

## Draft Wales Bill: summary of evidence

### Introduction

The Bill contains specific proposals about which much of the evidence received is positive, such as providing in law for a permanent devolved assembly or parliament, removal of unnecessary controls over the composition of internal Assembly committees, deletion of involvement of UK ministers in Assembly proceedings, placing the Sewel Convention on a legislative basis, and the transfer of powers concerning energy, transport and electoral reform.

However, several issues of concern were raised in evidence which are summarised below.

### Clause 3 (including Schedules 7A and 7B)

The **Secretary of State's [DWB18]** written evidence states:

The current conferred powers model of devolution in Wales lacks clarity and is incomplete. Indeed, it is silent about many areas of policy such as defence, policing, the criminal justice system and employment. This lack of definition has proved to be a recipe for confusion and dispute, and there is widespread acceptance that it is fundamentally flawed.

The new reserved powers model provides the clarity the current model lacks. It lists the subjects which are reserved to the UK level. The Assembly can legislate in all other areas and in relation to subjects that are excepted from those reservations. It provides a clear boundary between reserved and devolved subjects. The Assembly will continue to legislate in devolved areas as it does now. The consent of UK Government Ministers would be needed if the Assembly wished to place functions on reserved bodies.

**Professor Thomas Glyn Watkin's [DWB1]** evidence noted that there was a lengthy list of reservations and it was not always clear why they are there. He says:

It is difficult to discern a rationale or any guiding principles for the reservations. The existence of a final 'Head N - Miscellaneous' would appear to confirm the absence of such a principled approach, as does its range from 'Equal Opportunities' and 'Inter-country Adoption' to activities connected with outer space or Antarctica, nuclear weapons, and 'School-teachers' pay and conditions'.

He commented that it seems to perpetuate the problem of the cumulative acquisition of powers and therefore the complexity of the settlement and that "It is also demonstrably the case that the proposed reservations remove competence from the Assembly". He added that the aim appears to be to regain ground lost in Supreme Court judgements.

**The Presiding Officer's [DWB5]** evidence noted:

There is a significant roll back of the Assembly's powers in the list of reservations. A large number of matters which are not exceptions from the Assembly's current competence have been made into reserved matters. This is a reversal of the Supreme Court judgement on the Agricultural Sector (Wales) Bill.

The fundamental organising principle for devolved settlements should be subsidiarity – the centre should reserve to itself only what cannot be effectively done at a devolved level.

**The First Minister [DWB7]** states that the reserved powers model in the draft Bill is merely a mirror of the current model – a ‘technical’ change. It should be based instead on the principle of subsidiarity. He adds that the number of reservations should be significantly reduced – many are not appropriate for inclusion in a Wales Bill or cover matters better suited to the Assembly. The drafting of Schedule 7A is defective in that it sometimes refers to “The subject matter of [specified Acts of Parliament]” and it is not therefore clear on the face of the Bill what is being reserved.

In his evidence the **Auditor General for Wales [DWB9]** expresses concerns about paragraph 218 of the new Schedule 7A and paragraph 8 of the new Schedule 7B proposed by the draft Bill. They appear to create uncertainty as to whether public bodies that could be considered integral parts of the Welsh public sector are excluded from the definition of “Welsh public authority”. Clarification is needed.

**YourLegalEyes’ [DWB16]** evidence states:

This Bill [...] appears to replace the interpretation of the extent of the Assembly’s legislative powers which was decided by the Supreme Court in the Byelaws and Agricultural Sector cases. The Bill seeks to do this by protecting the powers of the UK Government and by ring fencing them.

**The Bishops of the Church in Wales [DWB17]** say that the sheer number of reservations makes for an incoherent and unwieldy system which will be difficult to understand. The cumulative effect of the reservations will result in a loss of competence, undermining the 2011 referendum.

**The Learned Society of Wales’ [DWB22]** evidence states:

The lists of reservations in Schedule 7 appear excessive, particularly when compared to the list of reserved powers in the Scotland Act 1998 and with their ‘relates to’ legislative competence tests obscure and complicate what is presented as a clarification of powers and actually represent a reduction in the Assembly’s powers. The mix of General Restrictions set out in Part 2 of this Schedule, some of which are general and some specific, taken with the exceptions and interpretation provisions within, are a recipe for confusion.

