



# Library Note

## Wales Bill (HL Bill 63 of 2016–17)

The Wales Bill seeks to implement those elements of the St David's Day agreement that require legislative change and to introduce a clearer and more durable devolution settlement in Wales. The Bill would replace the current conferred powers model used by the National Assembly for Wales with a reserved powers model. The Bill includes the following:

- A declaration that the Assembly and Welsh ministers are a permanent part of the UK's constitutional arrangements and would not be abolished without a referendum in Wales.
- A declaration that the UK Parliament would not normally legislate with regard to devolved matters without the consent of the Assembly.
- Provisions to amend the Government of Wales Act 2006 to define the limits on the legislative competence of the Assembly and detail of the tests for assessing whether the Assembly is within its competence. The Bill includes two new schedules which would define the areas that are reserved to the UK Parliament.
- Provisions for the Assembly to modify "protected subject matters", such as the name of the Assembly and the franchise and electoral system used for Assembly elections.
- Provisions to devolve responsibility for ports policy, speed limits, bus registration, taxi regulation, local government elections and sewerage.
- Provisions to give Wales powers over planning development consents for electricity generating stations with 350MW capacity or less.
- A requirement for justice impact assessments to be produced for Assembly bills.
- Removal of the requirement for the devolution of a portion of income tax to be subject to a referendum in Wales.
- Provisions to allow Welsh ministers to grant licences for onshore oil and gas extraction.

No non-government amendments were made to the Bill during its passage through the Commons. Key issues discussed included the creation of a separate or distinct legal jurisdiction for Wales; the Bill's requirement for justice impact assessments for Assembly bills; restrictions on the Assembly's legislative competence for energy schemes over 350MW; and powers for the Welsh Assembly with regard to water supply and sewerage. The Bill was introduced in the House of Lords on 13 September 2016 and is scheduled for second reading debate on 10 October 2016. This Lords Library briefing provides background to the Bill and outlines its key provisions. In addition, it highlights the key amendments and discussions held during the Bill's passage through the Commons. It concludes with a summary of the scrutiny the Bill has received in the Welsh Assembly, produced in support of this briefing by the Research Service at the National Assembly for Wales.

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## I. Background to the Bill

The Bill seeks to implement those elements of the St David's Day agreement that require legislative change and to introduce a clearer and more durable devolution settlement in Wales.<sup>1</sup>

The Bill would change the devolution structure of Wales from a conferred model, whereby only powers specified by the Government of Wales Act 2006 are within the competence of the National Assembly for Wales, to a reserved powers model. In this model, the National Assembly for Wales could make law on any matter not expressly reserved to the UK Parliament.

Devolution arrangements in Wales have been subject to several changes and much debate since 1997, when a referendum about devolving powers took place.<sup>2</sup> Three main pieces of primary legislation—the Wales Act 1998, the Wales Act 2006 and the Wales Act 2014—have sought to define devolution arrangements for Wales in recent history, with each incrementally increasing the powers which the National Assembly for Wales holds.

The Wales Act 1998 under which Wales originally gained independence was largely limited to the powers previously exercised by the Secretary of State for Wales. The Wales Act 2006 gave the National Assembly for Wales the power to make 'measures' on a limited number of matters. The number of matters which the Assembly could legislate on could be expanded either by UK primary legislation being drafted to devolve new powers to Wales when creating them for England or the UK; or by means of special orders that put new matters under the remit of the Assembly. In addition the Wales Act 2006 Act included an option for the Assembly to take on legislative powers over a larger set of matters; for this to occur it would require approval in a referendum.

The Wales Act 2014 implemented the recommendations made in the first report of the Silk Commission on financial matters (see below). The Act included a power to reduce income tax by 10 pence in the pound and introduce a Welsh rate of income tax to replace the 10 pence reduction. The 2014 Act allowed these powers over income tax to be devolved only if they were approved in a referendum, the calling of which was to be subject to UK parliamentary approval and a two-thirds majority in the Assembly. In addition, the Act made changes to the term length of an Assembly and removed the possibility of sitting both in the Assembly and in the House of Commons. Notable recent developments include:

- **2011 Referendum:** On 3 March 2011, a referendum was held in Wales to decide whether the National Assembly for Wales should gain the power to legislate on a wider range of matters in one go, as allowed for under the Wales Act 2006. The referendum approved the change, by approximately 63 percent to 36 percent.<sup>3</sup> The changes came into force after elections to the Assembly in May 2011.
- **Silk Commission:** the Commission on Devolution in Wales, also known as the 'Silk Commission', was set up by the UK Government in 2012. The Commission's first report, *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, was published in November 2012 and the report's financial recommendations gave rise to

<sup>1</sup> [Explanatory Notes](#), p 4, para 1.

<sup>2</sup> For more detailed background to the Wales Bill 2016–17 see: House of Commons Library, [Wales Bill 2016–17](#), 13 June 2016.

<sup>3</sup> For further information see: House of Commons Library, [Referendum in Wales](#), 7 March 2011.

the Wales Act 2014.<sup>4</sup> The Commission's second report, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, was published in March 2014.<sup>5</sup> In the report the Commission sought to “review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales”.<sup>6</sup> Amongst its recommendations were calls for a reserved powers model of devolution, alongside further devolution of powers and greater control for the Assembly on the running of its internal affairs.

- **Agricultural Sector (Wales) Bill—Reference by the Attorney General for England and Wales [2014] UKSC 43:** On 9 July 2014 the Supreme Court gave its judgment on the case, which provided further clarity on the extent of the Assembly's law making powers.<sup>7</sup> Under the conferred powers model, the National Assembly for Wales legislation must relate to a subject listed in schedule 7 to the Government of Wales Act 2006. Schedule 7 also lists exceptions. An Assembly act under the conferred powers model must not relate to an exception (even if it also relates to a devolved subject). In addition there are a number of ‘silent subjects’, that is, subjects that are neither exceptions nor conferred powers. As explained by the National Assembly for Wales Research Service:

There used to be a question as to whether the Assembly could pass legislation that related to both a devolved subject and a silent subject. In 2014, the Supreme Court clarified that the Assembly can pass legislation that both relates “fairly and realistically” to a devolved subject and relates to a silent subject. The classic example is the Agriculture Sector (Wales) Act 2014 which relates both to agriculture (a devolved subject) and employment (a silent subject). Therefore, provided that Assembly legislation fairly and realistically relates to a devolved subject it does not matter that it also relates to a silent subject. But it does matter if it relates to an exception, because an Assembly act is not law if it relates to an exception.<sup>8</sup>

The courts involvement led the then Secretary of State for Wales, Stephen Crabb, to announce that the Wales Office would be working on developing a reserved powers model for Wales, in order to provide further clarity about “who is responsible for what”.<sup>9</sup>

- **St David's Day Agreement:** In September 2014, following the Scottish referendum on independence, the Prime Minister announced “a new and fair settlement for Scotland should be accompanied by a new and fair settlement that applies to all parts of our

<sup>4</sup> Commission on Devolution in Wales, [Empowerment and Responsibility: Financial Powers to Strengthen Wales](#), November 2012.

<sup>5</sup> Commission on Devolution in Wales, [Empowerment and Responsibility: Legislative Powers to Strengthen Wales](#), March 2014.

<sup>6</sup> *ibid*, p 4.

<sup>7</sup> [Judgment: Agricultural Sector \(Wales\) Bill—Reference by the Attorney General for England and Wales \[2014\] UKSC 43](#), 9 July 2014.

<sup>8</sup> National Assembly for Wales Research Service, [The Wales Bill: Reserved Matters and their Effect on the Assembly's Legislative Competence](#), September 2016, p 2.

<sup>9</sup> Wales Office press release, [Secretary of State Sets Out Long Term Vision on Devolution](#), 17 November 2014.

