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Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 – Senedd

Meeting date:
9 November 2015

Meeting time:
13.30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

For further information please contact:
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Agenda

Private Pre-meeting 13.15 – 13.30

Concurrent meeting with the Welsh Affairs Select Committee of the House of Commons

1 Introduction, apologies, substitutions and declarations of interest

2 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Pages 1 – 2)

CLA(4)-27-15 – Paper 1 – Statutory Instruments with clear reports

Negative Resolution Instruments

CLA595 –The Care Planning, Placement and Case Review (Wales) Regulations 2015
Negative procedure; Date made: 21 October 2015; Date laid: 23 October 2015; Coming into force date: 6 April 2016

CLA596 –The Visits to Children in Detention (Wales) Regulations 2015
Negative procedure; Date made: 21 October 2015; Date laid: 23 October 2015; Coming into force date: 6 April 2016

CLA597 – Care Leavers (Wales) Regulations 2015
Negative procedure; Date made: 21 October 2015; Date laid: 23 October 2015; Coming into force date: 6 April 2016

CLA599 –The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Wales) Regulations 2015
Negative procedure; Date made: 20 October 2015; Date made: 26 October 2015; Coming into force date: 16 December 2015

CLA600 – The Well-being of Future Generations (Wales) Act 2015 (Registrable Interests) Regulations 2015
Negative procedure; Date made: 20 October 2015; Date laid: 2 November 2015; Coming into force date: 23 November 2015

<u>Affirmative Resolution Instruments</u>

CLA594 –The Partnership Arrangements (Wales) Regulations 2015
Affirmative procedure: Date made: Not stated: Date laid: Not stated; Coming into force in accordance with regulation 1(2)

CLA598 – The Children (Secure Accommodation) (Wales) Regulations 2015
Affirmative procedure: Date made: Not states; Date laid: Not stated; Coming into force date: 6 April 2016

3 Paper to note (Pages 3 - 4)

CLA(4)-27-15 – Paper 2 –Letter from Leighton Andrews AM, Minister for Public Services, 30 October 2015

4 Evidence in relation to the Draft Wales Bill (Pages 5 - 51)

(Indicative time 13.35 – 14.30)

Professor Thomas Glyn Watkin
Emyr Lewis, Partner and Regional Senior Partner, Blake Morgan

CLA(4)-27-15 – Paper 3 – Written Evidence
CLA(4)-27-15 – Paper 4 – Written Evidence
CLA(4)-27-15 – Research Service Briefing
CLA(4)-27-15 – Legal Advice Note

5 Evidence in relation to the Draft Wales Bill

(Indicative time 14.30 – 15.30)

Professor Richard Wyn Jones, Wales Governance Centre
Professor Roger Scully, Wales Governance Centre

National Assembly for Wales

Agenda Item 2

Constitutional and Legislative Affairs Committee

Statutory Instruments with Clear Reports

9 November 2015

CLA594 - The Partnership Arrangements (Wales) Regulations 2015

Procedure: Affirmative

Sections 166 to 169 of the Social Services and Well-being Act 2014 make provision for partnership arrangements between local authorities and Local Health Boards. These Regulations set out the requirements for each Local Health Board and the local authorities within the area of each Local Health Board to participate in partnership arrangements for the delivery of specified health and social services functions. The Regulations also make provision, amongst other things, for the operation and management of the partnership arrangements, the establishment of regional partnership boards and the establishment and maintenance of pooled funds.

CLA595 - The Care Planning, Placement and Case Review (Wales) Regulations 2015

Procedure: Negative

These Regulations make provision about care planning for children who are looked after by a local authority, whether or not they are in the care of the local authority by virtue of a care order. They also deal with care planning and placement decisions and the review of a looked after child's case, including:-

– arrangements for looking after a child

– placements – general provisions

– provision for different types of placement:

- placement of a child with parents
- placement with local authority foster parents
- other arrangements

– visits by the responsible local authority's representative etc.

– reviews of the child's case

– arrangements made by the responsible local authority for ceasing to look after a child

– independent reviewing officers and independent visitors; and

– application of the Regulations with modifications to children who are on remand or who are detained

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– the provision of short breaks for looked after children.

CLA596 - The Visits to Children in Detention (Wales) Regulations 2015

Procedure: Negative

Section 97 of the Social Services and Well-being (Wales) Act 2014 imposes a duty on a local authority to ensure visits to, and contact with, looked after children and other children.