**Huw Williams’ [DWB24]** evidence states:

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

The Explanatory Notes to the Draft Bill at paragraph 26 seems to confirm that the extent of the movement in legislative competence has been drawn solely along the

lines delineated by Silk Part 2 and the subsequent political consensus of “St David’s Day agreement”. Neither of these processes undertook (and perhaps were not well suited to) the detailed but necessary work of analysing a full list of potential reservations as is now before us to establish whether they create unnecessary, confusing or unintended constraints on the ability of the Welsh institutions to develop policy and to legislate in way that makes reference to Ministers of the Crown for consent or to the Supreme Court, a wholly exceptional event.

**Dr Elin Royles [DWB29]** noted that the list of reserved powers is lengthy: Schedule 5 of the *Scotland Act 1998* outlining Reserved Matters is 18 pages in length and Schedules 7A and 7B in the draft Wales Bill have 41 pages. The complexity of the settlement means that interpretation is likely to be susceptible to conflicting interpretations and potentially a high level of judicial dispute.

**The Electoral Reform’s Society [DWB32]** evidence states:

On the surface at least, the list of reserved powers appears to be less led by clear rationale and principles, than a fairly ad-hoc list based on competing interests within the government machinery. This suggests that the judgement of what is devolved appears to have been made to simply reflect asymmetrical power relations between the Welsh and UK Governments. It is important that the devolved institutions are able to participate in the constitutional building process on an equal footing.

Concerns about the number of reservations and the loss of competence were expressed in other evidence received, for example **[DWB 27] Aled Edwards** and **[DWB 19] Chwarae Teg**.

### Single jurisdiction in England and Wales

**Professor Thomas Glyn Watkin’s** evidence **[DWB 1]** says that defending the single jurisdiction by limiting the legislative powers of the Assembly is misplaced given the mandate for a devolved legislature in Wales. The legal system needs to develop so as to accommodate the new legislative structure, although that doesn’t necessarily mean a separate Welsh jurisdiction. (para 35) It entrenches the view that law made in Wales is only an appendix to the general law for England and Wales.

**Emyr Lewis’** written evidence states:

**DWB 2**[...] the crux of the problem is not so much about jurisdiction (meaning which courts hear which cases) but addressing the paradox that there is, as a matter of law only one law of England and Wales, but that the laws which **apply** in Wales and England have diverged, not just because of what the Assembly has done in Wales, but also because of what Parliament has done in respect of England. It seems to me that trying to maintain this paradox, and trying to recover what might be perceived from one perspective as lost ground, is at the root of so much of the complexity in this Bill.

Acknowledging that there is a law of Wales and (of course) a law of England, which extend to the respective territories of Wales and England would be a good starting point. That would not require necessarily the devolution of the administration of justice in Wales, nor putting in place separate Welsh institutions.

The **Secretary of State** told the Committee:

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

In his evidence the **First Minister [DWB 7]** states that Welsh Government considers that a Welsh legal jurisdiction would be the best and most effective legal framework to implement reserved powers. The retention of the England & Wales jurisdiction increases the complexity of the settlement. (para 11) The creation of a distinct (not separate) jurisdiction could provide an interim measure.

**The Communities, Equalities and Local Government Committee [DWB11]** expressed concern that the reserved powers model would be extremely difficult to operate without a distinct legal jurisdiction for Wales.

**Professor Laura McAllister and Dr Diana Stirbu [DWB15]** state:

A major weakness of the Bill comes from the disproportionate focus on marrying the numerous reservations and powers with the status quo of the 'highly integrated border and the single jurisdiction with England', rather than on designing a bespoke model in itself. (p4)

They believe that a move to separate or distinct Welsh jurisdiction is inevitable and the Bill should assist, not hinder this.

The **Learned Society of Wales [DWB 22]** states:

The draft insists on a unified England and Wales jurisdiction and fails to recognise the practical existence of three bodies of law - those of England and Wales, those of England only, and those which apply only in Wales. This last category will grow as the National Assembly legislates. In the view of the Society, developments and Acts will determine how jurisdiction will evolve. It is unhelpful now to insist artificially on a unified system which is unnecessary and serves to fetter the powers of the Assembly.