United Kingdom”.<sup>10</sup> To this end, from November 2014, Stephen Crabb, the then Secretary of State for Wales, met with political parties in Wales to discuss areas for agreement for future devolution arrangements. The resultant framework, *Powers for a Purpose: Towards a Lasting Devolution Settlement*, was published on 27 February 2015, and became known as the ‘St David’s Day agreement’.<sup>11</sup>

- **Draft Wales Bill:** On 20 October 2015, the Government published the draft Wales Bill.<sup>12</sup> In his foreword to the Bill, Stephen Crabb announced his intention to “ensure the people of Wales have a clear and lasting devolution settlement. For too long Welsh politics has been dominated by constitutional debates about what is and is not devolved”.<sup>13</sup> The draft Bill was subject to pre-legislative scrutiny by the House of Commons Welsh Affairs Committee, which took evidence from a number of Members of the Welsh Assembly, alongside academics and the Secretary of State for Wales. The Committee published its report on 28 February 2016.<sup>14</sup> The report was critical of the draft Bill and expressed particular concern regarding the scope of the reservations in the Bill and the ‘necessity tests’ used to decide whether legislation could touch on reserved matters, modify criminal law or modify the private law.
- **Responses to Pre-Legislative Scrutiny:** On 29 February 2016, Stephen Crabb announced changes to the draft Wales Bill, which reflected some of the criticisms it had received during pre-legislative scrutiny.<sup>15</sup> The formal government response to the Welsh Affairs Committee was published on 14 June 2016.<sup>16</sup> On 7 March 2016, the Welsh Government published its own proposals for a draft Wales Bill.<sup>17</sup>
- **Wales Bill:** On 7 June 2016, the Wales Bill (of session 2016–17) received its first reading in the Commons.<sup>18</sup> Appendix I of this briefing, produced by the National Assembly for Wales Research Service, provides information about the scrutiny which the Wales Bill, as introduced in the Commons, has undergone in the National Assembly for Wales.

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<sup>10</sup> Prime Minister’s Office press release, ‘[Scottish Independence Referendum—Statement by the Prime Minister](#)’, 19 September 2014.

<sup>11</sup> HM Government, [Powers for a Purpose: Towards a Lasting Devolution Settlement](#), 27 February 2015, Cm 9020. For more detail regarding the St David’s Day agreement see: House of Commons Library, [Wales: Current Devolution Proposals 2014–15](#), 3 March 2015.

<sup>12</sup> HM Government, [Draft Wales Bill](#), October 2015, Cm 9144.

<sup>13</sup> *ibid*, p 4.

<sup>14</sup> House of Commons Welsh Affairs Committee, [Pre-Legislative Scrutiny of the Draft Wales Bill](#), 28 February 2016, HC 449 of session 2015–16.

<sup>15</sup> Wales Office press release, ‘[Amended Wales Bill Will Deliver a Stronger Devolution Settlement](#)’, 29 February 2016.

<sup>16</sup> House of Commons Welsh Affairs Committee, [Pre-Legislative Scrutiny of the Draft Wales Bill: Government Response to the Committee’s First Report of Session 2015–16](#), 14 June 2014, HC 280 of session 2016–17.

<sup>17</sup> Welsh Government, [Government and Laws in Wales Bill](#), 7 March 2016. An accompanying [Explanatory Summary](#) was also produced.

<sup>18</sup> For more information about the provisions of the Bill, as introduced in the House of Commons, see: House of Commons Library, [Wales Bill 2016–17](#), 13 June 2016.

## 2. Overview

### 2.1 Summary of the Key Provisions

The [Wales Bill](#), as introduced into the House of Lords, consists of four parts. The aim of the Bill, as set out by the Explanatory Notes, is to create “a clearer and stronger settlement in Wales which is durable and long-lasting”.<sup>19</sup> The Bill would change the devolution structure of Wales from a conferred model, whereby only powers specified by the Government of Wales Act 2006 are within the competence of the National Assembly for Wales, to a reserved powers model. In this model, the National Assembly for Wales could make law on any matter not expressly reserved to the UK Parliament.

This section briefly outlines the Bill’s key provisions, as summarised by the [Explanatory Notes](#), which have been prepared by the Wales Office. A more detailed analysis of the Bill, as introduced in the House of Commons, can be found in the House of Commons Library briefing, [Wales Bill 2016–17](#).

#### Part I: Constitutional Arrangements

Part I of the Bill provides most of the detail regarding the legislative competence of the National Assembly for Wales under the reserved powers model. Clause 1 includes declaratory statements regarding the permanence of the National Assembly for Wales which seeks to show that “the Assembly and Welsh Government are a permanent part of the United Kingdom’s constitutional arrangement, and that those institutions are not to be abolished except on the basis of a decision of the people of Wales in a referendum”.<sup>20</sup> In addition, clause 1 would include a recognition of Welsh law. Clause 2 states that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.

Clause 3 would insert new section 108A into the Government of Wales Act 2006. This section would define the limits of the legislative competence of the Assembly and detail the tests for assessing whether the Assembly was within its legislative competence. The clause would insert two new schedules into the Government of Wales Act 2006, which would define the areas that were reserved to the UK Parliament. The proposed subsection 1 of the new section 108A states that “an act of the Assembly is not law so far as any provision is outside the Assembly’s legislative competence”.

Subsection 2 of the new section 108A would provide “five separate independent tests for an Assembly Act provision to satisfy before it will be within competence”.<sup>21</sup> A provision would be outside the competence of the National Assembly for Wales if:

- It would extend outside England and Wales; this relates to a provision’s legal extent.
- Its practical application would be outside of Wales or it would confer, impose, modify or remove functions exercisable outside of Wales. However, exceptions to this would be inserted by subsection (3) of the new section 108A where provisions were “ancillary” to either an Assembly act or measure or “devolved provision”, and would

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<sup>19</sup> [Explanatory Notes](#), p 4, para 1.

<sup>20</sup> [Explanatory Notes](#), p 7, para 20.

<sup>21</sup> [Explanatory Notes](#), p 8, para 29.

have “no greater effect otherwise than in relation to Wales than is necessary to give effect to the provisions”.<sup>22</sup> Subsection 7 would define “ancillary” and subsection 4 would define “devolved provisions”.

- It would relate to any of the “reserved matters”, which are set out in what would become the new schedule 7A of the Government of Wales Act 2006. Subsection 6 of new section 108A would define “relates to” as being determined “by reference to the purposes of the provision, having regard (among other things) to its effect in all circumstances”. This would replicate the “purpose test” found in the current Government of Wales Act 2006.
- It would breach any of the restrictions of what will become new schedule 7B of the Government of Wales Act 2006. This is a separate test from that covered by schedule 7A.
- It would be incompatible with the European Convention on Human Rights or EU law.

The proposed schedule 7A includes both general and specific reservations and includes subjects such as the constitution, political parties, single legal jurisdiction of England and Wales, defence and foreign affairs.

Clause 3 would also insert new schedule 7B into section 108A of the Government of Wales Act 2006. Part 1 of proposed schedule 7B sets out the general restrictions on the Assembly’s legislative competence, whilst part 2 sets out the exceptions to those restrictions. As outlined by the Explanatory Notes:

Schedule 7B is part of separate legislative competence test from schedule 7A [...] Whilst schedule 7A is intended to set the parameters of future Assembly acts in terms of reserved matters about which it cannot legislate, the restrictions in paragraphs 1 and 2 of schedule 7B are intended to provide a separate form of protection for the existing legislation and common law which has a reserved matter as its subject matter.<sup>23</sup>

In addition, part 1 would provide for the following:

- Provisions regarding the Assembly’s role in Assembly elections, and restrictions in its role in relation to franchise and timing of police and crime commissioner elections.
- Provisions regarding “protected subject matters” which the Assembly would require a super-majority to modify. These include the name of the Assembly, the franchise for Assembly elections and the electoral system for Assembly elections. The Presiding Officer would decide whether an Assembly bill contained any provisions relating to “protected subject matters”. The Bill provides for a matter to be referred to the Supreme Court to ascertain whether protected subject matters are being discussed.
- Requirements for Assembly standing orders to require a justice impact assessment be produced in relation to Assembly bills.

