

**CHALLENGE AND OPPORTUNITY:
THE DRAFT WALES BILL 2015**

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Foreword

This Report is the second to emanate from a joint project by the Wales Governance Centre at Cardiff University and the Constitution Unit at University College London focusing on the UK Government's proposals for a reserved powers model of Welsh devolution. Our first Report, *Delivering a Reserved Powers Model of Devolution for Wales*, was published in September 2015 and provided a detailed analysis of the issues raised by the Command Paper published by the then UK Coalition Government earlier in the same year under the title *Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales* (Cm 9020). That Report was widely welcomed and served to inform political and public debate about the UK Government's proposals. Its successor seeks to provide an expert commentary on and assessment of the detailed provisions set out in the draft Wales Bill published in October 2015. It points up the need for fundamental changes to the proposed legislation, whilst also setting out a series of proposals for reconstructing the legislation in order to deliver a properly constituted reserved powers model of devolution for Wales. Our hope is that the Report will inform policy decisions as well as the wider legal, political and public debate.

The Report has been produced by a Review Group of experts in the field of devolution and legislation. The complexity of the draft Wales Bill, as well as the brevity of the period allowed by the UK Government for pre-legislative scrutiny has meant a substantial workload and we are very grateful to them for their efforts. Particular thanks are due to Professor Richard Rawlings who drafted the final version of the Report. We are also most grateful for the many insights provided by three colleagues from Scotland, Des McNulty and Professor Adam Tomkins from the University of Glasgow and Professor Alan Page from the University of Dundee, who joined members of the Review Group at a seminar in Cardiff to discuss an early draft of the Report. Finally we would also like to express our thanks to the Economic and Social Research Council for their financial support.

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Executive Summary

The draft Wales Bill is a document of great constitutional importance, intended by the Secretary of State to produce a stronger, clearer, and fairer devolution settlement that will stand the test of time. Wales's constitutional journey since 1997 has seen too little strategic thinking. Our earlier report in September 2015 set out some of the challenges. This report suggests that those challenges have not been met and that major changes need to be made to the proposed legislation if it is to be workable and sustainable. We welcome the Secretary of State's willingness to respond to the sort of constructive criticism we offer. (Chapter 1)

Constitutional amendment must be rooted in principle. Subsidiarity is a fundamental principle of devolution, but must be balanced against the needs of the Union. Comity and mutual respect between London and Cardiff is essential and new obstacles to this should be avoided. Workability and clarity are also key. Reasoned justification is needed for what is proposed in the Bill, and transplants from Scotland will not always be appropriate. While the National Assembly should not legislate in a way that affects England, it should not be hampered when it legislates for Wales on devolved matters. (Chapter 2)

The draft Bill has received little support. There was a consensus to move to a reserved powers model, but the non-transparent St David's Day process allowed any political party to veto proposals made by the Silk Commission. It was followed by an internal Whitehall trawling exercise that sought further to delimit devolved competence. Non-conferred and "silent" subjects were flipped over to become reservations. There was no process of principled rationalisation aimed at ensuring a coherent and consistent package – a fundamental defect in the draft Bill. Consultation with the Welsh Government was insufficient and the disagreement between the two Governments about the extent of legislative "roll-back" does not augur well. We identify three particular legislative "squeezes" that represent a step backwards in Wales's constitutional journey. (Chapter 3)

There are positive aspects of the draft Bill. Some additional powers of direct relevance to people's lives are to be devolved, though the Welsh Government believes that more powers should be included. The National Assembly is to be made permanent and the convention that Parliament should not legislate on devolved matters without the Assembly's consent is to become statutory. Both proposals need, however, further amendment. The Assembly is to be given control of its own elections, and it will receive the greater internal autonomy that reflects its proper status. Following progress on establishing a Barnett "funding floor" for Wales, the requirement for a referendum before the income tax powers in the Wales Act 2014 can be brought into effect will be removed. However, key aspects of tax devolution remain unaddressed. (Chapter 4)

Welsh law will increasingly diverge from the law applying in England. Yet under the draft Bill, a modicum of legislative space ('leeway') is bounded on all sides by legal restriction ('lock'). This derives from an existential concern to protect the unified legal system of England and Wales. Onerous tests of 'necessity' are imported from the different legal context of Scotland. They add complexity and uncertainty and may provoke legal challenge, with decisions on whether legislation is necessary taken by judges rather than parliamentarians. There is no quick-fix drafting solution through replacing 'necessary' with an alternative such as 'appropriate'. It is the 'leeway and lock' model that is the fundamental problem, not the particular terminology used. (Chapter 5)

Establishing a properly constituted model of reserved powers for Wales requires a different way forward in terms of territory and jurisdiction. Two possible approaches are outlined. The first involves territorial rules for applying Welsh law but within the single legal jurisdiction of England and Wales. Two methods are illustrated for this approach. The second approach involves a distinct but not separate legal jurisdiction for Wales. The differences between this approach and a separate jurisdiction are illustrated by reference to broader responsibilities in relation to the administration of justice. The constitutional and practical benefits of a distinct but not separate jurisdiction are highlighted, particularly in terms of law-making and the courts structure. Three possible models are set out. The legislative process should be paused for these matters to be fully examined, with the Ministry of Justice engaging constructively with the Welsh Government, as well as other stakeholders. (Chapter 6)

The list of specific and general reservations set out in the draft Bill shows ‘reservation creep’. It both begrudges devolved power and will in practice create very substantial and unnecessary constraints on policy-making and legislation in Wales. We re-state the principles for whether a subject should be reserved, as articulated in our earlier report. Leaving aside areas generally reserved throughout the UK and those where a political decision has been taken not to devolve in Wales (such as policing), a large number of proposed reservations are questionable – and at least need the reasoned justification that has not yet been made. The intricacy and complication of the reservations will result in blame-shifting between London and Cardiff and undesirable litigation. Streamlining the list of reservations will simplify the devolution settlement and improve its robustness. (Chapter 7)

The more expansive requirements for UK ministerial consent introduced by the draft Bill conjure the prospect of democratically legitimated Welsh legislative policy being overridden by UK executive power. There are many difficulties with the proposed regime, especially in the novel concept of ‘reserved bodies’ and in the definition of ‘Welsh public authorities’. The UK Government’s promise of speedy action and a presumption in favour of consent is not adequate. While the UK Government has proper interests to protect, more transparency is needed. The legislation should aim to specify those bodies and functions subject to the consent requirement. As well as proper dialogue between the two governments, a streamlined process for decisions on consent is also needed. (Chapter 8)

The Secretary of State’s policy objectives of a stronger, clearer, fairer and more robust devolution settlement would be frustrated by a draft Bill that is constricting, clunky, inequitable and constitutionally short-sighted. The legislation needs to be reconstructed and enough time needs to be taken for this to be done properly. Joint working by the two Governments is particularly important. As matters stand, we could not recommend that the National Assembly consent to the proposed legislation. (Chapter 9)

Introduction

On 20 October 2015, the draft Wales Bill was presented to the Westminster Parliament.¹ In his foreword, the Secretary of State for Wales Stephen Crabb hearteningly declared that it ‘sets out in detail how the Government plans ... to create a stronger, clearer, and fairer devolution settlement for Wales that will stand the test of time’.² Centred on the move from a conferred powers model of devolution, where the areas in which the National Assembly for Wales can legislate are prescribed, to a reserved powers model, where the matters on which it may not legislate are listed, the draft Bill is formally - and less inspiringly - designed ‘to amend the Government of Wales Act 2006 and make provision about the functions of the Welsh Ministers; and for connected purposes’.³ At over 70 pages it is a weighty document.

1.1. Backdrop

The short history of Welsh devolution demonstrates much change and much continuity. What was originally devolved under the Government of Wales Act 1998 was a patchwork of executive, not primary legislative, functions that were in essence powers which had been exercised by the Secretary of State for Wales from the Welsh Office. Part 3 of the Government of Wales Act 2006 provided for the conferral on the National Assembly of legislative powers to make ‘Assembly Measures’ within some 20 fields where executive responsibilities had been vested in the National Assembly and exercised through Welsh ministers (Schedule 5). Following the referendum in favour of full primary law making powers for Wales in 2011, Part 4 of the 2006 Act was brought into force. It is under this scheme that the National Assembly makes ‘Assembly Acts’. Set out in Annex A to this report, section 108 on ‘legislative competence’ requires (among other things) that such provision relates to one or more of 20 matching subjects set out (with defined exceptions) in Schedule 7. Most recently, the Wales Act 2014 broke new ground in the fiscal constitution by establishing some Welsh taxing powers.

Successive bouts of public criticism, followed by review and recommendation by independent Commissions,⁴ bear ample testimony to the confusion, incoherence and frustration associated with a constitutional journey that in turn reflects and reinforces the pervasive sense of no overall strategy in UK devolutionary development.⁵ Against this backdrop, the official imagery of the draft Bill moving ‘towards a lasting devolution settlement for Wales’⁶ has clear and immediate appeal. But as we said in *Delivering a Reserved Powers Model of Devolution for Wales*, our first report on the subject published in September 2015, ‘the commitment ... to move to the “reserved powers” model ... is not a

¹ HM Government, *Draft Wales Bill*, Cm 9144, 2015.

² *Ibid.*, p 4.

³ Preamble to the draft Wales Bill 2015.

⁴ Lord Richard (Chair), *Report of the Commission on the Powers and Electoral Arrangements of the National Assembly* (2004); Sir E. Jones Parry (Chair), *Report of the All Wales Convention* (2009); G. Holtham (Chair), *Final Report of the Independent Commission on Funding and Finance for Wales* (2010); P Silk (Chair), *Report of the Commission on Devolution in Wales: Part 1, Empowerment and Responsibility: Financial Powers to Strengthen Wales* (2012); *Part 2, Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014).

⁵ R Hazell (ed), *Devolution and the Future of the Union* (Constitution Unit, 2015).

⁶ HM Government, *Powers for a Purpose: Towards a lasting devolution settlement for Wales* Cm. 9020, 2015.

straightforward technical change but raises fundamental questions about the development of Welsh devolution'.⁷

The draft Bill has already attracted considerable criticism. On 13 January 2016, in a debate described by Presiding Officer Dame Rosemary Butler as 'unprecedented' in the history of the National Assembly,⁸ elected representatives from across the political spectrum voiced their concerns. The First Minister of Wales Carwyn Jones stated that in important respects 'the draft Bill is not fit for purpose'.⁹

Our first report was produced in the light of *Powers for a Purpose*, the Command Paper published by the previous UK coalition government on which the draft Bill is largely – but not wholly – based. Looking more closely, draft clauses are seen to reflect successive rounds of framing and reframing of devolution policy: by the independent Silk Commission and the cross-party 'St David's Day process' ahead of the Command Paper, and then by Whitehall departments, including of course the Wales Office.

1.2. Challenge and opportunity

Constructing a reserved powers model for a small polity long dependent on, and economically and socially highly integrated with, its larger English neighbour, was always going to be very challenging. The more so, since the constitutional situation in what the draft Bill calls in resounding and historically remarkable language 'the union of the nations of Wales and England'¹⁰ is unique: not only two legislatures, one of which is sovereign, and two governments, but also a shared legal system. Conversely, however, the scale of the challenge speaks loudly against backward-looking and rigidly mechanical forms of constitutional design.

Making sense of the draft Wales Bill is certainly a challenge - especially when read with the Secretary of State's laudable sentiments of a stronger, clearer, fairer and lasting devolution settlement in mind. As this report will make clear, certain parts of the legislative package comply, and some could do so if suitably revised, but other very important parts are fundamentally flawed. The package is also shown to be incomplete. We particularly stress the practical importance of a workable and sustainable devolution settlement for Wales: the many ways in which constitutional arrangements directly affect day-to-day policy development and implementation and hence the lives of citizens.

'It is vital that we get the Welsh devolution settlement right'. In the light of a difficult history the Secretary of State's words¹¹ have special resonance. We welcome his declared willingness to take on board constructive criticism.¹² In the light of the draft Bill, we further stress the need for close, joint working between the two governments of Wales with a view to establishing a balanced set of constitutional arrangements.

As well as critically analysing the provisions of the draft Bill, this report offers constructive suggestions and charts alternative ways forward with a view to securing a consensus-based

⁷ Wales Governance Centre and The Constitution Unit, *Delivering a Reserved Powers Model of Devolution for Wales* (2015), p 5.

⁸ Presiding Officer of the National Assembly Dame Rosemary Butler, press release 13 January 2015.

⁹ National Assembly for Wales, Record of Proceedings 13 January 2015.

¹⁰ Draft Wales bill Schedule 1, inserting new Schedule 7A Part 1 paragraph 1(b).

¹¹ Foreword to the draft Wales Bill, p. 4.

¹² National Assembly for Wales Constitutional and Legal Affairs Committee, committee transcript 23.11.2015, paragraphs 130-131.

devolution settlement for Wales that meets the Secretary of State's declared policy objectives. Proceeding then on the basis that the legislative proposals represent a major constitutional opportunity as well as a legal and bureaucratic challenge, it is structured in the following way.

Chapter 2 considers the principles which should inform a new constitutional settlement for Wales inside the UK, while chapter 3 illuminates the adverse influence of serious defects in the process of framing and working up the draft legislation. Chapter 4 examines a series of enhancements to the devolution settlement that, if otherwise rendered fit for purpose, the legislation could deliver. Chapter 5 demonstrates fundamental flaws in the particular version of a reserved powers model of devolution set out in the draft Bill. Building directly on our first report, Chapter 6 suggests alternative ways round, based on territorial rules and on a distinct but not separate jurisdiction for Wales. Chapter 7 examines the list of reservations in the draft Bill, demonstrating the need both for pruning and for a coherent, consistent approach. Chapter 8 shows the need to rethink the system of UK ministerial consents to National Assembly legislation envisaged in the draft Bill.

Powers for a Purpose stated that 'fundamental reform of the foundations of Welsh devolution is now needed' and that 'it is time to develop a new way of thinking' on Welsh devolution.¹³ Unfortunately, despite the seeming promise of the move to a reserved powers model, many of the complex provisions in the draft Bill, which would undermine its workability and sustainability, reflect a backward-looking approach. In the concluding chapter, we thus underscore the scale of the challenge presented by the draft legislation and the constitutional opportunity waiting to be seized. The proposed legislation requires reconstruction: changed parameters, not mere tinkering. Ideally, it would be a replacement Act, not an amending one.

¹³ *Powers for a Purpose*, paragraphs 2.1.10; 2.1.18.

Principle: Wales in the UK

Failure properly to incorporate constitutional principle into constitutional design is a chief theme in the scrutiny of the UK's changing territorial constitution.¹⁴ The draft Wales Bill can be seen as a particularly striking example in view of the existing reservoir of constitutional principles for Welsh devolution established by the Silk Commission.

2.1. Reservoir of principles

In the words of the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, 'the key to constitutional drafting is ensuring that it is rooted in principle'.¹⁵ In the case of Wales, this must involve understandings about how functions should be divided between the UK and the devolved tier of government and the practicalities of policy delivery and implementation. While a solid dose of pragmatism fits our domestic constitutional traditions, our earlier report made clear that another ad hoc political bargain would not produce a robust, stable and lasting devolution settlement.

The independent Silk Commission established by the UK Government is an authoritative source of constitutional principle. Evidence-based, their analysis made clear that any new devolution settlement should be constructed in terms of the following key values of good governance:¹⁶

Accountability – Clarity – Coherence – Collaboration

Efficiency – Equity – Stability – Subsidiarity

Subsidiarity is naturally seen as a guiding principle by local actors. Ahead of the draft Bill, the National Assembly's Constitutional and Legislative Affairs Committee (CLAC) recommended that the UK Government adopt it as 'the starting point'.¹⁷ Following publication, the Presiding Officer of the National Assembly has reiterated that 'the centre should reserve to itself only what cannot be done effectively at a devolved level'.¹⁸ The Counsel General for Wales Theodore Huckle QC has pursued the argument that powers relating to 'domestic' matters should generally be devolved, observing that Wales, as compared with Scotland and Northern Ireland, is treated harshly. Much of the legal and administrative complexity associated with the Welsh devolutionary process 'derives from its narrowness'.¹⁹

¹⁴ See for example House of Lords Constitution Committee, Tenth Report, *Proposals for the devolution of further powers to Scotland*, HL (2014-15)145, paragraphs. 22, 24. The Constitution Committee is currently undertaking a principled inquiry into the Union and devolution.

¹⁵ Lord Thomas of Cwmgiedd, 'The Law of Wales': Looking Forwards', speech at the Legal Wales Conference 9 October 2015. See also Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015).

¹⁶ Silk Commission, Part 2 Report, paragraph 3.3.3. See also, Silk Commission, Part 1 Report, paragraph 3.3.

¹⁷ National Assembly for Wales Constitutional and Legislative Affairs Committee, *The UK Government's Proposals for Further Devolution to Wales* (July 2015), paragraph 24.

¹⁸ Dame Rosemary Butler, letter to the Welsh Affairs Committee, 11 November 2015.

¹⁹ Theodore Huckle QC, "'Fixes, Fudges and Falling Short"? The Need for a Coherent and Lasting Devolution Settlement for Wales' (Sir William Dale Memorial Lecture, 2015).

