



**BRIEFING PAPER**

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# Wales Bill 2016-17

By Paul Bowers

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Contributing Authors:

- Jack Simson Caird: body of Welsh law
- Isobel White / Neil Johnston : elections
- Louise Butcher: road transport, harbours and ports
- Louise Smith / Ed Potton / Ed White: energy
- Oliver Bennett: marine licensing
- Doug Pyper: equal opportunities

## Summary

The [Wales Bill 2016-17](#) [Bill no. 5] was published on Tuesday 7 June 2016. Its First Reading in the House of Commons took place that day. Its Second Reading is scheduled for Tuesday 14 June 2016. [The Bill](#), and [its explanatory notes](#), are available on the Parliamentary website.

The Bill will give effect to the Government's policy of establishing a 'reserved powers' model for devolution to Wales. This arose from the second report of the Silk Commission, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), published in March 2014. Stephen Crabb MP, then Secretary of State for Wales, announced the Coalition Government's intention to pursue a reserved powers model of devolution for Wales [in a speech on 17 November 2014](#). This took place in the context of the agreement of additional powers for the Scottish Parliament after the Scottish independence referendum of September 2014.

This announcement was followed by an extended negotiation with the four main political parties in Wales, known as the '[St David's Day process](#)', which concluded on 27 February 2015. An agreed document, entitled [Powers for a purpose: towards a lasting devolution settlement for Wales](#), was published on the same day.

To give effect to the St David's Day agreement, a [draft Wales Bill](#) was published on 20 October 2015. This Bill was extensively critiqued by [a pre-legislative scrutiny report](#) published by the Welsh Affairs Committee, and by reports from the [Welsh Governance Centre and the Constitution Unit](#), the [Constitutional and Legislative Affairs Committee](#) in Cardiff Bay.<sup>1</sup>

The then Secretary of State, Stephen Crabb MP, announced a 'pause' in the expected timeline for the introduction of the Bill. On 29 February 2016, Mr Crabb announced considerable changes would be made to the draft Bill:

Speaking at a press conference in Cardiff Bay, one year on from the St David's Day Agreement, Stephen Crabb announced that he will:

- Remove the so-called 'necessity test', so that the Assembly will be able to change the law to help enforce its legislation without first applying the test
- Reduce the number of reservations in the Bill
- Remove the general restriction on the Assembly modifying a Minister of the Crown function in devolved areas<sup>2</sup>

Shortly after, on 7 March 2016, the Government of Wales published an alternative draft '[Government and Laws in Wales Bill](#)', together with an [explanatory summary](#). This Bill differed considerably from the draft Wales Bill.

The Bill that has now been introduced into the House of Commons differs from the draft Bill published in October 2015. The nature of the powers that were to be reserved under the draft Bill has been adjusted, and the use of the 'necessity tests' to govern the reach of the Assembly's legislative powers was scaled back.

The Bill formally extends to the whole of the United Kingdom. The Explanatory Notes state:

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<sup>1</sup> Welsh Affairs Committee, [Pre-legislative scrutiny of the draft Wales Bill](#), HC-449 2015-16, 2016

<sup>2</sup> Wales Office, ["Amended Wales Bill will deliver a stronger devolution settlement"](#), 29 February 2016

The Bill resets the devolution boundary in Wales, whilst also devolving further powers to the Welsh Assembly and the Welsh Ministers. As such, the Bill is of constitutional significance to the whole of the UK. The UKG's view is that, because of the importance of the Bill to the UK's constitution, the majority of the clauses have more than a minor or consequential effect on Scotland and Northern Ireland; they go to the heart of where the power to legislate rests in the UK.<sup>3</sup>

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<sup>3</sup> Wales Office, [Wales Bill: Explanatory Notes](#), 2016, p.84

# 1. Background

The *Wales Bill* is the outcome of several recent political developments. After the Scottish independence referendum in September 2014 the Prime Minister made a commitment to review devolution in the round. In respect of Wales, this gave rise to the St David's Day Agreement for further devolution. This itself was a reaction to the second report of the [Commission on Devolution in Wales](#) (the Silk Commission). Equally, the [Supreme Court judgment](#) in respect of the *Agricultural Sector (Wales) Bill* had transformed the understanding of the powers devolved to Wales.

Prior to these events, there had long been a desire to create a lasting set of arrangements to put an end to the relatively frequent changes to Welsh devolution. There was pressure from the Welsh Government, especially over the question of the single England and Wales legal jurisdiction, and from the political class more generally for greater clarity and certainty about Welsh devolution.

## 1.1 Development of devolution

A stated aim of the St David's Day Agreement was that this Wales Bill should create a durable and long lasting devolution settlement. In the Foreword to the [Agreement](#) the Secretary of State confirmed:

I want to establish a clear devolution settlement for Wales which stands the test of time. I firmly believe that there should always be a clear purpose for devolving new powers to the Assembly, and that the Assembly and the Welsh Government should use any new tools and levers to put Wales in a stronger position to develop as a nation.

The devolution arrangements for Wales have been adjusted a number of times, including three main previous pieces of primary legislation: one of these contained two different models of devolved powers. The first was enacted after a referendum in 1997, when Wales initially gained devolved governance under the [Government of Wales Act 1998](#). The level of devolution in Wales was comparatively limited, when compared with the settlement for Scotland. The powers devolved were effectively those previously exercised by the Secretary of State for Wales.

New arrangements were established under the [Government of Wales Act 2006](#). Under this Act, Wales gained the power to make 'measures' on a relatively compact set of matters. The reach of the Assembly's legislative power could be expanded either by UK primary legislation being drafted to devolve new powers to Wales when creating them for England or the UK; or by means of special orders that put new matters under the remit of the Assembly. Additionally, the 2006 Act included an option for the Assembly to take on primary law-making powers over a larger set of matters, which was to be subject to approval in a referendum. This change was approved in a referendum across Wales in March 2011, and came into force after the Assembly elections in May 2011.

The third main piece of legislation was the [Wales Act 2014](#). This implemented the recommendations made in the first report of the Silk Commission on financial matters, including devolving stamp duty and landfill tax.<sup>4</sup> A power was created to reduce income tax by 10 pence in the pound and introduce a Welsh rate of income tax to replace the 10 pence reduction. The 2014 Act allowed these powers over income tax to be devolved only if they were approved in a referendum, the calling of which was to be subject to UK Parliamentary approval and a two-thirds majority in the Assembly. (The Bill will remove this requirement for a referendum: see section 2.5 below.)

The 2014 Act also changed the term of the Assembly to five years, allowed candidates to stand in constituencies and regions at the same time, and removed the possibility of sitting both in the Assembly and in the House of Commons.

The Commons Welsh Affairs Committee summarised the impact of these previous changes in their report on the Draft Wales Bill published in 2016:

The story of devolution in Wales is a story of constitutional fluidity. Since 1997, there have been three pieces of devolution legislation, a move from secondary legislative to primary legislative powers (and within that, a move from one model of primary legislative powers to another). In the space of sixteen years since the first Assembly election, the National Assembly for Wales has been transformed from a body corporate, tasked with passing secondary legislation, to a legislature which, from 2018 onwards, will have the power to levy stamp duty land tax, landfill tax and the aggregates levy.<sup>5</sup>

## 1.2 Events leading up to the Bill

### Silk Commission

In 2012 the Government set up a Commission on Devolution in Wales, also known as the Silk Commission, which was broadly inspired by the Calman Commission in Scotland. The Silk Commission made two reports, one on financial matters, and one on the devolution arrangements.

The financial recommendations gave rise to the *Wales Act 2014*, which devolved stamp duty and landfill tax, and which created the possibility that some powers over income tax could be devolved if approved in a referendum (the Bill will remove this requirement).

The second report, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), was published in March 2014. This proposed a 'reserved powers' model of devolution for Wales, further devolution of a series of powers, and the removal of some restrictions on the Assembly's running of its internal affairs.

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<sup>4</sup> See Welsh Affairs Committee, [Pre-legislative scrutiny of the Draft Wales Bill](#), HC-962 2013-14, 27 February 2014

<sup>5</sup> Welsh Affairs Committee, [Pre-legislative scrutiny of the Draft Wales Bill](#), HC449 2015-16, 24 February 2016.

## The Supreme Court case of the Agricultural Sector (Wales) Bill [2014]

In July 2014, the Supreme Court ruled on the *Agricultural Sector (Wales) Bill* (sometimes referred to as the *Agricultural Wages* case).<sup>6</sup> Its judgment transformed the understanding of what matters were devolved to Wales.

The *Government of Wales Act 2006* specified devolved subjects, and the UK Government argued that anything not so specified was not devolved. However, the Act also provided some exceptions to the devolved subjects. The Supreme Court held that a Welsh Bill relating to a devolved subject could also touch on a subject not explicitly devolved, so long as that subject was not listed in the exceptions to that particular devolved subject.

According to Ann Sherlock, senior lecturer in law at Aberystwyth University, the ruling represented “a very significant clarification” of the Assembly’s competence.<sup>7</sup>

The case arose because the Attorney General had referred the *Agricultural Sector (Wales) Bill* to the Supreme Court, under his powers in Section 112 (1) of the 2006 Act. The Attorney General argued, on behalf of the United Kingdom Government, that the Bill was outside of the legislative competence of the Assembly. The Attorney General’s view was that the Bill related to “employment” and “industrial relations”, neither of which was devolved under the 2006 Act. The Welsh Government argued that the Bill related to “agriculture”, which the 2006 Act lists as a subject upon which the Assembly can legislate.