The **Learned Society** also says it "looks forward to consideration of two options; either that England and Wales should be a shared or joint jurisdiction within which the National Assembly has unfettered power to change the criminal and private law as it extends to Wales or a distinct Wales jurisdiction is created to sit within the current England and Wales legal institutional framework".

**Aled Edwards [DWB27]** says:

Restrictions should not be imposed upon the Assembly in an outdated effort to provide 'a general level of protection for the unified legal system of England and Wales.' Since the law of England and Wales has not been completely unified for some time, the legal system which administers it needs to develop so as to reflect that modern reality rather than restrict it. Three bodies of law already exist in Wales and England.

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

The Secretary of State's [DWB18] written evidence states:

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

And:

**The no greater effect than necessary test is designed to address occasions where the Assembly seeks to enforce its laws by legislating in relation to England, the law on reserved matters and the general principles of private law and criminal law.** The model enables the Assembly to modify the general principles of the private law and criminal law if that is needed to give effect to its laws. But we do not want to see those modifications lead to significant divergence in the fundamental legal landscape of England and Wales. Any modification of private law and criminal law should be proportionate to the devolved provision the Assembly is seeking to enforce. It is subject therefore to the no greater effect than necessary test: any modification must have no greater effect on the general application of the private law and criminal law than is necessary to give effect to the devolved provision. The test also applies when the Assembly enforces its laws by legislating in relation to England and where it modifies the law on reserved matters. We believe it is reasonable to set a limit on the extent to which the Assembly can legislate beyond Wales or change the law on reserved matters. The test has operated with no difficulty as part of the reserved powers model in Scotland since the start of devolution.

The First Minister's [DWB7] evidence states:

We have a number of concerns with the detail of Schedule 7B. At present, the National Assembly can modify the law of contract, common law and other areas of private law and criminal law wherever those modifications *relate to* a devolved subject. This might include, for instance, simplifying how contracts work in, or creating a criminal offence in relation to, areas of devolved life where that is appropriate to make Assembly legislation effective. **The draft Bill significantly curtails this ability, by limiting the National Assembly's power to modify the private law to provisions which are either 'necessary for a devolved purpose' or 'ancillary' to another provision within competence, and limiting the National Assembly's power to modify the criminal law solely to provisions which are ancillary to another provision within competence.** In both cases, the provisions are further prohibited from having any greater effect on 'the general application [whatever that might mean] of the private or criminal law' than is *necessary*. But preventing the Assembly from modifying the criminal law for a devolved purpose is too restrictive. **The choice about whether it is necessary, appropriate or expedient to modify the private or criminal law for a devolved purpose is one properly for the National Assembly, not for the courts, but this new limitation dramatically increases the likelihood of Assembly legislation being challenged in the courts.**

And:

‘Necessity’ can mean different things in different contexts; this makes it very difficult to predict how the test will be interpreted by a court, and makes the settlement unstable, unclear, and, ripe for further legal challenge. Under these provisions decisions about how best to give effect to Welsh laws would therefore shift inexorably from elected Assembly Members, accountable to the electorate, to unelected judges.

**The Presiding Officer [DWB5]** expresses concerns about the increased number of tests of competence which would increase the complexity of the settlement and therefore reduce its workability.

The tests also have internal complexity and include the term ‘necessity’ which is capable of a range of meanings in law, creating a new area of legal uncertainty. The overlapping nature of the tests and reservations further increase the complexity.

The new restrictions on the Assembly modifying the private and criminal law are a ‘very significant backward step’ (1.11). These need to be modified in order to enforce obligations and make rights effective.

Detailed analysis of the tests of competence are included in annex A of the PO’s evidence. Suggested amendments to paragraphs 3 and 4 of new Schedule 7B are provided (annex B).

**Professor Thomas Glyn Watkin [DWB1] states:**

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

He argues that restrictions in Schedule 7B regarding the making of modifications of the private law and the criminal law appear to go against what the Welsh people voted for in the 2011 referendum since the move to full legislative powers removed this restriction.

