Y Fonesig Rosemary Butler AC
Dame Rosemary Butler AM

Llywydd
Presiding Officer

Rt Hon Stephen Crabb MP
Secretary of State for Wales
1 Caspian Point
Cardiff Bay
CF10 4DQ

Your ref:
Our ref: PO/RB/BA

2 September 2015

Dear Stephen

Thank you for your letter of 31 July and for sharing the draft reserved powers model for Wales with me in confidence. Your openness is much appreciated.

Disappointingly, however, the current proposals would amount to a backwards step for the National Assembly and would not deliver a lasting constitutional settlement for Wales and the UK as a whole. If they proceed as presently proposed, I would anticipate almost immediate calls for yet another Wales Bill, something that none of us wishes to see.

I have long advocated the move to a reserved powers settlement and welcomed your commitment in the St David's Day announcement to do so. However, I also made clear that my support was predicated on any new settlement meeting three key criteria, namely clarity, workability and no roll-back on the current competence of the Assembly. My assessment of your draft proposals is that they fail against each of these criteria and I thought it might be helpful to you if I set out my reasons for reaching that conclusion.

The draft proposals would leave the Assembly with less clarity over its powers than it currently has and less able to function effectively as a legislature. The continued intervention of the Courts would be inevitable. The legislative competence of the Assembly would be reduced in significant ways, leaving it unable, for instance, to pass several pieces of legislation that have been made by the current Assembly.

By way of illustration:

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- the proposals increase the number of tests that must be applied to assess legislative competence;
- the four new tests based on the term 'necessary' create a new area of legal uncertainty that will inevitably require elucidation by the Supreme Court if the Assembly is to have clarity over its competence;
- the general restrictions within Schedule 7B represent a significant roll-back in competence. For instance, Paragraph 8 removes the ability of the Assembly to remove or modify a function of a UK Minister, where to do so is incidental or consequential. This is a rollback of the Assembly's current competence and reverses the effect of the Supreme Court judgment in the case of the Local Government Byelaws (Wales) Bill;
- Paragraphs 3 & 4 also shrink the Assembly's current competence in the fields of civil and criminal law, in particular.

My concerns are fundamental ones and these are only illustrations. To give you a fuller picture, I am attaching a paper which explains the nature of my concerns in more detail and provides examples of the complexity and impracticalities which would arise from the draft proposals.

The proposals appear to me to be the result of a technical, piecemeal consideration of powers that are to be devolved to Wales from Whitehall departments. Such an approach leads inevitably to a defective solution. If implemented, it would certainly not provide the 'clear devolution settlement for Wales which stands the test of time' that you described in your foreword to the Powers for a Purpose Command Paper. In their current form, I therefore cannot support the proposals.

However, I continue to believe that you are sincere in your ambition to deliver such a settlement for Wales. To do so, I suggest you need to ensure that the proposals are radically revised. The fundamental organising principle for the devolved settlements for the whole of the UK should be subsidiarity - the centre should reserve to itself only what cannot be done effectively at devolved level. In my view, such a principles-based approach to designing a reserved powers model would provide a stable and sustainable basis for the settlement.

I hope that you will consider my response in the constructive manner in which it is intended and I look forward to your reply.

Rosemary

Dame Rosemary Butler AM
Presiding Officer

cc Rt Hon Carwyn Jones AM, First Minister

DRAFT WALES BILL 2016 – CLAUSE 1 AND SCHEDULES 7A AND 7B – RESERVED POWERS
NATIONAL ASSEMBLY FOR WALES COMMISSION ANALYSIS IN TERMS OF PRESIDING OFFICER'S TESTS OF CLARITY, WORKABILITY AND NO ROLL-BACK OF COMPETENCE

Introduction

This analysis does not focus on individual reservations. The National Assembly for Wales Commission sees those as primarily a matter for discussion between the Welsh and UK Governments (save for any which might touch on the Assembly as an institution). Instead, it concentrates on the tests for competence, which are of key interest to the Assembly and to the Presiding Officer, who has a statutory duty to apply those tests and to reach a view on whether each provision of an Assembly Bill is within the Assembly's competence or not.
However, the Presiding Officer's tests of clarity, workability and no roll-back of competence do, of course apply to individual reservations and the Assembly Commission may make submissions on the reservations, or certain of them, for that reason – whether before or after publication of the draft Bill.

Clause 1 – new section 108A GOWA 2006 – the test for legislative competence

1. Overview

1.1 Initially, clause 1 appears to introduce 5 tests for competence – as compared to 9 currently. This would suggest a significant, and welcome, simplification of the settlement.

1.2 However, the fourth test (contained in new section 108A(2)(d) of the Government of Wales Act 2006 (GOWA 2006)) itself contains 5 separate tests – all set out in new Schedule 7B. And the fifth test (contained in new section 108A(2)(e)) contains 2 tests.

1.3 Therefore, in fact, the Bill sets out 10 tests for competence, as opposed to 9 now. This in itself does not accord well with the principles of clarity and workability. Moreover, most of the tests are not straightforward to apply.

1.4 Some of these complex tests are the same as, or similar to, current tests (e.g. the meaning of the words "relates to", and compliance with the European Convention on Human Rights and EU law). **But some of them are new – in particular, the four new "necessity" tests.**

1.5 The 10 tests are set out below. As mentioned, some of them are the same as current tests. Others are new, but flow inevitably from the change to a reserved powers model. But there are other tests – or elements of tests – that are new, that do not flow inevitably from a reserved powers model and

which would constrain the Assembly more than at present – in other words, that **roll back competence.** These are marked in bold in the list. There then follows an analysis of the new tests/elements, with worked examples referring to clarity, workability and whether there is roll-back of the Assembly's current competence.

2. The 10 tests

2.1 The 10 proposed tests for competence are that a provision of an Assembly Bill:

(i) Must not extend beyond the England and Wales jurisdiction.