Lord Reed and Lord Thomas gave a joint lead judgment, with which the other three Justices of the Supreme Court agreed,<sup>8</sup> which ruled that the Bill was within the competence of the National Assembly. Lords Reed and Thomas found that the Bill related to “agriculture”.<sup>9</sup> Their judgment rejected the Attorney General’s argument that the Bill’s engagement with subjects that were not explicitly devolved rendered the Bill outside the legislative competence of the National Assembly. This was because the subject heading “agriculture” included some exceptions, and these did not cover the employment matters in the Bill:

Where however there is no exception, as in the present case, the legislative competence is to be determined in the manner set out in section 108. Provided that the Bill fairly and realistically satisfies the test set out in section 108(4) and (7) and is not within an exception, it does not matter whether in principle it might also be capable of being classified as relating to a subject which has not been devolved. The legislation does not require that a provision

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<sup>6</sup> *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43

<sup>7</sup> A Sherlock, ‘The Continuing Development of Devolution in Wales’, *European Public Law* (2015) p433

<sup>8</sup> Lord Neuberger (President), Lady Hale (Deputy President) and Lord Kerr

<sup>9</sup> *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43 paras 49-54

should only be capable of being characterised as relating to a devolved subject.<sup>10</sup>

The Attorney General's argument was problematic, according to Lords Reed and Thomas, as it required the Court to add to the exceptions specified in Schedule 7 of the 2006 Act. Such an approach would "give rise to an uncertain scheme that was neither stable nor workable".<sup>11</sup> They explained that the Assembly could legislate for subjects not specified as exemptions, known as the "silent subjects",<sup>12</sup> as long as the Bill's main purpose was within one or more of the subjects conferred upon the Assembly.

## Response to the judgment

Neither the UK Government nor the Welsh Government felt it satisfactory for the reach of the Assembly's law making powers to be resolved in the courts. The Secretary of State for Wales, Stephen Crabb, responded to the judgment by indicating his dissatisfaction with the role of the Court under the conferred model and made the case for reform:

First, there is the overarching question of which model of devolution is right for Wales. We all know the problems with the current "conferred" model of devolution. It's complicated. It means the devolution boundary is often blurred and indistinct. And, crucially, it has meant laws that should be decided in Wales being decided instead in the Supreme Court. That cannot be right.

I want Welsh devolution to be clear. I want people to be able to understand who is responsible for what. And I want Welsh laws to be decided by the people of Wales and their elected representatives, not by lawyers in London.

That is why I have asked my Office to work on a reserved powers framework for Wales - the model in place in Scotland. It means a different approach for Welsh devolution. Instead of defining what's devolved, as the current settlement does, it would define the powers reserved to the UK Parliament. The default will be that anything not reserved is devolved.<sup>13</sup>

The Welsh First Minister, Carwyn Jones, responded to the judgment by saying:

This is a significant judgment of the Supreme Court which goes some way to clarifying the complexities of the current devolution settlement. It is the second unanimous judgment in our favour, and a clear vindication of the way our relatively new Welsh law-making powers are being interpreted by the Welsh Government. [...]

But we cannot continue to have Bill after Bill passed by our democratically-elected Assembly, then referred to the Supreme Court, with all the time, cost and uncertainty that involves.<sup>14</sup>

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<sup>10</sup> Ibid para 67

<sup>11</sup> Ibid para 68

<sup>12</sup> See for example Wales Governance Centre 'Challenge and Opportunity: The Draft Wales Bill 2015' (2016) p22

<sup>13</sup> Wales Office, Press Release, [Secretary of state sets out long term vision on devolution](#), 17 November 2014.

<sup>14</sup> Welsh Government Press Release, [First minister welcomes "significant" Supreme Court ruling](#), 9 July 2014.



## Prime Minister's comments following Scottish referendum

On 19 September 2014 the Prime Minister announced the establishment of the Smith Commission, to consult with the political parties and others and take forward devolution commitments for Scotland made shortly before the referendum ('the Vow'). The Prime Minister also stated:

It is absolutely right that a new and fair settlement for Scotland should be accompanied by a new and fair settlement that applies to all parts of our United Kingdom. In Wales, there are proposals to give the Welsh government and Assembly more powers. And I want Wales to be at the heart of the debate on how to make our United Kingdom work for all our nations.

So, just as Scotland will vote separately in the Scottish Parliament on their issues of tax, spending and welfare, so too England, as well as Wales and Northern Ireland, should be able to vote on these issues and all this must take place in tandem with, and at the same pace as, the settlement for Scotland.

I hope that is going to take place on a cross-party basis. I have asked William Hague to draw up these plans. We will set up a Cabinet Committee right away and proposals will also be ready to the same timetable. I hope the Labour Party and other parties will contribute.

### 1.3 St David's Day Agreement, February 2015

Whilst the Smith Commission was underway in Scotland, Stephen Crabb met with the political parties in Wales, from November 2014, to discuss main areas of agreement for future devolution. On 27 February 2015 the Government published a framework agreement ('the St David's Day Agreement'), entitled [\*Powers for a purpose: Towards a lasting devolution settlement for Wales \(Cm 9020\)\*](#).

In the St David's Day Agreement the majority of the recommendations made in the [second report of the Silk Commission](#) were agreed by all parties (some recommendations involved more than one point). Fourteen recommendations were noted as "No consensus", in whole or part. Many of these were related to aspects of policing and criminal justice.

The UK Government reinforced its commitment to implementing a reserved powers model for Wales, as recommended in the Silk Report, and set out progress made on this and areas still to be considered.

The Secretary of State set out the main recommendations in the St David's Day Agreement as:

**Energy projects** up to 350 megawatts should be decided by Welsh Ministers. This would include most onshore wind farms and renewable technologies to harness tidal power.

The National Assembly should have powers over the **development of ports** to improve Wales's transport infrastructure.

The National Assembly should have the power to **lower the voting age to 16 for Assembly elections**. The Assembly already has the power to lower the voting age to 16 for a referendum on devolving income tax powers.

All powers relating to **Assembly and local government elections** should be devolved. This includes deciding the electoral system, the number of constituencies, their boundaries, the timing of elections and the conduct of the elections themselves.

Welsh Ministers should have the power to **appoint one member of the Ofcom board** to represent Welsh interests.

A review should be carried out of **Air Passenger Duty** which could open the door for it to be devolved to Wales.

As part of the framework, the UK government has also pledged to examine the **Smith Commission's recommendations** that are relevant for Wales.

This will enable the new government, following the General Election, to take decisions early in the next Parliament on whether any further Smith recommendations should be implemented for Wales.<sup>15</sup>

In constitutional terms, the Government agreed that the Welsh Assembly and Welsh Government should be formally recognised as permanent and that this should be set out in legislation, mirroring provisions in the *Scotland Act 2016*. The St David's Day Agreement differed from the Silk recommendations in requiring a two-thirds majority within the Assembly for certain decisions. This super-majority provision too echoes a provision set out in the *Scotland Act 2016*.

Further details on the St David's Day Agreement and immediate reactions to it can be found in the House of Commons Library briefing [Wales: Current devolution proposals](#), published on 3 March 2015.

## Funding for the Assembly

The UK government set out its position on future funding in the Agreement and in statements made to accompany it.

Building on this, in order to empower the Welsh Government to deliver for the people of Wales, the UK Government will introduce a floor in the level of relative funding it provides to the Welsh Government, in the expectation that the Welsh Government will call a referendum on income tax powers in the next Parliament.

Funding arrangements beyond the next Parliament will need to take full account of the Welsh Government's new powers and responsibilities, given the significant impact that tax devolution could have on its funding. The UK Government will work with the Welsh Government to develop sustainable long term funding arrangements within a robust fiscal framework that reflects the changes made.<sup>16</sup>

The [2015 Spending Review](#) introduced a guaranteed floor for Wales's funding from the UK Government: the Welsh Government will receive

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<sup>15</sup> Wales Office, [Landmark funding announcement and new powers for Wales in St David's Day Agreement](#), 27 February 2015

<sup>16</sup> HM Government, [St David's Day Agreement](#), 2015, p. 8-9

at least 115% of comparable UK Government spending per head. The funding floor will be reset at the next Spending Review to reflect further devolution of tax and spending powers. The promise of a floor was made by the Coalition Government in February 2015 in the [St David's Day Agreement](#).

## 1.4 Draft Wales Bill (October 2015)

The Government published a Draft Wales Bill on 20 October 2015.<sup>17</sup> This attracted criticism from Welsh political actors, and was the subject of a critical report by the House of Commons Welsh Affairs Committee, published in February 2016. The criticisms were mostly in two areas, reserved powers and the 'necessity tests':

**The Government departments' views on what should be reserved.** There was criticism that the reservations went further than the non-devolved subjects in the current model. In addition, the Welsh Affairs Committee expressed concern over the coherence of the reservations (or the devolved powers they implied) and the process that led to them:

In this Chapter, we have identified a number of criticisms concerning the reservations in the draft Bill. We recommend that Whitehall be given a second attempt to come up with a list of the powers to be reserved. However, departments must be given clear guidance about the questions they should ask themselves before deciding whether or not to reserve a power. This guidance should make clear that UK Government departments should be considering what they need to reserve or devolve. It must be published prior to the publication of the Bill, so that the final list of reservations can be assessed against the criteria given. We further recommend that, at the same time, the UK Government carries out a consultation exercise with the Welsh Government regarding their expectations. This exercise should both make the final list of reservations more coherent, and also provide a defensible justification for each decision, which will have to be expressed when the final Bill is debated.<sup>18</sup>

**The necessity tests.** There was criticism of the use of a criterion that legislation could touch on reserved matters, modify the criminal law and modify the private law so far as was "necessary" to give effect to the purpose of a devolved provision. The concept of necessity in respect of public policy was considered potentially to lack objectivity. The Welsh Affairs Committee took evidence on this:

Unease about the necessity tests was widely voiced by witnesses. Specific criticisms included that the test to be applied before modifying the criminal law or the private law would or could:

- reduce the Assembly's legislative zone of competence (criminal and private law are subjects about which GOWA is "silent");
- create complexity and/or uncertainty;

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<sup>17</sup> [Draft Wales Bill](#), Cm 9144, 20 October 2015.