Illuminating the importance of interaction and mutual benefit, or of flexible, federal-type practices of ‘shared rule’ as well as ‘self-rule’²⁰ inside the UK, the Secretary of State speaks of building ‘a stronger Wales within a strong and successful United Kingdom’.²¹ The draft Bill and in particular the proposed reservations invite consideration of the character and purposes of the UK ‘union state’ or ‘state of unions’.²² Reference is often made to three main aspects: ‘political union’, as with representation of all parts at the centre; ‘economic union’, as with an integrated market underpinned by a single currency and central fiscal framework; and ‘social union’, as with a safety net of welfare benefits.²³ Not least in view of the strong contribution of Wales to Her Majesty’s forces, we would point up a fourth dimension: ‘defence and security union’.

There are legitimate political choices to be made, or agreements struck, about how to balance the claims of subsidiarity on the one hand, and of political, economic, social, or defence and security union, on the other.²⁴ Certain powers and functions are naturally seen as core to the identity or cohesion of the state and as such not fit to be devolved. As illustrated in the Scotland Act 1998, these include the Crown, the Westminster Parliament, monetary policy and the currency, the commitment of defence forces, and immigration and nationality. Beyond this, there may be more pragmatic reasons centred on the pooling and distributing of risks and resources, or the maintenance of common standards, to warrant brigading powers or functions, to some degree, at UK level. In the present context, for example, the Silk Commission accepted that control over very large energy projects should remain in London because of their strategic importance to the UK.²⁵

Strengthening the UK’s voluntary association of four home countries does not mean power-hoarding at the centre.²⁶ Principles of comity and mutual respect as well as greater parity of esteem among the several democratically legitimated centres of authority inside the UK tell against this.²⁷ The Silk Commission emphasised the importance of ‘political institutions that... work together in the interests of the people they serve’.²⁸ Enlightened – prudent – constitutional policy seeks to avoid unnecessary legal obstacles liable to generate friction among the component parts. Key provisions in the draft legislation will be shown not to comply.

There is a pressing need to upgrade the machinery of intergovernmental relations, most obviously with a view to securing the declared aims of cooperation, communication, and consultation,²⁹ and promoting the discipline of accountability.³⁰ Indeed, the Silk Commission recommended a Welsh intergovernmental committee, in part to resolve cross-border issues

²⁰ D Elazar, *Exploring Federalism* (1987); M. Burgess, *In Search of the Federal Spirit* (2012).

²¹ Foreword to the draft Wales Bill, p 4.

²² J Mitchell, *Devolution in the UK* (2009).

²³ Calman Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2009), paras. 15-20.

²⁴ See generally, R Hazell (ed), *Devolution and the Future of the Union*.

²⁵ Silk Commission, Part 2 Report, paragraphs 8.2.19-8.2.20.

²⁶ See for this theme, D Melding, *The Reformed Union: The UK as a Federation* (2013); and Society of Conservative Lawyers, *Our Quasi-Federal Kingdom* (2014).

²⁷ See further, R Rawlings, ‘Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis’ (2015) 42 *Journal of Law and Society* 471.

²⁸ Silk Commission, Part 2 Report, paragraph 3.4.1.

²⁹ *Devolution: Memorandum of Understanding and Supplementary Agreements* (October 2013 version).

³⁰ See for example House of Lords Constitution Committee, Eleventh Report, *Inter-governmental relations in the United Kingdom*. HL (2014-15) 146, ch. 3; and Institute for Government, *Governing in an Ever Looser Union* (2015).

and to settle disputes at an early stage.³¹ In the context of UK ministers' powers, the draft Bill will be seen to highlight the importance of establishing a more equitable balance of negotiating strength in this important constitutional domain.

From the standpoint of civil society, we would highlight the importance of workability. Any new Wales Bill must establish a constitutional scheme that, to borrow from the Silk Commission, is 'straightforward to operate' and 'provides value-for-money'.³² At stake are the output values of efficiency and effectiveness and ultimately the credibility or legitimacy of the devolved institutions.

Elemental rule of law concerns about clarity and transparency in the constitutional order also loom large from the citizens' perspective. In the words of the Silk Commission, the devolution settlement should be 'predictable in its operation' and 'voters should understand where decisions are made'.³³ Of course, as comparative constitutional experience testifies, demarcating central from territorial powers is often a complex task. But this places a special premium on principles of coherence and stability and on reasoned justification as part of the process. The draft legislation, it will be seen, scores badly.

2.2. 'Devolution revolution'

The precise shape of UK-level functions is currently at the heart of constitutional debate, most obviously in the wake of the Scottish independence referendum. The draft Wales Bill must be seen as part of a package of territorial constitutional reforms promoted by the new government at Westminster. UK ministers speak of nothing less than a 'devolution revolution'.³⁴

As well as the Scotland Bill, officially described as making the Scottish Parliament 'one of the most powerful devolved parliaments in the world',³⁵ this includes a Cities and Local Government Devolution Bill for England. The associated policy concept of the 'city deal' is coming to Wales.³⁶ Especially noteworthy are the new procedures in the House of Commons for 'English votes for English laws' (EVEL), a constitutional development of the first importance. Given the porous nature of the border between the two countries, this has particular relevance for Wales, extending to an English-and-Welsh variant in certain non-devolved policy areas.³⁷

Asymmetry remains a defining feature of the 'devolution revolution'. We need only mention the provisions in the Scotland Bill on extensive welfare devolution, powers which, particularly in view of differential funding levels, have not been high on the political agenda in Wales hitherto.³⁸ On the other hand, Scotland furnishes many legislative precedents or opportunities for read-across to Wales; and often valuably so, as will be shown in provisions of the draft Bill echoing recommendations from the Smith Commission³⁹ concerning the

³¹ Silk Commission, Part 2 Report, recommendation 6.

³² Ibid, paragraph 3.3.3.

³³ Ibid

³⁴ HM Government, *Spending Review 2015*, paragraph 1.233. For the long view, see K Morgan, *Revolution to Devolution: Reflections on Welsh Democracy* (Cardiff, 2014).

³⁵ Prime Minister's Office, *Queen's Speech 2015 – Background Briefing*, p 50.

³⁶ HM Government, *Spending Review 2015*, paragraph 1.235.

³⁷ House of Commons debates 22 October 2015, cols 1159-1255.

³⁸ Silk Commission, Part 2 Report, chapter 11. See further, First Minister of Wales Carwyn Jones, Oral Evidence to the House of Lords Constitution Committee, 21 January 2015.

³⁹ Lord Smith (Chair), *Report of the Commission for further devolution of powers to the Scottish Parliament* (2014).

constitutional architecture. Unfortunately, other major provisions of the draft Bill will be seen to demonstrate the risks of legal transplantation when insufficient attention is paid to different constitutional and political contexts.

2.3. Two constitutional imperatives

Two constitutional imperatives command special attention. First, effective law-making for Wales must be a main priority. In particular, the devolved institutions must not be hampered in the development and application of legislative policies otherwise within devolved competence. Smooth legal and administrative processes are thus required, all the way from rule formulation to enforcement and sanctions, not an obstacle course drawn from legal history. Since they provide the essential means for animating, implementing and upholding legislative policies on a routine basis, not least in the regulatory sphere, the civil law and the criminal law provide the acid test. A 'legislature' which is unable to make effective policy choices about when and how to provide for civil or criminal means of enforcement through its primary legislation is not worthy of the name.

A related consideration concerns the constitutional distinction visible across Offa's Dyke. The sovereign Parliament will commonly be (seen to be) functioning as a legislature for England, while of course the National Assembly remains a devolved legislature. The tighter the legal constriction on the National Assembly in terms of effective law-making, the more the difference between the two legislatures in terms of the practical application of policies will be accentuated. From a unionist perspective, this may be accounted an unnecessary source of grievance.

All too easily overlooked in Cardiff, a second imperative is the need to regulate legislative 'overspill' and so do well by English neighbours. Giving tangible expression to the principles of comity and mutual respect among the union 'family' of countries, a distinctive demography must be properly accommodated in the emergent constitutional design.

The relevant provisions of the devolution legislation need to be properly aligned with those on EVEL set out in standing orders. The key democratic concern about citizens being affected by laws in which their representatives had no say now cuts both ways. It appears that if the House of Commons were dealing with provisions for England which contained minor or consequential provisions applying to Wales and those provisions could be shown to correspond to something that could be done under the general tests for Welsh devolved competence, then that is a matter on which Welsh MPs may have their rights curtailed (House of Commons Standing Order 83J(2), (3)(b) and (6)). Major complexity in a new model of Welsh devolution cuts against the smooth working of EVEL and may further hinder the work of Welsh MPs.

3

Process and consequence

Centred round one particular version of a reserved powers model of devolution, the proposals set out in the draft Wales Bill have garnered very little support since their publication in October 2015. This is highlighted in the pre-legislative scrutiny in both Cardiff and London⁴⁰ (to which many members of our review group contributed as witnesses). In the words of the National Assembly's Constitutional and Legal Affairs Committee (CLAC), 'the weight of evidence received overwhelmingly opposes the way in which the draft Bill delineates the boundary of the Assembly's legislative competence'. The draft Bill 'should not proceed until it is significantly amended'.⁴¹

This frosty reception stands in striking contrast to the high degree of consensus previously evident in Wales about moving to a reserved powers approach. At the time of the May 2015 UK General Election the four main political parties in Wales, as well as both UKIP and the Greens, supported the idea. Moreover, both of the reports that constituted the starting point for the production of the draft Bill, namely the second report of the Silk Commission on legislative powers to strengthen Wales, and the report of the Smith Commission for further powers for the Scottish Parliament,⁴² were produced via cross-party processes that were characterised by broad consensus.⁴³ And the Silk Commission had 'formed the firm view that a reserved powers model would be superior to the current arrangements'.⁴⁴

Our previous report duly rehearsed the possible advantages of a reserved powers model: from a Welsh viewpoint, the linked potentials of greater clarity and consistency, and workability and sustainability; and, from a UK standpoint, the advantages of a single core model of devolution but with tailored variations for Scotland, Wales and Northern Ireland.⁴⁵ Reserved powers models obviously come in different shapes and sizes, however. There is much scope for different perspectives in London and Cardiff over what constitutes a 'stronger' and 'fairer' devolution settlement for Wales. 'Clearer' provision can also cut both ways.

While moving from conferred to reserved powers may seem attractive at first sight, so much depends on the internal design of the model or tests for competence, as well as the width and depth of the reservations. The Silk Commission had in fact injected a word of caution: 'in recommending a reserved powers model, we stress that this is not the panacea that some seem to believe it to be'.⁴⁶ Examination of the draft Wales Bill serves to puncture any lingering complacency. It is not the model of reserved powers *per se* that really matters, but the chosen specification.

The draft Bill must be understood in the light of the distinctive workings by which it came into being. This in turn helps to explain the apparent breakdown in consensus. This Chapter

⁴⁰ At the time of writing, the House of Commons Welsh Affairs Select Committee (WAC) has not reported the conclusions of their inquiry into the draft Bill.

⁴¹ National Assembly for Wales Constitutional and Legal Affairs Committee, *Report on the UK Government's Draft Wales Bill* (December 2015), paragraphs 162, 179.

⁴² Lord Smith (Chair), *Report of the Commission for further devolution of powers to the Scottish Parliament* (2014).

⁴³ See generally, R Rawlings, 'Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis' (2015) 42 *Journal of Law and Society* 471.

⁴⁴ Silk Commission, Part 2 Report, paragraph 4.5.1.

⁴⁵ *Delivering a Reserved Powers Model of Devolution for Wales*, paragraph 1.1.

⁴⁶ Silk Commission, Part 2 Report, paragraph 4.6.11.

demonstrates how the process of formulating the particular version of a reserved powers model has served to undermine the aspirations invested in the basic concept, support for which the Secretary of State has notably continued to articulate.⁴⁷

3.1. Genesis of the draft Bill

The process by which the draft Bill came into being in the wake of the Silk Commission's principled analysis consists of two main elements that must not be confused. One – the so-called St David's Day process – is at least relatively well-known. The second, the Whitehall-based process up to and beyond the production of Annexes to the Command Paper *Powers for a Purpose*, is not. Yet as will be made clear, the content of those Annexes and the bureaucratic mechanics surrounding them are key to understanding some of the most difficult and controversial provisions in the draft Bill.

- *St David's Day process*

Established by the Secretary of State for Wales in the aftermath of the Scottish independence referendum, the St David's Day process drew together 'the Westminster representatives of the Welsh political parties' in order to seek cross-party consensus on which of the recommendations in the Silk Commission's second report on legislative powers should be implemented.⁴⁸ The suitability for Wales of the non-fiscal elements of the Smith Commission's recommendations for Scotland was also considered on the same basis.

There was much ground to cover. The Silk Commission had made some 60 recommendations clustered round the core recommendation of moving to a reserved powers model. They ranged from major devolved competencies 'to strengthen Wales', for example in policing or key elements of the transport system, to increasing the size of the National Assembly. The Smith Commission had identified three main pillars of reform – providing for a durable but responsive constitutional settlement, delivering prosperity, and strengthening financial responsibility – the first one being of immediate relevance for the St David's Day process. Some areas that had been excluded from the Silk Commission's terms of reference, notably the National Assembly's electoral arrangements, as well as issues that had come to the fore following the Scottish independence referendum, were thereby factored into the Welsh constitutional equation. This was welcome recognition of the place of Wales in the wider reform of the post-devolution UK state.

The St David's Day process also had severe limitations. Each party to the process was able to veto any of the individual recommendations under review. Inevitably, this privileged consensus over coherence. The process was singularly lacking in good governance values of transparency and accountability. In sharp contrast to the Silk Commission, there was no requirement for a party wielding a veto to offer any justification of their position, let alone explain how their aggregate preferences amounted to a basis for, in the words of the sub-title of *Powers for a Purpose*, a 'lasting devolution settlement for Wales'. Nor was there any subsequent attempt to work through the resulting lowest common denominator consensus between the parties to consider whether or not it amounted to a coherent package of devolution.

- *Annexes*

⁴⁷ As in the foreword to the *Draft Wales Bill*, p. 4.

⁴⁸ Foreword, *Powers for a Purpose*, p. 6.

The main body of *Powers for a Purpose* is largely descriptive in character, so laying out the cross-party consensus position achieved in the St David's Day process. Annex A of the Command Paper in turn provides a tabular overview of the Silk Commission's recommendations and their fate. But also appended were three annexes of a functional nature, directed to the task of elaborating the legislative development in the wake of the cross-party political process. We understand that these other, far more consequential, annexes were not shared with the non-UK Government participants in the St David's Day process prior to publication. Save where they flow directly, they cannot, therefore, be viewed as representing even a minimum cross-party consensus. Indeed, they do not seem to have been the subject of any pre-publication debate or deliberation beyond the confines of Whitehall.

Annex D of *Powers for a Purpose* points up the distance already travelled from the principle-based effort of the Silk Commission to delineate a coherent and stable set of constitutional arrangements for Wales in the UK. Taking the form of a checklist of 'issues to be considered in moving from a Conferred to a Reserved Powers Model', it is highly London-centric. The role of central government policy delivery, to ensure that citizens have the same rights and obligations, is faithfully and properly recorded. Devolutionary concepts of subsidiarity, autonomy and diversity are conspicuous by their absence. Heralding the key theme with the draft legislation of a lack of balance, a Whitehall-based process had lurched in a Whitehall direction.

Annex B provided an illustrative list of 'The Areas Where Reservations Would Be Needed' (complemented in Annex C with a worked example concerning road transport). As shown in our first report,⁴⁹ this clearly demonstrated an expansive approach to reservation-making, driven in part - but only in part – by the rejection in the St David's Day process of some of the Silk Commission's major recommendations for further devolution in subject-areas such as policing and prisons.⁵⁰ Indeed, the constitutional convention of ministerial responsibility notwithstanding, the Secretary of State has subsequently expressed surprise at some of the reservations included in the draft Bill.⁵¹

Most importantly, Annex B began to lift the curtain on a set of official preoccupations destined to occupy centre-stage in the political and legal controversy over the draft Bill. Namely, the preservation of what the Secretary of State has called 'the integrity of the England-and-Wales jurisdiction',⁵² even to the extent (in a model of reserved powers) of strictly curtailing the use of civil law and criminal law to deliver the National Assembly's legislative policies.

Annex B (but not the main body of *Powers for a Purpose*) thus spoke of reserving the sprawling areas of 'civil law and procedure' and 'criminal law and procedure'. This is the forerunner of general restrictions in the draft Bill on the exercise of devolved competence, which according to the explanatory notes 'are intended to provide a general level of protection for the unified legal system of England and Wales, whilst allowing the Assembly some latitude to modify these areas of law'.⁵³ Whereas the representatives of the two main Westminster parties were apparently in favour of preserving the single jurisdiction,⁵⁴ these

⁴⁹ *Delivering a Reserved Powers Model of Devolution for Wales*, paragraph 2.5 and Annex B.

⁵⁰ Silk Commission, Part 2 Report, chapter 10.

⁵¹ National Assembly for Wales Constitutional and Legal Affairs Committee, transcript of evidence 23.11.2015, paragraph 114.

⁵² *Ibid*, paragraph 57.

⁵³ Explanatory notes to the draft Wales Bill, paragraph 32.