(ii) Must not apply otherwise than in relation to Wales or confirm, impose, modify or remove functions exercisable otherwise than in relation to Wales (or give the power to do so), unless the modification:
(a) is incidental to a Welsh provision, or
(b) is consequential on a core competence provision, or
(c) provides for enforcement of a core competence provision, or
(d) is appropriate for making a core competence provision effective;
AND
has no greater effect beyond Wales than is necessary to give effect to the purpose of the core competence provision.

(iii) Must not "relate to" reserved matters listed in Schedule 7A.

(iv) Must not modify the law on reserved matters, unless the modification:
(a) is incidental to a core competence provision, or
(b) is consequential on a core competence provision, or
(c) provides for enforcement of a core competence provision, or
(d) is appropriate for making a core competence provision effective;
AND
has no greater effect on reserved matters than is necessary to give effect to the purpose of the core competence provision.

(v) Must not modify private law (contract, tort, property law, trusts etc – see definition), unless the modification:
(a) is necessary for a devolved purpose, or
(b) is incidental to a provision made for a devolved purpose, or
(c) is consequential on a provision made for a devolved purpose, or
(d) provides for enforcement of a provision made for a devolved purpose, or
(e) is appropriate for making a provision made for a devolved purpose effective;
AND
has no greater effect on the general application of the private law than is necessary to give effect to that devolved purpose.

(vi) must not modify the criminal law (or civil penalties), unless the modification:
(a) is necessary for a devolved purpose, or
(b) is incidental to a provision made for a devolved purpose, or
(c) is consequential on a provision made for a devolved purpose, or
(d) provides for enforcement of a provision made for a devolved purpose, or
(e) is appropriate for making a provision made for a devolved purpose effective;
AND
has no greater effect on the general application of the criminal law/civil penalties than is necessary to give effect to that devolved purpose,
AND
is not a road traffic offence.

(vii) Must not modify a protected enactment (listed in Schedule 7B – some are provisions of GOWA 2006, some of other legislation).

(viii) Must not affect Minister of the Crown functions, government departments or other "reserved authorities" in prohibited ways. **(This test is similar to an existing one but has been significantly widened, i.e. has been made more restrictive of competence).**

(ix) Must not be incompatible with the Convention rights.

(x) Must not be incompatible with EU law.

3. Analysis of the new "necessity" tests – clarity and workability

3.1 The new "necessity" tests, which appear in clause 1 (new section 108A(3) of GOWA 2006) and in paragraphs 2, 3 and 4 of new Schedule 7B, constrain the Assembly's competence to make provisions affecting England, or modifying the law on reserved matters, or modifying "private law" (contract, tort, property law etc) or criminal law. Such provisions are not unusual or tangential, judging from experience of the conferred powers model. In particular, provisions that could be said to modify private law or criminal law arise in every Assembly Bill that modifies the rights or obligations of individuals or private bodies.

3.2 In terms of clarity and workability, the first issue that arises is that "necessary" is a concept capable of a range of meanings. This is a very practical issue, as it means that there will be uncertainty about the breadth of the Assembly's competence, at least until the Supreme Court has first pronounced on the meaning of the term. Indeed, that uncertainty could well lead to repeated legal challenges, as the Supreme Court's first judgment might well be confined to a particular legal context or the wording of a particular reservation.

3.3 A key aim of the new proposals is to create a "clear, robust and lasting" settlement for Wales[1] - one that would not need elucidation by the Supreme Court. The existence of a range of meanings of the word "necessary" immediately contradicts this. Further problems will be created, depending on which of the available meanings is chosen by the courts as the correct one.

Strict interpretation

3.4 The courts might interpret "necessary" in an objective way, according to its normal dictionary meaning in English. The Shorter Oxford English Dictionary,[2] for instance, defines it as "that cannot be dispensed with … requisite, essential, needful … requiring to be done, that must be done". The drafting of the Schedule appears to point quite strongly to this interpretation, in that the wording of the test is (in each case where it appears), that the Assembly Bill provision must:

> *have no greater effect on [the protected concept] than is necessary to give effect to [the devolved purpose].*

3.5 The concept of "no greater than is necessary" appears to call for a rigorous scrutiny of precisely what was "essential" in the context and what would go beyond that essential minimum.

3.6 This interpretation would have the advantage of clarity. It would also facilitate workability <u>in a narrow sense</u>, because there would be greater certainty and predictability as to the meaning of the term.

3.7 However, in a more important sense, this objective interpretation of the word would very much undermine the workability of the settlement. This is because the threshold for competence would be very difficult to cross, wherever the necessity test came into play. Ministers developing legislation, the Presiding Officer deciding competence, and Members scrutinising an Assembly Bill, would have to be satisfied that the manner in which the Bill affected England, or the law on reserved matters, or private law, or criminal law, was <u>absolutely the least impactful way</u> of doing so while still achieving the purpose of a "core competence" provision (a provision which is within competence without needing to be subjected to any of the "necessity" tests).

Flexible interpretation – Human Rights Act-type approach

3.8 If, on the other hand, the concept of what is "necessary" were applied more flexibly, different issues would arise. The courts might, for instance, decide to interpret "necessity" in the way in which they do when considering cases under the Human Rights Act 1998.

[1] Secretary of State for Wales's introduction to *Powers for a Purpose*, Cm 9020.

[2] Sixth edition

3.9 The word “necessary” appears in a number of the Convention[3] rights set out in the Act. Case-law of the Court of Human Rights in Strasbourg has established that, in that context, it means "proportionate". Interference by a State with a human right can be justified as “necessary” if it is proportionate to the importance of the legitimate aim pursued. So, even a severe interference may be accepted as “necessary” if the aim is important enough.

3.10 The courts may look at the question of whether the aim could have been achieved by a less severe interference[4]. If they do, there would be little or no difference between the objective, dictionary-based meaning (essential to achieve the purpose of the core competence provision) and the “Human Rights Act meaning” (a proportionate way of achieving the purpose of the core competence provision).

