰ CLA Committee, RoP paragraph [90], 9 November 2015

¹¹¹ DWB24 – Huw Williams

the compulsory purchase of land, currently a silent subject,¹¹² which in his view represented a rolling back of the current position. He added:

“The UK Government’s solution seems to have involved identifying the “silent subjects” and converting them into reservations, but without any supporting analysis of the consequences of this approach. Surely the boundaries within each “silent subject” should be drawn along logical lines that will achieve the “clear and lasting” settlement that the Secretary of State has referred to in his foreword to the Draft Wales Bill.”¹¹³

129. During our workshop on 13 November 2015 we heard:

- concerns that the draft Bill adds to the complexity and inaccessibility of the law;
- frustration at the lack of explanation of the rationale for the reservations within the Explanatory Notes to the draft Bill; and
- concerns that it would be difficult to give clients of legal practitioners a coherent explanation of the law.

Our view

130. We agree with the Secretary of State that the list of reservations is too long.

131. We, like many witnesses and consultees, are concerned that the overall effect of the extensive number of reservations is to reduce the competence of the Assembly to make laws.

132. The complexity is increased by overlapping provisions. For example, section 108A(2)(c) provides that a provision is outside competence if it relates to reserved matters. The restriction in paragraph 1 of Schedule 7B would prevent the Assembly making modifications of the law relating to a reserved matter. This is a very obvious example of unnecessary complexity.

133. Similarly, courts and tribunals are amongst matters reserved in Part 1 of Schedule 7A, whilst the private and criminal laws that they apply appear as restrictions in Schedule 7B.

¹¹² A silent subject is considered to be any subject that is not referred to in Schedule 7 to the *Government of Wales Act 2006* as either a conferred subject or as an exception

¹¹³ DWB24 – Huw Williams

134. The extent of the reservations should develop from, and not reduce in any way, the competence provided in the 21¹¹⁴ subject areas contained in Part 5 of Schedule 7 to the 2006 Act. This would be consistent with the outcome of the 2011 referendum.

135. In addition, the reservations should be based on clearly identified principles, the most important of which is that of subsidiarity. The absence of a principled approach has contributed to the excessive number and complexity of the reservations.

136. We share the concerns of the First Minister and YourLegalEyes about references to specific Acts in Part 2 of Schedule 7A.

137. The decision to draft the subject matter of some reservations by reference to parts of other Acts adds further complexity to the Bill and uncertainty regarding the extent of the Assembly's legislative competence. It means that the draft Bill is currently incomprehensible without referring to a large number of other pieces of legislation. This is not an easy task for a legal practitioner never mind the interested citizen. We urge the Secretary of State to replace them with clear reservations on the face of the Bill.

Clause 30 – Consequential provision

138. Professor Thomas Glyn Watkin also highlighted a particular concern with clause 30 of the Bill, which gives the Secretary of State a 'Henry VIII power' to amend, repeal, revoke or otherwise modify enactments contained in primary legislation.¹¹⁵ The power extends to Assembly Acts and Measures but, in such circumstances, the exercise of that power requires approval of the draft statutory instrument containing it by both Houses of Parliament but not the Assembly.

139. The Welsh Council for Voluntary Action also expressed concern about clause 30.¹¹⁶

140. We share these concerns and believe that this clause is inconsistent with the principle enshrined in clause 2.

141. We believe that clause 30 needs to be reviewed, with a view to ensuring that a draft UK statutory instrument altering law which applies only in Wales

¹¹⁴ Subject 16A (Taxation) was added to the original 20 subject areas by section 6(9) of the *Wales Act 2014*

¹¹⁵ DWB1 – Professor Thomas Glyn Watkin

¹¹⁶ DWB26 – Wales Council for Voluntary Action

and was made by the Assembly, be also approved by the Assembly. Not to do so would in our view be constitutionally unsound.

Financial matters

142. The Finance Committee told us:

“... we are disappointed that the draft Bill does not provide the required competence to enable the Assembly to legislate in relation to the fiscal framework arising from the conferment of these new fiscal powers, particularly in relation to the devolved taxes. The need for such legislation was identified in our extensive inquiry into best practice budget processes and we think this is essential in affording the Assembly the ability to competently manage the new fiscal powers afforded by the Wales Act 2014.