⁵⁴ National Assembly for Wales Constitutional and Legal Affairs Committee, committee transcript, 23.11.2015, paragraph 33.

wider developments were not (we understand) a subject of discussion in the St David's Day process. But there was apparently intensive, internal Whitehall debate: the Secretary of State for Wales has spoken of 'long, protracted, involved' discussions with the Ministry of Justice (MoJ).⁵⁵

The decision in Whitehall to go down this route has proved to be a fateful one. Cutting against the admirable policy aim of a clearer, stronger, fairer and sustainable devolution settlement, it has further served to undermine the evident consensus in Wales on moving from conferred to reserved powers. From the standpoint of civil society, it is particularly unfortunate that this defining feature of the draft Bill was never the subject of serious consideration or engagement outside Whitehall prior to publication.

- *Mechanics*

In-house bureaucratic process was effectively tasked with supplying the hard legal detail for the proposed new constitutional allocation of functions as expressed in terms of reserved powers. As explained by the Secretary of State, it was a classic Whitehall 'trawl'. This was naturally biased in favour of institutional self-interest, with the Wales Office asking Whitehall colleagues: 'What is your interpretation of the current devolution boundary in your departmental areas given the existing legislation?'⁵⁶

Delivering what would later be called 'a reserved powers model with a conferred powers model mind-set behind it',⁵⁷ the in-house characterisations of non-devolved matters were then 'flipped over' into the burgeoning draft lists of reservations. While the Wales Office seemingly made some attempt at 'push-back' against certain Departments' demands,⁵⁸ there was no more general process of principled rationalisation aimed at ensuring a coherent and consistent package of reserved matters. This is a fundamental defect in the construction of the draft Bill.

These general mechanics of 'trawling' and 'flipping' have a particular twist. In moving from the conferred powers model of devolution, the draft Bill would secure for London the control of so-called 'silent subjects'. This is the realm of the unanimous UK Supreme Court ruling in the *Agricultural Wages* case.⁵⁹ National Assembly legislation, where it also relates to a subject which, although not specified as an exception, is not listed as devolved (as with employment and industrial relations), is said to be within powers if the provision 'fairly and realistically' relates to a devolved matter (as in agriculture). Emphasising that the 2006 Act does not provide that an Assembly Act must relate solely to a devolved matter (see section 108), the Court clearly prioritised the workability of devolved governance in the context of the existing conferred powers model.⁶⁰

Powers for a Purpose exhibits a profound dislike in Whitehall of this expansive interpretation of devolved competence. As the Command Paper pointed out, Schedule 7 of the 2006 Act is silent on many policy areas which would ordinarily be considered not to be devolved.⁶¹ The

⁵⁵Ibid

⁵⁶ Ibid, paragraph 29.

⁵⁷ National Assembly for Wales Constitutional and Legal Affairs Committee, transcript of evidence 16.11.2105, paragraph 100 (Elisabeth Jones, Director of Legal Services, National Assembly for Wales).

⁵⁸ National Assembly for Wales Constitutional and Legal Affairs Committee, 23.11.2015, paragraph 29 (Secretary of State for Wales).

⁵⁹ *Agricultural Sector (Wales) Bill – Attorney General Reference* [2014] UKSC 43.

⁶⁰ Ibid, paragraphs 67-68.

⁶¹ *Powers for a Purpose*, paragraph 2.1.9.

Agricultural Wages case can further be seen leaving the UK Government with an open flank, which ministers understandably wish to seal.

Another key driver of the draft Wales Bill is thus identified: a very particular concern on the part of Whitehall to ‘bring more clarity and consistency to the Welsh settlement’ and render it more ‘stable’⁶² through a reserved powers model and hence detailed specification of what is not devolved. The reversed dynamic entailed in the move from a conferred to a reserved powers model of devolution must be factored into the equation. Thus the standard competence test of ‘relates to’ would no longer reference the requirement to find relevant statutory pegs on which to hang devolved legislative policies but instead the need to avoid a whole set of legislative hooks in the form of reservations. The logic of the Supreme Court’s stance in the *Agricultural Wages* case is that had the Schedule listed employment and industrial relations as reserved matters the legislation would have fallen.⁶³

Whereas the general conversion⁶⁴ of silent subjects into reservations in the draft Bill fits with the Secretary of State’s declared aim of a ‘clearer’ devolution settlement for Wales, the devolved institutions may not always see it as ‘stronger’ and ‘fairer’. Suffice it to add that this part of the legislative package has the potential to generate major political and constitutional controversy. This point is highlighted by the UK Government’s Trade Union Bill, where, in the light of reservations of employment and industrial relations akin to those in the draft Wales Bill (SA 1998, Schedule 5, Part II, section H1; draft Wales Bill, reservation 154), the Presiding Officer of the Scottish Parliament has determined that a legislative consent motion is not required.⁶⁵ In the blurry light of the *Agricultural Wages* case, such a motion has by contrast recently been laid in the National Assembly.⁶⁶

As well as being constitutionally owned by the UK Government, the draft Bill is of course a preliminary stage in the formal legislative process. The fact of limited joint working between the two governments of Wales is, nonetheless, a striking and troubling feature. Opportunities to minimise or at least ameliorate the legal difficulties with the draft legislation through inputs from those with first-hand knowledge and experience of devolved governance have been missed. In this respect, the official correspondence that has been published⁶⁷ makes dismal reading. According to the First Minister of Wales, the Welsh Government did not have clear sight of the draft Bill in the developmental process.⁶⁸ We are pleased to learn that a programme of bilateral meetings between officials has now been organised in the shadow of the ensuing political and legal controversy: better late than never.

3.2. Squeezes

⁶² Ibid, paragraph 2.1.18.

⁶³ See Bingham Centre, *A Constitutional Crossroads*, Appendix: ‘The case law on devolution’.

⁶⁴ The draft Bill creates a specific exception for the subject-matter of the Agricultural Sector (Wales) Act 2014 (exception to reservation 154).

⁶⁵ Scottish Parliament, Official Report, 10 December 2015, cols 109-110.

⁶⁶ Welsh Government, *Legislative Consent Memorandum: Trade Union Bill* (November 2015). Available at: <http://www.assembly.wales/laid%20documents/lcm-ld10439/lcm-ld10439-e.pdf> See further, A Trench, ‘Legislative consent for the Trade Union bill?’ *Devolution Matters*, 17 October 2015. Available at: <https://devolutionmatters.wordpress.com/2015/10/17/legislative-consent-for-the-trade-union-bill/>

⁶⁷ Copies of letters and supporting correspondence from the First Minister of Wales to the Secretary of State for Wales (CLAC, Deposited Papers 21 October 2015); Correspondence from the Secretary of State for Wales to the First Minister of Wales (WAC, published 6 November 2015).

⁶⁸ National Assembly for Wales Constitutional and Legal Affairs Committee, committee transcript, 16.11.2015, paragraph 215.

Enough has been said to show how and why the broad consensus achieved by the principles-based report of the Silk Commission has been eroded. The production of a fundamental structural constraint under the banner of the unified legal system of England and Wales and the multiple elements of reverse engineering in Whitehall late on in the process command particular attention. To say that the draft Bill constitutes the outcome of the St David's Day process glosses over key developments that followed the completion of that process.

Complaints about the 'roll-back' of National Assembly powers under the draft Bill have abounded.⁶⁹ Whereas the UK Government's concern about the *Agricultural Wages* case had signalled an element of this, the development is more far-reaching. The fact that the scale of the roll-back is disputed underwrites the likelihood of the draft Bill adding to, rather than resolving, the concerns about coherence, clarity, and robustness that have characterised the Welsh devolution story so far.

Public disagreement between the two sets of government lawyers about the impact the draft Bill would have had on previous National Assembly legislation is telling. Unprecedented in scale in the UK territorial constitutional development, it gives chapter and verse on the scope for legal uncertainty or for competing interpretation. Whereas Wales Office lawyers have suggested that provision in five out of 25 Acts or Measures would have failed to pass muster, Welsh Government lawyers have suggested that the figure is more like 20.⁷⁰ Such matters could of course only be authoritatively determined in the courts. The draft Bill constitutes uncharted waters in the UK's devolutionary arrangements.

Clearly illuminated in the light of the process, three main kinds of squeeze on the devolved institutions can be identified in the draft Bill. As later chapters will show, each could have significant adverse effects on policy development and law-making in Wales. They cumulatively represent a step backwards in Wales' constitutional journey.

- *Squeeze 1: general restriction*

First and foremost, attention is drawn to the imposition of novel constraints on the ability of the devolved legislature to utilise private law and criminal law techniques. The constitutional imperative of effective law-making for Wales is seen immediately to be in issue. Running across multiple policy domains, this kind of squeeze is by definition general in character. The burden of minimising legal divergence with a view to maintaining the 'integrity' of the single legal jurisdiction of England and Wales is put firmly on the shoulders of the small polity under the draft Bill.

- *Squeeze 2: occupation of legislative space*

The fact that the draft Bill would deliver additional devolved powers in certain areas must not be allowed to obscure the build-up of constraints on the National Assembly in the form of general and specific reservations. While this way of occupying legislative space references the move from conferred powers, especially as regards the 'silent subjects', the expansive – squeezing – potentials are well-illustrated by the collective Whitehall process, such that the list of reservations in the draft Bill is not as generous to the devolved institutions, nor as coherent and consistent, as could reasonably have been expected.

- *Squeeze 3: executive veto*

⁶⁹ See especially, National Assembly Presiding Officer, Written Evidence to WAC.

⁷⁰ First Minister of Wales, letter to Secretary of State for Wales, 7 September 2015; Secretary of State for Wales, letter to WAC, 5 November 2015; First Minister of Wales, letter to WAC, 20 November 2015.

A legislative policy of constricting the patterns of Welsh governance through multiple requirements of UK ministerial consent for devolved legislation reforming or steering public authorities in Wales evidently took the Welsh Ministers by surprise.⁷¹ Following the opposite direction of travel to the Silk Commission, the provision in the draft Bill again ranges beyond the ambit of the St David's Day process. Nor was it sign-posted in *Powers for a Purpose*. Evidently concerned to protect reserved bodies and functions against possible predation by the National Assembly, the Secretary of State has called this development a 'red line'.⁷² That line, however, is not drawn clearly in the draft Bill.

⁷¹ Letter from the First Minister of Wales to the Secretary of State for Wales, 23 June 2015.

⁷² Welsh Affairs Committee, 9 December 2015, Q307.

4

Enhancements

For all the problems presented by the substance of the draft Wales Bill and the process that led to it, some of the provisions would clearly enhance the devolutionary arrangements. These benefits are far outweighed by the disadvantages and difficulties highlighted in other chapters, especially in terms of clarity and workability. The proposed enhancements will however be valuable elements of a properly constructed constitutional settlement for Wales, however and whenever that arises.

The enhancements come under three headings:

- (1) Devolution of additional powers of direct relevance to people's lives
- (2) Improvements to the constitutional architecture of devolved governance
- (3) Fiscal reform directed to greater financial accountability

Benefits accruing under the first two headings relate directly to the St David's Day process and the acceptance of some of the recommendations of the Silk Commission as well as the 'read-across' to Wales of some of the proposals of the Smith Commission in Scotland. Building on the Wales Act 2014, and straddling legislative and non-legislative commitments, the financial developments are part of a broader process of constitutional reform for Wales that includes the draft Bill.

4.1. Additional powers

As outlined in the previous chapter, the Silk Commission made a number of recommendations concerning the devolution of more powers to Wales (or more accurately, 'non-reservation', given the chief recommendation of a reserved powers model). While almost every proposal for devolution in the field of policing and justice was vetoed through the St David's Day process, there was unanimous support for other recommendations in areas such as economic development.⁷³

In turn, the draft Bill includes clauses enacting some, though not all, of the Commission's recommendations for devolution of executive powers to Welsh Ministers in the field of transport (port development, speed limits, bus and taxi regulation), as well as its recommendation that sewerage and energy planning development consents for projects up to 350MW should be devolved (clauses 10-15, 17-18). The St David's Day process also achieved consensus on adopting the Smith Commission proposal that powers over onshore oil and gas extraction be devolved,⁷⁴ and the draft Bill follows suit for Wales (clauses 8-9). We note that CLAC has broadly welcomed these proposed new elements of devolved responsibility.⁷⁵ They help to give the constitutional arrangements a hard practical edge.

The Welsh Ministers, however, are not satisfied. They are committed to seeking further powers through inter-governmental discussions: in part in areas where the Silk Commission made no recommendation on issues that were raised by the Welsh Government, as with

⁷³ Silk Commission, Part 2 Report, recommendations 12 and 15; *Powers for a Purpose*, paragraphs 2.4.1., 2.5.1.

⁷⁴ *Powers for a Purpose*, paragraphs 3.10- 3.11.

⁷⁵ CLAC, Report on draft Wales Bill, paragraph 45.

alcohol licensing; and in part on the basis of equivalence with Scotland, as with new powers to regulate gaming machines.⁷⁶ By the same token, the vetoing of key recommendations made by the Silk Commission means that the debate over the extent of Welsh devolution is highly unlikely to come to an end even if a Wales Bill eventually reaches the statute book as a result of the current legislative process.

4.2. Constitutional architecture

Whilst most of the attention on the constitutional aspects of the draft Bill naturally focuses on the tests for competence and the list of ‘reserved powers’, Part 1 on ‘Constitutional Arrangements’ would significantly change the institutional framework of Welsh devolution.

- *Permanence*

The devolved legislature and government would both be formally recognised as permanent features of the UK constitution (clause 1). This echoes the views of the Silk Commission⁷⁷ and was one of the key recommendations of the Smith Commission in Scotland.⁷⁸ It is also consistent with the will of the people of Wales made evident in the 2011 referendum.

Prior to publication of the draft Wales Bill, UK ministers had agreed to strengthen the wording of the parallel provision in the Scotland Bill⁷⁹ to incorporate an element of political entrenchment through referendum.⁸⁰ As sent by the House of Commons to the House of Lords, clause 1 of the Scotland Bill provides:

- (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements.
- (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 Scottish Parliament and the Scottish Government.
- (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

Wales clearly merits equal treatment in this respect. Indeed, from a unionist perspective, it may be thought folly to do otherwise. Matching provision would also properly reflect the Silk Commission’s recommendation that ‘it should be recognised that the National Assembly is permanent, so long as that is the will of the majority of the people of Wales’.⁸¹

- *Constitutional convention*

⁷⁶ Welsh Government, Written evidence to CLAC, paragraph 27.

⁷⁷ Silk Commission, Part 2 Report, paragraph 13.3.30.

⁷⁸ Smith Commission, Report, paragraph 21.

⁷⁹ Letter from Secretary of State for Scotland David Mundell to the Scottish Parliament’s Devolution (Further Powers) Committee, 18 September 2015.

⁸⁰ For discussion in terms of the implications for Parliamentary Sovereignty, see House of Lords Constitution Committee, Sixth Report, *Scotland Bill*, HL (2015-16) 9, paragraphs 26-36; *Hansard*, HL, cols. 1441-1487 (8 December 2015).

⁸¹ Silk Commission, Part 2 Report, recommendation 56.

The draft Bill would place the constitutional convention⁸² that Westminster will not normally legislate ‘with regard to devolved matters’ without the consent of the devolved legislature on a statutory footing (clause 2). This convention is of the essence of self-rule arising out of the UK’s changing territorial constitution. As with the Scotland Bill,⁸³ however, the proposed wording does not reflect the subsequent development of a wider approach covering both additions and diminutions of devolved legislative or executive powers.⁸⁴ It was on this basis that devolved legislative consent was sought (and given) to the changes made by Scotland Act 2012 and the Wales Act 2014.⁸⁵

The explanatory notes to the draft Bill confirm that a legislative consent motion will be required ‘on the basis that it contains provisions applying to Wales which alter the legislative competence of the Assembly’.⁸⁶ If the convention is to be put on a statutory footing, there is a clear constitutional case for ensuring that this wider dimension is addressed as well.

- *Representative democracy*

Electoral arrangements both for the National Assembly and (echoing another recommendation of the Silk Commission⁸⁷) for Welsh local government are proposed to be devolved. In particular, through a read-across from the proposals of the Smith Commission, the National Assembly would be able to determine the entitlement to vote in those elections (allowing the possibility of votes at 16); the voting system used to elect Assembly members; the number of constituencies, regions or equivalent electoral areas; as well as the overall number of Assembly members. Plans to reduce the size of the House of Commons while equalising the number of voters per Westminster constituency⁸⁸ are very likely to necessitate early changes to electoral arrangements for the National Assembly.

Significant restrictions would be imposed on the use of the new powers. National Assembly elections could not coincide with the other major elections held in Wales, namely UK general elections, European and local government elections (clause 5). More importantly, a supermajority representing at least two-thirds of National Assembly seats would be required to change the key features of the devolved legislature’s electoral arrangements, including the number of Assembly members to be returned by each constituency, region or equivalent area (clause 20). While very demanding in Wales’ multi-party democratic system, this requirement of a supermajority for major changes to the size and shape of the National Assembly is in our view proportionate. It provides an important safeguard against partisan changes to the electoral system.⁸⁹

⁸² Familiarly known as the Sewel Convention: *Hansard*, HL, col. 791 (21 July 1998).

⁸³ See HM Government, *Scotland in the United Kingdom: An enduring settlement*, Cm 8990, 2015, paragraph 1.2.2; House of Lords Constitution Committee, *Scotland Bill*, paragraphs 37-41; and *Hansard*, HL, cols. 1487-1509 (8 December 2015).