3.11 However, there is another element in the UK courts’ approach to the concept of "necessity" in the Convention, an element which creates greater flexibility in some cases. This element is often described as the concept of “margin of appreciation”, “margin of discretion” or “deference”. Essentially, the courts accept that there are often a number of options that could achieve a particular policy aim; that it is for governments and legislatures to decide which of them to pursue; and that, in certain contexts, the courts should interfere with that choice only if it is “manifestly without foundation”[5]. In other words, the courts should not second-guess that choice by analysing minutely whether one option would have had slightly less impact on a particular human right than the option that was in fact chosen.

3.12 The context in which the courts have applied this flexible interpretation of what is “necessary” is the context of social and economic policy choices – a complex context in which the interests and rights of certain groups are almost inevitably being balanced against those of others.

3.13 However, in other contexts, the courts tend to set a higher threshold for proof of necessity. This approach reaches its apogee in contexts where judges consider themselves to be expert: i.e. impact on the administration of justice or on the law itself. If the courts followed this approach in the case of the proposed Welsh settlement, the likelihood is that they would scrutinise very closely any Bill’s impact on private or criminal law, and would allow the Assembly very little or no latitude in deciding whether that impact was “necessary” or not.[6]

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[3] European Convention on Human Rights and Fundamental Freedoms agreed at Rome, 4/11/1950

[4] See the four-stage approach to assessment of the legality of interferences with human rights set out by the Supreme Court in the case of *Bank Mellat v. Her Majesty's Treasury (No 2)* [2013] UKSC 39. This approach is not always taken by the Strasbourg Court itself but is becoming increasingly established in the UK courts.

[5] See, for instance, the decision of the Grand Chamber of the European Court of Human Rights in the case of *Stec v United Kingdom* (2006) 43 EHRR 47.

[6] The likelihood of this high threshold for necessity where a Bill impacts on private law or criminal law is also suggested by Lord Mance’s remarks on competence to affect the law of tort and contract in the Supreme Court’s judgment in the case of *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill,* [2015] UKSC 3,paras. 27 and 57 in particular.

3.14 Thus, the "human rights" approach to the concept of "necessity" would be more workable in the sense of allowing more freedom of action to the Assembly to make holistic legislation, in certain policy contexts. However, it would not be wholly predictable how widely the courts would interpret the word "necessary" in any particular case. The uncertainty is vividly illustrated by the disagreement within the Supreme Court itself in very recent cases such as *R (SG and others) v Secretary of State for Work and Pensions*[7], contrasted with *R (ota Tigere) v Secretary of State for Business, Innovation and* Skills[8]. And in some contexts, past experience suggests that the courts would allow little or no discretion to the legislature.

Flexible interpretation – EU-law based approach

3.15 The lack of clarity and legal certainty (and therefore workability) caused by the introduction of a necessity test is highlighted by the fact that the Supreme Court has recently delivered a landmark judgement[9] stating that the approach to proportionality (i.e., the concept of justification or necessity) is different depending on whether the case concerns the European Convention on Human Rights or European Union law.

3.16 One such difference concerns the contexts in which the courts will construe necessity strictly, versus where they will allow the government/legislature considerable discretion as to what is "necessary". The EU-law approach requires the courts to apply a "necessity" test strictly to any derogation from general EU rights (e.g. in the case of a national law limiting the free movement of goods on the grounds of public health, there would be a high threshold of proof of the "necessity" for the restriction). It is possible that the courts might take a similar approach to the necessity test for competence. In other words, they might interpret new s.108A(3) and paragraphs 2(1), 3(4) and 4(2) of Schedule 7B, as "derogations" from the "normal" position that an Assembly Bill cannot affect England, the law on reserved matters, private law or criminal law. And they might then follow the EU-law approach of construing derogations narrowly – i.e. against competence. As noted above, the way in which the necessity tests are drafted tends to support this way of interpreting them: they prohibit any "greater effect [on the protected concept] than is necessary to give effect" to the devolved purpose being pursued.

Problem of inconsistent results between different tests for competence

3.17 It must be remembered that compatibility with Convention rights and with EU law are separate tests for competence. As highlighted above, they will very frequently raise issues of whether a Bill provision is "necessary" or not.

[7] [2015] 1WLR 1449.

[8] [2015] UKSC 57.

[9] R (on the application of Lumsdon) v Legal Services Board; Bar Standards Board (Intervener) [2015] UKSC 41

3.18 Until the uncertainty about the meaning of the new "necessity" tests is resolved, it is possible that the Presiding Officer might consider that a Bill provision is "necessary" in human rights terms (i.e. is proportionate to the legitimate public-interest aim pursued) but modifies the law on reserved matters (or private law, or criminal law) in a manner that goes beyond what is "necessary", because the same aim could be achieved in a different way. That different way might not necessarily affect human rights less severely; it might simply affect reserved matters (etc) less. The same could apply in the context of the test for EU-law compatibility.

3.19 Strictly speaking, this does not give rise to a legal "problem"; if the two tests of "necessity" are different, they can produce different results without any legal incompatibility arising. However, that will feel counter-intuitive and be extremely difficult for members of the public, and even Assembly Members, to understand. In other words, it will make the Welsh devolution settlement even more opaque than at present – which is the opposite of the Secretary of State for Wales's aim.

Comparison with the "necessity" test in the Scotland Act 1998

3.20 Although there is a 'necessity test' within the Scotland Act 1998 (Schedule 4, paragraph 3), this has a much more limited effect. There are several reasons for this, not least of which is that there is only one such test in the Scotland Act, as opposed to four in the proposed Welsh settlement.

3.21 This Scottish test is very similar to the test in Schedule 7B, para 2(1); i.e. it relates to competence to modify the law on reserved matters. Indeed, it appears, at first sight, more constraining than the Welsh test, because it allows the Scottish Parliament to modify the law on reserved matters only in incidental or consequential ways, and where "necessary". The Welsh equivalent, on the other hand, would also allow competence for enforcement and effectiveness purposes, where "necessary".