And:

The function of a legislature is to make laws. The function of legislation is to make modifications to the law. To propose that a legislature may not make modifications to the law strikes at the heart of the reason for its existence. Legislation makes modifications to the law as a means of giving effect to policies. The choice of means is part of the choice of policy. Currently, policy makers can choose to give effect to their policy objectives from a number of means, including the imposition of criminal sanctions, the creation of civil (that is, private) law liability, or a variety of public law methods, such as licensing or regulation. The proposed restrictions would limit that choice. This reduces the Assembly’s legislative competence.

**Emyr Lewis’ [DWB2] written evidence states:**

My concern [...] arises from the fact that the question of determining whether an Act of the Assembly is within competence or not can be raised in *any proceedings*, in the same way as can the question of whether an Act of Parliament is compatible with EU law or Convention Rights.

This means that in any private or criminal proceedings, it is possible to challenge rights, obligations, offences etc. created by an Act of the Assembly. The introduction of the new tests in the new Schedule 7(B) at paragraphs 3 and 4 extend substantially the opportunity to challenge the validity of laws. There is no time limit on this, so an Act of the Assembly may have been in place and functioning very well for years, and still be challenged.

My concerns do not relate to the fact of challenge, but to the grounds on which a challenge might be made, and the practical impact.

In relevant cases involving issues of private law (e.g. landlord and tenant cases) or criminal law (e.g. prosecution for a criminal offence created by an Act of the Assembly) Courts will be asked to determine not merely whether a particular provision is within competence, but also whether it satisfies the tests in Schedule 7B para. 3 or 4.

Leaving aside the added complexity which these paragraphs create (for instance what is meant by “effect on the general application of” the private or criminal law?), the first concern is that a Court will determine whether the legislation meets the tests, including the necessity tests. So what will count is Judges’ estimation (for instance) of the necessity of a provision (in the case of 7(B)(3)(a)) or of whether its impact on the “general application of” the private or criminal law goes beyond what is necessary (in the case of 7(B)(3)(b) and 7B(4)(b)). This comes dangerously close to privileging judges’ assessment of matters which are properly decisions for elected politicians. “Is this provision necessary?” and “Are we going further than necessary in creating this offence?” seem to me to be questions properly addressed by the legislature, not the judiciary.

**The Public Accounts Committee [DWB8]** state:

The Committee noted the 10 proposed tests for competence found in clause 3 of the Bill and noted that, while some of these tests exist currently, there are others that are new, or elements of those tests that are new, that do not flow inevitably from a reserves powers model and which would constrain the Assembly more than at present - for example the ‘new necessity tests’ - which in essence roll back competence. The Committee is not content with this potential reduction in the Assembly’s legislative competence.

**The CELG Committee [DWB11]** is concerned about the new tests of competence which would, if applied now, restrict the Assembly’s ability to pass some of the nine Bills it has considered.

A restriction on modifying private law would reduce competence and create uncertainty which could result in more referrals to the Supreme Court. E.g. Assembly competence is unclear in relation to *Mobile Homes (Wales) Act 2013* and *Renting Homes (Wales) Bill* under the draft Bill.

Restriction on modifying criminal law could have affected provision in the *Housing (Wales) Act 2014* and *Historic Environment (Wales) Bill*. Challenges could result, or the passing of “toothless’ and largely ineffectual laws in Wales” (p5)

**The Health & Social Care Committee [DWB13]** is concerned about necessity tests and restrictions around private and criminal law. Private law restrictions could affect Assembly legislation on, for example, NHS contracts and social care agencies.

**YourLegalEyes [DWB16]** state:

the proposed necessity test is not a clear test as challenges on similar grounds in Scotland show that the judges have already been divided on its interpretation and application. (*Martin v Miller* and *Imperial Tobacco* cases). It is therefore my opinion that this extra test adds unnecessary additional complication to an already complicated system and it opens a new door to challenges of Welsh legislation in an unconstructive manner, once they have become Acts and have started to produce legal effect.

**Chwarae Teg [DWB 19]** state that the necessity tests would create confusion and uncertainty and undermine the Assembly as the democratically elected Welsh legislature.

**Aled Edwards states [DWB 27]** that the Assembly should not have its role as a primary law-making body undermined by restricting its appropriate choices. The proposed necessity test is unnecessary and undermines the Assembly’s law-making.