⁸⁴ UK Cabinet Office, *Devolution Guidance Note 17: Modifying the Legislative Competence of the National Assembly for Wales*, paragraph 13; National Assembly for Wales, Standing Order 29 (March 2015 version).

⁸⁵ National Assembly for Wales Constitutional and Legislative Affairs Committee, *Legislative Consent Memorandum Report: Wales Bill* (June 2014).

⁸⁶ Explanatory notes to the draft Wales Bill, paragraph 10.

⁸⁷ Silk Commission, Part 2 report, recommendation 42.

⁸⁸ Parliamentary Voting System and Constituencies Act 2011.

⁸⁹ See in this regard, R Scully, ‘The draft Wales Bill: The electoral implications,’ *Elections in Wales blog*, 26 October 2015, at:

<http://blogs.cardiff.ac.uk/electionsinwales/2015/10/26/the-draft-wales-bill-the-electoral-implications/>

The arrangements in the draft Bill would enable an open debate in Wales about increasing the size of the National Assembly with a view to better scrutiny. Again, this was recommended by the Silk Commission.⁹⁰ Irrespective of the outcome, however, devolving power over the electoral arrangements of the National Assembly allows for a proper home-grown – autochthonous – shaping of representative democracy.

- *Institutional autonomy*

The draft Bill would also enhance the constitutional status of the National Assembly as a self-governing institution. As once more proposed by the Silk Commission,⁹¹ the devolved legislature would gain power (exercisable by super-majority) to decide its own name as well as direct control (pursued via standing orders) over the composition of its own committees. Existing arrangements for participation in National Assembly proceedings by UK ministers would be formally ended (clauses 20(2)(a), 22-24). As well as changes on the face of the draft Bill, the National Assembly would be given extensive powers to amend the Government of Wales Act 2006 so far as it governs the devolved legislature's practice and procedure (paragraph 7(2) of new Schedule 7B).

These proposed reforms sit comfortably with – and, indeed, confirm – the maturation of the National Assembly as a well-established and permanent part of the body politic. They finally set aside some of the most obviously subordinating features of the original model of executive devolution established by the Government of Wales Act 1998.

4.3. Financial accountability

The Secretary of State has consistently emphasised that the draft Bill is part of a wider devolution package for Wales in which greater financial accountability founded on more substantial powers of taxation plays a key role.⁹² Following a commitment made in the Command Paper *Powers for a Purpose*,⁹³ UK ministers have taken action to regulate the convergence of Treasury funding per head in Wales on the lower figure for England that was otherwise liable to occur under the Barnett formula.⁹⁴ The new Conservative Government's first Spending Review thus produced an undertaking to establish a 'funding floor' for Wales, set at 115% of 'comparable spending' per head in England.⁹⁵ It also paved the way for the announcement of legislation that will remove the requirement for a referendum before the income tax powers in the Wales Act 2014 can be brought into effect. The new provision would be included in the intended Wales Bill,⁹⁶ though draft clauses have not yet been published.

Key aspects of tax devolution remain unaddressed, however.⁹⁷ Details of the 'funding floor' remain vague. So is the way the block grant will be reduced to allow for tax devolution (an issue still unresolved for Scotland, despite several years of public debate and

⁹⁰ Silk Commission, Part 2 Report, recommendation 50. See further, UK's Changing Union/Electoral Reform Society Wales, *Size Matters: Making the National Assembly More Effective* (Cardiff, 2013).

⁹¹ Silk Commission, Part 2 Report, recommendations 51-53.

⁹² See for example, Foreword to the *Draft Wales Bill*, p. 4.

⁹³ *Powers for a Purpose*, paragraph 4.10.

⁹⁴ G Holtham (Chair), *Final Report of the Independent Commission on Funding and Finance for Wales* (2010).

⁹⁵ HM Government, *Spending Review and Annual Statement 2015*, Cm 9162, paragraph 1.233.

⁹⁶ *Hansard*, HC, col W18647 (9 December 2015).

⁹⁷ For an overview, see A Trench, 'Wales and the 2015 Spending Review', *Devolution Matters*, 26 November 2015, at: <https://devolutionmatters.wordpress.com/2015/11/26/wales-and-the-2015-spending-review/>

intergovernmental discussion). The UK and Welsh Governments will need to work closely together to ensure that the mechanism by which the ‘floor’ is implemented is both transparent and mutually acceptable, requiring both closer and more effective intergovernmental co-ordination and a role for the National Assembly to ensure democratic accountability. Such a role will need to extend beyond HM Treasury to HM Revenue & Customs. Without such arrangements there is a strong risk that fiscal devolution will be so opaque and leave so much discretion to HM Treasury as to undermine its goal of improving financial accountability. Moreover, an agreed ‘funding floor’ would be no substitute for more fundamental reform of the way that devolved government is funded and, specifically, a move to a needs-based funding formula.⁹⁸ While the British party leaders’ ‘Vow’⁹⁹ to the Scottish electorate at the time of the independence referendum to maintain the Barnett formula makes this much more difficult to achieve, the case for further reform remains compelling.

How the block grant should be adjusted to accommodate income tax devolution is a vexed question. As the current debate over introducing Scottish rates of income tax has illustrated, the consequences of getting this mechanism wrong are potentially serious.¹⁰⁰ It must not be assumed that a solution suitable for Scotland could or should automatically apply to Wales, a country with a very different and much weaker tax base.¹⁰¹ A lack of information about both the emergent fiscal framework and a promised revamp of the machinery of intergovernmental relations (IGR)¹⁰² has been roundly criticised by the House of Lords Constitution Committee in the context of the Scotland Bill.¹⁰³ For it to happen again with a Wales Bill would be inexcusable.

⁹⁸ House of Lords Select Committee on Economic Affairs, First Report, *A Fracturing Union? The Implications of Financial Devolution to Scotland*, HL (2015-16) 55. See also, Bingham Centre, *A Constitutional Crossroads*, chapter 6.

⁹⁹ *Daily Record* 15 September 2014.

¹⁰⁰ For discussion see D Bell, D Eiser and D Phillips, *Adjusting Scotland's Block Grant for new Tax and Welfare Powers: Assessing the Options* (London: Institute for Fiscal Studies, November 2015); and G Holtham ‘Tax devolution and the block grant: a solution for Scotland that doesn’t work anywhere else?’, *Devolution Matters*, 22 December 2015, at <https://devolutionmatters.wordpress.com/2015/12/22/tax-devolution-and-the-block-grant-a-solution-for-scotland-that-doesnt-work-anywhere-else/>

¹⁰¹ Silk Commission, Part 1 report, Chapter 2.

¹⁰² Hitherto a much-criticised aspect of the UK’s devolutionary arrangements: see for example, House of Lords Constitution Committee, Eleventh Report, *Inter-governmental relations in the United Kingdom*. HL (2014-15) 146, chapter 3.

¹⁰³ House of Lords Constitution Committee, *Scotland Bill*, paragraphs 14-21. The UK Government’s response is at: <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/Scotland-Bill-Government-response-110116.pdf>

5

Competence

Wales is developing a distinct legal personality': so says the Law Commission. In their words, 'it has become meaningful to speak of Welsh law as a living system of law for the first time since the Act of Union in the mid-sixteenth century'.¹⁰⁴ Already clearly visible in a range of areas such education, housing and local government, planning and social services,¹⁰⁵ the logic of devolution is a divergence of the law applicable in Wales from that applicable in England. Not least because of legislative change – different government policies – in the much larger country, further divergence is inevitable. The provisions on 'permanence' of the devolved institutions in the draft Bill underscore this.

Against this backdrop, the modelling of the boundaries of devolved legislative competence in the draft Bill demands the closest scrutiny. In this Chapter we show how and why the relevant provision is technically defective and fails to strike a proper constitutional balance including in terms of clarity and workability.

5.1. 'Leeway and lock'

In modelling the devolved legislative competence the draft Bill affords the National Assembly a modicum of legislative space ('leeway') bounded on all sides by legal restriction ('lock'). As highlighted in Chapter 3, the existential concern 'to provide a general level of protection for the unified legal system of England and Wales'¹⁰⁶ appears to be a chief driver, so producing the first main type of squeeze on the devolved institutions in the draft Bill.

The draft Bill would impose a whole battery of tests of legislative competence: ten in all. The basic one that an Assembly Act 'is not law' in so far as any provision of the Act 'relates to' reserved matters (clause 3 inserting new section 108A(2)(c)) is given extended bite by the sheer detail of listing. But great weight is also placed on the contestable concept of 'necessity'. The draft Bill relies on the concept to provide key elements both of leeway and lock (devolved legislation may be within competence if judged 'necessary', but not so if judged 'unnecessary').

Jumbled up in the legislation with protection of the unified legal system, the twin constitutional imperatives of effective law-making and regulation of legislative overspill are put in issue. Necessity-testing is included in the general clause on devolved competence as regards legislative provision affecting England (clause 3 inserting new section 108A(3)), and then in a trio of general – legal system – restrictions on the local legislative space (Schedule 2 inserting new Schedule 7B paragraphs 2, 3 and 4). These deal successively with modifications of 'the law on reserved matters', which extends to any non-statutory rule of law the subject-matter of which is a reserved matter; modifications to the 'private law', expansively defined in terms of contract, tort, property, trusts, etc.; and modifications to the 'criminal law and civil sanctions'.

¹⁰⁴ Law Commission, *Form and Accessibility of the Law Applicable in Wales* (2015; CP 223), paragraph 1.10.

¹⁰⁵ *Ibid*, Chapter 5.

¹⁰⁶ Explanatory notes to the draft Wales Bill, paragraph 32.

In contrast, provision may be within devolved competence under the current system of conferred powers if it provides for the enforcement of National Assembly legislation, or is otherwise appropriate for making National Assembly legislation effective, or is otherwise incidental to, or consequential on, such provision (Government of Wales Act 2006 section 108(5)). Previous policy-makers evidently prioritised the importance of implementation.

The new general restrictions in the draft Bill must be viewed in the light of the general reservation of the ‘Single legal jurisdiction of England and Wales and tribunals’ (Schedule 1 inserting new Schedule 7A Part 1 paragraph 6). Though there are certain exceptions, most obviously tribunals which operate wholly within devolved competence, the general reservation is strongly worded, with ‘courts and tribunals (including, in particular, their jurisdiction)’ reserved. This general reservation is followed by a cluster of specific but widely-drawn reservations such as ‘family law’, ‘arbitration’, ‘legal aid’ and ‘the legal profession and legal services’ (see Chapter 7).

5.2. ‘Necessity’?

The concept of necessity-testing in the draft Bill represents a failure of comparative legal method. Transplanting provision from one constitutional setting to a qualitatively different one is famously seen as a recipe for unfortunate and/or unseen side-effects.¹⁰⁷ ‘Necessity’ has been lifted from a provision allowing the Scottish Parliament to modify the law on reserved matters only in consequential or incidental ways, and where ‘necessary’ (SA 1998 Schedule 4 paragraph 3).¹⁰⁸ Given however that Scots private law and criminal law are not reserved matters, and that the Scottish Parliament may amend only the law of Scotland (SA 1998 section 29(2)(a)), the scope of application there is narrow. The very different and wider context in which necessity-testing is envisaged for Wales puts much more weight on the tests and means they will be much more often in play. The repeated use of ‘necessity’ in the draft Bill cannot be justified by reference to Scotland.

The use of necessity-testing in the draft Bill jars with basic constitutional principle. Parliamentarians will wish to reflect on which branch of government should have the final word on ‘necessity’ in legislation not involving the Convention rights or EU law: the democratically elected representatives of the people – as with legislation for England – or the judges. To restrict the choice of National Assembly members in matters likely to form parts of a great many Assembly Acts may be said to undercut their role as primary legislators, and to deny the institution – now to be made permanent – proper esteem in ‘the union of the nations of Wales and England’. Nor does imposing on the judiciary such an institutionally challenging and intrinsically political task appear sound constitutional policy.

Technical problems abound. One source of difficulty is that in attempting to deal with many different scenarios, the draft Bill uses multiple formulae for necessity-testing. For example, as regards modifications of the private law, the provision of an Assembly Act must be (a) ‘necessary’ for a devolved purpose or ancillary to a provision which has a devolved purpose, and (b) have ‘no greater effect on the general application of the private law than is necessary to give effect to that purpose’ (Schedule 2 inserting new Schedule 7B paragraph 3). In contrast, for modifications of the criminal law, the necessity-testing applies to and only allows a provision ancillary to a devolved purpose (Schedule 2 inserting new Schedule 7B paragraph 4). The use of multiple formulae for different purposes has implications for how they may be construed in each case, and, especially in the light of the two particular

¹⁰⁷ Sir O Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 MLR 1.

¹⁰⁸ CLAC, Report on draft Wales Bill, paragraph 80.

constitutional imperatives, the extent to which a consistent approach is either possible or desirable. Difficult legal questions could arise where more than one of the tests was in play at the same time in relation to the same provision.

There is an evident lack of clarity. The Presiding Officer of the National Assembly has provided a detailed analysis of the range of meanings that may be borne by a statutory necessity test.¹⁰⁹ We too think that the enactment of such tests leads to considerable doubt as to how generously they will be construed in practice. Not least, that is, in the light of different approaches at the highest judicial level to issues concerning the proportionality of policy measures in other contexts.¹¹⁰ In particular, the test in each place where it is used is in terms of ‘no greater effect ... than is necessary...’ 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.¹¹¹ Given the need to make rights effective and enforce obligations, it would be strange if it were otherwise. If the UK Government has financial concerns about, say, the National Assembly creating new offences punishable with imprisonment, this should be dealt with through proper inter-governmental arrangements, not clunky statutory restriction.

If the expansive list of reservations generates ample opportunity for legal challenge, a statutory necessity test may be said to invite it. Just as modifications of the private law and the criminal law are the principal means by which legislation is made effective, so they are a natural target of legal challenge by many actors, private as well as public. As well as the possible dislocating effects in individual cases, perhaps in an area of criminal law enforcement, we cannot overlook the chilling effects on the devolved legislative process of these new issues. Navigating legal risk and uncertainty may be a fact of life for governmental institutions, but that is no justification for generating more.

5.3. No quick-fix

Given the difficulties that the necessity tests present, it may be tempting to look for alternative ways of reformulating the model of leeway and lock that would have a similar but less onerous effect, and hence avoid fundamental alteration of the proposed legislative framework. That temptation must be firmly resisted in the interest of good governance. Such quick-fix solutions in reality offer no improvement on necessity-testing, and may even make matters worse.

One difficulty is that the process of drafting and framing of legislation would not be simplified, given the other constraints on the National Assembly’s legislative powers. Trials conducted on behalf of the Presiding Officer confirm that even the experiment of removing ‘necessity’ from competence-testing still constricted National Assembly legislation in terms

¹⁰⁹ National Assembly Presiding Officer, Written Evidence to WAC, Annex A.

¹¹⁰ See especially the speeches of Lord Mance (majority) and Lord Thomas of Cwmgiedd (minority) in the *Asbestos Diseases* case. See also now, *Pham v Secretary of State for the Home Department* [2015] UKSC 19 and *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

¹¹¹ NHS Redress (Wales) Measure 2008; Human Transplantation (Wales) Act 2013; Renting Homes (Wales) Bill 2015.

of ‘ancillary’ – minor – provision as well as identifying the devolved ‘purpose’ of the legislation.¹¹²

A second difficulty is that any test that requires a justification for changes to private law or criminal law alters the way a reserved powers model works. Less demanding terms such as ‘reasonable’, ‘appropriate’ or ‘proportional’ may reduce the height of the hurdle to be overcome, but not the fact of the hurdle or the implications of there being a hurdle. The drafters of devolved legislation (whether in the Welsh Government or elsewhere) would still have to consider what is ‘reasonable’ etc. by way of impact on private or criminal law.¹¹³ The National Assembly and its advisers would also have to apply the test in considering legislation, and any amendment to it. The test would be further applied by the UK Government in determining whether legislation is within devolved competence, and whether to refer it to the UK Supreme Court. Each of these institutions might disagree with the others about a complex technical judgement. Even if the UK Government considers that the legislation does surmount the hurdle, others might disagree and challenge its validity in the courts. Ultimately, it would fall to the courts to determine whether the relevant test is satisfied or not, and their judgments would in practice determine what legislation the National Assembly could pass across a wide range of policy areas and how it should do so.

The implications deserve special emphasis. The judges would be dragged into making a range of necessarily subjective and controversial decisions that will determine whether legislation passed by an elected legislature is lawful or not. The responsibility of elected politicians would be undercut and proper lines of democratic accountability blurred. The National Assembly would be subject to uniquely unequal treatment among the several Parliaments and Assemblies inside the UK.

It is the leeway and lock model that is the fundamental problem, not the particular terminology used.

¹¹² National Assembly Presiding Officer, Written Evidence to WAC, Annex B, ‘Option A’.

¹¹³ See further in this regard, *AXA General Insurance Ltd. v Lord Advocate* [2011] UKSC 46.

6

Territory and jurisdiction

Establishing a properly constituted model of reserved powers for Wales requires a different way forward in terms of territory and jurisdiction. Building on our first report, this Chapter outlines two possible approaches. The first involves territorial rules for applying Welsh law but within the single legal jurisdiction of England and Wales. The second one, which has already attracted considerable interest, involves a distinct but not separate legal jurisdiction for Wales.