3.22 **However, this impression that the Scots test is stricter is largely false. This is because, crucially, Scots private law and Scots criminal law are not reserved matters.** Therefore, almost any modification of Scots private law or criminal law is within competence and so the Scottish Parliament does not need to confine itself to incidental or consequential modifications, and the "necessity" test does not apply. So the Scottish Parliament can modify Scots private or criminal law to enforce other provisions, or to make them effective, without needing to pass any necessity test. In other words, it does not need an express exception for enforcement and effectiveness provisions.

3.23 Of course, there are many other reserved matters where the test <u>does</u> come into play. But it is private and criminal law that, overwhelmingly, provides a legislature with ways of enforcing the rights and duties it creates, or making them practically effective.

3.24 The Scottish Parliament can also, of course, make <u>substantive</u> changes

to Scots private and criminal law (not merely modify these areas of law). Indeed, paragraph 2(3) of the same schedule to the Scotland Act 1998 makes clear that Acts of the Scottish Parliament can make changes to rules of Scots private law or criminal law that themselves affect reserved matters, subject only to a short list of exceptions.

4. Analysis of the new necessity tests – roll-back

4.1 Test 4 – effect on the law on reserved matters

A provision of an Assembly Bill must not modify the law on reserved matters, unless the modification:

(a) is incidental to a core competence provision, or
(b) is consequential on a core competence provision, or
(c) provides for enforcement of a core competence provision, or
(d) is appropriate for making a core competence provision effective;
AND
has no greater effect on reserved matters than is necessary to give effect to the purpose of the core competence provision.

4.2 This test rolls back competence in two ways.

4.3 The first way relates to the fact that many of the "silent subjects" in the current settlement will become reserved matters – e.g. employment. Under the current settlement, the Assembly can legislate on these, provided that the purpose of that legislation also relates, "fairly and realistically", to a subject in Schedule 7 GOWA 2006[10]. In contrast, under the proposed settlement, it will be able to do so only in the very limited ways set out in Test 4. The whole of Test 4 - in so far as it relates to reservations that are currently exceptions - therefore rolls back competence, not merely the introduction of a necessity test.

4.4. Example

An Assembly Bill might seek to legislate on wages, conditions and training in the social care sector (a notoriously low-pay sector) in a similar manner to the way in which the Agricultural Sector (Wales) Act 2014 did in the agricultural industry. The aim of that Bill might be, as in the case of the 2014 Act, to ensure a sustainable care sector in Wales, a country with a high proportion of elderly, sick and disabled residents. In the present settlement, it seems clear that, by analogy with the Supreme Court decision in the Agricultural Sector (Wales) Bill case, the Bill concerning social care would be within competence. But it is highly likely that the reservation of "employment rights and duties and industrial relations" under Head H, Section H1, of proposed Schedule 7A would take the same Bill outside competence. The single exception from Section H1, for the subject-matter of the 2014 Act, makes this even more likely: it is clear that agricultural wages, holidays and

[10] See the judgment of the Supreme Court in the case of *Agricultural Sector (Wales) Bill, Reference by the Attorney General for England and Wales* [2014] UKSC 43, para. 67.

training are within competence; the implication is that these matters will be reserved for other sectors of the economy.

4.5 Secondly, the new necessity test also rolls back competence as regards topics which are currently exceptions from competence and which will become reserved matters under the proposed settlement (e.g. "Generation, transmission, distribution and supply of electricity"). Currently, the Assembly can legislate on excepted matters, provided that it does so only incidentally, consequentially, for enforcement, or in a way that is "appropriate" to make the legislation effective. In other words, competence is currently subject to the first part of Test 4. But it is not currently subject to the second part – the "necessity test". And that necessity test narrows the Assembly's competence considerably.

4.6 Example

An Assembly Bill introduced by the Welsh Government seeks to reduce marine pollution (which will not be a reserved matter). The Welsh Government consider that the Bill should regulate certain shipping routes, as part of achieving its aim. But "navigational rights and freedoms" will be a reserved matter. They are also currently covered by an exception in Schedule 7 GOWA.

Currently, the Bill would be within competence if its effect on navigational rights and freedoms was "appropriate" to make the legislation effective. In other words, it may not be the least impactful option, but it is an appropriate option. It could also be one of a suite of measures included in the Bill, to tackle marine pollution in a number of ways.

There is no doubt that the existence of the exception would make this a difficult competence issue, currently. However, there is also no doubt that the words "no greater than necessary" are capable of setting a much higher threshold for competence than the word "appropriate". Therefore, the likelihood is that, under the proposed settlement, it would be considerably harder to show that there was competence for this part of the Bill.

4.7 It is noteworthy that the Welsh Government normally canvasses a number of different options for achieving its aims in legislation. This is part of evidence-based and transparent policy-making, which, in modern times, is generally regarded to be a desirable way for governments and legislatures to proceed. These options– or at least the main ones considered - will be set out in consultation documents and in the Explanatory Memorandum accompanying a Bill. The public availability of these options will give ammunition for challenges to competence based on the "necessity" tests. This is another factor pointing to the proposed settlement being subject to even more court challenges than the present one.

4.8 Test 5 – effect on private law

This test provides that an Assembly Bill must not modify private law (which is defined as contract, tort, property law, trusts, succession and some other related areas of law), unless the modification:

(a) is necessary for a devolved purpose, or
(b) is incidental to a provision made for a devolved purpose, or
(c) is consequential on a provision made for a devolved purpose, or
(d) provides for enforcement of a provision made for a devolved purpose, or
(e) is appropriate for making a provision made for a devolved purpose effective;

AND

has no greater effect on the general application of the private law than is necessary to give effect to that devolved purpose.