... The Wales Act 2014 conferred specific powers on the Assembly in relation to fiscal devolution and we are very concerned that some of the provisions in the draft Bill will make legislating in relation to specific taxes problematic.”¹¹⁷

143. On 25 November 2015, the Chancellor of the Exchequer announced in his Spending Review and Autumn Statement that the UK Government intends to legislate to allow the devolution of some income tax powers to Wales without a referendum.¹¹⁸

144. Currently, the *Wales Act 2014* allows the Assembly to hold a referendum on whether it should be able to vary the rate of income tax in Wales by up to 10 percentage points. The Chancellor’s announcement means that the referendum requirement will be removed. The Secretary of State subsequently announced:

“I will amend Wales Bill to remove referendum block on Welsh tax powers. Wales needs a more accountable & effective Assembly #spendingreview”.¹¹⁹

145. We consider that in light of the Chancellor’s announcement, the Secretary of State should ensure that, in amending the draft Bill to remove

¹¹⁷ DWB6 – Finance Committee

¹¹⁸ Hansard, 5 November 2015, p1365

¹¹⁹ <https://twitter.com/walesoffice>, 25 November 2015

the referendum lock on Welsh tax powers, he also addresses the important matters raised by the Finance Committee.

146. We support the devolution of some income tax powers to the Assembly without the need for a referendum, but consider that the welcome responsibility and accountability this seeks to bestow on the Assembly stands in contrast to the number and level of reservations and restrictions contained in the draft Bill, which have been informed by a far less expansive approach.

147. The Assembly has the power to initiate the referendum that was intended to act as the trigger for the income tax powers devolved in the *Wales Act 2014*. We are now unclear on how or when these powers will be activated. We hope we are justified in believing that it is the Assembly that will now decide whether or not to activate these provisions.

148. Even with the devolution of some income tax powers, the block grant will still comprise the majority of the Welsh budget. In decentralised democratic states across the world, an equalisation grant is recognised as a key part in ensuring fairness of economic union. Thus, it is imperative that clarity is obtained on how the block grant will be adjusted in relation to income tax powers. We note that this is an issue which is the subject of a long running and complex negotiation between the Treasury and the Scottish Government in respect of devolution in Scotland.

4. A Consolidated Bill

Consideration

149. We have regularly commented on our preference for a consolidated approach when considering Welsh Government legislation. This was a key finding of our recent, comprehensive inquiry into *Making Laws in Wales*.

150. The Secretary of State has regularly highlighted the weaknesses of the previous pieces of Welsh devolution legislation:

“...two large flagship pieces of legislation for Welsh devolution. I would say both of them have been proved not fit for purpose....”¹²⁰

151. When we asked the Secretary of State about why he didn’t provide a consolidated Bill he told us:

“... the idea of a consolidated Act is one that we’ve discussed internally. I’ve discussed externally as well with various legal interests and lawyers. I have to say, there isn’t unanimity within the legal profession about the benefits of a consolidated Act. That’s something that we’re happy to consider for the future. But I think, at the moment, this is about implementing the very clear promises that we made in the run-up to the general election. There were promises that were in the St David’s Day announcement. They were promises backed up in our manifesto to move to a reserved powers model, akin to what Paul Silk recommended in the Silk commission report, and to give new powers to the Welsh Government and to the Welsh Assembly to build in new clarity to the devolution settlement. So, I think, to that extent the legislation is clear.”¹²¹

152. Professor Richard Wyn Jones noted that a:

“...sign of the haste is the fact that so much of the draft Bill amends previous legislation and that there is no consolidation. So, to read this, you have to have a copy of the 2006 Act, and compare the two pieces of legislation. As a constitution for Wales, this isn’t user friendly, shall we say.”¹²²

¹²⁰ House of Commons Welsh Affairs Committee, Oral Evidence, Pre-legislative scrutiny of the draft Wales Bill HC 449 Q1

¹²¹ CLA Committee, RoP paragraph [9], 23 November 2015

¹²² CLA Committee, RoP paragraph [192], 9 November 2015

Our view

153. In line with our previous clear statements, we would encourage consolidation. We would welcome further detailed consideration by the Secretary of State of the merits of re-drafting the Bill as a consolidating Bill. We believe that this would help deal with some of the issues of accessibility and complexity.

154. The preparation and scrutiny of a consolidated Bill would be conducted over a longer time span and would help to develop consensus and clarity on key constitutional concepts. We believe that fundamental constitutional law is best developed in this way.

