



Legal and Research Briefing
**The Wales Bill: Reserved
Matters and their effect on the
Assembly's legislative
competence**

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Research Service

The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

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Legal and Research Briefing

The Wales Bill: Reserved Matters and their effect on the Assembly's legislative competence

The **Wales Bill** was introduced in the House of Commons on 7 June 2016 and accompanied by a **statement by the Secretary of State for Wales, Alun Cairns MP**. This paper focuses on evidence of whether the Bill causes “roll-back” of the Assembly's legislative competence.



1. Introduction

The **Wales Bill** was introduced in the House of Commons on 7 June 2016. The Bill amends other Acts of Parliament, principally the *Government of Wales Act 2006*.

This Briefing aims to:

- Describe a key aspect of the Assembly’s current competence;
- Explain briefly how that key aspect would change under the Wales Bill;
- Set out some views expressed by external commentators on that change; and
- Illustrate the change with examples.

2. The changes proposed by the Bill to the Welsh devolution settlement

The current settlement

The current settlement is based on a “conferred powers” model. This means that, among other things, Assembly legislation **must relate to a subject** listed in Schedule 7 to the *Government of Wales Act 2006* (called “devolved subjects” in this Briefing). Devolved subjects are listed under 21 headings and include, for example, health services, social welfare and housing.

Assembly Acts such as the *Human Transplantation (Wales) Act 2013*, the *Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015*, the *Renting Homes (Wales) Act 2016* and the *Regulation and Inspection of Social Care (Wales) Act 2016* all relate to one or more of the devolved subjects.

Schedule 7 also lists **exceptions**. An Assembly Act **must not relate to an exception** (even if it also relates to a devolved subject). Here are a few examples of exceptions in Schedule 7

- Abortion
- Broadcasting
- Consumer Protection
- Road traffic offences
- Betting, gaming and lotteries
- Social security
- Licensing of sale and supply of alcohol

Exceptions are listed under various subject headings, but apply to all of the subjects in Schedule 7, regardless of the heading under which they happen to appear. As an example, “oil and gas” is listed as an exception under “Economic Development”. However, it equally applies to all subjects in Schedule 7, notably “Environmental protection”.

Then, there are subjects that are not listed in Schedule 7. These are not devolved subjects nor are they exceptions. For example, “defence of the realm”, “immigration” and “employment” are not listed

in Schedule 7. Schedule 7 is silent on these matters, and so they have come to be known as **silent subjects**.

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

Therefore, **provided that Assembly legislation fairly and realistically relates to a devolved subject** it does not matter that it also relates to a silent subject. But it does matter if it relates to an exception, because an Assembly Act is not law if it relates to an exception.

It is also important to know that the expression “relates to” is not as simple as it may, at first, appear. It has a special meaning in the *Government of Wales Act 2006*:¹ whether Assembly legislation relates to a subject (or not) depends primarily on its **purpose**. But its effect, and anything else relevant, also have to be looked at. Moreover, the Supreme Court has said that, in order to “relate to” a subject, the Bill must have **more than a loose or consequential connection** with it.²

3. The Wales Bill

The Wales Bill turns the current settlement into a “reserved powers” model. To put it very simply, this is the reverse of a “conferred powers” model. In a reserved powers model the Assembly can pass legislation **provided it does not relate to a reserved matter** (i.e. a matter which is reserved to the UK Parliament). Therefore, the list of reserved matters is important; the longer the list of reservations, the more things the Assembly will not be able to do. Devolution in Scotland and Northern Ireland is already based on a reserved powers model.

The number and breadth of reservations

Evidence heard by the Assembly’s Constitutional and Legislative Affairs Committee indicated that aspects of the Bill had improved on the draft Wales Bill which was published by the Wales Office in October 2015. Stakeholders giving evidence included Emeritus Professor of Law, Professor Thomas Glyn Watkin, who was formerly First Welsh Legislative Counsel, leading the Welsh Government’s team of lawyers responsible for drafting government Bills.

Professor Watkin argued that, while the number of reservations had been reduced from those in the draft Bill, this is being done “...in a way that ensures that there is no greater space to legislate”. He said:

I think the best example of this, perhaps, is section G, where there were five sections, but now there is just one, but those sections were, “G1 Architects”, “G2 Health Professions”, “G3 Auditors”; you now only have G1, and G1 is “Architects, auditors, health professionals”. They’re all included under the same heading. So, you haven’t enhanced your powers.

¹ Section 108(7).

² See, for instance Imperial Tobacco Limited –v- Lord Advocate [2012] UKSC 61 and Agricultural Sector (Wales) Bill [2014] UKSC 43

During consideration of the Wales Bill in the House of Commons, on behalf of the Labour Opposition, Nia Griffith MP noted that that the list of reservations in the Bill “runs to 34 pages” and argued that the justification for reserving some subjects was far from clear.

Plaid Cymru MP, Hywel Williams, argued that moving to a reserved powers model should also be about changing the attitude towards devolution. It ought to be, he argued, for the UK Government to justify why a subject is reserved, rather than justifying why a subject should be devolved.

Professor Richard Rawlings, Professor of Public Law at the University College London, said the feeling was that “Westminster was not being sufficiently generous to Wales in terms of reservations ...”