4.9 This test is wholly new and so constitutes a significant roll-back of competence. Currently, "contract", "tort" etc can be seen as silent subjects – meaning that the Assembly can legislate on them as it wishes, provided that the legislation in question also "fairly and realistically" "relates to" a subject in Schedule 7 GOWA.

4.10 Alternatively, "contract", "tort" etc can be seen, not as separate subjects in themselves, but simply as "the law" – the infrastructure that underpins all the specific law on subject areas. Under this view, again, the Assembly is currently free to modify the rules of contract, tort, etc, if it is doing so as a genuine part of legislating on a subject listed in Schedule 7.

4.11 A third interpretation is that "contract", "tort" etc are simply ways of making substantive provisions enforceable or effective. If seen in that way, the Assembly's current competence to modify them is set out in section 108(5) GOWA – which is similar to Test 5, but, crucially, contains no "necessity" test.

4.12 Whichever analysis is adopted, it is clear that Test 5 rolls back the Assembly's competence in relation to cross-cutting areas of law.

4.13 It may be argued that the Assembly's competence in relation to the private law was narrowed by the judgment of the majority in the Supreme Court in the case of the Recovery of Medical Costs of Asbestos Diseases (Wales) Bill[11]. In that case, Lord Mance, delivering the judgment of the majority, states that a particular conferred subject of competence, "organisation and funding of national health service" does not cover "rewriting the law of tort and breach of statutory duty by imposing [a liability] on third persons …, having no other direct connection in law with the NHS"[12].

4.14 We would argue that this judgment is confined to its facts and says very little about the Assembly's competence in general terms. It is confined:

[11] [2015] UKSC 3.

[12] Ibid, paragraph 27.

(a) to the particular conferred subject in question; and
(b) to the particular type of liability imposed, on the particular category of persons in question.

4.15 In other words, the Supreme Court might have found that the Assembly had competence, even under “organisation and funding of national health service”, to create a new quasi-tortious liability on a person having a more “direct connection” with the NHS. In addition, or alternatively, it might have found that the Assembly had competence to alter the law of tort under a different subject of competence: “environmental protection”, perhaps.

4.16 It is also of concern that Schedule 7A includes a specific reservation for “civil proceedings” (Schedule 7A, paragraph 6(1) and (2). The combined ambit of this reservation and of the restriction in Schedule 7B appears very wide, and it is not clear what the boundary between them is (given that “civil proceedings” is not fully defined, but only glossed as “including” certain things).

4.17 Test 6 – effect on the criminal law

This provides that an Assembly Bill must not modify the criminal law (or civil penalties), unless the modification:

(a) is necessary for a devolved purpose, or
(b) is incidental to a provision made for a devolved purpose, or
(c) is consequential on a provision made for a devolved purpose, or
(d) provides for enforcement of a provision made for a devolved purpose, or
(e) is appropriate for making a provision made for a devolved purpose effective;
AND
has no greater effect on the general application of the criminal law/civil penalties than is necessary to give effect to that devolved purpose;
AND
is not a road traffic offence.

4.18 This test is wholly new and so represents a significant roll-back from the present settlement. As with “civil proceedings”, there is also specific reservation for “criminal proceedings” in paragraph 6 of Schedule 7A. Equivalent remarks apply as to Test 5.

5. New elements in Test 8 - the test regarding modification etc of Minister of the Crown functions and effects on reserved authorities

5.1 This test is contained in paragraph 8 of Schedule 7B. It rolls back competence in a number of significant ways and is of considerable concern.

5.2 Currently, the Assembly is prohibited from removing or modifying a "pre-commencement" function of a "Minister of the Crown", unless the Secretary of State consents, or the removal/modification is incidental or consequential. "Pre-commencement" means existing before 5 May 2011.

5.3 The first way in which the proposed new test rolls back competence is that it applies to all functions of UK ministers – not merely pre-commencement ones (see paragraph 8(1)(a)). Thus, the Assembly will not be able to remove or modify any function of a UK Minister that was created between 5 May 2011 and the date of coming into force of the Bill.

5.4 Additionally, it appears that the provision is "ambulatory": in other words, the Assembly would be prohibited from removing or modifying a future function of a UK Minister.

5.5 It is true that it is unlikely that UK Ministers will have been given new functions in areas that are generally devolved, or that they will be in the future, because to do so would require the Assembly to pass a Legislative Consent Motion – at least in theory. However, there have been occasions when the Welsh Government (and the Assembly) has considered that a Legislative Consent Motion was necessary, and the UK Government has disagreed. In those cases, the UK Government has gone ahead and legislated against the wishes of the Welsh Government and Assembly. Therefore, this widening of the restriction on the Assembly's competence gives grounds for concern.

5.6 This roll-back of competence contrasts sharply with the position in Scotland. It is true that the Scottish Parliament cannot legislate to modify an enactment which relates to UK Ministerial powers (Schedule 4 paragraph 6 of the Scotland Act 1998). However, in reality, this restriction is of extremely narrow effect, since all UK Ministerial powers within the Parliament's competence were transferred to the Scottish Ministers when devolution took effect in 1999, apart from a very limited list of shared functions (set out in s. 56 of the Scotland Act 1998). It is only this very limited list that is outside the Parliament's competence.

5.7 The second way in which this new test rolls back competence is that it removes the ability of the Assembly to remove or modify a function of a UK Minister, where to do so is incidental or consequential. The fact that this is a roll-back of the Assembly's current competence is demonstrated by the fact that the provision reverses the effect of the Supreme Court judgment in the case of the Local Government Byelaws (Wales) Bill.

5.8 The third way in which this new test rolls back competence is that the prohibition now extends beyond functions of UK Ministers, to cover all "reserved authorities". The prohibition also bans the Assembly from conferring or imposing any function on such authorities (paragraph 8(1)(b)). "Reserved authority" is defined as meaning a Minister of the Crown or government department, and any other public authority, apart from a "Welsh public authority" (also defined). It is, therefore, very wide.