155. Should the Secretary of State proceed without consolidating, we take the view that the resulting Act should be the subject of a subsequent consolidation exercise. The provisions of the new Act should be consolidated with those of the *Government of Wales Act 1998*, the *Government of Wales Act 2006* and the *Wales Act 2014*. We consider the most effective way forward in this task would be for the consolidating legislation to be prepared by the UK and Welsh Governments jointly, with the assistance of the Law Commission. We also consider that the consolidating Act should be made bilingually. Our continuing emphasis on the accessibility of legislation includes accepting that laws made in devolved areas should be accessible in both our official languages.

156. If the current draft Bill is not re-drafted as a consolidating Bill, we believe that it should be amended to include a clear commitment and process for consolidation before the end of the current Parliament. If the Secretary of State does not expect parliamentary time to be available for such a consolidation, consideration should be given to amending the draft Bill to include legislative competence for the Assembly to carry out such a consolidation.

5. Overall view

158. Legislation is the means by which it is often necessary to give effect to policy objectives to improve the lives and opportunities of people through a range of public services. This has been seen clearly in the Welsh Government's legislative programme for the Fourth Assembly which has led to important legislation being placed on the statute book: for example the *Human Transplantation (Wales) Act 2013*, the *Social Services and Well-being (Wales) Act 2014* and the *Housing (Wales) Act 2014*.

159. How legislation is constructed in Wales is dependent on the legislative competence given to the Assembly in statute by the UK Parliament. This explains why the constitution is continually debated and why after three attempts, it is vital that legislators use the forthcoming Wales Bill to strengthen the constitutional position.

160. As we have heard, the complexity of the boundary of legislative competence can affect the complexity of the laws made by the Assembly. As we made clear in our recent report on *Making Laws in Wales*, the clarity and accessibility of the law to citizens is paramount.

161. The prospect of a further Bill has therefore represented a golden opportunity not only to providing a lasting, durable settlement but also to ensure that Wales sits fairly and equitably within the United Kingdom, on a par with the devolved legislatures of Scotland and Northern Ireland.

162. Unfortunately, the weight of evidence received overwhelmingly opposes the way in which the draft Bill delineates the boundary of the Assembly's legislative competence.

163. The general consensus is that a roll-back of the Assembly's legislative competence is proposed in the draft Bill and it is hard to disagree with that assessment, particularly given that the Secretary of State's own analysis highlights five Acts of the Assembly that would have required UK Ministerial consent, with no guarantee that such consent would have been given.

164. It has been suggested that the purpose of the draft Bill is to overturn the decisions of the Supreme Court in relation to the existing settlement and conferred powers model. While that may be the approach from a Whitehall perspective and within Parliament's prerogative, if that is the intention it should be expressly stated in the interests of openness and transparency.

165. A number of witnesses and consultees have also questioned whether the draft Bill also overturns or reverses elements of the result of the 2011 referendum,¹²³ a point we note the Secretary of State denies.¹²⁴

166. Our principles of subsidiarity, clarity, simplicity and workability have in our judgement not been met. Equally, we consider that the draft Bill neither meets the Secretary of State's aims of a stronger, clearer and fairer devolution settlement for Wales that will stand the test of time, nor the view expressed in his evidence to us that "the new reserved powers model provides the clarity the current model lacks".¹²⁵

167. The exchanges of correspondence between the First Minister and the Secretary of State in advance and since the publication of the draft Bill have served to highlight the complexity and lack of clarity in the settlement.¹²⁶

168. The complexity of the draft Bill has been a recurring theme of the evidence we have received. The necessity tests blur the boundaries of the Assembly's legislative competence and hinder understanding for citizens rather than aid clarity. The provisions relating to Ministerial consents mean that the settlement is considerably more restrictive, not only adding to the complexity but also maintaining exceptionalism and irregular devolution within the UK.

169. The restrictions being imposed on the ability of the Assembly to modify criminal and private law run counter to the core functions of a legislature. The reservations introduce further complexity not only through their excessive volume and the lack of a coherent, principled approach to their creation, but also by the way in which some of them are drafted so that the competence of the Assembly is defined across multiple pieces of legislation, which could be amended in the future.

170. The welcome devolution of some income tax powers without the need for a referendum stands in contrast to the unnecessarily restrictive boundary of legislative competence currently delivered through the draft Bill.