<sup>18</sup> [Draft Wales Bill](#), Cm 9144, 20 October 2015, para 43

give ordinary citizens a means by which they might challenge Assembly Acts in everyday court cases; and  
have a chilling effect on policy development.<sup>19</sup>

The Committee concluded that necessity was “the wrong test” and recommended that it be replaced.<sup>20</sup> The Committee also asked the UK Government to pause and reconsider the concerns it had highlighted, before proceeding with introduction of legislation.

On 29 February 2016, in a speech marking the anniversary of the St David’s Day Agreement, the Secretary of State announced that the Government had accepted the need to look again at the Draft Bill. He also announced that the recommendations of the Select Committee, as part of the scrutiny process, had been accepted. The Government would:

- Remove the so-called ‘necessity test’, so that the Assembly will be able to change the law to help enforce its legislation without first applying the test;
- Reduce the number of reservations in the Bill;
- Remove the general restriction on the Assembly modifying a Minister of the Crown function in devolved areas.<sup>21</sup>

In March 2016 the Welsh Government published its own alternative proposal for a draft bill, entitled [Government and Laws in Wales Bill](#).<sup>22</sup> This was accompanied by an explanatory summary.<sup>23</sup> This Bill provided for a reserved powers model, devolution of courts, criminal justice and policing by 2026, and separate jurisdictions for England and Wales. The Constitution Unit at UCL carried out an analysis of the Welsh Government draft bill and recommended it for further consideration in Whitehall.<sup>24</sup>

## 1.5 Introduction of the Bill to Parliament

The [Wales Bill 2016-17](#) [Bill no. 5] was published on Tuesday 7 June 2016. Its First Reading in the House of Commons took place that day. Its Second Reading is scheduled for Tuesday 14 June 2016. [The Bill](#), and [its explanatory notes](#), are available on the Parliamentary website. Much of the Bill consists of amendments to the *Government of Wales Act 2006*, referred to throughout as the 2006 Act.

Given that much of its content is of constitutional significance, its committee stage is likely to take place on the floor of the House.

[The Government’s response](#) to the Welsh Affairs Committee’s pre-legislative scrutiny of the draft Bill was published on 13 June 2016.

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<sup>19</sup> [Draft Wales Bill](#), Cm 9144, 20 October 2015, para 55

<sup>20</sup> [Draft Wales Bill](#), Cm 9144, 20 October 2015, para 64-5

<sup>21</sup> *Amended Wales Bill will deliver a stronger devolution settlement*, [Wales Office Press Release](#), 29 February 2016,

<sup>22</sup> Welsh Government, [Government and laws in Wales Bill](#), 2016.

<sup>23</sup> Welsh Government No 3, [WG28243](#), March 2016.

<sup>24</sup> Alan Cogbill, [Constitution Unit blog](#), 22 March 2016.

The bill reflects Government's attempts to address the concerns expressed about the 2015 draft Bill. It has made some changes to the 'necessity tests' in the draft Bill. The draft Bill, for instance, permitted the Assembly to alter criminal law and private law only so far as 'necessary' to implement policy. This was subject to criticism from the Constitution Unit and Welsh Governance Centre, as it:

.... implies a need to quantify the effect of all the different legislative options and to identify the one with the least effect that still meets the need. A difficult and perhaps impossible task, this in turn suggests very little leeway for the National Assembly: these are heavy duty locks.

The complexity cuts against workability. To put this in perspective, the National Assembly has been legislating on aspects of private law and criminal law in such diverse areas as NHS redress, human transplantation, and landlord and tenant. Given the need to make rights effective and enforce obligations, it would be strange if it were otherwise.<sup>25</sup>

Otherwise, the Bill retains the central thrust of the draft Bill: it changes the nature of Welsh devolution from a conferred powers model to a reserved powers model. In other words, instead of giving the Welsh Assembly power to make law only on the matters specified in the *Government of Wales Act 2006*, the Bill would give the Welsh Assembly power to make law on any matter not expressly reserved to the UK Parliament.

This approach tends to be more permissive, not least in the treatment of newly arising matters, but it is not necessarily without its own margin of uncertainty. Equally, the Assembly will have to observe various restrictions on its competence. Legislation must not only avoid straying into reserved matters; it must also meet other criteria, such as compatibility with EU law.

Other interesting features include a number of declaratory clauses, in which Parliament recognises or acknowledges matters of fact. These are not without precedent, but remain something of a rarity. They do not oblige a legal person to do anything that a Court could find them not to have done. They are responses to a desire to entrench the Assembly in the UK's constitutional arrangements.

There is recognition in the Bill of a distinct body of Welsh law, but this is not the same as the creation of a separate legal jurisdiction.

The Bill creates a new arrangement, based on one introduced in Scotland, whereby the Assembly gains power over some sensitive subjects, but may pass laws on them only by a special majority (a "super-majority") of two-thirds.

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<sup>25</sup> Constitution Unit / Welsh Governance Centre, [Challenge and opportunity: the draft Wales Bill 2015](#), 2015, p. 30

## 2. Constitutional arrangements

**Part 1 of the Bill, clauses 1 – 21**, covers constitutional arrangements. These include the legislative competence of the Assembly, which is the most significant element of the Bill. It also devolves new powers over elections and introduces a super-majority requirement in respect of some of these and of some other matters. It removes the requirement, in the *Wales Act 2014*, for a referendum on the commencement of that Act's income tax provisions.

### 2.1 Constitutional status of National Assembly

**Clause 1** is declaratory. It concerns the permanence of the Assembly and the existence of Welsh law. It inserts two new sections into the *Government of Wales Act 2006*.

New s92A opens with the statement that:

(1) The Assembly and the Welsh Government are a permanent part of the United Kingdom's constitutional arrangements.

This reflects a similar provision in the *Scotland Act 2016*, section 1 of which inserted the same wording into the *Scotland Act 1998* in respect of the Scottish Parliament and Government.

In itself this provision does not guarantee the permanent existence of these institutions. New section 92A could be repealed by a future UK Parliament. In addition, the new section itself goes on to envisage possible abolition. However, it makes any such move contingent on a referendum in Wales:

(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.

(3) In view of that commitment it is declared that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum.<sup>26</sup>

On the one hand, this is meant to provide reassurance against precipitate action from a hypothetical UK Government opposed to devolution. On the other hand, it effectively recognises the political reality that the existence of institutions like the Welsh Assembly is guaranteed by popular legitimacy more than by statute. Any statutory provision, including these ones, can be repealed or amended, but it would be extremely risky for a UK government to abolish an Assembly that commanded support from the Welsh electorate. That said, this approach to constitutional entrenchment might do little to protect an Assembly that lost popular legitimacy.

Two interesting points arise.

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<sup>26</sup> Wales Bill clause 1 (inserting new section 92A into the *Government of Wales Act 2006*)

First, does the National Assembly have the power to abolish itself? It would appear not. Schedule 2 inserts a new Schedule 7B into the *Government of Wales Act 2006*. This lists in paragraph 7 those parts of the 2006 Act which the Assembly may modify. These include all of section 1 **after** the words “There is to be an Assembly for Wales to be known as”. In other words, the fact that there is to be an Assembly for Wales **cannot** be changed by the Assembly under the Bill.

In addition, new s92A, which declares permanency, is not listed as being open to modification by the Assembly.

It would also seem unlikely that the Welsh Government could, under existing powers, call a referendum. Under section 64 of the 2006 Act they may hold polls:

for the purpose of ascertaining the views of those polled about whether or how any of the functions of the Welsh Ministers (other than that under section 62) should be exercised.

A poll on the future of the Assembly would not relate to the functions of the Welsh Ministers, as they do not have the power to abolish the Assembly. Thus, primary legislation at Westminster would be needed to hold a referendum, as well as to repeal the need for one, and/or to abolish the Assembly.

Second, purely declaratory provisions such as clause 1 of the Bill are still rare, but they are not without precedent. As noted, section 1 of the *Scotland Act 2016* declares the permanence of the Scottish Parliament and declares that the Scottish Parliament and Scottish Government are not to be abolished except on the basis of a referendum.

The Constitution Committee of the House of Lords criticised the wording of clause 1 of the *Scotland Bill 2015-16* (that became the 2016 Act), not because it was declaratory but because the provision could be read to imply that the UK Parliament had limited its own competence.<sup>27</sup>

An earlier proposal, in draft clauses published before the Scotland Bill, stated that the Parliament and Government were “recognised” as permanent parts of the UK constitutional arrangements. While this might be read to indicate a practical reality beyond statute which is recognised by Parliament, some critics argued that it was less emphatic than a simple statement that the institutions “are” permanent. The Bill used the latter form. The Constitution Committee argued that the version in the Bill might more readily support the argument that the UK Parliament had sought to limit its own competence.