5.9 The fourth way in which the new test rolls back competence is that it introduces a new category of prohibition on the Assembly. This prohibits the Assembly from conferring, imposing, modifying or removing "any functions

specifically exercisable in relation to a reserved authority" (paragraph 8(1)(c)).

5.10 Finally, and fifthly, the new test introduces a further new prohibition, banning the Assembly from making modifications of the constitution of a reserved authority (paragraph 8(1)(d)).

5.11 The many restrictions introduced by paragraph 8 will constrain the Assembly from making effective legislation, as it could require the Assembly to disapply its legislation from many bodies. This could very much weaken the introduction of policies that require concerted action, such as provisions to protect the environment or to promote public health. Examples to illustrate the problem are given at the end of this document.

5.12 Paragraph 8 of Schedule 7B is also extremely problematic in terms of clarity and workability. Its complexity is perhaps illustrated by the fact that it contains four separate restrictions on competence and four definitions of terms that appear in it. It alone takes up roughly a page of legislation.

"Reserved authorities" restriction – comparison with Scotland

5.13 The Scotland Act 1998 deals with 3 kinds of authority[13], expressly or implicitly:

(a) Bodies/offices/office-holders that are part of the Scottish Administration – these are all wholly within competence (implicitly);

(b) Bodies/offices/office-holders which have only functions which are exercisable in or as regards Scotland and do not relate to reserved matters – these are also wholly within competence (implicitly);

(c) Bodies/offices/office-holders with mixed functions – i.e, some functions which are exercisable in or as regards Scotland and do not relate to reserved matters, and some other functions – either functions that extend beyond Scotland (even though relating to non-reserved matters) or functions that relate to reserved matters. These authorities will not normally be within competence (unless the provision is consequential/incidental), and the Scottish Ministers' executive powers to establish, maintain or abolish them must be exercised jointly with the relevant Minister of the Crown (section 56 Scotland Act 1998).

5.14 The Assembly's proposed competence would appear to be wider than that of the Scottish Parliament. It would cover bodies, offices or office-holders whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters. The first condition is the same as the first Scottish condition under (b) above. But the second condition is less strict than the second Scottish condition under (b).

[13] Not counting the Parliament itself and the SPCB

5.15 Nevertheless, the proposed restriction represents a roll-back from the present settlement as regards public authorities.

5.16 Moreover, the Welsh test is less clear (and therefore potentially less workable) than the Scottish one. A definition that depends on the concept "wholly or mainly" is ripe for dispute – especially in this area of financial and political responsibility for public bodies, which is likely to be hotly contested. It is true that similar wording has been used in other legislation (e.g. GOWA 2006 itself, and the Public Bodies Act 2011) to draw the boundary between individual devolved and UK responsibilities. However, that does not make it suitable for a piece of legislation that aims to create a clear and lasting devolution settlement across the board.

5.17 Furthermore, the reservation of named bodies (dealt with in paragraph 216 of Schedule 7A) again represents a roll-back of competence by comparison with the present situation, in which the Assembly could (for instance) impose a function on a body named in an exception in Schedule 7 GOWA 2006, provided that doing so was incidental to or consequential on a "core competence" provision, or enforced such a provision, or was appropriate to make it effective (s. 108(5) GOWA 2006).

6. Conclusion

6.1 Taken as a whole, the proposals do not look clearer and more workable than the current settlement. Indeed, the "necessity" tests make the new proposed competence both less clear and less workable. Less clear, because it is going to be very difficult to assess whether a provision is within competence or not. This means also less workable, because it suggests that there will be numerous references to the Supreme Court (and/or other legal challenges, after Royal Assent, as has happened in Scotland in cases such as *HM Advocate v. Martin and Miller*[14]; *Imperial Tobacco Ltd v Lord Advocate (Scotland)*[15] and *Salvesen v Riddell & Anor*[16]).

6.2 It will also be less workable in that it will be more difficult to legislate seamlessly across related areas and to provide for enforcement and effectiveness of the substantive legislative provisions.

6.3 The new tests might be acceptable if the reservations were not numerous or wide, because the net effect might still be an extension of competence, and more workable competence (although the restrictions concerning private law and criminal law would continue to be problematic, as they are so cross-cutting).

6.4 However, the reservations in Schedule 7A appear to be numerous. The width of them cannot be properly assessed at this time due to the Commission's limited resources and the restrictions on the number of Commission lawyers who can have access to the documents. We understand

[14] [2010] UKSC 10
[15] [2012] UKSC 61
[16] [2013] UKSC 22

that the Welsh Government is carrying out an in-depth analysis of Schedule 7A.

6.5 The greater restriction of competence when modifying Minister of the Crown functions, and the introduction of a new restriction in relation to "reserved authorities", also represents roll-back of competence.

6.6 The Annex attached offers some further examples of applying the proposed new tests.

NATIONAL ASSEMBLY FOR WALES COMMISSION
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ANNEX: Applying the new tests – additional examples

Test 5 – Modification of "the private law" – examples concerning contract – Mobile Homes (Wales) Act 2013

The Mobile Homes (Wales) Act 2013 implied new terms into mobile home agreements (i.e. new implied terms over and above those already implied under the Mobile Homes Act 1983).

Did the Mobile Homes (Wales) Act 2013 "modify" "the law of contract"?

We consider that it did, in so far as regards contracts concerning mobile homes. We consider that the Act is analogous to the various Sale of Goods Acts, which modified the law of contract by implying terms into contracts for the sale of goods (such as an implied term that goods are of satisfactory quality). All these Acts had both a legal and practical impact on contracts. It is difficult therefore to say that they did not "modify" the law of contract. However, the Mobile Homes (Wales) Act 2013 had a legal and practical effect only on a very limited category of contracts – not on contracts generally, or even on contracts for the sale of goods generally. This introduces uncertainty as to whether Test 5 would have been engaged by the Act. There is an argument that the test should be whether the Bill modifies the law of contract generally, rather than simply whether it modifies it at all.