## **Ministerial Crown Consents**

The **Secretary of State [DWB18]** says:

I have read many incorrect and inaccurate comments about the new draft model in terms of the constraints it places on the Assembly in exercising its legislative competence. I would like to take this opportunity to put the record straight:

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

The **First Minister’s [DWB7]** evidence states:

**The draft Bill significantly extends the requirement for Ministerial consents to Assembly legislation.** UK Government consent would be required for the Assembly to be able to modify:

- any UK Minister function, even if it is within the Assembly’s devolved competence. It is hard to see how this can be reconciled with the Secretary of State’s aspiration for a clearer boundary between devolved and reserved spheres?
- any UK government department function, again even if within devolved competence,



□ any function of a reserved authority (the definition of which is extremely wide: for example, it includes the water industry regulator, OfWAT, notwithstanding that the activities of this body are of fundamental importance to Wales).

**The practical effect of these new consent requirements is that Assembly legislation will be vulnerable to delay, or worse still, frustration, by Whitehall.** This is irreconcilable with the Secretary of State's expressed desire for "a settlement that fosters co-operation not conflict between either end of the M4", and for "Welsh laws to be decided by the people of Wales and their elected representatives."

**The Presiding Officer's evidence [DWB5]** states that the draft Bill extends need for UK ministerial consents in five new and far-reaching ways which significantly rolls back the Assembly's ability to legislate free of UK ministerial consent. Detailed analysis is included in annex A of her evidence, section 5 and suggested amendments to Schedule 2 in annex B.

**Professor Thomas Glyn Watkin [DWB1]** says:

[...] In effect, the Assembly's legislative competence is determined by ministerial discretion rather than a clear rule of law, and it is clarity as to the Assembly's power to legislate that is needed for the settlement to be clear, not clarity as to when UK ministers have discretion. The exercise of such discretion could vary from time to time, from government to government, from minister to minister. The discretion is inimical to clarity regarding legislative competence.

**Keith Bush QC [DWB 3]** states that the Local Government Byelaws Bill illustrates the dangers of the approach taken to ministerial consents in the draft Bill. Consent was withheld not because UK Government had any objection to the effect of the legislation but because it contained a provision which appeared to reduce their control over future Welsh legislation on the same subject. The draft Bill would reverse the Supreme Court decision on that Bill.

Schedule 7B, para. 8 extends the protection of Minister of the Crown functions by:

- including government departments and other public authorities (other than Welsh public authorities);
- removing the 'pre-commencement' functions limitation;
- removing the exception to the restriction which currently applies to provisions which are "incidental to, or consequential on, any other provision contained in the Act of the Assembly".

The effects would be far reaching.

One solution is to return to the status quo but this represents a fundamental weakness in the settlement for Wales – there is no equivalent on the *Scotland Act 1998*. (The history of devolution in Wales and Scotland is different from Wales and UK Ministers continue to exercise many statutory functions, including in devolved areas.)

Section 53 of the *Scotland Act 1998* simply devolves all pre-commencement functions of ministers of the Crown relating to devolved matters to Scottish ministers. This would be a better approach for Wales.

He states:

34. A number of undesirable consequences flow from the proposed inclusion of Schedule 7B paragraph 8:

- The opportunity to align devolved legislative competence with devolved executive functions will be missed;
- The Welsh model of devolution will continue to be unnecessarily complex and difficult to operate;
- Public understanding of the division between devolved and reserved powers will not be enhanced;
- Fundamental constitutional principles will continue to be undermined (and will, indeed, be further damaged) by the existence of a power for the UK executive (Government) to interfere in the affairs of the Welsh legislature (Assembly);
- Opportunities for unnecessary friction between Welsh institutions of government and UK ones will continue and may well be increased;
- The UK Government will be seen (contrary to its stated aims) to be rolling back the powers of devolved government in Wales rather than making them stronger and more effective;
- Wales will continue to be subject to devolution arrangements which, even within the narrower fields devolved to Wales, are significantly inferior to those that apply to Scotland;
- Calls for yet another Wales Bill in order to remove the anomalous treatment of Wales will be inevitable.

**CELG Committee [DWB 11]** is concerned about the widening of the test relating to reserved authorities and minister of the crown functions. The *Welsh Language (Wales) Measure 2011* would be affected. Other examples are provided of Welsh Acts that would now require consent under the draft Bill proposals. The proposed consent process is likely to be inefficient and could delay Assembly legislation.