Section 1 of the *Northern Ireland Act 1998* declares that:

[...] Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay

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<sup>27</sup> Constitution Committee, [Scotland Bill](#), 23 November 2015, HL 59 2015-16, paras 26-36

before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.<sup>28</sup>

Daniel Greenberg, the editor of the Ninth Edition of *Craies on Legislation*, also highlights the constitutional conundrum of a declaratory provision such as this, as the Constitution Committee did in the case of the *Scotland Bill 2015-16*. *Craies* notes that

Since one Parliament cannot bind another (or even itself) ... even the latter part of [sub-section 1] is no more than a declaration of the present intention of the present Parliament.<sup>29</sup>

## 2.2 Body of Welsh law

New section 92B – also inserted by **clause 1** of the Bill - declares:

(1) There is a body of Welsh law made by the Assembly and the Welsh Ministers.

(2) The purpose of this section is, with due regard to the other provisions of this Act, to recognise the ability of the Assembly and the Welsh Ministers to make law forming part of the law of England and Wales.

This provision was not in the 2015 draft Wales Bill. The explanatory notes identify that the purpose of 92B is to recognise in statute that law made by Assembly and Welsh Ministers is a distinct body of law that applies in Wales. This declaration does not affect the devolution boundary, nor does it change the fact that there is a single legal jurisdiction of England and Wales - which is itself a reserved matter. The body of Welsh law recognised by this provision forms part of the law of the legal jurisdiction of England and Wales. Schedule 1 of the Bill adds paragraph 6 to new Schedule 7a of the *Government of Wales Act 2006*, which reserves the single legal jurisdiction of England and Wales to the UK Parliament.

The inclusion of section 92B reflects growing calls for the need of legislative recognition of the development of a distinct body of Welsh law since the advent of devolution in Wales. In the United Kingdom, there are three legal jurisdictions: England and Wales, Scotland, and Northern Ireland. For historic reasons, England and Wales have long shared a single legal jurisdiction. Wales shares a system of courts and tribunals with England. These are not devolved: they are administered by Her Majesty's Court and Tribunal Service, part of the Ministry of Justice. By contrast, Scotland has its own courts structure, administered separately, as well as its own distinct body of Scots law. Northern Ireland has the same arrangement. Sharing a jurisdiction has presented challenges for devolution in Wales.

The National Assembly for Wales and the Welsh Government have created a substantial body of primary and secondary legislation. As the Law Commission has recently identified, this has caused, in a number of significant areas, "a divergence of the law applicable in England and

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<sup>28</sup> *Northern Ireland Act 1998* (chapter 47), section 1

<sup>29</sup> Daniel Greenberg (ed), *Craies on Legislation*, Ninth Edition, 2008, p70, n303



that applicable in Wales".<sup>30</sup> This presents issues of accessibility of the law. The Silk Commission report recognised that:

It is sometimes difficult to establish what the law is that applies in Wales. Laws for Wales have been made by the UK Parliament and the National Assembly, and laws made by each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens.<sup>31</sup>

Theodore Huckle QC, a former Counsel General for Wales, argued that the existence of a single jurisdiction is incompatible with the idea of such a thing as "Welsh" law.<sup>32</sup>

New section 92B appears to be an attempt to address the lack of clarity arising from the fact that laws made by the National Assembly extend to England and Wales, but only apply to Wales.

In 2012, the Welsh Government consulted on the question of a separate Welsh legal jurisdiction.<sup>33</sup> The Welsh Government concluded that a separate legal jurisdiction, with its own court system, would not be beneficial.<sup>34</sup> Others, such as Professor Thomas Glyn Watkin, have argued that a Welsh legal jurisdiction could be created without a separate legal system and separate system of courts.<sup>35</sup> In 2015, in response to the *Draft Wales Bill*, the Welsh Government argued for a "Welsh legal jurisdiction that is distinct, but not separate, from that of England".<sup>36</sup>

The Constitution Unit and Welsh Governance Centre report on the Draft Wales Bill put forward two options: an approach based on territorial rules, and an approach based on a "distinct but not separate jurisdiction".<sup>37</sup> The former would mean a "sharper definition of the extent of the applicability of Welsh legislation" within the single jurisdiction of England and Wales.<sup>38</sup> The latter could be achieved in a number of ways, including through both distinct courts and distinct bodies of law. The declaration in Section 92B stops short of any of these options.

This Bill gives new powers for the Welsh Assembly to modify private and criminal law in areas within its competence. Welsh First Minister Carwyn

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<sup>30</sup> Law Commission, *Form and Accessibility of the Law Applicable in Wales* (2015) 3

<sup>31</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) at para 10.3.45

<sup>32</sup> Theodore Huckle QC, '[Why Wales needs its own legal jurisdiction](#)' IWA Click on Wales (2016)

<sup>33</sup> Welsh Government, [Consultation on a separate legal jurisdiction for Wales](#), 2012

<sup>34</sup> Ibid.

<sup>35</sup> National Assembly for Wales Constitutional and Legislative Affairs Committee, [Record of Proceedings](#), 9 November 2015

<sup>36</sup> National Assembly for Wales Constitutional and Legislative Affairs Committee, [Record of Proceedings](#), 9 November 2015

<sup>37</sup> Constitution Unit / Welsh Governance Centre, [Challenge and opportunity: the draft Wales Bill 2015](#), 2015, p. 32

<sup>38</sup> Constitution Unit / Welsh Governance Centre, [Challenge and opportunity: the draft Wales Bill 2015](#), 2015, p. 34

Jones has welcomed this, but has argued that this increases the need for a distinct or separate Welsh jurisdiction:

At the same time, however, in extending the Assembly's competence into new areas of law, the Bill will bring even more sharply into focus the tension within the single jurisdiction that was evident in the original draft [...] The revised Bill makes crystal clear that, over time, the divergence of the law applying in Wales and the law applying in England will continue to grow, to the point where a distinct or separate Welsh jurisdiction is inevitable. I'll continue to argue that this issue must be addressed in this Bill if it is to be at all credible as a long-term settlement for Wales. Now, if the UK Government does not see its way clear in this Bill to a complete resolution, it should put in place, at least, arrangements that pave the way for a longer-term solution.<sup>39</sup>

In oral evidence to the House of Commons Justice Committee in 2015, Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, warned that confusion often arises on this subject as a result of unclear understanding on what is meant by 'jurisdiction'.<sup>40</sup> He also warned of some of the practical challenges for the judiciary arising from the growing body of Welsh law.<sup>41</sup> In doing so he emphasised the need for practical solutions to the problems caused by the divergence of two systems.

**Clause 2** relates to the Sewel Convention, the undertaking that the UK Government will not normally invite Parliament to legislate on a devolved matter, nor to change devolved powers, without consent from the relevant devolved legislature.

The Clause inserts a new subsection (6) into section 107 of the [Government of Wales Act 2006](#). This is another example of a declaratory provision, since it appears to serve only the purpose of avoiding doubt. Parliament's continuing right to legislate on devolved matters does not rest on this provision, but is a question of parliamentary sovereignty. Currently section 107 (5) provides that the power of the UK Parliament to make laws for Wales remains in place. New subsection (6) adds the following text:

But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.

This reflects the provision in section 2 the *Scotland Act 2016*, which is identical except for "Scottish Parliament" instead of "Assembly".

The provision raises two points of interest. First, the Sewel Convention includes a commitment not to legislate without consent on matters that are devolved, or on the extent of devolved powers. Clause 2, like section 2 of the *Scotland Act 2016*, refers only to legislating "with regard to devolved matters." During passage of the 2016 Act, the SNP criticised the non-inclusion of an explicit undertaking to seek consent

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<sup>39</sup> Carwyn Jones, [Statement to National Assembly for Wales](#), 8 June 2016

<sup>40</sup> Justice Committee, [Oral Evidence: the Lord Chief Justice's report](#) 2015 HC 814 p23

<sup>41</sup> Justice Committee, [Oral Evidence: the Lord Chief Justice's report](#) 2015 HC 814 p24

before changing the extent of devolved powers, and tabled a new clause to include that undertaking.<sup>42</sup>

Second, the statement that the UK Parliament “will not normally legislate” raises interesting questions. If it did so legislate, would this be a ground for judicial review? If so, how would the courts interpret “normally”? The sovereignty of Parliament limits the ability of the courts to review its scope to legislate. But if Parliament has stated its intention to legislate (on devolved matters without consent) only in abnormal circumstances, does that imply that it is feasible for UK Parliamentary legislation to be ultra vires, if the circumstances are normal, however that is defined?

The House of Lords Constitution Committee expressed concern that what became section 2 of the *Scotland Act 2016* risked

creating a route through which the courts might be drawn inappropriately into an area that has previously been within the jurisdiction of Parliament alone, namely its competence to make law.<sup>43</sup>

## 2.3 Legislative competence of the Assembly

The National Assembly for Wales has power to legislate only as defined in the [Government of Wales Act 2006](#), which the present Bill amends.

The existing section 108 of the 2006 Act restricts competence to subjects listed in Schedule 7. This is known as a conferred powers model: the Welsh Assembly can legislate on subjects conferred on it in the Schedule. There are also limits on the ways in which Welsh legislation can touch on reserved matters.

The Silk Commission recommended a shift from a form of devolution based on conferred powers to one based on reserved powers. This commands support among Welsh political actors, and has been accepted in principle by the Government. However, the draft Bill was criticised on the ground that the reserved powers were too extensive, and effectively devolved less than the existing conferred powers in Schedule 7.

**Clause 3** deals with legislative competence. It replaces section 108 of the 2006 Act with a new section 108A. Section 108 currently opens by stating that “Subject to the provisions of this Part, an Act of the Assembly may make any provision that could be made by an Act of Parliament”. The new section does not reproduce this text. Both the current and new sections include the following:

An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly’s legislative competence.

This means that an Act ceases to have legal effect if it is found to fail any of the five tests of competence set out in the rest of the section.