Was the modification necessary for a devolved purpose?

We would say that it definitely was. The purpose of implying these terms was "housing" – currently a devolved subject. Specifically, it was to protect the housing conditions, security and mobility of people who buy mobile homes. However, others could argue that there were different ways – other than implying terms into contract – to produce the protection aimed at: for example, by imposing licence conditions to similar effect.
That would have shifted the onus of enforcement to the local authority, rather than giving the individual mobile-home owner a remedy that he or she can enforce. Should it not be a legitimate policy choice for the Welsh Government to decide that one of those enforcement methods was more practical, or less expensive for the public purse, than the other – so long as that policy choice is "appropriate" – rather than being forced to shoe-horn its policy into an ill-fitting competence framework?

Does the modification have no greater effect on the general application of the private law than is necessary to give effect to the purpose?

We would argue that there is no effect on the general application of the law of contract; there is an effect only on specific contracts in a very limited category.

If, however, the expression "the general application of the law of contract" is not be interpreted in that way (another area of uncertainty created by the proposals), we would say that the effect on it is no greater than necessary.

The terms are limited to what is "necessary" to protect people from specific problems identified. Thus, questioning the necessity for the implied terms would amount to questioning the validity of the devolved purpose itself – the protection that the Government, and Assembly, have decided to afford to owners of mobile homes in Wales.

We believe that this difficulty in disentangling the "necessity" for the impact on private law from the necessity for the policy aim pursued will be repeated in many Assembly Bills, and that there is a danger that the courts will also stray into questioning the policy aims pursued by Bills, rather than the manner in which those aims have been pursued – which would be unconstitutional.

Test 5 – Modification of "the private law" – examples concerning property – Renting Homes (Wales) Bill

The Bill will sweep away, in Wales, a number of existing housing rental regimes, replacing them with a single new arrangement to be known as an "occupation contract". Most tenants and licensees will be known as "contract holders", but the term "landlord" will remain in use.

Section 145 relates to "supported accommodation" (broadly, public-sector or third-sector accommodation accompanied by "support" in, for example, controlling addiction, finding employment, or living independently). It allows the landlord to exclude the contract-holder temporarily for certain seriously unacceptable behaviour in the dwelling. The exclusion can last for up to 48 hours. The only procedural requirement is that the contract-holder must be given a notice explaining the reasons for the exclusion.

This power of exclusion can be exercised up to three times in any period of six months. There is no provision requiring the landlord to seek a court order, nor is there any means for a contract-holder to request a review.
The current law would require a court order before a landlord could exclude a tenant. So, the Bill significantly increases the powers of landlords in this instance and, by implication, potentially impacts negatively on contract-holders.

This is a <u>new policy</u>. It is not a restatement of the law and it does not affect either EU law or the criminal law.

Under the current test for competence, this new policy would clearly be within legislative competence because it relates to "housing" (Heading 11 in Part 1 of Schedule 7 to GOWA) and does not fall within an exception. The other competence tests are also satisfied. There are, of course, <u>human rights</u> implications to the policy. Because the current and proposed competence tests are the same as regards human rights, we are ignoring that issue for the purposes of this paper. By way of completeness, however, it is worth adding that case-law strongly indicates that the human rights considerations will not take this new policy outside the Assembly's legislative competence.

Under the proposed new test, this policy is either likely to **fall outside** legislative competence or, at the very least, highly respectable arguments can be advanced to **cast doubt on the question of competence**. So, this would almost certainly create uncertainty as to whether or not section 145 of the Renting Homes (Wales) Bill would be within the Assembly's legislative competence. The reasoning is as follows.

On the assumption that there are no relevant reserved matters a provision of an Act cannot make modifications of the "private law". This includes "property law".

However, the rule that an Act cannot modify the private law does not apply to a modification which is necessary for a devolved purpose or is ancillary to a provision which has a devolved purpose.

A devolved purpose means a purpose, other than modification of the private law, which does not relate to any reserved matter. As there is no relevant reserved matter and the new policy modifies the private law, then it falls within the test.

However, there is a further restriction. If the provision has a greater effect on the general application of the private law than is necessary to give effect to its purpose, the provision is <u>outside</u> legislative competence.

But the question of necessity is highly subjective. In this instance, an assessment would need to be made as to whether or not the landlord's <u>absolute</u> right (in other words a right that is not subject to any challenge in the courts) to exclude contract-holders from their homes for periods of up to 48 hours has a greater effect on the general application of the private law than is "*necessary to give effect to that purpose*". To put it another way, if it is not necessary to confer this right on landlords, then the provision is outside legislative competence.

As Stage One of the Bill, evidence was taken from stakeholders on this issue. Some expressed the view that landlords need this power in order to manage their supported accommodation and to protect other residents.

Others expressed the view that this is a very harsh power which may result in vulnerable individuals being made street homeless, perhaps by being removed from their homes in the middle of the night. Such individuals, it is suggested, may then become permanently street-homeless.

Equally, the argument was advanced that, in serious cases of violence the police could arrest (and by implication remove) the contract-holder which, in itself, diminishes the landlord's need to have this power.

Given these competing arguments, it is extremely difficult to assess whether or not the power has a greater effect on the private law "*than is necessary*". Without the benefit of expert advice (such as that given in evidence at Stage One) it is difficult to see how an assessment of "necessity" can be made by

those scrutinising Bills or by the courts in considering the question of competence. In particular, the Presiding Officer is unlikely to have the benefit of such advice in assessing the Bill's competence on introduction. In any event, if expert opinion is divided, taking advice may add confusion rather than clarity.

Test 6 – effect on the criminal law

An Assembly Bill might seek to protect children by imposing heavier sentences for crimes of child abuse or neglect, where the crime was committed in Wales, than apply presently in England and Wales. Protecting children from harm or neglect, or promoting their well-being, are not reserved and so are "devolved purposes". The Assembly's present competence includes "Protection and well-being of children", "care of children" and "prevention of …injury".