**H&SC Committee [DWB 13]** is concerned about ministerial consents which might have affected the ‘workplaces’ provisions in the Public Health Bill – consent may have been needed for those in reserved authorities ‘workplaces’ provisions.

**Professor Laura McAllister and Dr Diana Stirbu [DWB 15]** are of the view that Schedule 7B paragraph 8 represents a reduction of competence. Executive responsibilities of ministers should match legislative competence of the Assembly, as provided in s53 of the *Scotland Act 1998*.

**The Learned Society of Wales’ [DWB22]** evidence states:

As drafted the Bill removes some of the Assembly's existing competences. Examples include teachers' pay and conditions, clawing back the Supreme Court's rulings on the scope of the Assembly's powers which the Court considered had been intended by Parliament, and expanding the current requirements for Minister of the Crown consents. These requirements are already more extensive than those which characterise Scotland's devolved settlement. Such an extension is constitutionally objectionable in that it greatly expands executive control over Wales's democratically elected legislature. It does this in two ways. Most obviously, it provides Whitehall with a direct veto power over National Assembly legislation. Not only that, but given that it is the Welsh Government who would be required to negotiate with Whitehall over these consents, it will also increase the power of the Welsh executive over the legislature in Cardiff Bay. The proposed system of Minister of the Crown consents will also create unnecessary delays and frustration in the process of enacting National Assembly legislation as well as, almost inevitably, generate conflict between devolved and central government. As an alternative, we propose the general devolution of Minister of the Crown consents with the retention of specific reservations for specified bodies. This would bring the situation in Wales into line with that pertaining in Scotland.

**YourLegalEyes'** evidence stated:

**DWB 16** While I fully understand that as a matter of balance of interests or fairness, there should be a UK equivalent to the Legislative Consent Motion when Wales legislate in reserved matters, the current draft Bill does not offer satisfactory arrangements. First there is the question of constitutional balance: in my opinion it should be for the legislatures to consent to the other legislature legislating in their sphere of competence. This could be included in the Draft Wales Bill. The Bill could require the Secretary of State to prepare and lay before Parliament a Legislative Consent Memorandum as do the Welsh Ministers under the current Sewel Convention. This represent the ideal constitutional scenario and this would seem to solve all the problems of the need or not for a necessity test, the effect on reserved bodies etc. While this seems nearly impossible in the UK constitutional tradition, amendments to the Draft Bill are in my opinion necessary.

17. The Draft Bill needs to be amended to include procedural guarantees and in particular ensure transparency and expediency.

18. As the draft Bill stands there is no transparent procedure by which the opinions of Whitehall are known or discussed before a decision as to whether consent should be given. This contrasts the transparent procedure relating to Legislative Consent Motions for which there is a published Memorandum and a debate taking place in the Assembly.

19. If the consenting powers of the Secretary of State were to remain then there should be a public procedure, statutory grounds for refusal, a statutory presumption of consent and most importantly there should be a statutory deadline to avoid unnecessary blockages of Welsh Bills.

20. I also note that the requirements for consents have expanded quite importantly in the draft Bill.

21. It was understandable why, under GOWA 2006, Ministerial consents were required for Assembly legislative amendments to pre-referendum ministerial functions within

devolved areas, (Para. 1(1) Part 2 General restrictions of Schedule 7 of the 2006 Act). Provision was then being made for a transition from the pre-devolution world to the devolved era. However, I do not understand the rationale in the draft Bill for extending the application of the restriction to all Ministerial including for the future.

Also the draft Bill should provide for an automatic transfer of all executive powers under the devolved areas to the Welsh Government, as is the case in Scotland.

Much of the evidence expressed similar concerns about Ministerial Consent provisions.

### **General and specific reservations**

**The First Minister [DWB 7]** believes that additional powers should be given to Wales regarding rail franchises, road signs, gaming machines, as in the Smith Commission recommendations. Others powers should include alcohol licensing and the Community Infrastructure Levy and executive competence for civil contingencies.

**The Assembly's Finance Committee's [DWB6]** evidence says:

We think this confusion over a Welsh public authority is particularly relevant to some aspects of the Finance Committee work, in relation to the WAO/Auditor General for Wales and the Public Services Ombudsman for Wales (PSOW) as it is not possible to categorically state that the WAO and/or the Auditor General and the PSOW are or are not "Welsh public authorities".