<sup>22</sup> [Explanatory Notes](#), p 8, para 30.

<sup>23</sup> [Explanatory Notes](#), p 53, paras 411–13.

- Provisions relating to financial control, accounts and audit of the Assembly and relating to composition of Assembly committees and the participation of UK ministers in Assembly proceedings.
- The removal of the requirement for the devolution of a portion of income tax to Wales to be subject to a referendum.
- Provisions relating to the executive competence of Welsh ministers, the implementation of EU Law and the transfer of ministerial functions.

## **Part 2: Legislative and Executive Competence—Further Provision**

Part 2 of the Bill would make further provision about matters that would form part of the Assembly's legislative competence and Welsh ministers' executive competence. These would include:

- Provisions to allow Welsh ministers to grant licences for onshore oil extraction.
- Provisions to devolve a number of road-related powers to Welsh ministers. The Bill would include devolving executive competence for bus route registration and powers regarding taxi and private hire vehicles regulation to Wales.
- Provisions transferring harbour functions, other than reserved trust ports defined in clause 32, to Welsh ministers.
- Provisions to give Wales powers over planning development consents for electricity generating stations with 350MW capacity or less.
- Provisions for greater powers for Welsh ministers to modify the list of Welsh authorities subject to the public sector equality duty.
- Provisions to allow Welsh ministers to impose the public sector duty regarding socio-economic inequalities on public authorities that exercise devolved or mainly devolved functions.
- Provisions for devolving powers relating to marine licensing and conservation. Extending existing executive responsibilities for marine licensing in the Welsh inshore region to the Welsh offshore region, and allowing Welsh ministers to designate areas as marine conservation zones in the Welsh offshore region.
- Provisions to transfer competence for sewerage to the Assembly, including provisions for an intervention power for the Secretary of State where they believe that "a serious adverse impact on sewerage services in England" might result from an Assembly bill.
- Provisions for the transfer of functions to the National Assembly for Wales in relation to "excepted energy buildings".
- Provisions to require the Secretary of State to consult with Welsh ministers before establishing or amending a renewable energy incentive scheme.

### Part 3: Miscellaneous

Part 3 of the Bill would provide for the following:

- Provision for the Office for Budget Responsibility to require Welsh public finance information from devolved bodies.
- Provision for the Assembly to impose requirements on the Gas and Electricity Markets Authority in relation to Wales.
- Provisions about the role of Welsh ministers in relation to the Coal Authority and the Office of Communications (OFCOM).

### Part 4: General

Part 4 of the Bill would include minor and consequential amendments as a result of the Bill. Clause 53 would allow the Secretary of State to make regulations amending primary or secondary legislation, which the Secretary of State considered appropriate in consequence of any provision of the Bill. Resolutions made relating to primary legislation would go through the affirmative resolution procedure in Parliament, resolutions which related to secondary legislation would be subject to negative resolution procedure.<sup>24</sup>

This part of the Bill includes information regarding transitional provisions and savings, commencement and short title.

## 2.2 Territorial Extent

As outlined in the Explanatory Notes:

The Bill extends to the whole of the UK. However, the territorial extent of a bill can be different from its application. Application means the territory where a bill produces a practical, legal effect. The details of this Bill's application are set out in the following paragraphs.

The majority of the Bill clauses apply to the whole of the UK as they are of constitutional significance, devolving powers away from the UK Parliament and Secretaries of State.

The only exceptions to this are clauses 9–16 (which relate to the Assembly's internal arrangements and therefore only apply to Wales) and clause 46 (which applies to England and Wales because it confers a power to be exercised if provision in an Assembly act has an adverse impact on sewerage services in England).<sup>25</sup>

The table in Annex A of the Explanatory Notes provides a more detailed summary of the position regarding territorial extent and application in the United Kingdom. It also includes details regarding legislative consent motions and matters relevant to *Standing Orders of the House of Commons Relating to Public Business*.

<sup>24</sup> [Explanatory Notes](#), p 81, paras 632–6.

<sup>25</sup> [Explanatory Notes](#), p 5, paras 12–13.

### 3. House of Commons Second Reading

Introducing the Bill during its second reading in the House of Commons, the Secretary of State for Wales, Alun Cairns, noted the “fundamental importance” of the Bill to the future of the governance of Wales and its role in the UK and stated, “preparing this Bill I have been guided by two underpinning principles: clarity and accountability”.<sup>26</sup> He argued that the Bill would provide clarity about devolution in Wales through a new reserved powers model of devolution which would “draw a well-defined boundary between what is reserved and what is devolved”. In addition, he said that devolving some tax raising powers would make the Welsh Government more accountable.<sup>27</sup>

Nia Griffith, the then Shadow Secretary of State for Wales, welcomed the Bill as an improvement on the draft Wales Bill noting, “we now have a piece of legislation that, while not perfect, is definitely a marked improvement”.<sup>28</sup> She was positive about the reserved powers model and the removal of the ‘necessity tests’, which had been criticised during pre-legislative scrutiny, but noted that a “more long-term solution may need to be found at some point in the future” to the issue of the single legal jurisdiction for England and Wales.<sup>29</sup> The then Shadow Secretary of State was also critical of the number of reservations in the Bill and their justification, stating “we will consider the list in more detail as the Bill proceeds, but the Secretary of State must be ready to justify each of the reservations and to present a rational basis for the final list”.<sup>30</sup>

The chair of the Welsh Affairs Committee, David T C Davies (Conservative MP for Monmouth) welcomed the removal of the ‘necessity tests’ from the Bill, but expressed disquiet about the removal of the requirement for a referendum before the devolution of some tax raising powers to the Assembly.<sup>31</sup>

Hywel Williams, the Westminster Leader of Plaid Cymru, was critical of the Bill noting “Far from being an agreement, the St David’s Day white paper and this eventual Wales Bill fall well short of the consensus that Silk worked so hard to achieve”.<sup>32</sup> Although acknowledging, “some progress has been made in making the Bill fit for purpose” he said that, “we still have a long way to go before this Bill will become fit for enactment”.<sup>33</sup> He welcomed the reserved powers model, but was critical of the number of reserved powers the Bill contained.

Mark Williams, Leader of the Welsh Liberal Democrats, stated that “the Bill does represent a significant move forward” from its earlier draft form, commenting, “I am therefore prepared to give the Bill cautious support at this stage”.<sup>34</sup>

### 4. House of Commons Committee Stage

Committee stage in the House of Commons took place on the floor of the House over two days, 5 and 11 July 2016. Day one of the committee considered all of part I of the Bill, with the

<sup>26</sup> [HC Hansard, 14 June 2016, col 1644.](#)

<sup>27</sup> [ibid, col 1645.](#)

<sup>28</sup> [ibid, col 1654.](#)

<sup>29</sup> [ibid, col 1656.](#)

<sup>30</sup> [ibid, col 1657.](#)

<sup>31</sup> [ibid, col 1661.](#)

<sup>32</sup> [ibid, col 1686.](#)

<sup>33</sup> [ibid, col 1685.](#)

<sup>34</sup> [ibid, col 1702.](#)

exception of clause 3 (legislative competence).<sup>35</sup> Day two considered clause 3 of part I of the Bill and its associated schedules, followed by discussion on the rest of the Bill.<sup>36</sup>

There were no non-government amendments made to the Bill during committee stage, with divisions on three amendments and two clauses on day one, and divisions on four amendments and one new clause on day two. These are summarised below.