These Regulations make provision about visiting children who, having been convicted of an offence by a court:

– are detained in youth detention accommodation or in prison, or

– are required to live in approved accommodation

and are not entitled to ongoing care and support under the Care Leavers (Wales) Regulations 2015, (or equivalent English legislation) for looked after children, care leavers, or visits for former looked after children in detention

CLA597 - The Care Leavers (Wales) Regulations 2015

Procedure: Negative

The purpose of these Regulations is to ensure that care leavers are given the same level of care and support that their peers would expect from a reasonable parent and that they are provided with the opportunities and chance needed to help them move successfully in to adulthood.

The Regulations make provision about the support to be provided to certain young persons who are no longer looked after by a local authority, including category 2, 3 and 4 young persons. The Regulations provides that an additional category of young person, a category 2 young person, which includes a child aged 16 or 17 and who was detained or admitted to hospital and who was previously looked after by a local authority for 13 weeks, is subject to the same access to suitable accommodation as other category 2 young persons.

CLA598 - The Children (Secure Accommodation) (Wales) regulations 2015

Procedure: Affirmative

These Regulations impose requirements in relation to the placement of children in secure accommodation.

They establish a framework for placing looked after children in secure accommodation, putting safeguards in place to ensure that such placements are made in the best interests of the child, and that there are suitable checks and balances to ensure that no child is placed in such accommodation without due process.

CLA599 - The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Wales) Regulations 2015

Procedure: Negative

These Regulations revoke and replace, with some changes, the Town and County Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997, in relation to Wales.

These regulations also prescribe classes of appeal under the Town and Country Planning Act 1990, the Planning (Listed Building and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 which are determined by persons appointed by the Welsh Ministers, instead of by the Welsh Ministers.

CLA600 - The Well-being of Future Generations (Wales) Act 2015 (Registrable Interests) Regulations 2015

Procedure: Negative

Paragraph 13(1) of Schedule 2 to the Well-being of Future Generations (Wales) Act 2015 ("the Act") makes provision that the Future Generations Commissioner for Wales ("the Commissioner") must create and maintain a register containing all of the registrable interests of the Commissioner and the Deputy Future Generations Commissioner for Wales ("the Deputy Commissioner").

Paragraph 13(2)(a) of Schedule 2 to the Act provides the Welsh Ministers with the power, by regulations, to specify what interests are registrable interests for the purposes of paragraphs 13, 14 and 15 of Schedule 2 to the Act.

The Welsh Ministers make these Regulations in reliance upon the power provided by paragraph 13(2)(a) of Schedule 2 to the Act. Regulation 2 introduces the Schedule to the Regulations which specifies the registrable interests of the Commissioner and Deputy Commissioner.

Leighton Andrews AC / AM
Y Gweinidog Gwasanaethau Cyhoeddus
Minister for Public Services

Llywodraeth Cymru
Welsh Government

Our ref/Ein cyf: MA-(L)-LA-0064-15

David Melding AM
Chair, Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

30 October 2015

Dear David,

In my letter to you of 5 March, I undertook to provide information to the Constitutional and Legislative Affairs Committee by 31 October in relation to subordinate legislation regarding local taxation which is dependent on the 2015 Autumn Statement.

As you may know, the Chancellor is due to announce the conclusions of the 2015 Spending Review on 25 November.

Currently, the only piece of dependent subordinate legislation I am planning to bring forward in relation to local taxation is the Council Tax Reduction Schemes (Prescribed Requirements and Default Scheme) (Wales) (Amendment) Regulations 2016 ("the 2016 Regulations"). These Regulations will uprate the figures used to calculate eligibility for a reduction to reflect the cost of living changes applied to the calculations for welfare benefits, and related systems across the UK.

There are also a number of complex technical amendments which will need to be incorporated within the 2016 Regulations to ensure the Council Tax Reduction Schemes remain fit for purpose and reflect the changes made to interrelated social security benefits. Some of these amendments relate to measures announced in the UK Government's July budget and the relevant legislation is still being considered by Parliament. Whilst my officials are in discussions with their counterparts in the relevant UK departments regarding these amendments, there is still scope for significant changes to be made during the Parliamentary process. As a result, it will not be possible to provide a reliable draft of the 2016 Regulations to the Committee by 21 November.

Nevertheless, I anticipate it should be possible to lay the 2016 Regulations by 1 December, and taking into account Christmas Recess, a plenary debate has been arranged in accordance with Standing Orders for 19 January 2016. This leaves sufficient time to ensure Local Authorities are able to incorporate the uprated figures and technical amendments into their adopted reduction schemes by 31 January (which is a statutory requirement). As the plenary debate has been scheduled to comply with Standing Orders, I hope this will not present any significant difficulties for the Committee.