If the definition applies and they are not "Welsh public authorities" there will a loss of competence e.g. to confer, remove or modify their functions, as they will be either be reserved or be beyond the scope of the Assembly's powers in the absence of consent from a UK Government Minister under paragraph 8(1) of Schedule 7B as they exercise some functions otherwise than only in relation to Wales and/or have a number of functions which relate to reserved matters.

We think this uncertainty could be overcome by expressly providing for the Auditor General for Wales, the WAO and the PSOW to be expressly stated to as "Welsh public authorities".

**The Public Accounts Committee [DWB8]** also expressed concern about the definition of Welsh public authorities (Clause 218 of Schedule 7A) within the draft Bill:

These provisions appear to present scope for discussion as to whether public bodies that could be considered integral parts of the Welsh public sector are excluded from the definition of 'Welsh public authority'. Such an exclusion would seem to arise in the case of bodies with general or supplementary powers that are not confined to 'only in relation to Wales' and examples include local health boards and the Wales Audit Office powers under the provision of services under section 19 of the Public Audit (Wales) Act 2013. The Committee feels that clarity would be desirable on this point.

**The Chair of the Enterprise and Business Committee [DWB10]** submitted correspondence to the Secretary of State as evidence in which he said:

In our committee discussion, a room full of experienced legislators struggled to understand what the bill does and what it is seeking to do. For those who are not used

to reading and drafting laws, it is – in its present form – very difficult to understand. Clarity and workability are important principles when it comes to legislation, and I am sure that more can be done in this regard.

The letter also sought greater clarity about particular reservations, in particular some that appear to restrict competence in respect of Economic Development.

**CELG [DWB11]:** Examples of issues with specific reservations which fall within the remit of the Committee are provided in annex A of its written evidence, including where these would have impacted on Assembly Bills/Acts. These include immigration, crime public order and policing, anti-social behaviour, dangerous items, misuse or dealing in drugs and psychoactive substances, entertainment etc., charities and fund raising, health and safety, media culture and sport, local land charges, and equal opportunities.

A particular concern to the **H&SC Committee [DWB13]** is the reservation of the sale and supply of alcohol which it says is a serious health issue best addressed at the devolved level.

Reservation 149 (regulation of health professionals) includes a catch all provision which could include social care workers. Clarification is needed.

Reservation 154 (employment rights and duties) is inappropriate and could, for example prevent the Assembly from legislating in this area for the social care sector.

**The Equality and Human Rights Commission [DWB 31]** states that the draft Wales Bill appears to remove the Assembly's competence on equal opportunities – it is defined as a reserved matter with only some, unclear exceptions. It states that this is a retrograde step which would harm the protection and promotion of equality and human rights in Wales. The draft Wales Bill should ensure that the National Assembly's competence in relation to equality and human rights is at least maintained, and, where possible, enhanced.

### Implications for the Welsh Language

Several pieces of evidence raise some uncertainties in respect of the Assembly's competence to legislate on matters relating to the Welsh language. The Welsh Language Commissioner herself states.

**DWB 4** Mae Atodlen 7A y Bil Cymru drafft yn rhestru materion sydd wedi eu cadw yn ôl ('reserved matters'). Un o'r materion hynny yw 'cyfleoedd cyfartal' (Atodlen 7A, Adran N1). Diffinnir 'cyfleoedd cyfartal' yn Adran honno'n Bil drafft fel a ganlyn

“Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions, but not including language.’[*Commissioner's emphasis*].