We do not suggest that either alternative is a panacea. But both sets of options are clearly preferable to the defective model of ‘leeway and lock’ in the draft Bill. They can be designed with a view to effective law-making for Wales and/or the regulation of legislative overspill, while at the same time allowing the shared common law heritage to continue to flower and Wales to continue to benefit from a rich vein of judicial and legal expertise and resources. The larger step of a distinct jurisdiction would give Wales the higher legal profile and recognition.

6.1. ‘Jurisdiction’

The existence of the unified jurisdiction of England and Wales has been repeatedly used as justification for refusing distinct legal arrangements for Wales.¹¹⁴ It was used to oppose Wales-only legislation in the 1880s, the creation of a Secretary of State during the first half of the twentieth century, and most recently as a reason for not giving Wales a reserved powers model of devolution. The competing view, espoused by the famous Speaker’s Conference on Devolution of 1919 to 1920, has been that a Welsh judiciary and accessory institutions should be created if and when a Welsh legislature is so minded. As our earlier report was at pains to emphasise, however, there is ample space for more or less legal demarcation between these polar opposites. We made clear the need to revisit the question of jurisdiction in view of a move to reserved powers, a point which the flawed provision in the draft Bill only serves to underline.

Matters are compounded because ‘jurisdiction’ is a slippery concept. It is in the words of the Lord Chief Justice of England and Wales ‘essential to distinguish carefully the different ways in which the term ... is used’.¹¹⁵ This is highlighted by the most recent iteration of the concept of a Welsh legal jurisdiction from the Welsh Government. It references ‘a distinct geographical area’ (including the territorial waters adjacent to Wales); ‘identifiably distinct Welsh courts’ whose jurisdiction essentially correlates with the extent of the laws of that jurisdiction; and ‘a body of distinctively Welsh law’ that includes National Assembly legislation, Acts of the UK Parliament intended to apply in Wales and dealing with devolved

¹¹⁴ See T Watkin, ‘Devious Debates and Devolution: The History of the Campaign for a Welsh Jurisdiction’ in T Watkin (ed), *The Welsh Legal Triads and Other Essays* (Welsh Legal History Society, 2012).

¹¹⁵ Lord Thomas of Cwmgiedd, speech to Legal Wales conference, paragraph 9. For a recent discussion, see A Kaushal, ‘The Politics of Jurisdiction’ (2015) 78 *Modern Law Review* 759.

or non-devolved matters, and the shared heritage of principles and doctrine from the common law jurisdiction of England and Wales.¹¹⁶

This Report does not pursue the idea of a separate legal jurisdiction for Wales akin to that of Scotland or Northern Ireland. As illustrated below, in addition to the recognition of England and Wales as distinct legal territories and of the law of England and the law of Wales as legally distinct, this would mean establishing for Wales a separate system for the administration of justice, with separate institutions, a separate judiciary and separate professions, and with associated devolved legislative and executive responsibilities.

Box 1: Model of a separate jurisdiction

Wales would have its own Court of Appeal, High Court, Crown, County and Family Courts, and Magistrates Courts. These courts would have exclusive jurisdiction over the law in Wales, with the UK Supreme Court as the final court of appeal. The National Assembly would have power to reform, restructure or abolish courts. Judges and magistrates in Wales would be appointed by or on the advice of the Welsh Ministers, and would only sit in Wales. A separate court service for Wales would be funded from the Welsh Government's budget and legal aid would also be devolved. Wales would have a separate prosecution authority. Wider responsibilities in relation to the administration of justice, as regards prisons or offender management, might also be included.

There would be a separate Bar and a separate solicitors' profession and no automatic right to practise in Wales if admitted in England or *vice versa*. There would be separate Welsh regulation of ancillary professions (legal executives, licensed conveyancers, etc.)

Issues of Welsh law arising in England (or in another jurisdiction) would be a matter of 'foreign law' requiring determination in accordance with rules of private international law. Specific rules, for example on judicial notice, could be created to regulate legal jurisdictional relations with England.

Establishing such a system would clearly be a major political decision. While it would bring Wales more into the mainstream of sub-state constitutional arrangements in the common law world,¹¹⁷ very careful consideration of the cost and wider practical and economic implications would be required. As the Secretary of State has stressed,¹¹⁸ the UK Government is firmly opposed to this type of model. The Welsh Government made clear in evidence to the Silk Commission that while it was their longer-term ambition to see the establishment of a separate legal jurisdiction as part of a package including the devolution of policing as well as the administration of civil and criminal justice, this was not something that could be contemplated at that time.¹¹⁹ The Commission recommended a review with ten years of the case for devolving legislative responsibility along the lines set out in Box 1,¹²⁰ but there was no consensus for this in the St David's Day process.¹²¹

¹¹⁶ Welsh Government, Supplementary Evidence to CLAC, paragraph 3. See further, CLAC, *Inquiry into a Separate Welsh Jurisdiction* (2012).

¹¹⁷ See further, Justice for Wales, *In support of a Welsh jurisdiction* (September 2015).

¹¹⁸ See for example, Welsh Affairs Committee, 9 December 2015, Q317.

¹¹⁹ Welsh Government, *Written evidence to the Commission on Devolution in Wales* WG17658 (Cardiff, 2013), p 2.

¹²⁰ Silk Commission, Part 2 Report, recommendation 28.

¹²¹ *Powers for a Purpose*, Annex A.

The two approaches discussed below are more modest. In particular, in terms of a distinct but not separate jurisdiction we deal with law-making and the courts structure, and not broader responsibilities in relation to the administration of justice such as legal aid, probation and youth justice. Devolution of these other matters is once again redolent of the different model (illustrated in Box 1) of a separate jurisdiction and was not taken forward in the St David's Day process.

Although designed in their different ways to grease the wheels of a reserved powers model of devolution, the alternative approaches of territorial rules and distinct but not separate jurisdiction were overlooked in the initial process of policy development leading to the draft Bill. With the focus firmly on the advantages and disadvantages of a fully separate legal jurisdiction, the Silk Commission did not expressly consider them.¹²² Hence neither approach featured in the St David's Day process. In contrast, the appearance of the draft Bill has provoked a groundswell of support in the devolved institutions for, in the words of the Welsh Government, the establishment of 'a Welsh legal jurisdiction that is *distinct, but not separate*, from that of England'.¹²³

6.2. Territorial rules

An approach based on 'territorial rules' essentially means sharper definition of the extent of the applicability of Welsh legislation inside the common legal jurisdiction of England and Wales. Functionally-speaking, this more ad hoc set of options is closely informed by the constitutional imperative of regulating legislative overspill. As such, it would sit comfortably with EVEL. But it also opens up the possibility of revisiting the general restrictions on the National Assembly envisaged in the draft Bill. The working assumption is that Westminster and Whitehall may take a more relaxed view of Welsh legal difference if legislative overspill is tightly regulated.

In other words, once there was a satisfactory and precise territorial demarcation for the operation of laws made in Wales, it might be possible to have a more liberal approach to when devolved legislation could amend private law and criminal law. This though is subject to further explanation from the UK Government of precisely what interests, in terms of the 'integrity' of the common legal system and otherwise, the general restrictions in the draft Bill have been designed to protect. The necessity test for amending the law on reserved matters could be retained simply to perform the limited function it does for Scotland (Chapter 5).

- *Method 1*

There are two methods by which this approach might be delivered. The first is to define in the devolution legislation, more precisely but in a general way, the types of cases with a connection to places in England or otherwise outside Wales on which it would be beyond the competence of the National Assembly to legislate without input from the local elected representatives.

A clause to set out territorial rules might replace the limits on the territorial reach of the National Assembly in (clause 3 of the draft Bill inserting new) section 108A2(b) and (3) with

¹²² For the origin of the idea of a distinct but not separate legal jurisdiction for Wales, see A Trench, *Memorandum to the Commission on Devolution in Wales* (Cardiff, 2013).

¹²³ Welsh Government, supplementary evidence to CLAC, 26 November 2015, paragraph 12. See further, CLAC, Report on draft Wales Bill, paragraphs 72-75; National Assembly Presiding Officer, letter to the Secretary of State for Wales, 8 December 2015; and National Assembly of Wales Record of Proceedings 13 January 2015.

a rule that it can make law that extends only to Wales, with that concept defined, perhaps along the following lines.

- (1) Where the provisions of any enactment or instrument extend only to Wales, those provisions are to form part of the law of England and Wales but are to be construed for all purposes, and disregarding any indication to the contrary—
 - (a) as not imposing any obligation to do anything outside Wales,
 - (b) as not conferring any power that is exercisable at a place outside Wales, or in relation to any person or property outside Wales,
 - (c) as not providing for any liability or other legal consequences to arise in respect of conduct occurring outside Wales, or for any liability or other legal consequences to be conditional or otherwise dependent on conduct outside Wales, or on the existence outside Wales of any other circumstances, and
 - (d) as not authorising the creation, modification or removal of any obligation or power of a sort mentioned in paragraph (a) or (b) or of any liability or other legal consequence which arises as mentioned in paragraph (c) or is conditional or otherwise dependent as so mentioned.
- (2) Nothing in this section is to be taken as preventing an enactment or instrument extending only to Wales –
 - (a) from imposing or conferring obligations, powers or liabilities in respect of property in Wales on persons outside Wales with interests in the property,
 - (b) from having effect for enabling goods or services to be supplied or made available outside Wales by, to or for the benefit of persons with connections with Wales, or for facilitating that, or
 - (c) from having effect in relation to any agreement that falls to be construed as intended by its parties to be subject to the law extending only to Wales.

In many cases, application would be straightforward because the National Assembly will only need to legislate in terms that relate directly to Wales. There are problems, however, in identifying all the possible connections with Wales and with specifying in advance when and how they might compete with other connections with places outside Wales.

- *Method 2*

The second method has territorial rules operating on a case by case basis, just as a jurisdictional rule for a court operates case by case. It would require a court operating within the England and Wales jurisdiction to look at a case and, in a case where it finds that Welsh legislation is, in terms, relevant to the case in question, to apply that legislation. Unless, that is, it finds the case has sufficient connections with places outside Wales to make the application of the Welsh legislation by reference to the connections of the case with Wales inappropriate.

There are various ways in which this set of rules could be formulated with a view to a proper balance being struck at the judicial stage between the needs of the devolved legislature and the interests of those intended to be protected by the limitations on devolved competence. Set out below, the draft clause suggested in our earlier report is just one possibility. For example, the ‘tie-break’ might instead be set in favour of the National Assembly in view of the risk of judicial ‘strike-down’ of devolved legislation on grounds of vires.

- (1) This section has effect where in any proceedings –

(a) any matter would (but for this section) fall to be determined in accordance with the provisions of Welsh legislation,

(b) the facts to which that matter relates have connections with England that are no less significant than [their] [the] connections with Wales [by reference to which the provisions of the Welsh legislation apply], and

(c) that matter would be determined differently if the provisions of Welsh legislation were to be disregarded.

(2) Where this section has effect, the provisions of the Welsh legislation that would apply are to be disregarded except to the extent that Her Majesty has by Order in Council designated those provisions as provisions that it would appropriate to apply in cases with a significant connection with England.

(3) No recommendation is to be made to Her Majesty in Council to make an Order in Council under this section unless a draft of the statutory instrument containing the Order has been laid before Parliament and approved by a resolution of each House.

(4) In this section ‘Welsh legislation’ means—

(a) an Act of the National Assembly for Wales;

(b) a Measure of that Assembly, or

(c) an instrument made under an Act or Measure of that Assembly or any instrument made by the National Assembly for Wales and contained in a statutory instrument.

A choice of law method of this type would be compatible with a purpose-based flexibility for the National Assembly to legislate beyond Wales, but would provide what would probably need to be only a backstop against any inappropriate effects of the use of that flexibility. A solely court-centred approach would risk engendering uncertainty, including for the policy-makers, and satellite litigation. Order-making powers, as proposed in the illustrative draft clause, could be relied on in practice for situations where, in the context of a long and porous border, there was a significant policy need to facilitate Welsh legislation which has spill-over effects. Accordingly, devolved legislation that covered cases that might have relevant connections with places outside Wales would not necessarily be beyond competence, but it would be subject to the choice of law clause unless and until specific provision was made for extra-territorial effect. So, in the interim, the case would only be decided in accordance with Welsh law, and enforced as such, if the facts had their closest connection with Wales.

6.3. Distinct but not separate jurisdiction

While the words ‘separate’ and ‘distinct’ are often used interchangeably, the phrase ‘distinct but not separate jurisdiction’ has emerged as shorthand for a second set of policy options concerned with tailoring the structures and processes of the shared legal system of England and Wales in distinctive ways, while recognising the many practical strengths of that system. Once again a chief aim is a better fit with a reserved powers model of devolution for Wales. Conversely, there is no assumption of parity for Wales with Scotland and Northern Ireland.

Facilitating responsive and effective governance in Wales is a key functional concern underlying this approach. But as well as consigning ‘leeway and lock’ to the dustbin of Welsh legal history, it too would serve to regulate legislative overspill. Moreover, it may be

said to accord with the new realities of Welsh devolution. Thus the approach goes with the grain of a constitutional journey effectively delineating Wales, more particularly in the light of considerable administrative devolution in the justice system;¹²⁴ and, in the language of the Law Commission, effectively recognises both Welsh law and English law as living systems of law: commonly the same but with growing divergence.

Establishing a distinct jurisdiction would recognise the constitutional connection between the authority to make laws in the devolved polity and the apparatus for their application and interpretation. The jurisdiction of the courts over Welsh laws with the rights of parties to use the Welsh language in legal proceedings could also be aligned. Again, fitting with the promised enhancements in terms of ‘permanence’ of the devolved institutions and more home-grown constitutional development (see Chapter 4), the approach is indicative of greater parity of esteem for Wales in the UK’s ‘family’ of countries. For example, a distinct jurisdiction would underwrite the case for a designated Welsh ‘seat’ on the UK Supreme Court,¹²⁵ a development in the joint interest of Wales and the Union which is overdue.

The working assumption can be taken as read: namely, that our senior judiciary would continue to maintain and enrich a shared common law heritage in the light of a formal division. In the words of the Lord Chief Justice, ‘there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions’.¹²⁶

- *Field of choice*

This approach also admits of a range of options. Our first report established a basic layout,¹²⁷ whereby, with a view to properly grounding a model of reserved powers, the devolved legislative competence would be limited to Wales, and matters regarding Welsh law, suitably defined to take account of the history of the shared legal system, would be determined by courts that would exercise a jurisdiction specifically for Wales.

Taking matters to the next stage, a trio of possible models serves to illustrate the scope in the formal and institutional design for greater or lesser distinctiveness. They also usefully underscore the major differences between a separate jurisdiction (Box 1 above) and a distinct but not separate one.

Box 2: A distinct but not separate jurisdiction – three models

Model 1: Separate courts and separate bodies of law

England and Wales would each have their own Court of Appeal and High Court (or as a variant separate High Courts only). The English courts would have exclusive jurisdiction over England-only law and the Welsh courts over Wales-only law. A common judiciary and legal professions would serve both countries.

The law common to both countries would, on a determined date, become two initially identical but distinct bodies of law, merging with the England-only and Wales-only bodies of law to become respectively the law of England and the law of Wales. The existence of a common judiciary coupled with the role of the UK Supreme Court would militate against undue divergence. Technically, issues of one country’s law arising in the other country would

¹²⁴ See Silk Commission, Part 2 Report, paragraphs 10.3.24-10.3.25.

¹²⁵ J. Rowe, *Review of the process for appointment to The Supreme Court* (July 2015).

¹²⁶ Lord Thomas of Cwmgiedd, speech to Legal Wales conference, paragraph 9.

¹²⁷ *Delivering a Reserved Powers Model of Devolution for Wales*, chapter 3, paragraph 4.2.

be a matter of ‘foreign law’ requiring determination in accordance with rules of private international law. Inconvenience could be minimised by specific rules for the two countries’ legal relations, as with judicial notice of laws and mutual binding authority of appeal court judgments

Model 2: Separate courts and distinct bodies of law

Formal institutional arrangements would be reconfigured as in Model 1, but the law common to both countries would remain a body of law over which both sets of courts would have concurrent jurisdiction. The risk of undue divergence would therefore be avoided, and there would be no problems regarding judicial notice or binding precedent with regard to this body of law. Only England-only and Wales-only law would constitute ‘foreign law’ in the other country and hence the need to apply conflicts of law rules would be correspondingly limited.

Model 3: Distinct courts and distinct bodies of law

England and Wales would have separate chambers within the existing structure of the Senior Courts of England and Wales, each with its own Court of Appeal and High Court. The English chamber would have exclusive jurisdiction over England-only law and the Welsh chamber over Wales-only law, and with corresponding powers to refer points of law. Both chambers would deal with issues arising under the law common to both countries, but the Welsh chamber would handle any cases requiring evidence to be taken or argument to be advanced in the Welsh language. A common judiciary and legal professions would serve both countries, but judges would have to be ‘ticketed’ to hear cases in the respective chambers.