A more detailed summary of the committee stage proceedings in the House of Commons can be found in the House of Commons Library briefing, [Wales Bill 2016–17: Committee Stage Report](#).

## 4.1 Part I: Constitutional Arrangements

As noted above, part I of the Bill focuses on the legislative competence of the National Assembly for Wales under the reserved powers model. Although some government amendments were made during committee stage, such as amendments to extend the Assembly competence to regulate movement of such things as plants, animals, foods and fertilisers, for specified purposes both within Wales and in and out of Wales,<sup>37</sup> there were no non-government amendments made to part I of the Bill during Committee.

### Legal Jurisdiction

Liz Saville Roberts (Plaid Cymru MP for Dwyfor Meirionnydd) moved amendment 5 to clause 1, which would have entailed a separation of the legal jurisdiction of England and Wales. She noted, “Wales is unique in the world in having a primary law making legislature without a jurisdiction [...] The relative stability of the Scottish devolution settlement, when compared with the turmoil in Wales is stark. It is rare that Wales passes a law without the threat of legal challenge”.<sup>38</sup> The amendment was taken from wording used by the Labour Government in Wales, but not supported by the Opposition. The amendment was defeated on division by 270 votes to 41.<sup>39</sup>

The Shadow Secretary of State for Wales, Paul Flynn, moved an amendment which would have required the Lord Chancellor and Welsh ministers to keep the function of the justice system in relation to Wales under review, including keeping under review the question of whether the single legal jurisdiction of England and Wales should be divided. He noted: “The Secretary of State, like his predecessor, wants the Bill to offer a lasting settlement, and so do we, but that will not happen unless they put forward a credible and serious process for reforming the joint jurisdiction, There is a major gap in the Bill as it stands. Amendment 7 is proposed as a constructive solution that deserves cross-party support”.<sup>40</sup> The amendment was defeated on division by 274 votes to 217.<sup>41</sup>

Responding for the Government to the amendments regarding the legal jurisdiction of Wales, the Parliamentary Under Secretary for Wales, Guto Bebb, noted that “as set out in the

<sup>35</sup> [HC Hansard, 5 July 2016, cols 761–846.](#)

<sup>36</sup> [HC Hansard, 11 July 2016, cols 54–138.](#)

<sup>37</sup> [HC Hansard, 11 July 2016, col 89.](#)

<sup>38</sup> [HC Hansard, 5 July 2016, col 766.](#)

<sup>39</sup> [ibid, cols 790–1.](#)

<sup>40</sup> [ibid, col 777.](#)

<sup>41</sup> [ibid, cols 793–5.](#)

St David's Day agreement, there is no political consensus on devolving justice".<sup>42</sup> He stressed that, "the Government are fully committed to maintaining the single legal jurisdiction in England and Wales. It has served Wales very well. It is also our firm view that it is the most effective, efficient and consistent way to deliver justice".<sup>43</sup> He also highlighted a working group, established by the Justice Secretary and Secretary of State for Wales "to consider administrative changes needed to meet the administrative and operational demands of a diverging legislation in a Welsh context". He confirmed that the working group would report in autumn 2016.<sup>44</sup>

### Justice Impact Assessments

Several MPs spoke against clause 10, which would require the Standing Orders of the National Assembly for Wales to include provision for a justice impact assessment. This written statement, produced by the person in charge of a bill in the Assembly, would set out the potential impact, if any, of that bill on the justice system in England and Wales. Paul Flynn, the Shadow Secretary of State for Wales, argued "the clause goes against the whole thrust of the Bill, which is to sweep away micromanagement of the Assembly",<sup>45</sup> something Mark Williams, the Leader of the Welsh Liberal Democrats, agreed with, stating "this measure is inconsistent with the rest of the Bill".<sup>46</sup> Liz Saville Roberts (Plaid Cymru) also spoke against "the imposition" of the justice impact assessments, questioning "why should it be deemed acceptable to place an obligation on the Assembly by means of its own Standing Orders".<sup>47</sup>

Speaking in response, the Secretary of State for Wales, Alun Cairns, commented: "Within the UK Government, departments bringing legislation forward to this House are required to assess its likely impact on the justice system. The importance of that assessment is self-evident: for legislation to be effective it must be enforceable. It is vital that that enforcement process is ready and resourced sufficiently to cope with new demands placed upon it [...] I underline the need for proper consideration of any new legislation, so that the Ministry of Justice and the justice system can adjust their working practices to cope with those necessary changes".<sup>48</sup> The clause was agreed to on division by 294 votes to 228.<sup>49</sup>

### Income Tax and a Fiscal Framework

The Opposition moved an amendment to clause 16. This clause would remove the need for a referendum in Wales prior to any further devolution of income tax powers. The Opposition's amendment would have replaced the requirement for a referendum with a requirement that the Secretary of State gain the approval of the National Assembly for Wales and the UK Parliament for a "fiscal framework" for Wales. Paul Flynn, the Shadow Secretary of State for Wales, argued that Wales was suffering "referendum revulsion", stating:

[T]he introduction of Welsh rates of [income tax] will represent a step change in devolution to Wales, replacing about £2 billion of the Welsh block grant with a more volatile revenue stream. It will therefore be essential that fair and robust new funding

<sup>42</sup> [HC Hansard, 5 July 2016, col 780.](#)

<sup>43</sup> *ibid.*

<sup>44</sup> [ibid, col 782.](#)

<sup>45</sup> [ibid, col 829.](#)

<sup>46</sup> [ibid, col 812.](#)

<sup>47</sup> [ibid, col 812.](#)

<sup>48</sup> [ibid, cols 832–3.](#)

<sup>49</sup> [ibid, cols 837–40.](#)

arrangements are established before this takes place. A new fiscal framework is required, agreed by the Welsh Government and the Treasury, which addresses each of the new factors that will affect the level of spend on devolved public services in Wales.<sup>50</sup>

The amendment was defeated on division by 285 votes to 181.<sup>51</sup> Clause 16 stand part was agreed to on division by 285 votes to 7.<sup>52</sup>

### Legislative Competence and Reservations

Liz Saville Roberts (Plaid Cymru MP for Dwyfor Meirionnydd) moved a series of amendments to schedule 1 of the Bill, which sought to devolve aspects of the justice system to the Assembly, stating: “the Silk Commission recommended the devolution of policing and related areas of community safety and crime prevention, and my party is resolute in our standpoint that Wales, like the other nations of the United Kingdom, should have responsibility for its police forces [...] it is being proposed that policing is devolved to English city regions—Manchester and Liverpool, for example. If the policing of these cities can be held to account in a devolved landscape, why not the policing of Wales”.<sup>53</sup>

Paul Flynn, the Shadow Secretary for State for Wales, also spoke in favour of the devolution of policing, noting: “Policing is the only major front-line public service that is not at present the responsibility of the devolved institutions in Wales. That anomalous position means that it is significantly more difficult to achieve advantages of collaboration with other blue light services, which is strongly advocated for England in current government policy, as well as with other relevant public services. Deleting the reservation would address that anomaly”.<sup>54</sup> The amendment was defeated on division by 270 votes to 47.<sup>55</sup>

The Opposition proposed amendment 123 to schedule 1. Speaking to the amendment, the Shadow Secretary of State for Wales, Paul Flynn, commented:

As drafted, the Bill would reserve the sale and supply of alcohol, and the licensing of provision of entertainment and late-night refreshment. The amendment would delete the reservations and allow the Assembly to legislate on those matters. Alcohol misuse is a major public health issue and a principal cause of preventable death and illness in Wales. It can lead to a great many health and social harm problems, in particular for a significant minority of addicts and people who drink to excess for other reasons. Given those impacts and the direct link with devolved responsibility for public health and the NHS, there is a pressing need to tackle alcohol misuse, so the Assembly and Welsh Government must have the full range of tools at their disposal.<sup>56</sup>

The amendment was defeated on division by 270 votes to 210.<sup>57</sup>

<sup>50</sup> [HC Hansard, 5 July 2016, col 828.](#)

<sup>51</sup> [ibid, cols 842–4.](#)

<sup>52</sup> [ibid, cols 845–6.](#)

<sup>53</sup> [HC Hansard, 11 July 2016, col 74.](#)

<sup>54</sup> [ibid, col 66.](#)

<sup>55</sup> [ibid, cols 93–5.](#)

<sup>56</sup> [ibid, col 67.](#)

<sup>57</sup> [ibid, cols 96–8.](#)

## 4.2 Part 2: Legislative and Executive Competence—Further Provision

Part 2 of the Bill was considered on the second day of the committee of the whole House, following discussion regarding clause 3 of part 1 of the Bill and its associated schedules. The Government made technical amendments relating to electricity generating stations, “to correct an inadvertent constraint in the current drafting of clause 38 by removing the presumption that Welsh ministers are the devolved consenting authority”.<sup>58</sup>

In addition, there was further discussion on issues such as harbours, particularly concerning reserved trust ports, and of wind energy. Two Plaid Cymru amendments were defeated on division; these related to energy limits and the Secretary of State’s power to veto any Welsh legislation or measures that might have a serious adverse impact on water supply or quality in England.

### Energy Limits

Plaid Cymru tabled amendment 74 which sought to remove the 350 megawatts limit on the Welsh Government’s legislative competence in the field of energy. Speaking in support of the amendment, Hywel Williams (Plaid Cymru MP for Arfon) noted that the limit was recommended by the Silk Commission, but argued:

We have always believed that Wales’s natural resources should be in the hands of the people of Wales, and that the people of Wales are best placed to make decisions about how best to put those resources to use. That is our historic stance. We have never believed in placing a limit on that principle, above which the people of Wales should no longer have a say. We never thought that that was a good idea, and never thought that it was necessary. However, we compromised, for the good of the Silk process and to ensure good order and progress.<sup>59</sup>

Commenting on the amendment, Paul Flynn, Shadow Secretary of State for Wales, noted “The Welsh Government would have no powers over schemes above 350 MW. That is a very low level”.<sup>60</sup> Responding for the Government, Guto Bebb, the Parliamentary Under Secretary for Wales, argued that the amendment sought “to reopen the issue of the political consensus we found under Silk and as part of the St David’s Day process. It is important that we recognise that the Bill is attempting to move forward on the basis of consensus [...] the consensus on the 350 MW figure is appropriate, given that we are dealing with a system that is interrelated and interdependent. It is moving significant changes and decision-making powers to Wales, but it is also recognising the importance of what might be seen as a strategic energy development”.<sup>61</sup> The amendment was defeated on division by 275 votes to 195.<sup>62</sup>

### Water Supply and Sewerage

Plaid Cymru moved amendment 81 which sought to amend clause 44 of the Bill to remove the power of the Secretary of State to veto any Welsh legislation or measures that might have a

<sup>58</sup> [HC Hansard, 11 July 2016, col 121.](#)

<sup>59</sup> [ibid, col 111.](#)

<sup>60</sup> [ibid, col 108.](#)

<sup>61</sup> [ibid, col 120.](#)

<sup>62</sup> [ibid, cols 128–30.](#)

serious adverse impact on water supply or quality in England. Speaking to the amendment, Hywel Williams noted:

Clause 44 refers to sections 114 and 152 of the Government of Wales Act 2006, which gives the Secretary of State for Wales a veto over any acts or measures of the Assembly that might have a serious adverse impact on water quality or supply in England. This has been referred to in earlier debates. While the expectation was that this Bill would remove these sections from the Government of Wales Act, in fact it seems to extend the power of veto to cover sewerage services in England. These sections embody the peculiar notion that Wales is somehow incapable of managing its own resources. Once again, it is exclusive to the Welsh settlement. Neither the Secretary of State for Scotland nor the Secretary of State for Northern Ireland have such powers, so why must the Secretary of State for Wales have a veto over Welsh water? It makes Wales a special case—a lesser case.<sup>63</sup>

The issue of devolution of water and sewerage to the Assembly was also raised by Paul Flynn, Shadow Secretary of State for Wales, who spoke to amendments 127 to 129, which were similar in their aims to the Plaid Cymru amendments.<sup>64</sup>

Responding for the Government, Guto Bebb noted that the issue was under consideration stating: “The Silk report recognised that water and sewerage devolution is complex and that further work to consider the practical implications was needed. The Government set up the Joint Governments Programme Board with the Welsh Government to look at these issues [...] that work has concluded and the Government are considering the evidence before deciding whether and how the recommendations will be taken forward”.<sup>65</sup>

The amendment was defeated on division by 274 votes to 47.<sup>66</sup>

### 4.3 Parts 3 and 4: Miscellaneous and Transitional Provisions

Parts 3 and 4 of the Bill were considered on the second day of the committee of the whole house, following discussion regarding clause 3 of part 1 of the Bill and its associated schedules.

The Government made amendments relating to transitional provisions from moving from a conferred to a reserved powers model stating: “Government amendments 50 to 52, 59 and 60 are the result of productive discussions between the Wales Office, the Welsh Government and the Assembly Commission”.<sup>67</sup>

There was also some discussion regarding:

- Assembly approval where the Secretary of State wishes to make use of his order making powers in relation to Assembly legislation.
- Devolving executive and legislative competence of the Crown estate in Wales to the Welsh Government and the National Assembly for Wales.

<sup>63</sup> [HC Hansard, 11 July 2016, col 113.](#)

<sup>64</sup> [ibid, col 69.](#)

<sup>65</sup> [ibid, col 123.](#)

<sup>66</sup> [ibid, cols 132–4.](#)

<sup>67</sup> [ibid, col 124.](#)

- Devolving competence in respect of agricultural, aquacultural and fisheries levies.
- Devolving air passenger duty as a tax to Wales.
- Devolving corporation tax, VAT revenues and income tax revenues.

Plaid Cymru pushed one new clause, which would have provided for the introduction of Welsh thresholds for income tax, to a division. Jonathan Edwards (Plaid Cymru MP for Carmarthen East and Dinefwr) spoke to the new clause during the first day of committee, on 5 July 2016. He argued that the clause was of “vital importance”, stating:

The setting of thresholds is a key component of being able to use those powers based on domestic considerations. The Welsh economy in comparison to other parts of the UK is, regrettably, currently a lower-wage economy, a concern raised by Labour colleagues. New clause 2 would enable the National Assembly ultimately to determine the number of income tax thresholds and the levels at which they are set, including, critically, the basic rate.<sup>68</sup>

New clause 2 was defeated on division on 11 July 2016 by 273 votes to 46.<sup>69</sup>

## 5. House of Commons Report Stage

The Bill was considered at report stage in the House of Commons on 12 September 2016.<sup>70</sup> Several government amendments were accepted. These included:

- New clause 4 (clause 8 in the Bill as introduced in the Lords), which decoupled the timing and franchise of police and crime commissioner (PCC) elections from local government elections. The Secretary of State for Wales, Alun Cairns, argued that the clause was necessary “to avoid certain aspects of PCC elections in Wales being subject to future changes that the Assembly makes for future local elections in Wales”.<sup>71</sup> The clause provided that ordinary PCC elections would occur on the first Thursday in May in the year of an election; the franchise for PCC elections would correspond to the parliamentary franchise.
- New clause 5 (now clause 39), which sought to provide Welsh ministers with the power to demarcate safety zones around renewable energy installations in Welsh waters and to make provision prohibiting activities within safety zones. In addition, the Government made a number of technical amendments which included amending the consenting regime for applications for their consent to electricity generating stations in Welsh waters that do not exceed 350 MW and providing Welsh ministers with further executive responsibilities in the Welsh offshore region.<sup>72</sup>
- Government amendments “addressing several issues that have arisen during the ongoing discussion of the Bill with the Welsh Government, the Presiding Officer and the

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<sup>68</sup> [HC Hansard, 5 July 2016, cols 819–20.](#)

<sup>69</sup> [HC Hansard, 11 July 2016, cols 137–8.](#)

<sup>70</sup> [HC Hansard, 12 September 2016, cols 634–734.](#)

<sup>71</sup> [ibid, col 641.](#)

<sup>72</sup> [ibid, cols 690–1.](#)

Assembly Commission”.<sup>73</sup> These included changes to arrangements for financial controls, accounts and audit, as well as additions in the Bill of further bodies to the list of “Wales public authorities”.<sup>74</sup>

- Government amendments to address issues raised in committee which the Secretary of State for Wales had committed to return to.<sup>75</sup> These included provisions to give the Presiding Officer, rather than Welsh ministers, the power to propose varying the date of an ordinary Assembly general election by up to a month and the power to propose the date of an extraordinary Assembly general election. In addition, amendments were agreed that “if the Assembly changes its name, any Welsh language references in the statute book to the National Assembly for Wales, the Commission or act of the Assembly are changed to reflect the new name”.<sup>76</sup>

Several non-government amendments were discussed, although only one amendment on part 1, which sought to establish two distinct legal jurisdictions for England and Wales was pushed to, and defeated on, division. There were divisions on two new clauses, relating to rail franchising and air passenger duty in part 2 of the Bill; both were defeated on division.

Amongst the issues discussed, but on which no amendments were made, were:

- Devolving the community infrastructure levy.
- Devolving Welsh language broadcasting and Welsh language media.
- Devolving betting, gaming and lotteries.
- Welsh ministers’ involvement in the strategic priorities of the delivery of coastguard functions in Wales.
- Removing the necessity of gaining the consent of UK Government ministers for an act of the Assembly that would modify the functions of a reserved authority if that act related to a Welsh language function.
- Removing the need for a super-majority for any future agreement to Assembly legislation altering the specification or number of constituencies or regions, or the number of Members they return.
- Assigning a share of VAT revenues generated in Wales to the Welsh Government.
- Devolving youth justice.
- Devolving the funds generated through the apprenticeship levy to Wales.
- Keeping the devolution of policing under review.

<sup>73</sup> [HC Hansard, 12 September 2016, col 641.](#)

<sup>74</sup> [ibid, col 644.](#)

<sup>75</sup> [ibid, col 641.](#)

<sup>76</sup> [ibid, col 646.](#)

- Removing the limit on the Welsh Government’s legislative competence in the field of energy from 350MW to 2000MW.

## 5.1 Amendments Divided On

### Legal Jurisdiction

Returning to the issue, Liz Saville Roberts (Plaid Cymru MP for Dwyfor Meirionnydd) moved amendment 60 to establish two distinct legal jurisdictions of England and of Wales, arguing: “The Government’s proposed piecemeal and fragmented approach to this issue will only cause greater confusion, weaken the ability of the Welsh legal sector to operate effectively and create the need for constant “tweaking” by the Government, as we have been discussing today. Surely the Minister can see it is only logical that if he truly wants a lasting devolution settlement for the people of Wales, as I do, the Bill must recognise the need for a distinct Welsh legal jurisdiction”.<sup>77</sup> She went on to note: “It is important to say that although we are presenting a compromise, Plaid Cymru has used exactly the same words as those of the alternative Wales Bill provided by the Welsh Government. I note the official Opposition’s announcement, whereby Labour in Wales has done a U-turn on this policy”.<sup>78</sup>

For the Opposition, Paul Flynn noted: “The separation of jurisdictions has been a matter of great discussion and I will not spend too much time on it as I think we are under time pressure. We have been grateful for the authoritative comments and deliberations. We are currently disinclined to support amendment 60, although we are sympathetic towards it”.<sup>79</sup> Mark Williams, the Leader of the Welsh Liberal Democrats, also expressed concerns: “My problem with amendment 60 is that, as night turns into day, a great leap will be necessary. As Silk suggested, I think we need to consider a period of review and reflection”.<sup>80</sup>

Responding for the Government, the Secretary of State for Wales, Alun Cairns reiterated that: “The Government are fully committed to maintaining the single legal jurisdiction of England and Wales. It has served Wales very well. It is also our firm view that it is the most effective, efficient and consistent way to deliver justice”.<sup>81</sup> The amendment was defeated on division by 288 votes to 30.<sup>82</sup>

### Rail: Franchising of Passenger Services

The Welsh Government expects to take control of letting and managing the new Wales-only rail franchise from 2018, although as it currently stands the Bill does not make changes to the Welsh Government’s powers with regard to railways. Several amendments discussed during report stage related to the devolution of railway franchising powers. Commenting on these, the Secretary of State for Wales, Alun Cairns, noted:

New clause 3, tabled by the hon. Members for Newport West, Arfon, Dwyfor Meirionnydd and Carmarthen East and Dinefwr, and new clause 10 and amendment 67, tabled only by the Plaid Cymru Members, seek to probe the progress that the Government have made in implementing our commitment to devolve executive rail

<sup>77</sup> [HC Hansard, 12 September 2016, col 659.](#)

<sup>78</sup> [ibid, col 659.](#)

<sup>79</sup> [ibid, col 655.](#)

<sup>80</sup> [ibid, col 674.](#)

<sup>81</sup> [ibid, col 651.](#)

<sup>82</sup> [ibid, cols 680–2.](#)

franchising functions. New clause 3 also seeks to press the Government to make a decision on whether to enable Welsh ministers to invite public sector operators to bid for rail franchises for which they are the responsible franchising authority.<sup>83</sup>

Amendment 67 and new clause 10, moved by several Plaid Cymru MPs, sought to make the Welsh Government responsible for the Wales and Borders franchise and for the letting and managing to take effect after the expiry of the current franchise in 2018. The Government indicated that it would seek to introduce secondary legislation to this effect following negotiations.<sup>84</sup>

New clause 3, moved by both Plaid Cymru and Labour MPs, sought to remove the restriction in section 25 of the Railways Act 1993 on certain public sector bodies bidding to operate a rail franchise that is made up of or includes rail services within Wales.

For the Opposition, Paul Flynn stated that the clause would replicate the situation in Scotland and would mean that the Railways Act's prohibition on public sector operators would not apply to the franchising decisions of Welsh ministers.<sup>85</sup> Jonathan Edwards (Plaid Cymru MP for Carmarthen East and Dinefwr) argued new clause 3 "would remove restrictions in the Railways Act 1993 on certain public sector bodies bidding to operate a rail franchise in Wales. That is a long-standing Plaid Cymru policy. Many Labour Members, not least the Shadow Secretary of State for Wales, have made powerful speeches about it, and when the time comes for a division on the new clause, Plaid Cymru will support it".<sup>86</sup> Mark Williams, Leader of the Welsh Liberal Democrats, also indicated his support for the amendment.<sup>87</sup>

Responding for the Government, the Secretary of State for Wales, Alun Cairns, stressed that "considerations, debates and discussions are taking place between the Wales Office, the Welsh Government and the Department for Transport, and we are conducting detailed negotiations over the franchise arrangements". He argued: "If we accepted the new clauses and the amendment, that would set the whole franchise process back considerably. It has already been advertised, and we are anxious to press ahead as possible with the aim of reaching an agreement with the Welsh Government to fulfil the franchise obligations".<sup>88</sup> The new clause was defeated on division by 286 votes to 191.<sup>89</sup>

### **Air Passenger Duty**

New clause 6, relating to air passenger duty (APD), was tabled by Plaid Cymru MPs. The new clause would have made air passenger duty a devolved tax in Wales.