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<sup>42</sup> New Clause 10. See HC Deb 15 June 2015, c97, and Angus Robertson’s contribution at cc102-3.

<sup>43</sup> [Scotland Bill](#), House of Lords Select Committee on the Constitution, HL 59, 23 November 2015, para 39

Subsection (2) of new section 108A gives criteria for competence: this is the technical heart of what laws the Assembly can pass. A provision will be outside competence if:

- its legal extent goes outside the England and Wales jurisdiction;
- if its practical application is beyond Wales;
- if it is incompatible with EU law or the European Convention on Human Rights;
- if it relates to reserved matters, which are set out in new Schedule 7A;
- if it breaches a range of conditions set out in new Schedule 7B.

Competence is therefore conditioned by the list of reservations in new Schedule 7A and by the restrictions in new Schedule 7B, as well as by requirements to extend to England and Wales, to apply to Wales and to fit with core international obligations.

The international obligations and the territorial extent are relatively straightforward. Application to Wales, reserved matters and the restrictions in Schedule 7B are more complex.

## Territorial application

Subsection (3) of new Section 108A creates an exception to the rule that a provision is outside competence if it applies otherwise than in relation to Wales (i.e., subsection (2) (b), above). This does not apply to a provision that is ancillary to one in an Act or Measure or to a devolved provision in an Act of Parliament, so long as it has no greater effect outside Wales than is necessary to give effect to its purpose.

Subsection (7) defines “ancillary”. It means a provision that provides for the enforcement of another provision, or which is “otherwise appropriate for making that provision effective,” or which is “otherwise incidental to, or consequential on, that provision”.

## Powers reserved to UK Government

New subsection 108A(2)(c) provides that a provision is outside the legislative competence of the Assembly if it “relates to reserved matters”. New subsection 108A(6) states that the question of whether a provision relates to a reserved matter “is determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.”

Reserved matters are listed in new schedule 7A. These subjects are described as “Heads” and they contain “sections”. Anything that is not expressly reserved is devolved.

New schedule 7A include some “exceptions”. These are matters within an otherwise reserved area that are not themselves reserved: in other words, the Assembly **can** legislate on them. Furthermore, some of these exceptions themselves indicate matters that are not part of the exception and thus **are** reserved. These are described in the Explanatory Notes as “carve outs”, although they are not separately headed as such

in the Bill. The sections also include some “interpretations” which give the meaning of defined terms.

## Restrictions on Assembly’s legislative competence

**Schedule 2** to the Bill inserts new Schedule 7B into the 2006 Act. This is split into two parts. Part 1 sets out general restrictions on Assembly competence. Part 2 gives exceptions from Part 1. If a provision breaches Part 1, it is outside competence and therefore, under new section 108A(1) “not law”, unless it falls within Part 2.<sup>44</sup>

### Reserved matters

A provision in an Act of the Assembly cannot modify the law on reserved matters, nor may it confer power by subordinate legislation to do so.<sup>45</sup> The law on reserved matters is defined as any enactment on a reserved matter contained in an Act of Parliament or subordinate legislation, or any other rule of law on a reserved matter.<sup>46</sup>

This does not apply to a modification that is ancillary to a provision not relating to reserved matters, so long as it “has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision”.<sup>47</sup> Thus, the Assembly may stray into reserved matters in order to implement devolved legislation.

At present section 108 (5) of the 2006 Act brings a provision within competence if it provides for the enforcement of a provision which is within competence or “is otherwise appropriate for making such a provision effective,” or if it is otherwise incidental to or consequential on such a provision.<sup>48</sup>

Therefore, the Bill changes this exception for those provisions that are not themselves devolved but are ancillary to ones that are. It will apply to provisions that are ‘necessary’ to give effect to the purpose of a devolved provision, instead of provisions that are ‘appropriate’ to making them effective.

### Private law

A provision cannot make modifications of the private law, nor confer power to do so by subordinate legislation.<sup>49</sup> The private law is defined as the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession.<sup>50</sup> This restriction does not apply to a modification of private law “that has a purpose (other than modification of the private law) which does not relate to a reserved matter”.<sup>51</sup> In other words, if the Assembly legislates for a modification

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<sup>44</sup> Part 2 mainly excepts those cases in which an Act of the Assembly restates the law or repeals a spent enactment.

<sup>45</sup> New Sch 7B, para 1(1)

<sup>46</sup> New Sch 7B, para 1(2)

<sup>47</sup> New Sch 7B, para 2(1)

<sup>48</sup> Subsection 108(5) is also subject to riders concerning compatibility with EU etc.

<sup>49</sup> New Sch 7B, para 3(1)

<sup>50</sup> New Sch 7B, para 3(2)

<sup>51</sup> New Sch 7B, para 3(4)

to private law with a purpose unrelated to reserved matters, it would not fall foul of this restriction.

### **Criminal law**

A provision cannot modify any of a list of serious offences, nor confer power to do so by subordinate legislation. These offences are treason, homicide, the most serious violent offences, sexual offences and perjury.<sup>52</sup>

In addition, a provision cannot modify the law on criminal responsibility, mental elements (e.g. the meaning of “intention” or “recklessness”), inchoate and secondary criminal liability, or sentences and other orders in respect of defendants in criminal proceedings.<sup>53</sup> Finally, the creation or modification of offences on reserved matters is reserved.<sup>54</sup>

The draft Bill attracted criticism on the grounds that its restrictions on modifying criminal law were so sweeping as to endanger the Assembly’s capacity to enforce its policies. The Bill defines more tightly those aspects of criminal law which the Assembly may not modify. Broadly, offences may be created on devolved matters, so long as they do not include the serious offences (homicide, treason etc.) set out in the protected list.

### **Other enactments**

New Schedule 7B includes a list of enactments which the Assembly may not modify.<sup>55</sup> These differ from the existing protected enactments: the *Data Protection Act 1998* and the *Re-Use of Public Sector Information Regulations 2005* have dropped off the list, while the *Public Audit (Wales) Act 2013* has been added. Other enactments that cannot be modified are the *European Communities Act 1972*, the *Human Rights Act 1998*, the *Civil Contingencies Act 2004* and parts of the *Government of Wales Act 2006*.

There are also complex provisions conditioning the protection of the *Public Audit (Wales) Act 2013*, set out in sub-paragraphs 5(2) – 5(6).

### **The Government of Wales Act 2006**

New Schedule 7B para 7 sets out provisions of the *Government of Wales Act 2006* which the Assembly cannot modify.

### **Functions of Ministers, government departments and reserved authorities**

New Schedule 7B paras 8 – 11 set out restrictions on the competence of the Assembly to modify functions of Ministers, government departments and other reserved authorities.

Broadly, unless ministerial consent is gained, a provision may not confer or impose any function on a reserved authority, nor may it confer the power to do so by subordinate legislation. Likewise, it may not modify

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<sup>52</sup> New Sch 7B, para 4(1) and (2)

<sup>53</sup> New Sch 7B, para 4(3)

<sup>54</sup> New Sch 7B, para 4(5)

<sup>55</sup> New Sch 7B, para 5

the constitution of a reserved authority. Finally, it may not confer, impose, modify or remove functions specifically exercisable in relation to a reserved authority.<sup>56</sup> There are exceptions to this, set out in new Schedule 7B, para 9, and further conditions of some complexity in paras 10 and 11.

A reserved authority is defined as a Minister of the Crown, a government department or any public authority that is not a Wales public authority.<sup>57</sup> “Wales public authorities” are listed by name in Schedule 4 to the Bill, which inserts new Schedule 9A to the 2006 Act.

**Clause 4** of the Bill also covers Wales public authorities. It inserts new section 157A into the 2006 Act. This includes a definition of a Wales public authority as one which has functions exercisable only in relation to Wales and which wholly or mainly concern devolved matters.

**Clause 44** extends the Secretary of State’s power to block an Act of the Assembly to include the grounds that a provision might have a serious adverse impact on sewerage services or systems in England. At present, section 114 of the 2006 Act allows the Secretary of State to make an order prohibiting the Clerk of the Assembly from submitting a Bill for Royal Assent. This can be done if s/he believes that it would have an adverse effect on a reserved matter, on water resources, supply or quality in England, or on the operation of the law in England, or if it is incompatible with international obligations, defence or national security.

## 2.4 Elections

The [St David’s Day Agreement](#) stated that the UK Government agreed that there was a strong case in favour of devolving powers over Assembly elections:

2.2.13 We support therefore the devolution of powers relating to Assembly elections. This includes deciding the electoral system; the number of constituencies, their boundaries and the ratio of regional Assembly Members to constituency Assembly Members; the timing of elections and therefore election terms; matters relating to the requirements of candidates to stand for election and the conduct of the elections themselves; and the circumstances in which a sitting Assembly Member can be removed.

2.2.14 The Assembly should have control of campaign expenditure by political parties, controlled expenditure by third parties and party political broadcasts in relation to Assembly elections. The Assembly should not however be able to decide to hold Assembly elections on the same day as general elections to the UK Parliament, European Parliament or local government elections in Wales. The regulation of political parties, including donations to political parties, would remain reserved.

2.2.15 The UK Government agrees that the Assembly should decide the franchise for Assembly elections, including the ability to lower the voting age to 16 if it wishes. The Assembly already has the power to lower the voting age to 16 for a referendum on devolving income tax powers.

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<sup>56</sup> New Sch 7B, para 8(1)

<sup>57</sup> New Sch 7B, para 8(3), with public authority defined in 8(4)

2.2.16 The Electoral Commission should continue to operate on a UK-wide basis, with the Assembly having competence over the functions of the Electoral Commission in relation to Assembly elections and local government elections in Wales.