- *Welsh Government suggestions*

On 26 November 2015, the Welsh Government published proposals for a Welsh legal jurisdiction ‘run by the Ministry of Justice with the same judiciary and administrative system, buildings, etc. as now’.¹²⁸ Explicitly driven by concern about the ‘row back’ on National Assembly powers associated with the general restrictions in the draft Bill,¹²⁹ their suggested scheme is in fact a version of our Model 2. Set out in full in Annex C, their illustrative draft clauses thus deal successively with (a) establishment of the new legal jurisdictions of England and of Wales; (b) territorial and joint allocation of the law extending to England and Wales; (c) formal division of the Senior Courts system and (d) sharing of judicial expertise; (e) division of judicial business; as well as (f) transitional matters.

Several elements of the Welsh Government’s approach are worth highlighting. The first is the hallmark of Model 2: a common legal area for England and Wales and – in view of the twin legislative motors of divergence – distinct legal areas for both countries. Confusingly perhaps, the words ‘extends’ and ‘extend’ thus convey different things in the following piece of drafting:

The law extending to England and Wales

- (1) All of the law that extends to England and Wales—
 - (a) except in so far as it applies only in relation to Wales, is to extend to England, and
 - (b) except in so far as it applies only in relation to England, is to extend to Wales...

¹²⁸ Welsh Government, supplementary evidence to CLAC, 26 November 2015, paragraph 12.

¹²⁹ *Ibid*, paragraph 5.

A second illustrative provision further illustrates the substantial differences between a fully separate jurisdiction and a distinct but not separate one. While there is formal division of the senior court architecture, a joint judiciary remains in place as part of the ‘glue’ of a re-invented ‘union of the nations of Wales and England’. A strong guarantee of consistency in common law and equity is thus provided (but without the deadening effects for the devolved institutions of ‘leeway and lock’). The ‘Senior Courts of England’ and the ‘Senior Courts of Wales’ would be established, whereupon:

The judiciary and court officers

(1) All of the judges and other officers of Her Majesty’s Court of Appeal in England or Her Majesty’s High Court of Justice in England become judges or officers of both of the courts to which that court corresponds ...

As regards England-only and Wales-only law, a third illustrative provision references the well-established rules of private international law such as already apply between England and Wales and Scotland or Northern Ireland:

Division of business between courts of England and courts of Wales

(1) The Senior Courts of England, the county courts for districts in England and the justices for local justice areas in England have jurisdiction over matters relating to England; and (subject to the rules of private international law relating to the application of foreign law) the law that they are to apply is the law extending to England.

(2) The Senior Courts of Wales, the county courts for districts in Wales and the justices for local justice areas in Wales have jurisdiction over matters relating to Wales; and (subject to the rules of private international law relating to the application of foreign law) the law that they are to apply is the law extending to Wales.

The Welsh Ministers stress that this is work in progress.¹³⁰ Their illustrative drafting clearly requires further consideration and other important matters would also need to be addressed in the legislation. For example, in contrast to our earlier discussion of ‘territorial rules’, the Welsh Government’s suggested draft clause on division of business does not tackle the critical question of what in practice ‘relating to England’ and ‘relating to Wales’ denotes. In a different vein, provision confirming that, notwithstanding the division of jurisdiction and court business, all barristers and solicitors in England and Wales have equivalent rights to practise and of audience to those presently enjoyed, may be thought appropriate.

As our earlier report highlighted,¹³¹ it would be possible to have as restrictions or reservations on devolved competence certain ‘red-line’ provisions or areas of the criminal law. This form of targeted approach to boundary-drawing might help allay fears about a loss of ‘integrity’ of the shared legal system, while allowing the National Assembly to escape the indignity of the type of general restriction associated with the ‘leeway and lock’ model. There is precedent in Scotland and Northern Ireland, where certain specified offences and groups of offences are reserved or excepted to Westminster (SA 1998, Schedule 5 Part II; NIA 1998, Schedule 2).

¹³⁰ Ibid, paragraph 13.

¹³¹ See *Delivering a Reserved Powers Model*, chapter 3.

6.4. Policy gap

A policy gap is revealed at the centre of the current constitutional proposals for Wales. Whereas alternative approaches to a full, separate jurisdiction were overlooked in the initial policy development, the multiple failings of ‘leeway and lock’ highlight the need to take the concepts of territorial rules and distinct but not separate jurisdiction seriously in the formal legislative development. Nor can the task of so anchoring a reserved powers model of devolution simply be left to Whitehall.

The Ministry of Justice must clearly play an active and creative role in making good the false start. This demands close engagement with multiple stakeholders in Wales, not least the legal professions with a view to maintaining the free flow of legal work between England and Wales. Justice stakeholders would in turn need to live up to their responsibilities in terms of planning, messaging and implementation. The senior judiciary have a strong role to play in the formulation and practical ordering of relevant structures and procedures.

The importance of joint working between the Ministry of Justice and the Welsh Government needs special emphasis. It is not only that, as the work of their justice stakeholders group¹³² serves to underscore, the Welsh Ministers have a chief interest in this area of policy development. Establishing territorial rules or a distinct but not separate jurisdiction for Wales would place an additional premium on the three principles of intergovernmental relations: communication, cooperation and coordination. If, as has been suggested to us, working relationships between the MoJ and the Welsh Government have been poor, then Ministers must provide a firm lead. The electors of the two governments of Wales deserve nothing less.

It would ill-behave the UK Government to respond negatively to the fact that alternative approaches based on territorial rules and a distinct but not separate jurisdiction need more work. First, it is Whitehall that has brought matters to a head by producing, without proper engagement with stakeholders in Wales, the defective model of ‘leeway and lock’. Second, the limited time allowed for consultation on the draft Bill prevents full elaboration of the alternatives. All this constitutes a chief reason why the formal legislative process should be paused. Wales must not be hurried under the banner of ‘a reserved powers model’ into another unsatisfactory devolution settlement.

¹³² <http://gov.wales/about/cabinet/cabinetstatements/2015/justicestakeholdergroup/?lang=en>

Reservations

The draft Wales Bill contains a complex set of specific as well as general reservations; that is, matters ‘relating to’ which the National Assembly will not have power to legislate (subject to exceptions). The list is some 34 pages long and contains 220 separate entries (Schedule 1 setting out new Schedule 7A to the 2006 Act).

In the current context, ‘relates to’ is an established legal concept. This is partly thanks to the use of similar phrasing and legal concepts in the draft Wales Bill to those in the Scotland Act 1998, and partly thanks to the devolution jurisprudence of the UK Supreme Court,¹³³ and particularly the Scottish case of *Martin and Miller*.¹³⁴ The new section 108A (5) provides that ‘The question whether a provision of an Act of the Assembly relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances’. This test combines both a ‘purpose’ test, for which it is necessary to establish the policy behind the legislation, and a form of a ‘pith and substance’ test, which looks to the effect of the legislation (and not its intent). Applying that test will require an exercise in judicial interpretation of the legislation as well as the ‘purpose’ underlying it.

The general restrictions in the draft Bill on devolved competence concerning ‘the law on reserved matters’, ‘private law’ and ‘criminal law and civil penalties’ (Schedule 2 inserting new Schedule 7B paragraphs 1-4) must be kept in mind. As matters stand, ensuring that National Assembly legislation does not relate to reserved matters and does not affect restricted matters will be a complex and time-consuming task for all involved – whether Ministers, policy officials and Welsh Government lawyers, legislative drafters, or the Presiding Officer and other National Assembly Members and their advisers. Business and civil society groups could find it particularly challenging. The potential for legal challenge casts a long shadow.

7.1. Combatting reservation creep

New Schedule 7A in the draft Bill gives tangible expression to the Whitehall ‘trawl’ for non-devolved matters among individual Departments and the process of ‘flipping’ from non-conferred to reserved powers. The UK Government’s concern to deal with the wide-ranging problem of the so-called ‘silent subjects’ in the wake of the *Agricultural Wages* case naturally features prominently in the list of reservations (see Chapter 3).

Unfortunately, with no general attempt at principled rationalisation in Whitehall, there is substantial ‘reservation creep’. Some reservations are hard if not impossible to square with the Minister’s stated policy aims. Others may proceed from a clear policy rationale but appear drafted to excess, especially when compared with parallel provision in the Scotland Act 1998. Others again may lock up together in convoluted fashion. The result is a legal definition of reserved matters that begrudges devolved power and would in practice create very substantial constraints on what the National Assembly and the Welsh Government can do.

¹³³ For discussion of the Supreme Court’s devolution jurisprudence, see Bingham Centre, *A Constitutional Crossroads*, Appendix: ‘The case law on devolution’.

¹³⁴ *Martin and Miller v Lord Advocate* [2010] UKSC 10.

Complexity, in other words, would be piled on complexity. The task of determining what exactly is within devolved legislative competence and what is outside it would thus be made all the more challenging and wearing for the policy makers and those they serve. The issue then is not simply how many reservations there are or how long the list of reserved matters is. Reflecting in large measure the one-sided nature of ‘trawling’ and ‘flipping’ in Whitehall, the problem is more deep-seated.

The scale of the difficulty will reflect the impact of the matters specifically reserved to Westminster. Thus the key question is how policy-making and legislation in the devolved institutions will be affected in practice. This depends on how the reserved and restricted matters interact with devolved functions. The deeper the interconnections between reserved/restricted and devolved matters, the greater the impact is liable to be.¹³⁵

Following criticism in the wake of publication of the draft Bill, the Secretary of State has indicated that the list of reservations is too long and is open to review.¹³⁶ This development is welcome. To assist his reconsideration, this Chapter seeks to classify and assess illustrative groups of reservations by reference to the official policy aims of the legislation and through comparison with Scotland, and to exemplify the need for reduction. Our aim is to provide a pathway to a properly justified and constitutionally appropriate list of reservations.

We are of course mindful of the veto in the St David’s Day process on pursuing further devolution in key areas such as policing and prisons (Chapter 3). There is still however important work to do in cleaning up the list of reservations in accordance with the principles of clarity and workability, and coherence and subsidiarity, not least with a view to having a clearer division of functions between Cardiff and London and so sharper lines of legal and political responsibility. We envisage this exercise going hand in hand with the jurisdictional/territorial reform presaged in Chapter 6, and hence enhanced effectiveness and clearer delineation.

7.2. Policy tools

Whether or not a function or subject-matter should be reserved may not be a straightforward question. Attention needs to be given both to the policy justification and the impact of reserving a specific item, as well as to the overall shape of the package of reservations in constitutional terms. The draft Bill itself presents a continuum: all the way from ‘core’ reservations of items of compelling UK governmental interest to the constitutionally inexplicable.

Our earlier report supplied a set of tools for the policymakers. They consist of a series of questions designed to facilitate careful and constructive forms of analysis of possible reservations. We set them out again below, with a view to promoting both thorough and expert justification and detailed scrutiny.

Considerations for identifying functions that should be reserved

1. Is its retention at UK level necessary for the functioning of the UK as a state – for its operation on the international level, or for the social, economic, political and defence and security unions it comprises internally?

¹³⁵ See further in this regard, Theodore Huckle QC, ‘“Fixes, Fudges and Falling Short”? The Need for a Coherent and Lasting Devolution Settlement for Wales’.

¹³⁶ CLAC, Report on draft Wales Bill, paragraph 116.

2. Does the overall package of reserved matters taken as a whole constitute a coherent, consistent package? Does its overall impact make for effective or ineffective law-making and public administration? Will its coherence make it comprehensible and accessible to lawmakers and the public at large?
3. Does retention of a particular function make the governance of the UK generally less clear or comprehensible? Does it affect the coherence of the package of devolved powers and functions?
4. Does retention of a function undermine the workability, stability or durability of the devolution settlement?
5. Does a failure to reserve a particular matter create the potential for devolved legislation with practical or legal cross-border implications that would have an effect on the working of government in England or policy-making for England of such significance that it needs to be taken into account?
6. Is the reservation expressed in terms that go no further than is necessary to give effect to the purpose of the reservation?
7. Is the reservation expressed in terms that avoid unjustifiable interference with the exercise of functions that are meant to be devolved?

Here as elsewhere, we aim to help deliver a stronger, clearer, fairer and sustainable devolution settlement for Wales. These criteria do not appear to have been applied in framing the draft Bill. In CLAC's words, 'the absence of a principled approach has contributed to the excessive number and complexity of the reservations.'¹³⁷ We highlight examples of reservations which either offend or do not sit comfortably with the Secretary of State's declared objectives. In truth, we are spoilt for choice.

7.3. Unpacking

The proposed reservations can be divided into three main categories. First, there are those matters that are reserved across the UK or GB. UK-wide designation indicates the extent to which central government regards these functions or subjects as not suitable for devolution. There is little further to say about these matters given the nature of that choice, save perhaps as regards the comparative breadth of drafting. Similar considerations typically apply in the case of matters reserved for Scotland but not Northern Ireland (given the distinctive route by which reservations and exceptions came to be framed for Northern Ireland).

The second main category involves matters where a political decision has been taken, most obviously through the St David's Day process, not to devolve them to Wales. The exemplar of course is the decision not to devolve policing and criminal justice. However much one may regret that choice, a choice has been made and it is appropriate for the draft Bill to implement it.

A political decision to reserve a matter may though have wider undesirable results. For example, the drafting of the reservations often appears to go beyond what is needed to achieve the policy goal of reserving policing and criminal justice matters. Reservations of the prevention, detection and investigation of crime (reservation 38) at least in so far as it relates to police investigation etc., the maintenance of public order (reservation 39), and Police and Crime Commissioners (reservation 41, and their elections), may follow logically from that choice. So may reservations of compensation for victims of crime (reservation 190), compensation for miscarriages of justice (reservation 191) and offender management

¹³⁷ CLAC, Report on draft Wales Bill, paragraph 135.

generally (reservation 192), although there are complex issues where offender management and devolved public services interact. In a number of cases, however, the rationale for the reservation may be because of a perceived relation to policing and criminal justice. Further justification of the reservation is therefore necessary. This may be said to apply to the following reservations:

- 36 Covert surveillance by persons exercising public functions
- 37 Use of surveillance systems
- 42 The subject-matter of Parts 1 to 6 of the Anti-social Behaviour, Crime and Policing Act 2014
- 43 Dangerous dogs and dogs out of control
- 44 The subject-matter of the Modern Slavery Act 2015
- 47 Criminal records, including disclosure and barring
- 49 The subject-matter of the Poisons Act 1972
- 50 Knives (defined to include knife blades and razor blades, axes and swords)
- 57 Hunting with dogs
- 157 Abortion

As noted in Chapter 6, a similar situation arises in the light of the policy of protecting the ‘integrity’ of the unified legal system of England Wales. This appears to necessitate a number of specific reservations:

- 141 Child support maintenance
- 179 The legal profession and legal services
- 180 Claims management services
- 181 Legal aid
- 182 Coroners (including their appointment and remuneration)
- 184 Arbitration
- 185 The subject-matter of the Mental Capacity Act 2005
- 193 Family law
- 197 The subject-matter of (a) the Land Charges Act 1972, (b) the Land Registration Act 2002, and (c) Part 1 of the Commonhold and Leasehold Reform Act 2002
- 214 Intercountry adoption
- 215 Functions of “the Central Authority” under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption

Again, some ‘specific reservations’ are less specific than others. As set out below, ‘family law’ exemplifies a need with sprawling subjects to drill down to the different policy justifications.

Box 1: ‘Family Law’

Family law is to be reserved, with ‘Adoption agencies and their functions’ an exception. And while the courts are to be reserved, ‘the provision of advisory and support services in respect of family proceedings in which the welfare of children ordinarily resident in Wales is or may be in question’ is not. This appears to be an attempt to restate the current legal position without any re-examination of whether that is appropriate given the other devolved functions of the National Assembly and Welsh Government.

The difficulty partly arises because of the imprecision of the term ‘family law’. Family law may be a subject for legal textbooks, and certain matters clearly come within the present jurisdiction of the Family Courts, but the boundary of family law is not clear. For example, the Children and Families Act 2014, which made provision for some matters in England that are regarded as devolved already to Wales, is regarded by the Ministry of Justice as ‘family law’.

In any case, the draft Bill is not a straightforward restatement of the current position. Under the Government of Wales Act 2006, ‘Social welfare’ and the ‘Protection and welfare of children (including adoption and fostering)’ are conferred matters, with an exception for ‘Family law and proceedings’ that itself excludes welfare advice to courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and Welsh family proceedings officers. The proposed new powers to legislate on advice generally (not restricted to welfare advice) are arguably wider than the present powers, but without making ‘the protection and welfare of children’ an exemption, there may be doubt over the extent of the National Assembly’s powers to legislate about, for example, looked-after children in Wales let alone the circumstances in which children might be taken into care.

There may be a good case for preserving a common system in England and Wales for some aspects of family law particularly relating to private matters rather than those where social services agencies are involved. The case needs to be made however: these are devolved matters in Scotland and Northern Ireland, with voluntary arrangements ensuring extensive co-operation with England and Wales. The scope of this proposed reservation could potentially catch areas of law where the National Assembly either already has competence or for which there are no good reasons under our criteria (see paragraph 7.2.) for it to be denied competence.

A further miscellany of reservations underscores the demand for proper explanation. While there may be good reason to reserve some or all of the following matters, that case should be made publicly and be a matter for scrutiny:

- 203 Community Infrastructure Levy.
- 204 Compulsory purchase of land.
- 194 Registration of births, adoptions, marriages, civil partnerships and deaths.
- 195 Registration of places of worship.
- 198 Local land charges.
- 199 The subject-matter of sections 9 and 14 of, and the Schedule to, the Agricultural Credits Act 1928.