171. Despite criticism of previous legislation by the Secretary of State, the draft Bill seeks to amend that same legislation rather than introduce a

¹²³ DWB1 – Professor Thomas Glyn Watkin; DWB7 and DWB7 (Supplementary) – First Minister; DWB23 – Institute of Welsh Affairs

¹²⁴ DWB18 – Secretary of State for Wales

¹²⁵ DWB18 – Secretary of State for Wales

¹²⁶ Available on the [Committee web pages](#)

consolidating Bill, again adding to the complexity and lack of clarity available to the citizen.

172. Taken together it is not entirely clear why Wales still merits a lesser, and much more complex, form of devolution than Scotland and Northern Ireland.

173. Problems with the draft Bill in our view derive from the process used to develop the model of devolution it contains. There appears to have been an over-reliance on Whitehall departments to shape the draft Bill; they have not had to consider the consequences and practical effects of their views and decisions for law-making in Wales. Equally, the Welsh Government and Assembly, who will have to work with the model on a daily basis, have been brought into the process too late.

174. In our view the draft Bill would have benefited considerably from the earlier and greater involvement of the Welsh Government and the Assembly, particularly as a consequence of their day-to-day practical experience of using the existing model of legislative competence to draft and scrutinise legislation that seeks to deliver coherent policy objectives and the will of the electorate.

175. While the Secretary of State has sought to deliver a reserved powers model, regrettably it has fallen short of being a workable model that is fit for purpose and one that Wales deserves as an equal partner within the family of nations within the United Kingdom.

176. Unfortunately, we also believe it falls short of the ambition he outlined for the settlement in his speech to the Assembly on 24 June 2015.¹²⁷

177. Nevertheless we note and welcome the Secretary of State's comment that the draft Bill could change significantly. We also welcome his comments that:

"I want us to work constructively together to get this document right. Where there are fundamental issues of principle that need to get addressed within it, let's do that. If it's a question of drafting and rephrasing things then we can look at that. If it's a question of how we simplify and make the list of reservations more concise to give more clarity to the workability of the devolution settlement then we have an opportunity to do that."¹²⁸

¹²⁷ Record of Proceedings, 24 June 2015

¹²⁸ CLA Committee, RoP paragraph [130], 23 November 2015

178. While some members of the Committee have doubts about whether the draft Bill is salvageable, collectively we believe that it is worth attempting. The changes we suggest have been put forward in response to the Secretary of State's request for ideas and a desire to work constructively together.

Conclusions

179. The draft Bill, while containing welcome elements, is not yet in a state to command consensus. We believe that it should not proceed until it is significantly amended.

180. One approach would be to pause proceedings and use the evidence gathered in scrutinising the draft Bill to prepare a consolidating Bill in close collaboration with key players: the Assembly, Welsh Government, legal practitioners, civic society and the UK Parliament.

181. Should the UK Government proceed with the current timetable, the draft Bill needs to be amended so that the Bill introduced in the UK Parliament contains the following:

- the removal of the necessity test or its replacement by a test based on appropriateness;
- a system for requiring Minister of the Crown consents that reflects the model in the *Scotland Act 1998*;
- a significant reduction in the number and extent of specific reservations and restrictions consistent with a mature, effective and accountable legislature that is to acquire income tax powers through the same Bill;
- a distinct jurisdiction in which Welsh Acts extend only to Wales;
- a system in which Welsh Acts modify England and Wales law as appropriate for reasonable enforcement;
- a clear commitment that a bilingual consolidation be carried out during the current Parliament.

182. Whichever timeframe he adopts, in view of the Secretary of State's clearly stated wish for collaboration and partnership working, we believe he should set up a Constitutional Working Group involving the key players we refer to above to produce the lasting, durable constitutional settlement for Wales that its citizens deserve.

183. If the advice contained in paragraph 181 is followed, the exceptionalism that has marked the scheme for Welsh devolution will end and the Assembly would bear much closer resemblance to the Scottish Parliament and Northern Ireland Assembly. This would add to the coherence of the UK's constitutional structures in that reasonable asymmetry to accommodate particular circumstances in each nation would not tip over into exceptionalism that inevitably undermines basic constitutional principles.