The Secretary of State for Wales, Alun Cairns MP responded to criticisms about the reservations:

On the list of reservations, simply measuring something according to the number of pages is not necessarily the most sensible thing to do. In the Scotland Act 1998, reservations are listed according to subject matter with a broad headline. A requirement in the Wales Bill is to make the list far more specific, so exceptions to the reservations are included, which naturally lengthens it. I hope that the hon. Gentleman accepts the spirit in which those reservations are defined, to prevent our ending up in court challenging each other.

The “relates to” test

Under the Wales Bill, the “relates to” test is again used. But in this case, if the proposed legislation has more than a **loose or consequential** connection with a reserved subject it will be **outside competence** (rather than within competence as it is under the current model).

Another important difference from the current settlement is that Assembly legislation will not be able to relate to a reserved matter, even if it also relates to a non-reserved area. If it relates to a reserved matter then it will **always** be outside competence³.

In addition to the “relates to” test, the Wales Bill proposes a number of other tests which must be passed for an Assembly Bill to be within competence. Some of these tests are new – i.e., they are additional to the restrictions on current competence. Others lift certain of the existing restrictions.

Because this briefing concentrates on “roll back”, it is not intended to provide here an explanation of each test. Taking all of this together, there is a considerable weight of opinion that the Wales Bill reduces or “rolls-back” the Assembly’s legislative competence in a number of ways.

Evidence

This proposition that the Bill “rolls back” the Assembly’s legislative competence is supported by, among others, Professor Thomas Glyn Watkin. He pointed out that under the Bill, as an example, the law on employment will be reserved (see below under example 1).

Further examples of roll-back have been identified by the Assembly’s Legal Service and are set out below.

³ [Imperial Tobacco Limited –v- Lord Advocate \[2012\] UKSC 61](#)

Example 1: employment as a reservation

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

To give a hypothetical example: the Assembly might wish to legislate on wages and working times in the social care sector. Under the current settlement, this would be within competence if it fairly and realistically related to social welfare (e.g. if the purpose and effect of the legislation was to improve the care of vulnerable persons and older persons by, for example, ensuring that care-workers were not incentivised to cut care visits short by the way in which their wages or working hours were calculated). It would not matter if the legislation also related to employment.

However, under the Wales Bill, if the legislation had more than a **loose or consequential** connection with employment, then it would relate to a reserved matter and would be **outside competence**. Even if the legislation also related to a non-reserved area (such as social welfare) it would still be outside competence.

Example 2: The criminal law in respect of the sexual exploitation of children

In the context of sexual exploitation of a child, the definition of “sexual exploitation” in the *Sexual Offences Act 2003* includes “recording” indecent images of a child. There is a consensus that the law needs updating to cover “streaming” and “transmitting” indecent images of a child.

This is within the current legislative competence of the Assembly because it relates to “the protection and well-being of children” (a subject in Schedule 7) and there are no relevant exceptions.

Under the Wales Bill, however, Assembly legislation would not be able to modify or create a sexual offence. So, amendments of this nature would be outside the Assembly’s competence under the new settlement.

Example 3: consumer protection

The current settlement includes an exception for “consumer protection, including the sale and supply of goods to consumers, consumer guarantees, hire purchase, trade descriptions, advertising and price indications.....”

These subjects are already outside the Assembly’s competence. The Wales Bill puts more subjects under this heading out of the Assembly’s reach by including a more detailed description of

“consumer protection” as a reservation. For example, the “supply of services to consumers” would be outside the Assembly’s competence under the new Bill. This would cast doubt on the Assembly’s ability to legislate in order to regulate service-providers such as tattooists, as was proposed by the Public Health (Wales) Bill (introduced, but defeated, in the Fourth Assembly).

Example 4: dogs out of control

The Assembly can currently legislate about dangerous dogs or “dogs out of control” for the purposes of devolved subjects such as “Animal health and welfare”, “social welfare” or “the protection and wellbeing of children”.

The Wales Bill would reserve “dogs out of control”, taking this subject outside the Assembly’s competence.

Example 5: environmental nuisance

The Assembly currently has competence in relation to environmental nuisance. The Wales Bill will cast doubt on the Assembly’s competence to legislate on nuisances such as dog fouling, excessive noise and the control of Japanese knotweed, because of the breadth of the new reservation on Anti-Social behaviour.

Example 6: compulsory purchase

Under the current settlement, “compulsory purchase” is a “silent subject”. So, the Assembly could legislate in this area if the Bill also fairly and realistically related to a subject in Schedule 7 of the

Government of Wales Act 2006, such as Town and country planning or Economic regeneration. Under the Wales Bill as it currently stands, compulsory purchase will be reserved.

Example 7: knives

The Assembly could currently legislate in relation to knives, provided that the purpose of the Assembly Bill fairly and realistically related to one of the conferred subjects, such as prevention of injury, protection of children and young adults, or education.

In other words, “knives” is a silent subject. Under the Wales Bill, “knives” will be reserved. So, for example, the Assembly would probably not have the legislative competence to pass a Bill seeking to regulate further the carrying of knives in schools.