Under the proposed settlement, this Bill might fail another test for competence: it could be said to "relate to" the reserved matter "prevention … of crime", in the sense that the purpose of the Bill would be to prevent crimes of child abuse and neglect by punishing those crimes more severely. Case-law on the Scottish settlement has established that a Bill will "relate to" a reserved matter if it has more than a "loose and consequential connection" with it.[17] It has also established that, if a Bill has more than one purpose, and one of those purposes is reserved, then that is enough to take the Bill outside competence.

However, for the time being, we will assume that the Bill passes that test.

Would the Bill "make modifications to the criminal law"?

The answer would appear to be "yes" – albeit in defined areas, rather than generally.

Would the modification be "necessary for a devolved purpose"?

It would be very difficult to answer this without going into very complex considerations of the drivers for child abuse and neglect. We would submit that the Welsh Government and Assembly should be able to select the method that they consider is best able to achieve their devolved policy aim, rather than running the risk of having to justify the choice of those methods to the courts - and perhaps being forced to fall back on levers that they consider less effective in order to fit within competence boundaries.

Would the modification have no greater effect on the general application of the criminal law than is necessary to give effect to the purpose?

If it is accepted that a heavier sanction is "necessary" for the devolved purpose, this question appears redundant in this case. This again highlights

[17] Martin v Most [2010] UKSC 10; Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61

the overlap between different elements of the new "necessity" tests, and their consequent lack of clarity.
The "necessity" of the sanction would still have to be reviewed in human rights terms.

Test 8 – Minister of the Crown powers and reserved authorities

The restriction contained in paragraph 8(1)(c) of Schedule 7B – Example concerning the Welsh language

The Welsh Language Measure 2011 confers on the Welsh Language Commissioner functions that could be said to be "specifically exercisable" in relation to many bodies that would be "reserved authorities" under paragraph 8 of Schedule 7B. The functions appear to be "specifically exercisable" in that, although the Measure does not contain a list of named bodies, it prescribes categories of body to which its various provisions apply. Under the proposed new settlement, it would appear to be outside competence for the Assembly to give the Commissioner these powers unless the Secretary of State consented (see paragraph 8(1)(c) of Schedule 7B). Clearly, this rolls back competence, not merely from the 2011 settlement but from the much more limited 2006 one.

The restriction contained in paragraph 8(1)(b) of Schedule 7B – Example concerning the Environment (Wales) Bill (the Bill)

Section 6(1) of the Bill provides that a "public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales…". Section 6(5) requires the public authority to publish a report on what has been done to comply with the section 6(1) duty.
For the purposes of section 6, the definition of "public authority" includes a "public body". We consider that Post Office Limited (with its network of 11,500 post office branches) is a public body captured by the section 6 duties. Section 6 also captures government departments with a presence in Wales, such as the Ministry of Defence, the Department for Work and Pensions, etc.

Would paragraph 8(1)(b) of Schedule 7B prevent the Assembly from applying the section 6 Environment Bill duties to Post Office Limited and UK government departments without Ministerial consent? We consider that it probably would. We note that paragraph 8(1)(b) is broader than paragraph 8(1)(c), in that the former prohibits the Assembly from imposing any function on a reserved authority, while the prohibition contained in the latter relates only to functions 'specifically exercisable' in relation to reserved authorities. Thus, para. 8(1)(b) would appear to prohibit the Assembly from imposing duties on government departments, post offices and other reserved authorities even where the same duties were being imposed on all public bodies in Wales, or even on all persons in Wales.

No roll-back of competence?
Currently, section 6 of the Bill clearly relates to a devolved subject (specifically 'biodiversity'). And although 'post offices' and 'the Post Office' are current exceptions, the Presiding Officer considered that the dominance of the biodiversity purpose behind the section 6 duties overrode the minimal legal effect that section 6 has on post offices and the Post Office.

Assuming that section 6 can currently apply to post offices and the Post Office and that section 6 would not relate to the reserved matters of 'post offices' and 'any Post Office Company' (i.e. Post Office Limited), paragraph 8(1)(b) significantly rolls back the Assembly's competence. Paragraph 8(1)(b) of Schedule 7 appears to prohibit the Assembly from applying the section 6 duties to post offices and Post Office Limited without Ministerial consent, despite the section 6 duty being a broad-brush duty which seeks to implement a devolved purpose consistently across Wales and does not identify specific bodies.

The same issues would arise in relation to many other reserved authorities, for example, Royal Mail Group. This does not satisfy the no roll-back criterion.

There is also, we believe, roll-back in relation to government departments. The current settlement prohibits the Assembly from imposing new functions (including duties) on "Ministers of the Crown". It is arguable whether this current prohibition extends to general duties imposed on government departments along with other public bodies or indeed all people and bodies in Wales. It is noteworthy however, that the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill would, arguably, have imposed such duties and yet the UK Government did not challenge the competence for that Bill. Under the proposed settlement, however, it seems likely that Assembly Bills could impose no new duties on government departments operating in Wales.

Clarity and Workability?
This not only rolls back the Assembly's competence, it also restricts the development of policies which need to apply across Wales in order to achieve a devolved purpose. At the least, the restriction contained in paragraph 8 of Schedule 7B will require a great deal of negotiation and discussion between the Welsh Government and the UK Government when the former is developing a Bill. More seriously, it will affect the timing of legislation, as delays are inevitable in obtaining Ministerial consent. At worst, Assembly legislation will have to include very detailed carve-outs to exclude reserved authorities, making it impossible to implement devolved purposes consistently across Wales and making it very difficult for the public to understand the law that applies in Wales. For example, a small local authority with its fleet of [hundreds] of vehicles would have to seek to maintain and enhance biodiversity but Royal Mail Group, with its fleet of thousands of vehicles operating in Wales, would not be subject to the same duty. This does not satisfy the workability criterion.

END