Speaking in support of the new clause, Jonathan Edwards (Plaid Cymru) stressed that APD was already devolved in Northern Ireland and Scotland and its devolution to Wales had been recommended by the Silk Commission. He argued:

On second reading of the Bill, the Minister said it was right and proper for Wales not to have the same rights regarding APD as the other devolved nations, and he has

<sup>83</sup> [HC Hansard, 12 September 2016, cols 647–8.](#)

<sup>84</sup> [ibid, col 671.](#)

<sup>85</sup> [ibid, col 655.](#)

<sup>86</sup> [ibid, col 672.](#)

<sup>87</sup> [ibid, col 674.](#)

<sup>88</sup> [ibid, col 648.](#)

<sup>89</sup> [ibid, cols 711–13.](#)

reiterated that this evening. Why would the Wales Office seek to deny Wales the same powers as Scotland and Northern Ireland? Why would it deny our only international airport in Wales the potential to use those fiscal levers to expand and develop, and why would it deny the ability of the Welsh economy to grow? [...] With the prospect of Wales being dragged out of the biggest and most successful trading bloc in the world, now, more than ever, it is important that we connect Wales to the world, and clearly devolving APD to Wales would enable the Welsh Government to do that more effectively.<sup>90</sup>

For the Opposition, Paul Flynn indicated his support for the new clause, as did the former Shadow Secretary of State for Wales, Nia Griffith, who highlighted arguments that control of APD could be used to increase business and tourist visitors to Wales and subsequent economic activity.

Responding for the Government, Guto Bebb stated “we have considered the case and options for devolving air passenger duty to the Assembly, informed by a consideration of the impact on nearby English airports”. He argued that the close proximity of Cardiff and Bristol airports meant “If Welsh APD rates were lowered, it would cause significant and unjustifiable disadvantages for Bristol airport, probably leading to a large decrease of passenger numbers”, stating “we cannot justify the distortion it would cause to the wider economy of Wales and to the economy of the South-West of England”.<sup>91</sup> He rejected the argument that the power should be devolved as it has been in Scotland and Northern Ireland, noting: “What is right for Scotland or Northern Ireland is not necessarily right for Wales, as the asymmetric devolution settlements first put in place by Labour clearly demonstrate”.<sup>92</sup> The new clause was defeated on division by 281 votes to 195.<sup>93</sup>

## 6. House of Commons Third Reading

Opening the third reading debate, the Secretary of State for Wales, Alun Cairns, paid tribute to his predecessors as Secretary of State for Wales for developing the Bill. He also thanked the First Minister and the Presiding Officer in the Assembly for their constructive engagement in the development of the Bill, as well as Welsh Affairs Committee and the Welsh Assembly Constitutional and Legislative Affairs Committee for their role in scrutinising the draft Bill, stating:

I am sure hon. Members will recognise that the Bill has come a long way from the one that was published in draft form just over a year ago. The list of reservations is shorter and more succinct, with a clearer rationale for the inclusion of each. Importantly, the Assembly will be able to create offences to enforce its legislation [...] the powers in the Bill together usher in a new era of devolution to Wales: one which draws a line under the constant squabbles over where powers lie; one in which it is clear who should be held to account for the decisions on public services that people use every day; and one in which the Welsh Government are truly accountable to the people of Wales. A manifesto commitment has been delivered that will lead to a stable devolution within a strong United Kingdom.<sup>94</sup>

<sup>90</sup> [HC Hansard, 12 September 2016, col 701.](#)

<sup>91</sup> [ibid, cols 692–3.](#)

<sup>92</sup> [ibid, co 692.](#)

<sup>93</sup> [ibid, cols 715–17.](#)

<sup>94</sup> [ibid, cols 727–8.](#)

Paul Flynn, Shadow Secretary of State for Wales, welcomed the Bill, but felt that the Bill did not go far enough, arguing that the Welsh Government should have at least the powers of Scotland. He regretted “that is not possible because there is a drag anchor coming from the Conservative party. I wish they would pull their anchor up and let the good ship Welsh Assembly sail free into clear water”.<sup>95</sup>

Mark Williams, Leader of the Welsh Liberal Democrats, welcomed the Bill as “a step in the right direction”. Noting the Bill was “a far sight better than what we had previously”, he congratulated the Government for listening to many of the concerns raised. He noted the issue of a separate or distinct legal jurisdiction, stating “the current system will sooner or later require substantial reform to cope with the growing divergence of English and Welsh law. There is an inevitability about that; the Government need to be mindful of it”.<sup>96</sup>

Hywel Williams, Westminster Leader of Plaid Cymru, stated that the Bill was “unsatisfactory”, arguing that the Bill “will most definitely be revised, and possibly much sooner than in four or five years”.<sup>97</sup>

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<sup>95</sup> [HC Hansard, 12 September 2016, col 728.](#)

<sup>96</sup> [ibid, col 728.](#)

<sup>97</sup> [ibid, col 732.](#)

## Appendix I: Scrutiny of the Bill in the National Assembly for Wales

Summary by Alys Thomas, National Assembly for Wales Research Service

### Scrutiny in the Assembly

The day after the Wales Bill was published the First Minister, Carwyn Jones AM, made a statement in the Plenary session of the National Assembly for Wales. He gave the Bill “a cautious welcome”:

I have to say, Llywydd, that the new Bill is far from perfect, and there are many important details still to work out, but it’s better than the previous draft. It has benefited from discussion with Welsh Government officials, and those discussions are continuing.<sup>98</sup>

However, he expressed regret at the UK Government’s resistance to the idea of a distinct jurisdiction:

At the same time, however, in extending the Assembly’s competence into new areas of law, the Bill will bring even more sharply into focus the tension within the single jurisdiction that was evident in the original draft. In our supplementary pre-legislative scrutiny evidence, we argued for a distinct jurisdiction as a solution to this tension, and we published an alternative draft Bill, which provided a more sustainable, longer-term solution. The revised Bill makes crystal clear that, over time, the divergence of the law applying in Wales and the law applying in England will continue to grow, to the point where a distinct or separate Welsh jurisdiction is inevitable. I’ll continue to argue that this issue must be addressed in this Bill if it is to be at all credible as a long-term settlement for Wales.<sup>99</sup>

Plaid Cymru also triggered a debate on the Wales Bill in Plenary 15 June 2016.<sup>100</sup> The motion said:

To propose that the National Assembly for Wales:

1. Notes the publication of the Wales Bill;
2. Regrets the omission of the devolution of policing;
3. Regrets the failure to establish a distinct or separate legal jurisdiction; and
4. Regrets the lost opportunity to devolve the administration of justice.

The motion was passed unamended by the Assembly by 39 votes in favour to 16 against.

### Scrutiny in Committee

The Assembly’s Constitutional and Legislative Affairs Committee (CLA) took [evidence](#) on the Bill in June and July 2016.<sup>101</sup> It heard from the First Minister, the Llywydd (the Presiding Officer) and other legal and constitutional experts. The Committee’s report is expected soon.

<sup>98</sup> [National Assembly for Wales, Record of Proceedings, 8 June 2016](#), accessed 22 September 2016.

<sup>99</sup> *ibid.*

<sup>100</sup> [National Assembly for Wales, Record of Proceedings, 15 June 2016](#), accessed 22 September 2016.