Again, we identify a group of cases where the proposed reservation appears to parallel a reservation in Scotland but which, on examination, goes further than the Scottish one:

- 196 Gender recognition
- 107 Energy conservation
- 108-121 Road transport reservations generally
- 133 Aviation, air transport, airports and aerodromes

- 143 Occupational and personal pensions (in relation to the exception which in Scotland extends to public authorities more generally)
- 149 Regulation of medical and related profession (so far as it concerns ‘any other profession concerned with the physical or mental health of individuals’ (with an exception for social work))

The third main category of reservations is even more problematic. It involves reservations which appear unique to Wales and where the rationale for the reservation remains unclear. Unnecessary for the functioning of the UK as a state, they do nothing for the coherence and consistency of devolved powers. They would demand careful navigation by the National Assembly in making legislation, and so would make the governance of Wales less clear and comprehensible.

- 52 Private security
- 54 Licensing of (a) the provision of entertainment, and (b) late night refreshment*
- 55 The sale and supply of alcohol*
- 59 Provision of advice and assistance overseas by local authorities in connection with carrying on there of local government activities*
- 94 Licensing and regulation of a water supply licensee*
- 96 Licensing and regulation of a sewerage licensee
- 97 The Water Services Regulation Authority
- 98 The exploration for and exploitation of minerals which are not capable of producing energy†
- 99 The subject-matter of Part 4 of the Small Business, Enterprise and Employment Act 2015 (Pubs Code Adjudicator and the Pubs Code)
- 100 Sunday trading*
- 101 Pedlars and street trading†
- 129 Reserved trust ports
- 130 Safety standards in harbours
- 144 Schemes for the payment of compensation for or in respect of public sector workers in respect of (a) incapacity or death as a result of injury or illness, (b) loss of office or employment, or (c) loss or diminution of emoluments†
- 145 Regulation of amounts payable, or paid, to or in respect of public sector workers in consequence of leaving office or employment†
- 155 Industrial training boards
- 156 Arrangements for assisting persons to select, train for, obtain and retain employment, and to obtain suitable employees (with exceptions for education, vocational, social and physical training, and careers services)
- 164 Specified feed additives
- 165 Animal feeding stuffs, in relation to (a) the inclusion of veterinary products or specified feed additives; (b) matters arising in consequence
- 171 Fire safety
- 178 Safety of sports grounds
- 189 The subject-matter of the Public Records Act 1958
- 213 Activities for the purposes of deep sea bed mining operations
- 217 Remuneration and conditions of employment of school teachers*

Within this group, some provisions are expressly excepted from the National Assembly’s current powers: these are marked *. As such, they preserve a status quo in the division of powers, but in ways that are questionable and reflect a political choice which gives more

weight to the functions of the old Welsh Office than to a considered approach to what the powers of the National Assembly should be in 2016. In other illustrative cases, identified with †, not only is there a questionable rationale for reserving the matter, but the reservation would remove from the National Assembly legislative powers it already has. Applying our set of tools for policy makers would have nullified most if not all of this group. At the very least, these reservations should be subject to careful consideration and reasoned justification if they are indeed to be reserved, given the significant practical implications of doing so. The area of fire safety, and the difficulties that will result from the reservation as presently drafted, illustrates the point well.

Box 2: 'Fire Safety'

Fire Safety is to be reserved, with two exceptions – the 'promotion of fire safety otherwise than by prohibition or regulation' and the 'provision of automatic fire suppression systems in newly-constructed and newly converted residential premises'. The reservation and the first exception reflect the Government of Wales Act 2006 as first passed, and the second reflects the amendment of Schedule 5 by the National Assembly for Wales (Legislative Competence) (Housing) (Fire Safety) Order 2010 and the subsequent passage of the Domestic Fire Safety (Wales) Measure 2011.

In general, fire and rescue services are completely devolved to Wales and the Welsh Ministers have extensive powers and responsibilities under the Fire and Rescue Services Act 2004 (including an obligation to produce a National Fire and Rescue Framework that takes account of public safety). Because of the exceptions, fire safety is oddly shared between London and Cardiff. The fire service's work in advising householders and businesses on fire safety is devolved, as is regulation of sprinkler systems in new houses - but not regulation of sprinkler systems or fire alarms in existing houses or business premises (though the Welsh Government can deploy executive powers through Building Regulations). At the margin, there are also matters where there could be a debate about whether they were within competence or not. The proposed reservation reflects a status quo that has not been examined since 1998, and is based on a division of functions between the Home Office and Welsh Office before devolution that does not fit with our criteria (see paragraph 7.2.)

Fire safety is devolved to Northern Ireland and Scotland, with some exceptions in Scotland relating to health and safety mainly regarding oil, ships and industrial processes.

The recent Home Office proposals to bring fire and rescue services in England (but not Wales) within the purview of Police and Crime Commissioners will result in an increasingly confused situation, and only strengthens the rationale for devolution of all matters relating to fire. It also strengthens the Silk Commission argument for the devolution of policing since Police Commissioners' functions will be different in Wales from England.

From this third category, one may discern a general reluctance to allow the National Assembly some key sets of powers:

1. *Regulatory powers of a local character*: whether that be alcohol sales and licensing, late night entertainments, street and Sunday trading or the safety of sports grounds. These are typically local government matters. Reserving them will require England and Wales to maintain a similar approach to the role of local government even though local government generally is a devolved matter and there is already evidence of significant policy divergence between the two countries.

2. *Running of the public sector*: with an imposition of UK Government rules regarding redundancy or retirement payments to public sector employees, as well as such matters as teachers' pay.
3. *Control of land and non-energy natural resources*: extending to aspects of regulating water and sewerage, and likewise ports, and constraints on deep sea mining
4. *Skills training*: despite this being a major area where the National Assembly and Welsh Government are expected to re-shape an under-performing Welsh economy.

7.4. Justification and scrutiny

The detailed and complicated listing of reservations in the draft Bill is a matter of serious constitutional concern. On occasion, it even suggests an unwillingness to take Wales seriously. The problems do not relate simply or solely to the political choices that underlie the drafting of particular reservations. The problems also arise because of the inclusion of reservations that have not been the subject of wider political debate, whether they reflect existing exceptions from devolved powers or 'silent subjects', or a one-sided bureaucratic process within Whitehall (Chapter 3). The list certainly does not reflect the hope that the Silk Commission expressed that the move to reserved powers would be an opportunity to rewrite the settlement to remove the defects of haste and inconsistency that have so far marred legislative devolution in Wales.¹³⁸

Detailed reservations that impact on local matters, even if they maintain a shared England and Wales approach, will not be conducive to good constitutional or political relations between the Welsh and UK Governments or between the National Assembly and Westminster. From the standpoint of civil society, keen to see responsive and accessible governance in accordance with the principle of subsidiarity, such reservations may well appear anomalous. Even if the intricacy of many of the reservations and the impact a particular reservation has on functions which more generally are considered to be devolved does not inhibit policy making, it will have a substantial deleterious effect. It is liable to generate unnecessary acrimony and blame-shifting between Cardiff and London, and it will necessarily require the courts to take a prominent role in the working of Welsh devolution at the expense of elected law-makers. From the standpoint of both good governance and the Union, this too is unwelcome.

We cannot over-emphasise the need for principled justification and scrutiny. Some of the reservations clearly are needed; some appear marginal and demand close testing; and some are clearly not required, and should not happen, in view of the UK Government's policy commitments. A streamlined approach would both simplify the devolution settlement for Wales and improve its robustness.

¹³⁸ Silk Commission, Part 1 Report, paragraph 4.5.7.

8

UK ministerial consents

The question of legislative powers for Wales should not obscure the important and related issues of the scope of ministerial – executive – powers – and their division between UK and Welsh Ministers. In this Chapter we focus on the vexed question of UK ministerial or Crown consents for devolved legislation reworking the role and functions of public authorities, which was earlier identified as the third main kind of squeeze on the devolved institutions in the draft Bill. Once again, an alternative – transparent and streamlined – approach is advocated.

8.1. Constitution, law and practice

Although the topic may sound dry and technical, it is one of major constitutional, legal and practical concern. The requirement for UK ministerial consent conjures the prospect of democratically legitimated Welsh legislative policy being overridden from elsewhere by executive power. Expansion of what is effectively a veto power, and hence greater dependency of the devolved institutions, would also sit oddly with the provision elsewhere in the draft Bill recognising that the National Assembly is a permanent legislative body (see Chapter 4). From the standpoint of the Union, the evident propensity for friction between the two centres of democratic authority is particularly concerning; and the more so, in view of the dual nature of UK and/or English ministerial responsibilities in London. A prudent approach to the use of Crown consents is called for.

The UK Government's policy of constricting devolved legislative power to change the functions of public bodies must be viewed against the general backdrop of UK governance and institutional development. This is the realm not only of institutions such as local government and the police, but also, especially from the 1980s on, of a raft of 'arm's length' or independent and specialist bodies commonly exercising executive and/or regulatory functions of day-to-day significance for citizens.¹³⁹ The legacy is of typically ad hoc or piecemeal development - such agencies may, on the one hand, work on various territorial bases (most obviously, UK, GB, and England and Wales); and, on the other, operate solely or primarily within areas of devolved or non-devolved competence, or otherwise range across.

From time to time, the devolved institutions will naturally wish to rework the functions of existing public bodies as part of policy development, not least in order to promote efficient and effective methods of implementation and/or 'joined-up' governance in cross-cutting policy fields. Conversely, UK ministers may have good reasons based on collective and/or uniform interest for protecting particular bodies from such a unilateral change of function, most obviously in 'core areas' where powers are reserved (Chapter 7).

- *Existing regime*

The general restrictions in the Government of Wales Act 2006 (Schedule 7 Part 2 paragraph 1) stipulate that an Assembly Act may not – directly, or indirectly through subordinate legislation it enables – remove or modify any existing pre-commencement¹⁴⁰ function of a Minister of the Crown; nor may it confer or impose – again, directly or indirectly through

¹³⁹ M Flinders, *Delegated Governance and the British State: Walking without Order* (OUP, 2008).

¹⁴⁰ A 'pre-commencement' function is a function exercisable before 5 May 2011 - the day on which the National Assembly took on full law-making powers following the 2011 referendum.

subordinate legislation – any new function on a Minister of the Crown. A provision removing or modifying a pre-commencement Minister of the Crown function is permitted however if the Secretary of State consents, or if it is incidental to, or consequential on, any other provision contained in the Assembly Act (Schedule 7 Part 3 paragraph 6(1)). This is the statutory foundation for the UK Supreme Court decision in favour of the devolved institutions in the *Local Government Byelaws (Wales)* case,¹⁴¹ where it was held that the Assembly Act was within competence despite incidentally overriding the UK Minister's powers to approve or disapprove byelaws. Again, the 2006 Act permits a provision conferring or imposing a function on a Minister of the Crown if (but only if) the Secretary of State consents (Schedule 7 Part 3 paragraph 6(2)).

Establishing a necessary element of flexibility, the 2006 Act further provides for the transfer of Minister of the Crown functions (where exercisable in relation to Wales) to the Welsh Ministers by Order in Council (section 58 and Schedule 3). Operating via affirmative resolution procedure, it allows for a range of options, such that an Order may transfer a power to the Welsh Ministers to exercise absolutely, or concurrently with the Minister of the Crown; or direct that it remain with the Minister of the Crown, but be exercisable only with the agreement of, or after consultation with, the Welsh Ministers. The Order may deal with powers in relation to a cross border authority, or in the case of water, sewerage, rivers and the like, with powers in relation to an English border area, if it (or another Order) deals also with these powers in relation to the Welsh side of the border.

This regime is already more restrictive and more complex than that which applies to Ministers' powers in Scotland. Section 53 of the Scotland Act 1998¹⁴² provided for the general transfer of existing Minister of the Crown functions, including prerogative and common law ones, so far as exercisable within devolved competence. While Westminster retains competence to legislate in non-reserved matters (subject of course to the convention of consent of the Scottish Parliament), the default position is therefore that Whitehall cannot act in areas of Scottish ministerial responsibility. Under the Scotland Act 1998 a special regime for the joint operation and adaptation of cross-border bodies was established, but with these being specified by Order in Council (sections 88-90).

The Silk Commission paid careful attention to the question of ministerial powers in the context of a reserved powers model for Wales. The Commission duly recommended that, following the Scottish precedent, there should be a general transfer to the Welsh Ministers of pre-devolution Minister of the Crown powers in devolved (non-reserved) areas, subject to any necessary exceptions.¹⁴³ As the Commission observed, this would promote alignment between legislative and executive competence, so helping to avoid a misshapen set of Welsh ministerial powers.

One practical difficulty with the current position highlighted in our first report is that there is no comprehensive list of those pre-commencement functions which are protected.¹⁴⁴ Blanket protection of functions which are not within the current notice of central government departments is an unattractive constitutional feature, and one which jars with the evident capacities of a Whitehall trawl for the purpose of reservations (Chapter 7). Clarity should not

¹⁴¹ *Local Government Byelaws (Wales) Bill 2012 - Attorney General Reference* [2012] UKSC 53.

¹⁴² See further, A Page, *Constitutional Law of Scotland* (Edinburgh: W Green, 2015).

¹⁴³ Silk Commission, Part 2 Report, recommendation 2.

¹⁴⁴ *Delivering a Reserved Powers Model of Devolution for Wales*, paragraph 1.4. See further, National Assembly for Wales Constitutional and Legal Affairs Committee, transcript of evidence 23.11.2015, paragraphs 91-93 (Stephen Crabb).

be confined to the boundaries of devolved legislative power, but extend to the substance of UK executive competence. The Silk Commission's recommendation was however one of those for which 'no consensus' in the St David's Day process was recorded in the Command Paper *Powers for a Purpose*.¹⁴⁵

8.2 Multiple consents

The draft Bill would prevent an Assembly Act – directly or through subordinate legislation it enables – from removing or modifying any function of a 'reserved authority'; or conferring or imposing any function on it; or conferring, imposing, modifying or removing functions specifically exercisable in relation to it; or modifying its constitution – without the consent of the appropriate UK Minister. A novel concept in the UK's devolutionary arrangements, 'reserved authority' means a Minister of the Crown or UK Government department and any other public authority apart from a 'Welsh public authority', which is defined as a public authority whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters (Schedules 1 and 2 inserting into the 2006 Act new Schedule 7A paragraph 218 and new Schedule 7B paragraph 8). Representing a total ban on the National Assembly legislating, the draft Bill would also prevent an Assembly Act from altering the constitution of a 'named authority' (listed in new Schedule 7A), or conferring or imposing functions on it, or modifying or removing its functions (new Schedule 7B paragraph 219).

This set of provisions would clearly widen and deepen the role of Crown consents in the constitutional framework. As such, the position of Wales would be further reduced in comparison with Scotland. First, the limitation applies to Minister of the Crown functions whenever conferred, not only to those conferred pre-commencement. Second, in the light of the general institutional development in recent times, the draft Bill would seemingly catch a broad range of public bodies and agencies performing functions inside areas of devolved competence. Thirdly, reversing the effect of the Supreme Court's decision in the *Local Government Byelaws (Wales)* case, any encroachment on Minister of the Crown functions incidental to or consequential on Assembly Act provisions would require consent.

Complex and hard to understand, the resultant regime relies on several definitions and determinative tests which would be arguable in their application. The concepts of 'reserved bodies' and 'Welsh public authority' may be particularly difficult to apply unambiguously and decisively in the context of a range of public bodies which – for good practical reasons – undertake a mix of functions, having impact in Wales but also in England. The draft Bill is also forced to rely for determinative purposes on assessment of whether a public authority is a Welsh public authority at the time of the introduction of the relevant Assembly Bill in an attempt to avoid the further - inevitable - complexity associated with future changes to public authorities (new Schedule 7A paragraph 218(6)). An unhappy augury, the relevant provision has featured prominently in the claims and counter-claims of the two sets of government lawyers about the size of the catch of existing Assembly Acts in the draft Bill (Chapter 3). Legal uncertainty is effectively piled on legal uncertainty.

Extra grit in the political and administrative system is a concern. Whereas the UK Government promises a speedy process, the Welsh Government points up past delays in giving Crown consent.¹⁴⁶ Certainly the experience with legislative competence orders in an

¹⁴⁵ *Powers for a Purpose*, paragraph 2.1.27.

¹⁴⁶ See for example, First Minister of Wales Carwyn Jones, National Assembly Record of Proceedings, 3 November 2015.

earlier phase of Welsh devolution does not bode well.¹⁴⁷ The UK Government has also declared a readiness to adopt a policy of presuming that Crown consent should be granted in all cases.¹⁴⁸ Yet the House of Lords Constitution Committee has repeatedly warned against this way of proceeding.¹⁴⁹ Ministerial assurance is not a substitute for clear provision on the face of a Bill. Policies change; governments come and go.