Mae'n bosibl bod y geiriau sydd wedi eu hamlygu ym mrawddeg olaf y cymal wedi eu cynnwys gan bod y Gymraeg yn fater sydd wedi ei ddatganoli ac er mwyn osgoi effeithio ar hynny. Credaf bod angen ystyried a fedrai'r cymal hwn fod ag oblygiadau

eraill, anfwriadol. Er enghraifft, ydy'n bosibl y gallasai'r cymal hwn rwystro Llywodraeth y DU rhag cymryd camau er mwyn ymatal, dileu neu reoleiddio camwahaniaethu yn erbyn unigolion ar sail y sail eu bod yn siarad Cymraeg neu iaith arall? Hefyd, a fedrai diffinio 'cyfleoedd cyfartal' fel hyn mewn deddfwriaeth, hynny yw eithrio iaith yn y diffiniad, fod ag unrhyw oblygiadau o ran sut y diffinnir 'cyfleoedd cyfartal' mewn cyfreithiau eraill, cyddestunau eraill neu'n fwy cyffredinol? Ystyriaf bod angen meddwl yn ofalus wrth graffu ar y Bil hwn ynghylch sut y mae'r Bil drafft yn eithrio y Gymraeg o'r diffiniad o 'gyfleoedd cyfartal'.

[**Translation:** *Schedule 7A of the draft Wales Bill lists issues that have been reserved ('reserved matters'). One of these is 'equal opportunities' (Schedule 7A, Section N1). 'Equal opportunities' in that Section of the draft Bill are defined as follows*

“Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions, but not including language<sup>1</sup>.’

*It is possible that the words which have been highlighted in the last sentence of the clause have been included as the Welsh language is a devolved issue and to avoid impacting on this. I believe there is a need to consider whether this clause could have other, unintentional implications. For example, is it possible that this clause could prevent the UK Government from taking steps to stop, abolish or regulate discrimination against individuals based on the grounds that they speak Welsh or another language? Also, could defining 'equal opportunities' in this way in legislation, thus excluding language from the definition, have any implications with regard to the definition of 'equal opportunities' in other laws, or other contexts or more generally? I believe that we need to think carefully when scrutinizing this draft Bill about how it excludes the Welsh language from the definition of 'equal opportunities'.*

However, the **Secretary of State's [DWB18]** written evidence says:

**The Assembly will continue to be able to legislate on the Welsh language.** The reservations listed in Schedule 1 to the draft Bill do not prevent the Assembly from legislating on the Welsh language. In particular, the equal opportunities reservation specifically excludes language from the definition of equal opportunities.

**Professor Thomas Glyn Watkin [DWB1]** states:

The essential problem is that Welsh language competence cuts across other subjects, and therefore may be more liable to being frustrated by the reserved-powers model than many other devolved subjects. The application of the 'relates to' test, as opposed to the 'falls within' test, for what would previously have been exceptions but would now be reserved matters may be particularly problematic here.

**Keith Bush QC [DWB3]** says that the Assembly would be unable to legislate “without the consent of the UK Government so as to impose duties relating to devolved matters on government departments and other UK public authorities”. He states:

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<sup>1</sup> Highlighted by the author of this paper

Provisions such as those in the *Welsh Language (Wales) Measure 2011*, which provide for Standards of service through the medium of Welsh to be imposed on public authorities, whether devolved or not, would in future require the consent of the UK Government.

The **Learned Society for Wales' [DWB22]** evidence states:

The power of the National Assembly to legislate on matters affecting the Welsh language is obviously right. Yet because this competence cuts across reserved areas, the outcome in the draft bill would be a diminution of powers and a potential recipe for confusion and conflict.

**Cymdeithas yr Iaith Gymraeg's [DWB25]** evidence states:

Hoffem bwysleisio eto mai sylwadau cychwynnol ar gynigion y Bil drafft yw'r uchod. Fodd bynnag, o'n golwg cyntaf ar y Bil drafft, credwn fod y ddeddfwriaeth arfaethedig, fan leiaf, yn mynd i greu ansicrwydd sylweddol ynghylch pwerau'r Cynulliad i ddeddfu ym maes y Gymraeg. Yn wir, credwn ei bod yn debygol y bydd llai o bwerau deddfu dros y Gymraeg gan y Cynulliad o dan y setliad a amlinellir yn y Bil drafft.

Felly, byddem felly yn gadarn ein gwrthwynebiad i basio'r Bil fel y mae. Mae'r ymdrech sydd ei hangen i sicrhau dyfodol y Gymraeg fel priod iaith lewyrchus yng Nghymru yn gofyn am ryddid sylweddol i'w deddfwrfa genedlaethol allu deddfu ar draws ystod o faterion heb gael eu llethu gan ddiffyg eglurder a chyfyngiadau diangen ar ei gallu i weithredu.