2.2.17 The Boundary Commission for Wales should continue to operate as a UK public body. Powers in relation to Assembly constituency boundaries should be devolved to the Assembly. Detailed transitional arrangements would need to be discussed with the Assembly Commission and the Welsh Government.

The Secretary of State for Wales, Stephen Crabb MP, set out the main recommendations in the St David's Day Agreement relating to elections:

The National Assembly should have the power to lower the voting age to 16 for Assembly elections. The Assembly already has the power to lower the voting age to 16 for a referendum on devolving income tax powers.

All powers relating to Assembly and local government elections should be devolved. This includes deciding the electoral system, the number of constituencies, their boundaries, the timing of elections and the conduct of the elections themselves.<sup>58</sup>

Each of these will be devolved under the Bill. The power to lower the voting age is conferred by Clause 5 on the same model as for Scotland. The franchise for elections to the National Assembly for Wales is defined by Section 12 of the *Government of Wales Act 2006* as the local government franchise. The conduct of local elections, including the franchise, is not included in the schedule of reserved matters, giving the Assembly the power to alter the voting age.

The Library briefing paper [Electoral arrangements in Wales](#) provides information about the consultation on the Green Paper on the future electoral arrangements for the Assembly published in 2012, and the provisions on electoral arrangements in the *Wales Act 2014* which had been included in the draft *Wales Bill* published for pre-legislative scrutiny in December 2013. The Briefing Paper also gives details of the draft *Wales Bill* published on 20 October 2015.

## Electoral administration

**Clause 5** provides the National Assembly for Wales with legislative competence for the administration and regulation of National Assembly for Wales and local government elections in Wales (including, for example, the registration of voters and the combination of polls).

Reserved electoral matters are included in Schedule 1 of the Bill (see below) and these include elections to the UK House of Commons and to the European Parliament.

Clause 5 (1) inserts two new sections into the *Government of Wales Act 2006* relating to the conduct of elections.

Subsection (2) inserts a section into the *Representation of the People Act 1985* relating specifically to the powers of the Secretary of State to combine polls. It requires the Secretary of State to consult Welsh

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<sup>58</sup> [Landmark funding announcement and new powers for Wales in St David's Day Agreement](#), Wales Office press release, 27 February 2015



ministers before making rules to combine polls where one of the polls is a local government poll in Wales.

New section 13 replaces the existing section 13 of the 2006 Act to transfer the powers conferred in the section from the Secretary of State to Welsh ministers. New section 13 (1) empowers a Welsh minister to make orders (if the power is within the legislative competence of the Assembly and included in an Assembly Act) in relation to the conduct of Assembly elections, a petitions process and the return of an Assembly Member other than at an election (for example filling a vacant regional seat).

Subsections (2) and (3) clarify the scope of devolved powers in relation to Assembly elections and include the registration of electors, limitation of election expenses of candidates, combination of certain polls, and allows for the modification of the 2006 Act in relation to allocation of seats.

Subsections (4) and (5) allow a Welsh minister to apply electoral law within their competence with or without modification.

Subsection (7) requires Orders made by a Welsh minister to be laid in draft before, and be approved by, the Assembly. Certain measures would be subject to a two thirds majority (see Clause 8 below).

New section 13A of the 2006 Act confers powers on the Secretary of State for Wales to combine certain polls with a general election of Assembly Members; namely an early UK general election, UK Parliamentary by-elections or European Parliamentary by-elections.

The Secretary of State may also make regulations to provide for the combination of an extraordinary general election to the National Assembly or Assembly by-elections with a UK general election or a European Parliamentary general election. The Secretary of State must not use this power without the agreement of Welsh Ministers and any regulations would be subject to the affirmative procedure in the UK Parliament.

A general election to the national Assembly for Wales cannot be combined with a general election to the UK Parliament or the European Parliament (see clause 6 below).

## Election dates

**Clause 6** of the Bill amends Section 3 of the *Government of Wales Act 2006* and prevents a general election of the National Assembly being held on the same day as a UK parliamentary general election or a European Parliamentary general election. If the dates of the Assembly general election would otherwise coincide with a UK general or European Parliamentary election then Welsh Ministers can vary the date of the Assembly election by order. The draft order must be laid before, and approved by a resolution of the Assembly.

Subsection (4) amends section 3(2) of the 2006 Act to dissolve the Assembly automatically on the date of poll or on the day specified by the Welsh Ministers by order under subsection (1B).

The power to set the date of local elections in Wales is devolved. The Bill inserts a new Section 37ZA into the [Representation of the People Act 1983](#). This gives Welsh Ministers the power to change the day of local government elections in Wales to another date. An order has to be made not later than 1 February in the year preceding the year in which the order is to take effect.<sup>59</sup> The order has to be approved by the National Assembly.

Section 37B of the *Representation of the People Act 1983* is also amended by Clause 6 (14) and (15) so that the date of local elections in Wales may not be changed to the same date as the European Parliamentary elections if that date is also the date of an ordinary general election to the National Assembly.

**Clause 7** amends Section 10ZC of the *Representation of the People Act 1983* to provide that Welsh ministers are not able to make any regulations regarding electoral registration in Wales under the RPA 1983 in relation to the digital service without the agreement of a Minister of the Crown.

## Reserved matters

The registration, funding and accounting of political parties is reserved by subsection (4) of Schedule 1. However, payments to political parties in support of Assembly Members carrying out their duties (the equivalent of Short Money) is exempt.

Section B1 of Schedule 1 details the reserved matters in relation to elections. These are:

- Elections to the House of Commons and the European Parliament;
- The ability to combine polls is reserved if one of the polls to be combined is a reserved election or referendum;
- The ability to combine an ordinary local government election in Wales with the general election to the Assembly;
- Any digital service provided by a Minister of the Crown for the registration of electors;
- Certain aspects relating to the constitution and functions of the Electoral Commission but many of the general functions of the Commission are not reserved in relation to elections for Assembly members;
- Certain provisions of the *Political Parties, Elections and Referendums Act 2000* to allow the Electoral Commission to investigate and, where appropriate, impose civil sanctions.

## 2.5 Procedures of National Assembly

The Bill introduces a new feature to the powers and procedures of the Assembly: the use of special majorities for the exercise of certain powers. This is modelled on provisions in the [Scotland Act 2016](#).

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<sup>59</sup> In the case of an order affecting more than one year, the order must be made in the year preceding the first year affected.

**Clause 8** inserts new section 111A into the 2006 Act. This lists certain “protected subject matters”. These are:

- The name of the Assembly;
- The franchise for Assembly elections;
- The electoral system for Assembly elections;
- The specification or number of constituencies, regions or other electoral areas, and;
- The number of members for each electoral area.

The Presiding Officer decides whether a Bill contains any provisions relating to these matters. This is done after the last amending stage and before the Bill is passed. If the Presiding Officer decides that it does contain provisions on protected subject matters the Bill must secure a two-thirds majority at the final stage in order to be passed. This is two-thirds of **Assembly seats**, not the Members voting on the motion.

Note that as a result of this, the Assembly will be able to change its name, for instance to become a “Parliament”, so long as the necessary majority is secured.

Clause 8 also inserts new section 111B, which allows the law officers to refer to the Supreme Court the question of whether a provision relates to a protected subject matter.

**Clause 9** makes amendments to the 2006 Act which are consequential on the changes made by Clause 8.

**Clause 10** creates a new type of impact assessment document, known as a “justice impact assessment”. It inserts new section 110A to the 2006 Act, under which standing orders must include a requirement on the person introducing a Bill to make a written statement setting out its potential impact on the justice system in England and Wales. This will read across to new section 92B (in Clause 1) and its recognition of a body of Welsh law.

During a debate on the Wales Bill in the National Assembly on 8 June 2016, the Plaid Cymru Leader, Leanne Wood, raised concerns over the Justice Impact Assessments: “we have concerns that this section could act as a block on the Assembly’s legislative powers”.<sup>60</sup> She also pointed out that the Scottish Parliament and the Northern Ireland Assembly do not have Justice Impact Assessments. Carwyn Jones, the First Minister of Wales, argued in response that:

The justice impact tests are similar, to my mind—I’m not arguing in favour of them—to regulatory impact assessments where we pass a law and we say, ‘Well this is the effect that it will have on the courts’. That’s it.<sup>61</sup>

**Clause 11** changes the person who submits Bills for Royal Assent from the Clerk of the Assembly to the Presiding Officer, in line with practice in Scotland.

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<sup>60</sup> [National Assembly for Wales](#), 8 June 2016

<sup>61</sup> [National Assembly for Wales](#), 8 June 2016

**Clause 12** inserts new section 130A into the 2006 Act, setting out new arrangements for financial control, audits and accounts. Broadly speaking, this shifts responsibility from Treasury directions to an Act of the Assembly as a basis for preparing and submitting accounts, and to standing orders for their consideration.

**Clause 13** removes section 29 from the 2006 Act, which sets out how Assembly committees are to be composed. This is therefore left to the Assembly to determine.

**Clause 14** removes section 32 from the 2006 Act, which allows the Secretary of State to participate without vote in Assembly proceedings. It also removes section 33, which requires the Secretary of State to attend the Assembly as part of the process of consultation on the UK Government's legislative programme.