8.3. Transparency and streamlining

It is worth taking a step back to consider what kinds of tension may arise between the devolved institutions and the UK Government, where provisions for UK ministerial consent might play a part. Often these will focus on an executive or advisory agency or body and arise over:

- Direct or indirect resource implications – changed financial requirements, liabilities or risks, diseconomies of scale, consequences of changed working patterns, or other dynamic interactions.
- Who appoints members, and how far they are to represent their countries versus effective discharge of collective responsibility and stewardship.
- Divergent policy or focus of operations responding to different countries' needs or expectations – say over food safety and nutrition, environment or culture, or where populations differ in housing, land use, economic or agricultural activity.

The logic of the detailed provision in the draft Bill, confirmed in the conflicting analysis by the two sets of government lawyers, is that from time to time the devolved institutions will be stymied or driven to find another way round. From the standpoint of the taxpayer, this may represent a perverse incentive: new Welsh public bodies where reserved or cross-border bodies could have been used.

An example the Welsh government give of how the draft Bill may place new restrictions on the Assembly's powers to legislate is illuminating.¹⁵⁰ The UK Government could argue that if an Assembly Act would create or modify any offence or cause of action, this would impact on the courts and tribunals. These (save tribunals adjudicating solely on devolved matters) being reserved bodies, the provision could require UK ministerial consent. From the standpoint of the devolved institutions, this underwrites the need for a new reserved powers model not to constrict the ability to make effective provision for the enforcement of Assembly Acts (Chapter 5).

Yet the UK Government also has a legitimate concern that the operations of bodies in which it has substantial, possibly overwhelming, interest and responsibility should not be altered without its agreement. The position may be reminiscent of the 'new burdens' procedures which operate within the UK Government, that if one Department proposes a policy which will carry costs to another, or to English local authorities, it should be responsible for securing the necessary resources within Spending Reviews.¹⁵¹ The Secretary of State has

¹⁴⁷ See *Devolution: A Decade On*, House of Commons Justice Committee, Fifth Report of Session 2008-09, pp 43-47.

¹⁴⁸ *Powers for a Purpose*, paragraphs 2.1.27 - 2.1.31

¹⁴⁹ See J Caird, R Hazell and D Oliver (eds), *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (Constitution Unit, 2nd edn 2015).

¹⁵⁰ Letter from the First Minister of Wales to the Secretary of State for Wales, 7 September 2015.

¹⁵¹ See further, Department for Communities and Local Government, *New burdens doctrine: guidance for government departments* (2011).

further argued¹⁵² that the requirement of UK ministerial consent to National Assembly legislation which impinges on reserved bodies or matters is the natural reciprocal of the convention (included in the draft Bill) that the UK Parliament will not normally legislate on devolved matters unless the National Assembly has given legislative consent.

All the more reason to ensure that what the Secretary of State calls a ‘red line’ is clearly and equitably drawn. Public authorities in particular need to know where they stand. In order to increase clarity and workability, the constitutionally appropriate way forward is a general statutory presumption that the Welsh Ministers should have sole executive powers in devolved areas,¹⁵³ coupled with a statutory list of exceptions for specific UK ministerial functions (with provision for amendment by order). More particularly, the legislation should aim to specify those bodies and functions subject to the consent requirement, rather than to seek to capture them by general descriptions. Fitting with the principle of subsidiarity and transparent constitutional process, this approach invites consideration of the appropriate level of decision-making in different policy contexts and demands reasoned justification for particular exceptions. In practice this process would be eased through read-across from Scotland in the case of ‘core’ UK-level activities. It would also need to be informed by the policy decisions concerning territorial rules and a distinct but not separate jurisdiction for Wales (Chapter 6).

If it is a firm political choice to rule out this approach, other options are preferable to the provision in the draft Bill. They essentially involve streamlining the requirements or processes with a view to greater clarity and efficiency and less constitutional tension between Cardiff and London.

So far as pre-commencement Minister of the Crown powers are concerned, absent a recognised list of protected powers we believe that little or no harm would be done if the legislation were to follow closely the approach of the Scotland Act 1998. So far as newly conferred powers are concerned (where it is seen that they must rest with a Minister of the Crown), and for new cross-border bodies, the implications for Wales will have to be considered on a tailored basis in the context of the UK Bill conferring the powers or establishing the body. A careful review of the political and administrative processes operative in this area, with the aim of encouraging dialogue and promoting agreement between the two governments, is clearly appropriate. The detailed provision in the draft Bill on UK ministerial consents must not obscure the need for efficient and effective systems of intergovernmental relations for delivering good governance and limiting and mediating conflict in this particular field.

Where Crown consent is seen to be a necessary safeguard for the public interest, the further question arises of whether the legislation should seek to regulate the process. It would be appropriate to incorporate a presumption of consent in the statute, with consent being treated as granted in default of reasoned objections being stated within reasonably short fixed periods. Such procedural requirements would operate to overcome the impediment to rapid and responsive making and implementation of policy and law that is a significant cost of the consent regime.

¹⁵² National Assembly for Wales Constitutional and Legal Affairs Committee, transcript of evidence 23.11.2015, paragraph 83.

¹⁵³ The draft Bill would transfer executive functions at common law so far as they are exercisable within devolved competence or are incidental to the exercise of another function within devolved competence, but not executive functions conferred or imposed via statute or the prerogative: clause 25.

In addition, clear timetables for decision-making must be established in the public documentation of intergovernmental relations, better to underpin ministerial accountability, and it will again be important to ensure proper political and administrative procedures for dispute resolution in this sensitive constitutional area. Constructive engagement between the two governments of Wales, to achieve better governance overall, must rest on a more equitable balance of negotiating strength than is envisaged in the draft Bill.

Conclusion

The draft Wales Bill does not do what was promised. All too often, the Secretary of State's fine policy objectives of a stronger, clearer, fairer and more robust devolution settlement are frustrated by provision that is constricting, clunky, inequitable and constitutionally short-sighted. At the heart of the difficulty is the triple squeeze on the devolved institutions of intrusive general restriction, over-occupation of legislative space, and blurry forms of executive veto. It does not have to be like this.

Process matters. The Silk Commission had set the scene with principled guidance that recognised the twin demands of ample legislative space for the National Assembly and proper protection of UK-level powers and functions, as well as the benefit for the people they serve of the two governments of Wales working together on the basis of mutual respect. Of course that Commission could not and did not provide all the answers. All the more unfortunate then that conditions have been ripe, first, with the opaque and veto-based St David's Day process, for incoherence and inconsistency; and second, with the opaque, aloof and mechanical Whitehall process, for lack of balance and more incoherence and inconsistency. Yes, the draft Bill would enhance the Welsh devolution settlement in some valuable ways; and yes, the so-called 'silent subjects' constitute (in the light of the *Agricultural Wages* case) a significant constitutional issue waiting to be tackled. But the ways and means of producing the draft Bill leave a lot to be desired; not least in view of the apparent consensus in Wales in favour of a reserved powers model of devolution.

9.1. Reconstruction

Assigning the National Assembly a modicum of legislative space ('leeway'), bounded by general legal restriction especially as regards private law and criminal law ('lock'), reflects a narrow, backward-looking view of the 'integrity' of the England and Wales legal system. This approach to the internal design of the reserved powers model is fundamentally flawed and self-defeating, whether statutorily expressed in terms of necessity-testing or otherwise. It invites constitutional and political difficulty because the seeming desire to protect every feature of a unified legal system generates provision that cuts deeply into the policy-making and legislative capabilities of the devolved institutions. It invites constitutional and legal difficulty because of the fresh uncertainties produced and the awkward demands placed on the judiciary.

The draft Bill is incomplete. A conferred powers model of devolution can fit inside the unified legal system of England and Wales in its present form, but a properly constituted model of reserved powers will not. The legislative architects must come to terms with the changed – and changing – realities of Welsh devolution. Alternative approaches based on territorial rules and a distinct but not separate jurisdiction for Wales offer ways of providing a designated legal space in which the new polity can continue to grow, of regulating legislative overspill, and of maintaining a shared common law heritage with England, while avoiding the evident depredation of 'leeway and lock'. A separate jurisdiction that entails wide-ranging devolution of the administration of justice would be neither ruled in nor ruled out for the future. Completing the task clearly demands proper engagement with a range of stakeholders, including the legal professions. The judges have a key contribution to make in the shaping of

new structures and procedures sensitive to the cross-border demands of justice and legal business.

The list of reservations in the draft Bill reflects the lack of a coherent overall approach in Whitehall. Securing to the UK-level policy areas for which UK ministers would and should always be held accountable is an essential element in the devolutionary design. Unfortunately however, in the light of the multiple demands of individual Whitehall departments and subsequent lack of principled rationalisation, this rightful core has been overlaid with untested and uneven layers of specific reservation. Some of the reservations appear inexplicable in the light of the Minister's stated policy aims; others appear gold-plated. Simply jettisoning the stranger ones will not suffice. The listing as a whole must be suitably navigable. In the cause of clarity and workability, a strong dose of the constitutional disciplines of reasoned justification, public debate and legislative scrutiny is in order to combat 'reservation creep'.

Just as it is important to bring clarity to the issue of the 'silent subjects', so it is important to bring clarity to the issue of UK ministerial consents. This the draft Bill does not do: quite the reverse. Notwithstanding the constitutional sensitivity of central executive power overarching devolved legislative competence, the draft legislation would impose an additional set of constraints on the National Assembly that is novel in form and highly convoluted. The proper way to draw a 'red line' securing the position of UK-level public authorities against material changes wrought by the devolved institutions is to specify on the face of the legislation the bodies and functions protected by requirements of Crown consent. This will allow the provision to be streamlined and rationalised, and provide clarity for the many public authorities and other stakeholders involved in the governance of Wales. For those ministerial consents that are required, there must be a clear timetable for decision-making established in the public documentation of intergovernmental relations, so buttressing the constitutional discipline of ministerial accountability.

9.2. Next steps

The Secretary of State correctly stresses that the draft Bill is a first step in the formal legislative process, but even so there is a pervasive sense of rush, seemingly with a view to introducing a Wales Bill into the House of Commons ahead of the May 2015 general election to the National Assembly. CLAC and WAC have had to scrutinise the draft legislation under very tight timetables (as indeed have we). The hard task of establishing a robust and workable reserved powers model for Wales has been made harder still. The UK Government must pause, rethink the parameters, and reconstruct the legislation.

As the story of the draft Bill sadly illustrates, and the prospective demands of a reserved powers model serve to underline, the precepts of cooperation, communication and consultation which officially frame intergovernmental relations across the UK need to be taken seriously. Close forms of joint working between London and Cardiff on the framework and detailed content of a Wales Bill is not too much to ask. CLAC's report on the draft Bill spoke of legislation made *for* Wales rather than *with* Wales.¹⁵⁴ Least of all should it be legislation done *to* Wales.

As matters stand, we could not recommend that the National Assembly consent to the proposed legislation. The defects are too many and too serious. In the abstract, the concept of

¹⁵⁴ CLAC, Report on draft Wales Bill, paragraph 23.

a reserved powers model of devolution may be deemed preferable to the existing system of conferred powers. But the considerable challenge of establishing a reserved powers model of devolution for Wales requires that it be done creatively, equitably and in principles-based fashion. The constitutional opportunity remains to be seized.

Annexes

Annex A: Section 108 of the Government of Wales Act 2006

108 Legislative competence

(1) 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.

(2) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(3) A provision of an Act of the Assembly is within the Assembly's legislative competence only if it falls within subsection (4) or (5).

(4) A provision of an Act of the Assembly falls within this subsection if—

(a) it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and

(b) it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.

(5) A provision of an Act of the Assembly falls within this subsection if—

(a) it provides for the enforcement of a provision (of that or any other Act of the Assembly) which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise appropriate for making such a provision effective, or

(b) it is otherwise incidental to, or consequential on, such a provision.

(6) But a provision which falls within subsection (4) or (5) is outside the Assembly's legislative competence if—

(a) it breaches any of the restrictions in Part 2 of Schedule 7, having regard to any exception in Part 3 of that Schedule from those restrictions,

(b) it extends otherwise than only to England and Wales, or

(c) it is incompatible with the Convention rights or with Community law.

(7) For the purposes of this section the question whether a provision of an Act of the Assembly relates to one or more of the subjects listed in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

Annex B: draft Wales Bill 2015 clause 3, setting out new section 108A (legislative competence)

3 Legislative competence

- (1) For section 108 of the Government of Wales Act 2006 (legislative competence) substitute—

“108A Legislative competence

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

(2) A provision is outside that competence so far as any of the following paragraphs apply—

- (a) it extends otherwise than only to England and Wales,
- (b) it applies otherwise than in relation to Wales or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales,
- (c) it relates to reserved matters (see Schedule 7A),
- (d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions, or
- (e) it is incompatible with the Convention rights or with EU law.

(3) But subsection (2)(b) does not apply to a provision which—

(a) is ancillary to a provision which is within the Assembly’s legislative competence (or would be if it were included in an Act of the Assembly), and

(b) has no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision.

(4) In determining what is necessary to give effect to the purpose of that provision, any power to make laws other than that of the Assembly is to be disregarded.

(5) The question whether a provision of an Act of the Assembly relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(6) For the purposes of this Act a provision is ancillary to another provision if it—

(a) provides for the enforcement of the other provision or is otherwise appropriate for making that provision effective, or

(b) is otherwise incidental to, or consequential on, that provision.”

Annex C: Welsh Government's illustrative draft clauses

SEPARATION OF THE LEGAL JURISDICTION OF ENGLAND AND WALES

Introductory

1 New legal jurisdictions of England and of Wales

The legal jurisdiction of England and Wales becomes two separate legal jurisdictions, that of England and that of Wales.

Separation of the law

2 The law extending to England and Wales

(1) All of the law that extends to England and Wales—

- (a) except in so far as it applies only in relation to Wales, is to extend to England, and
- (b) except in so far as it applies only in relation to England, is to extend to Wales.

(2) In subsection (1) “law” includes—

- (a) rules and principles of common law and equity,
- (b) provision made by, or by an instrument made under, an Act of Parliament or an Act or Measure of the National Assembly for Wales, and
- (c) provision made pursuant to the prerogative.

(3) Any provision of any enactment or instrument enacted or made, but not in force, when subsection (1) comes into force is to be treated for the purposes of that subsection as part of the law that extends to England and Wales (but this subsection does not affect provision made for its coming into force).

Separation of the Senior Courts

3 Separation of Senior Courts system

(1) The Senior Courts of England and Wales cease to exist (except for the purposes of section 6) and there are established in place of them—

- (a) the Senior Courts of England, and
- (b) the Senior Courts of Wales.

(2) The Senior Courts of England consist of—

- (a) the Court of Appeal of England,
- (b) the High Court of England, and
- (c) the Crown Court of England,

each having the same jurisdiction in England as is exercised by the corresponding court in England and Wales immediately before subsection (1) comes into force.

(3) The Senior Courts of Wales consist of—

- (a) the Court of Appeal of Wales,
- (b) the High Court of Wales, and
- (c) the Crown Court of Wales,

each having the same jurisdiction in Wales as is exercised by the corresponding court in England and Wales immediately before subsection (1) comes into force.

(4) For the purposes of this Part—

(a) Her Majesty's Court of Appeal in England is the court corresponding to the Court of Appeal of England and the Court of Appeal of Wales,

(b) Her Majesty's High Court of Justice in England is the court corresponding to the High Court of England and the High Court of Wales, and

(c) the Crown Court constituted by section 4 of the Courts Act 1971 is the court corresponding to the Crown Court of England and the Crown Court of Wales.

(5) Subject to section —

(a) references in enactments or instruments to the Senior Courts of England and Wales have effect (as the context requires) as references to the Senior Courts of England or the Senior Courts of Wales, or both; and

(b) references in enactments or instruments to Her Majesty's Court of Appeal in England, Her Majesty's High Court of Justice in England or the Crown Court constituted by section 4 of the Courts Act 1971 (however expressed) have effect (as the context requires) as references to either or both of the courts to which they correspond.

4 The judiciary and court officers

(1) All of the judges and other officers of Her Majesty's Court of Appeal in England or Her Majesty's High Court of Justice in England become judges or officers of both of the courts to which that court corresponds.

(2) The persons by whom the jurisdiction of the Crown Court constituted by section 4 of the Courts Act 1971 is exercisable become the persons by whom the jurisdiction of both of the courts to which that court corresponds is exercisable; but (despite section 8(2) of the Senior Courts Act 1981)—

(a) a justice of the peace assigned to a local justice area in Wales may not by virtue of this subsection exercise the jurisdiction of the Crown Court of England, and

(b) a justice of the peace assigned to a local justice area in England may not by virtue of this subsection exercise the jurisdiction of the Crown Court of Wales.

5 Division of business between courts of England and courts of Wales

(1) The Senior Courts of England, the county courts for districts in England and the justices for local justice areas in England have jurisdiction over matters relating to England; and (subject to the rules of private international law relating to the application of foreign law) the law that they are to apply is the law extending to England.

(2) The Senior Courts of Wales, the county courts for districts in Wales and the justices for local justice areas in Wales have jurisdiction over matters relating to Wales; and (subject to the rules of private international law relating to the application of foreign law) the law that they are to apply is the law extending to Wales.

6 Transfer of current proceedings

(1) All proceedings, whether civil or criminal, pending in any of the Senior Courts of England and Wales (including proceedings in which a judgment or order has been given or made but not enforced) shall be transferred by that court to whichever of the courts to which that court corresponds appears appropriate.

(2) The transferred proceedings are to continue as if the case had originated in, and the previous proceedings had been taken in, that other court.