Key issues emerging from scrutiny are discussed below.

## Number of Reservations

In a letter to the Secretary of State for Wales, dated 9 June, the First Minister stated with regard to reservations in the Bill:

[...] Some of these have been removed and others redefined, but there are still too many (for example, on Community Infrastructure Levy, Teachers Pay and Conditions), and others are still expressed far too broadly (for example, those in relation to Compulsory Purchase, and Buildings). You need to press Whitehall Departments to focus on the issues that really do need to be dealt with on an England-and-Wales or UK level; this requires a laser-like focus rather than a blunderbuss. And I continue to be very concerned about the reservations around alcohol licensing and sale and supply of alcohol; these are major Public Health issues for us, and the Assembly ought to be able to deal with them.<sup>102</sup>

Much of the evidence heard by CLA agreed that aspects of the Bill had improved on the draft Bill but the number of reservations did not show a significant reduction. Emeritus Professor of Law, Professor Thomas Glyn Watkin, pointed out that the number of reservations had been reduced from those in the draft Bill “but in a way that ensures that there is no greater space to legislate”. He said:

I think the best example of this, perhaps, is section G, where there were five sections, but now there is just one, but those sections were, ‘G1 Architects’, ‘G2 Health Professions’, ‘G3 Auditors’; you now only have G1, and G1 is ‘Architects, auditors, health professionals’. They’re all included under the same heading. So, you haven’t enhanced your powers.<sup>103</sup>

David Hughes, a barrister, gave the example of the inclusion of knives in schedule 7A: “So, a hypothetical cutlery act from you would be impossible. Could you legislate for the sale of forks and spoons? Well, forks and spoons might arguably relate to knives”.<sup>104</sup>

On the issue of space to legislate, Professor Watkin said he thought that “the greater the area of reservation, the greater that problem will be” because Welsh lawmakers are going to “bump up against that boundary” and they would need to make changes to the law on reserved matters in order to get devolved legislation through.<sup>105</sup> Professor Richard Rawlings, Professor of Public Law at UCL, concurred. Looking back at criticisms of the draft Bill and the issue of occupation of legislative space he said the feeling was “that Westminster was not being

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<sup>101</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Wales Bill Inquiry webpage](#), accessed 22 September 2016.

<sup>102</sup> [Letter from Rt. Hon. Carwyn Jones AM, First Minister of Wales to Rt. Hon. Alun Cairns MP, Secretary of State for Wales, 9 June 2016](#), accessed 22 September 2016.

<sup>103</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 22 June 2016](#), accessed 22 September 2016.

<sup>104</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 30 June 2016](#), accessed 22 September 2016.

<sup>105</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 22 June 2016](#), accessed 22 September 2016.

sufficiently generous to Wales in terms of reservations and I think my view would be that there are marginal improvements there with an emphasis on the word ‘marginal’”.<sup>106</sup>

The Welsh Government’s senior constitutional adviser, Hugh Rawlings, raised the drafting of schedule 1, which will become schedule 7A. He said that referring to “the subject-matter of” other pieces of legislation as the way of expressing the reservation was deeply unhelpful. He drew attention to reservation 139, which is the reservation about employment and industrial relations. It states that they are reserved; that is then said to include a list of legislation (a) to (q), but it only includes that list. “So, there will, perhaps, be others that should be included in the list and, of course, the list will become out of date and so on”.<sup>107</sup>

### Underlying Principles of Reservations

In evidence to CLA, several witnesses pointed to the lack of principles underpinning the inclusion of some reservations. David Hughes said that while the Bill is meant to provide a reserved-powers model it does not do that in the proper sense of the term. He said:

A reserved-powers model would feature the words, ‘The National Assembly for Wales has the power, subject to the provisions of this Act, to make laws for the peace, order and good governance of Wales.’ That is a standard form of wording that has been used in overseas territory constitutions; it’s one that the Privy Council has said confers a plenary legislative power.<sup>108</sup>

Professor Rawlings expressed doubts that a proper review of the reservations had been undertaken by the UK Government. The UK Government’s response to the House of Commons Welsh Affairs Committee report on the draft Bill states “the Explanatory Notes that accompany the Bill provide a clear rationale for each reservation included in the list”. Professor Rawlings said:

The Explanatory Notes are classic explanatory notes. They say what the provision says; they do not tell you why the provision says what the provision says. So, one is forced to conclude that either that statement is deliberately misleading, or that the author of that response to the Welsh Affairs Committee had never actually seen the explanatory memorandum accompanying the Bill.<sup>109</sup>

### “Relates to” Test

The Wales Bill turns the current conferred powers settlement into a “reserved powers” model. In a reserved powers model the Assembly can pass legislation provided it does not relate to a reserved matter (ie a matter which is reserved to the UK Parliament). Therefore, the list of reserved matters is important; the longer the list of reservations, the more things the Assembly will not be able to do.

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<sup>106</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 30 June 2016](#), accessed 22 September 2016.

<sup>107</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 4 July 2016](#), accessed 22 September 2016.

<sup>108</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 30 June 2016](#), accessed 22 September 2016.

<sup>109</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 30 June 2016](#), accessed 22 September 2016.

Witnesses to CLA explained how the number of reservations and retaining the “relates to” test would constrain the Assembly’s legislative competence. Professor Watkin explained that in the Bill, the question is: whether the provision of an Assembly Bill, using the same test, “Does it relate to—?”, is now in relation to something that is reserved. He explained that under the new Bill, the law on employment will be reserved, but agriculture will not appear on the face of the legislation. As a result of that, asking the question: “Does this relate to employment?” The conclusion will be ‘yes’. Therefore, competence is lost.<sup>110</sup>

David Hughes said if the Bill is passed as it is “‘relate’ is a bad thing”. He added “Parliament will have chosen the same word and the courts will be receptive to the argument that it is therefore intended to mean the same thing. So, the same broad meaning, which is good at the moment, because it brings things into competence, will be bad because it’ll take them out of competence”.<sup>111</sup>

## Roll Back of Assembly Powers?

For the reasons above that emerged in evidence to the CLA and during parliamentary scrutiny there is the possibility of a “roll back” of the Assembly’s powers. Asked about this when he appeared before the CLA, the First Minister said that there are some areas that still are areas of concern and the Welsh Government was examining the Bill to identify these.<sup>112</sup>

The Assembly’s Legal Service and Research Service produced a research paper, [The Wales Bill: Reserved Matters and their Effect on the Assembly’s Legislative Competence](#) (September 2016), which explores where powers could be “rolled back”. For example, the Assembly can currently legislate about dangerous dogs or “dogs out of control” for the purposes of devolved subjects such as “animal health and welfare”, “social welfare” or “the protection and wellbeing of children”. However, the Wales Bill would reserve “dogs out of control”, taking this subject outside the Assembly’s competence.

The current settlement includes an exception for “consumer protection, including the sale and supply of goods to consumers, consumer guarantees, hire purchase, trade descriptions, advertising and price indications [...]”. These subjects are already outside the Assembly’s competence. The Wales Bill puts more subjects under this heading out of the Assembly’s reach by including a more detailed description of “consumer protection” as a reservation. For example, the “supply of services to consumers” would be outside the Assembly’s competence under the new Bill. This would cast doubt on the Assembly’s ability to legislate in order to regulate service-providers such as tattooists, as was proposed by the Public Health (Wales) Bill (introduced, but defeated, in the Fourth Assembly).

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<sup>110</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 22 June 2016](#), accessed 22 September 2016.

<sup>111</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 30 June 2016](#), accessed 22 September 2016.

<sup>112</sup> National Assembly for Wales, [Constitutional and Legislative Affairs Committee, Transcript, 4 July 2016](#), accessed 22 September 2016.

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