**Clause 15** makes provisions that would follow the potential change of the Assembly's name.

**Clause 16** removes from the *Wales Act 2014* the requirement for a referendum before the income tax provisions commence. It therefore allows the devolution of a portion of income tax to happen by Treasury order. The First Minister, Carwyn Jones, said on 9 June 2016:

I have made it clear that I will not be able to support income tax devolution without a clear overall fiscal framework agreed by both Governments, and that this agreement will be a precondition of supporting a legislative consent motion for the Bill. I think that is entirely reasonable, where there is mutual agreement.<sup>62</sup>

**Clause 17** creates powers for the Welsh Ministers ("executive ministerial functions"), contained in new section 58A to the 2006 Act. It does not cover statutory powers, nor prerogative powers, but catches what the Explanatory Notes call "common law type powers".<sup>63</sup> These are mostly exercisable by the Welsh Ministers alone; exceptions, which may also be exercised by a Minister of the Crown, are listed in new section 58A (4). They are modelled on the functions carried out by Ministers of the Crown and, as mentioned, not based on legislation or the prerogative.

**Clause 18** concerns the implementation of EU law, and it inserts new section 58B to the 2006 Act. This gives Welsh Ministers the power to make regulations under section 2(2) of the *European Communities Act 1972* to implement EU law in respect of Wales. This applies only to regulations on matters that are within the legislative competence of the Assembly.

**Clause 19** concerns functions which originate in UK legislation in devolved areas and which are transferred to the Welsh Ministers under section 58 of the 2006 Act. It provides that these may, by order, be exercised jointly as well as concurrently by Welsh and UK Ministers.

**Clause 20** also concerns transferred functions. It allows them to be increased or reduced either on a geographical basis or otherwise.

<sup>62</sup> National Assembly for Wales, [Record of Proceedings](#), 8 June 2016, 14.33pm

<sup>63</sup> Explanatory Note, para 495

**Clause 21** removes section 63 from the 2006 Act, under which UK Ministers had to consult Welsh Ministers before exercising certain functions in respect of cross-border bodies. The term “cross-border body” is no longer used in the reserved powers model introduced by the Bill, and such bodies will generally be regarded as “reserved authorities” under the new arrangements.

## 3. New powers devolved to Wales

### 3.1 Onshore petroleum

The Bill provides for Welsh Ministers to grant licences for onshore petroleum activities. This power is currently held by the Secretary of State and administered by the [Oil and Gas Authority](#).

**Clause 22** amends the [Petroleum Act 1998](#) to provide Welsh Ministers with the power to award onshore petroleum licences. These powers were in the draft Bill.

A Petroleum Exploration and Development Licence (PEDL) grants the licensee exclusivity over an area of land for onshore hydrocarbon exploration, appraisal and extraction. This includes extraction by hydraulic fracturing ('fracking'). A PEDL does not itself give permission for operations to begin. Planning permission and other permits are required before this can happen.

**Clause 23** provides for the Secretary of State to make amendments to the provisions and model clauses of licences that were in existence before the commencement of devolved oil and gas licensing powers. This power is limited to those licences already in existence in Wales. These powers were in the draft Bill.

PEDLs are held that cover [blocks of land in South Wales](#). However, in the last round of licences granted by the UK Government (14<sup>th</sup> round), licences were not awarded in Scotland or Wales due to the future devolution of these powers.<sup>64</sup>

**Clause 24** amends the parts of the [Infrastructure Act 2015](#) that deal with deep-level access permission to drill for petroleum (including shale gas) or geothermal energy.<sup>65</sup> The clause deals with the parts that give the Secretary of State powers to make regulations around payment and notice schemes. Operators are expected to give notice to and provide payments to communities and landowners on a voluntary basis if they require access for deep level drilling. If this voluntary commitment is not satisfactory the 2015 Act gives the Secretary of State powers to make obligatory schemes instead. Clause 24 provides for the power to make these schemes to transfer to Welsh Ministers. These powers were not in the draft Bill.

Further information on onshore Oil and Gas in Wales is available from [Natural Resources Wales](#).

### 3.2 Road transport

**Clause 25** of the Bill devolves a number of roads-related powers to Welsh Ministers, specifically to:

<sup>64</sup> See Oil and Gas Authority, ["New onshore oil and gas licences offered"](#), 17 December 2015

<sup>65</sup> For background see Library Briefing Papers, [Shale gas and fracking](#), 15 January 2016 and [Infrastructure Bill \[HL\]](#), 4 December 2014, para 4.4

- make **speed limits** on special roads (essentially motorways and other major roads so designated by order); and more generally, to make speed limits on Welsh roads, particularly with regard to particular classes of vehicles;
- make regulations with regards to **pedestrian crossings**;
- prescribe signs and approve **school crossing** patrol uniforms; and
- make regulations in respect of **traffic signs**.

This broadly brings Wales into line with similar devolved powers in this area in Scotland. There remains a difference with regards to some road traffic offences, such as the setting of the drink drive limit, which have been devolved to Scotland but will not be devolved in Wales under this Bill.

**Clause 26** devolves executive competence for **bus route registration** to Welsh Ministers and limits the ability of the Senior Traffic Commissioner to issue guidance in Wales-only matters. This devolution of bus registration powers completes the devolved framework for bus services in Wales and would allow Welsh ministers to legislate to re-regulate buses in Wales, should they so wish.<sup>66</sup>

The Bill devolves powers over **taxi and private hire vehicle (PHV) regulation** in Wales; consequently, **clause 27** would make Welsh Ministers the relevant licensing authority for provisions in section 10 of the [Transport Act 1985](#) relating to the immediate hiring of taxis and advance booking of taxis and hire cars at separate fares.<sup>67</sup> On the issue of cross-border services, the impact assessment accompanying the Bill states that “any taxi and PHV firms that operate across the English-Welsh border would have to work within, and comply with, different regimes if the Assembly legislates to introduce a different licensing regime in Wales”.<sup>68</sup>

### 3.3 Harbours and ports

**Clauses 28-35** of the Bill essentially transfer to the Welsh Ministers a number of functions relating to harbours that are wholly in Wales, other than reserved trust ports as defined in clause 31. The functions transferred are functions of a Minister of the Crown under legislation concerning harbours, harbour authorities and pilotage.

Trust ports are independent statutory bodies, each governed by their own unique statutes and controlled by a local independent board. There are no shareholders or owners and any surplus is reinvested into each port for the benefit of its stakeholders.

**Clause 31(1)** defines a ‘reserved trust port’ as follows:

... if, on the principal appointed day ... it is a harbour, dock, pier or boatslip that is owned or managed by a harbour authority that

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<sup>66</sup> Re-regulation powers for some areas of England are currently being legislated for in the [Bus Services Bill](#), currently in the House of Lords

<sup>67</sup> More information on taxi licensing can be found in HC Library briefing paper SN2005, [Taxi and private hire vehicle licensing](#)

<sup>68</sup> [Impact Assessment of the Wales Bill](#), 7 June 2016, p5

... is a relevant port authority within the meaning of Part 1 of the Ports Act 1991 ... and ... meets the annual turnover requirement.

When the Labour Government last gave a list of the ports that would meet the turnover requirement for the purposes of the 1991 Act, Milford Haven was included. If this remains the case, then responsibility for Milford Haven harbour will remain reserved.<sup>69</sup> The Impact Assessment accompanying the Bill explains:

The only major trust port in Wales is Milford Haven. Policy in relation to other ports wholly in Wales will be devolved. Milford Haven is one of the key energy ports in the UK handling 62% of all liquid natural gas that passes through UK ports, while the oil refinery and fuel storage facilities at the Haven (which are dependent on the port) play an important national role in securing supplies of road and aviation fuel. In light of the Port's strategic significance to the UK, and as it is a trust port accountable to its stakeholders, the port is reserved and so accountable to UK Ministers.<sup>70</sup>

### 3.4 Electricity generating stations

The Bill intends to devolve the responsibility for granting development consent for energy generating projects up to and including 350MW onshore and in Welsh territorial waters. It devolves responsibility for development consent for onshore wind powered generating stations with no upper limit.

The effect of the provisions in the Bill is to disapply the Secretary of State's power under the Planning Act 2008 Act to grant development consent in relation to electricity generating stations, up to those of 350MW (clause 36). The Bill in effect transfers such projects into the town and country planning system in Wales if they are onshore. Energy generation development above 350MW will continue to be determined by the Secretary of State under the Planning Act 2008 development consent regime.

**Clause 37** deals with rights of navigation related to power stations by providing Welsh Ministers with powers under the Electricity Act 1989 to extinguish public rights of navigation, to ensure safety around generating stations. **Clause 38** provides that overhead electric lines associated with such generating stations can be consented by Welsh Ministers. **Clause 39** aligns planning policies in England and Wales by ensuring that associated development for power stations generating more than 350 MW are dealt with by the Secretary of State. 'Associated development' includes ancillary development that is necessary for the operation of a power station, for example network infrastructure or development to mitigate environmental impacts.

The 350 megawatts limit was recommended by the Silk Commission on the basis that it would bring most renewable energy schemes within a

<sup>69</sup> Further details can be found in HC Library briefing paper SN0010, [Ports: privatisation of trust ports](#)

<sup>70</sup> [Impact Assessment of the Wales Bill](#), p5



Welsh system, but larger schemes of ‘strategic importance’ would still be decided by the UK Government.

### **Developments of National Significance**

The [Planning \(Wales\) Act 2015](#) established a new category of development called Developments of National Significance (“DNS”). This enables planning applications for certain types of development above specified thresholds to be made directly to the Welsh Ministers. Further information about the DNS consenting process is available from the Welsh Government’s website on [Developments of National Significance](#) and its [Guidance on Developments of National Significance](#).