Annex 1 – Stakeholder event, 25 September 2015 – List of attendees

Gill Bell, Marine Conservation Society

Ann Beynon, Severn Trent Water

Jessica Blair, Institute of Welsh Affairs

Ben Davies, Arriva Trains Wales

Scott Fryer, Wildlife Trusts Wales

Emyr Lewis, Blake Morgan LLP

Colin Nosworthy, Cymdeithas yr Iaith Gymraeg

Rachel Pewset, Traveline Cymru

John Pockett, CPT Cymru

Kay Powell, The Law Society

Oriel Price, Tidal Lagoon Power

Neville Rookes, Welsh Local Government Association

Michael Vaughan, Arriva Trains Wales

Professor Thomas Glyn Watkin, The Learned Society of Wales

Steve Boyce, Senior Research Officer

Gwyn Griffiths, Senior Legal Adviser

Elfyn Henderson, Senior Research Officer

Tom Jackson, Clerk, Scrutiny Support Team

Llinos Madeley, Clerk, Health and Social Care Committee

Gareth Price, Clerk, Enterprise and Business Committee

Naomi Stocks, Clerk, Constitutional and Legislative Affairs Committee

Alys Thomas, Senior Research Officer

Chris Warner, Head of Policy and Legislation Committee Service

Gareth Williams, Clerk, Constitutional and Legislative Affairs Committee

Annex 2 – List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence, and correspondence referred to in this report, can be viewed in full on the [Committee's](#) webpages:

<i>Organisation</i>	<i>Reference</i>
Professor Thomas Glyn Watkin	DWB1
Emyr Lewis	DWB2
Keith Bush QC, Honorary Professor, Swansea University	DWB3
Welsh Language Commissioner	DWB4
Presiding Officer	DWB5
Chair, Finance Committee	DWB6
First Minister	DWB7
Chair, Public Accounts Committee	DWB8
Auditor General for Wales	DWB9
Chair, Enterprise and Business Committee	DWB10
Chair, Communities Equality and Local Government Committee	DWB11
Chair, Environment and Sustainability Committee	DWB12
Chair, Health and Social Care Committee	DWB13
Chair, Children, Young People and Education Committee	DWB14
Professor Laura McAllister, University of Liverpool and Dr Diana Stirbu, London Metropolitan University	DWB15
YourLegalEyes	DWB16
Bishops of the Church in Wales	DWB17
Secretary of State for Wales	DWB18
Chwarae Teg	DWB19
Royal Town Planning Institute Cymru	DWB20
Wales Environment Link	DWB21
The Learned Society of Wales	DWB22
Institute of Welsh Affairs	DWB23
Huw Williams, Lead Partner, Public Law, Geldards LLP	DWB24
Cymdeithas yr Iaith Gymraeg	DWB25
Wales Council for Voluntary Action	DWB26
Civic response (multiple signatories)	DWB27
The Electoral Commission	DWB28
Dr Elin Royles, Aberystwyth University	DWB29
Norman Bancroft	DWB30
Equality and Human Rights Commission	DWB31

Electoral Reform Society Cymru	DWB32
Dŵr Cymru Welsh Water	DWB33
Undeb Cenedlaethol Athrawon Cymru	DWB34

Annex 3 – List of oral evidence sessions

9 November 2015	Professor Thomas Glyn Watkin Emyr Lewis Professor Richard Wyn Jones, Wales Governance Centre Professor Roger Scully, Wales Governance Centre
16 November 2015	Presiding Officer First Minister
23 November 2015	Secretary of State for Wales

Annex 4 – Stakeholder workshop, 13 November 2015 – List of attendees

David Melding AM, Chair of Constitutional and Legislative Affairs Committee

Keith Bush QC, Honorary Professor, University of Swansea

David Hughes, Barrister, 30 Park Place

Professor Thomas Glyn Watkin

Professor Tim Jones, University of Swansea

Huw Williams, Lead Partner, Public Law, Geldards LLP

Justin Amos, Criminal Barrister, Apex Chambers

Aled Edwards, Cytun

Paul Smith, RSPCA

Kay Powell, Law Society

Sarah Beasley, Clerk, Communities, Equality and Local Government
Committee

Steve Boyce, Senior Research Officer

Bethan Davies, Clerk, Finance Committee

Gareth Howells, Legal Services

Naomi Stocks, Clerk, Constitutional and Legislative Affairs Committee

Chris Warner, Head of Policy and Legislation Committee Service

Siân Wilkins, Head of Chamber and Committee Service

Gareth Williams, Clerk, Constitutional and Legislative Affairs Committee