The provisions in the 2015 Act are supplemented by the [Developments of National Significance \(Specified Criteria and Prescribed Secondary Consents\) \(Wales\) Regulations 2016](#), as amended. The thresholds for when each type of development will qualify as a DNS is specified in Part 2 of the Regulations. These regulations originally set a threshold for energy generating stations of between 10-50 MW to be determined as a DNS by Welsh Ministers. Until such time as the Wales Bill comes into force, those energy generating stations above 50MW will continue to be determined for development consent by the Secretary of State under the provisions of the [Planning Act 2008](#), with the exception of onshore wind developments.

### **Onshore wind**

The Bill devolves to Wales the responsibility for all onshore wind powered generating stations – with no upper limit of 350MW as for other energy generating developments.

The [Energy Act 2016](#) contains provisions to transfer onshore wind out of the [Planning Act 2008](#) development consent regime, to return responsibility for decision making about these projects back to local planning authorities. In Wales, this would have meant that when the provisions of the 2016 Act come into force, decisions on larger onshore wind developments in Wales above 50MW would have fallen to be determined by planning authorities, whereas smaller onshore wind developments from 10-50MW would have been determined by Welsh Ministers as a DNS.<sup>[3]</sup> Further regulations, the [Developments of National Significance \(Specified Criteria and Prescribed Secondary Consents\) \(Wales\) \(Amendment\) Regulations 2016](#), have now captured those onshore wind projects above 50MW as a DNS. This means that onshore wind projects of 10-50MW *and* over 50MW will be dealt with by the DNS process.

## **3.5 Equal opportunities**

**Clauses 40-41** would amend two areas of the [Equality Act 2010](#) concerning the public sector equality duty and the socio-economic duty.

### **Public sector equality duty**

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<sup>[3]</sup> For further information see Library Briefing Paper, [Planning Reform Proposals](#), 18 May 2016

**Clause 40** would amend section 152 of the 2010 Act to enable Welsh Ministers to modify the list of Welsh authorities subject to the public sector equality duty (PSED). The PSED requires public authorities listed in Schedule 19 of the 2010 Act to have due regard to a number of equality considerations.<sup>71</sup>

Previously, Welsh Ministers could amend the listed Welsh authorities, although they had to obtain the consent of a Minister of the Crown before doing so. Clause 40 would change this, replacing the requirement of consent with a requirement to inform the Minister. The amendment would be materially the same as that made to the 2010 Act by section 37(7) of the [Scotland Act 2016](#).

### Socio-economic duty

**Clause 41** would enable Welsh Ministers to impose the “public sector duty regarding socio-economic inequalities” on public authorities that exercise devolved or mainly devolved functions. The Duty is set out in Part 1 of the 2010 Act.

Broadly, the Duty would require public authorities, when making decisions of a strategic nature, to have due regard to the desirability of reducing socio-economic inequality. Part 1 of the 2010 Act already enables Welsh Ministers to impose the Duty on public authorities. However, the relevant provision was never brought into force and there was no available mechanism by which Welsh Ministers could commence it insofar as it relates to Wales. Clause 41 would supply that mechanism, enabling Welsh Ministers to commence the provisions by order. Subsection (3) would remove the requirement for Welsh Ministers to consult a Minister of the Crown prior to making regulations under Part 1 of the 2010 Act. Subsection (2) would provide that authorities subject to the Duty must take into account guidance issued by Welsh Ministers. Again, the amendment would be materially the same as amendments made by the [Scotland Act 2016](#).<sup>72</sup>

### Equal opportunities – reservations and exceptions

Schedule 1 section N1 of the Bill would reserve “equal opportunities”, with a number of exceptions.

Equal opportunities is defined to mean:

the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions, but not including language.

The exceptions concern:

- the encouragement (other than by prohibition or regulation) of equal opportunities;

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<sup>71</sup> See [The Public Sector Equality Duty and Equality Impact Assessments](#), Commons Library Briefing Paper SN06591, May 2014

<sup>72</sup> [Scotland Act 2016](#), [section 38](#)

- imposing duties on Welsh public authorities conducive to securing that their functions are carried out with regard to equality law;
- the inclusion of persons with particular protected characteristics in non-executive posts on the boards of Welsh public authorities (e.g. the introduction of requirements concerning gender-balanced boards); and
- in relation to the functions of Welsh public authorities, any provision that supplements but does not modify the existing provisions of the 2010 Act (e.g. a requirement to take action that the Act does not prohibit).

## 3.6 Marine licensing and conservation in the Welsh offshore region

### Marine licensing

Certain marine activities, such as dredging and the scuttling of vessels,<sup>73</sup> require a licence to be conducted. These arrangements are provided for by the *Marine and Coastal Access Act 2009*.

Currently those seeking a licence have to apply to either:

- Natural Resources Wales for activities in the Welsh inshore region, under the authority of the Welsh Ministers, or;
- The Marine Management Organisation (MMO) for activities in the Welsh offshore region, under the authority of the Secretary of State.

**Clause 42** of the Bill will devolve marine licensing in the Welsh offshore region to Welsh Ministers.

Some activities would remain reserved to the Secretary of State, such as:

- Certain defence activities;
- Certain activities related to the exploration for, or the production of, petroleum;
- Activities related to the prevention of pollution from ships contained in part 6 of the [Merchant Shipping Act 1995](#).

This is broadly in line with the recommendations of the Silk Commission. The Commission agreed with the then Welsh Government that the “responsibilities of Welsh Ministers for marine conservation and licensing in the Welsh inshore area should be extended to the Welsh offshore area”.<sup>74</sup>

Wales Environment Link, commenting on the Draft Wales Bill, welcomed the proposal, which it believed would “enable connectivity for in the inshore and offshore and coordinated management of the whole Welsh marine area”. However, it raised some concerns about whether there would be “sufficient resources within the Welsh

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<sup>73</sup> Licensable marine activities are listed in Section 66 of the *Marine and Coastal Access Act 2009*.

<sup>74</sup> Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), 2014, p. 93

Government to extend to the offshore or given the reduction in their duties whether resources would be obtained from the Marine Management Organisation, who currently license the Welsh offshore".<sup>75</sup>

## Marine Conservation

**Clause 43** will devolve powers to the Welsh Ministers related to the creation of Marine Conservation Zones (MCZs) in the offshore region. Welsh Ministers already have powers to designate MCZ in inshore waters.

MCZs can be designated to protect nationally important marine wildlife, habitats, geology and geomorphology. Different levels of protection can be applied to each MCZ, from voluntary controls to "reference areas", where no damaging activities are allowed.<sup>76</sup>

This proposal was included in the draft Bill, and is broadly in line with the recommendations of the Silk Commission.<sup>77</sup>

Wales Environment Link, commenting on the Draft Wales Bill, "cautiously" welcomed the proposal. It said that the change would have benefits for the designation of sites that currently straddle the inshore and offshore regions. It went on that the change would "ensure that the whole of the Welsh territorial seas have one governing body responsible for site designation, management, protection and enforcement, providing clarity". However, it was concerned about how the "these extra duties will be resourced".<sup>78</sup>

## 3.7 Other powers

### Sewerage

The Bill will transfer competence on sewerage to the Assembly, which was not previously devolved. **Clause 44** provides for intervention powers for the Secretary of State should a Bill considered by the Assembly or function being exercised by the Welsh government possibly "have a serious adverse impact on sewerage services in England or sewerage systems in England."<sup>79</sup> This clause was in the draft Bill.

### Excepted energy buildings

While the regulation of buildings and building work is a reserved matter, functions under the [Building Act 1984](#) to make building regulations and associated matters were transferred to the Welsh Ministers by an order in 2009 that came into force in 2011.<sup>80</sup> **Clause 45**

<sup>75</sup> Wales Environment Link, Response to the Constitutional and Legislative Affairs Committee inquiry into the Draft Wales Bill, November 2015

<sup>76</sup> House of Commons Library, Marine Conservation Zones in England (CBP6129), 17 July 2015

<sup>77</sup> Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), 2014

<sup>78</sup> Wales Environment Link, Response to the Constitutional and Legislative Affairs Committee inquiry into the Draft Wales Bill, November 2015

<sup>79</sup> EM, para 583-4

<sup>80</sup> See the [Welsh Ministers \(Transfer of Functions\) \(No. 2\) Order 2009](#) (SI 2009/3019).

removes an exception relating to buildings that are part of energy infrastructure.<sup>81</sup> This clause was part of the draft Bill.

### Renewable energy incentive schemes

**Clause 46** would require the Secretary of State to consult with Welsh Ministers before establishing or amending a renewable energy incentive scheme. This clause was not previously in the draft Bill.

### Information for Office of Budget Responsibility

**Clause 47** concerns the provision of information to the Office for Budget Responsibility (OBR). It inserts new section 66A to the 2006 Act, giving the OBR a right of access to all information held by the Welsh Ministers or any Wales public authority specified in regulations made by the Secretary of State. This is so long as the information is reasonably required under its duty to examine and report on the sustainability of public finances under section 4 of the [Budget Responsibility and National Audit Act 2011](#).

### Gas and Electricity Markets Authority

**Clause 48** amends the [Utilities Act 2000](#) and the *Government of Wales Act 2006* to give the National Assembly the power to call the Gas and Electricity Markets Authority to give written or oral evidence in relation to Wales, and requirements for their annual report and accounts to be sent to Welsh Ministers and laid before the Assembly. This clause was not in the draft Bill.

### Coal-mining licensing

**Clause 49** requires applications for coal mining licences in Wales to be approved by Welsh Ministers by amending the [Coal Industry Act 1994](#). This clause was not previously in the draft Bill.

### Office of Communications

**Clause 50** allows the Welsh Ministers to appoint one member of the board of Ofcom. They must first consult the Secretary of State.

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<sup>81</sup> EM, para 585

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