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In the previous two years, the Welsh Government has sought assistance from the Committee to introduce a cap on the annual increase in the Non-Domestic Rating (NDR) Multiplier. Due to the current levels of inflation, it seems unlikely that the Chancellor will announce a decision to cap the Non-Domestic Rates Multiplier in England for 2016-17. At this stage therefore, I do not anticipate having to bring forward regulations to cap the Multiplier for Wales.

However as I set out in my previous letter, we cannot rule out the possibility of the Chancellor making policy announcements to which the Welsh Government may need to respond with subordinate legislation within tight timescales. Not to do so may have significant consequences for the Welsh economy. My officials have effective working relationships with the Treasury and the Department of Communities and Local Government. However, the Welsh Government does not have control over whether it receives notice of possible UK Government policy proposals in a timely manner. There has been no indication as yet from UK Government officials as to whether the Chancellor's announcement will include any policy proposals which may necessitate additional subordinate legislation to be made in respect of Wales.

The late announcement of the outcome of the Spending Review also means the Draft Welsh Budget and Provisional Local Government Settlement will be published considerably later than usual. Whilst this presents significant timing challenges for the Welsh Government, the Assembly and Local Government in most respects, the consequent delay to the debate on the Local Government Settlement may, paradoxically, alleviate some of the time pressures on the Committee if additional legislation is required.

If the need for such legislation arises and necessitates a departure from the normal scrutiny procedures of the National Assembly which requires the assistance of the Committee, I will write to you as a matter of urgency. If so, I will provide an outline of the proposed legislation and an indication of the possible timescales and constraints. I will also write if the position in respect of the 2016 Regulations changes.

Yours sincerely,

Leighton Andrews AC / AM
Y Gweinidog Gwasanaethau Cyhoeddus
Minister for Public Services

INQUIRY INTO THE DRAFT WALES BILL

Evidence submitted to the Constitutional and Legal Affairs Committee of the National Assembly for Wales

Thomas Glyn Watkin[1]

The Permanence of the Assembly and the Implications for the UK Constitution

1. Clause 1 of the Draft Bill inserts a new subsection (1A) into the Government of Wales Act 2006 to provide that: "An Assembly for Wales is recognised as a permanent part of the United Kingdom's constitutional arrangements".

2. It is significant that the clause speaks in terms of the *recognition* of this permanence. It is common for constitutional enactments in other states to recognize certain rights and freedoms as pertaining to individuals or to groups, ranging in size from the family to national or linguistic communities existing within the state. The use of *recognition* reflects the state's understanding that such rights or freedoms are not given by the state, but rather that they exist prior to the state and that it is the state's duty to uphold and protect them.

3. The clause does not recognize *the* National Assembly for Wales as being permanent, but "An Assembly". It is not a particular institution that is being recognized as permanent but the permanent need for an institution of that kind, namely a body with primary law-making powers, elected by the people of Wales and accountable to them. The clause recognizes that the people of Wales are entitled to such an institution. It reflects also that the people of Wales have chosen to have that kind of institution in the referendum on moving to the Assembly Act provisions in 2011. That referendum, unusually for referenda in the United Kingdom, decided in itself that the Assembly Act provisions were to come into force.

4. The question posed to the people of Wales at that referendum is pertinent to the proposals in the draft bill. They were asked whether the Assembly should "be able to make laws on all the matters in the 20 subject areas it has powers for", and told that a Yes vote would allow the Assembly to do that "without needing the UK Parliament's agreement". Having answered that question in the affirmative, one can say that the people of Wales are therefore entitled to an Assembly of that nature, with *at least* the powers then taken to make laws. While Parliament may, as a sovereign legislature, retain the power to reverse that situation, by enacting clause 1 it will recognize that it would be an abuse of its power to do so.

5. There is something ironic in this. Parliament is seeking to make a constitutional statement which it is entirely proper should be made. Yet, by virtue of its legal sovereignty it is in law incapable of making it. The fact that it can 'make or unmake any law whatever' means that it cannot make this kind of law. This illustrates the nonsensical position into

[1] Professor Thomas Glyn Watkin, now retired, is an honorary professor at both Bangor and Cardiff Law Schools. Prior to his retirement, he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998). He is a Fellow of the Learned Society of Wales.

which the governance arrangements of the United Kingdom have been moved by not accepting and acting upon the consequences of the constitutional changes wrought by devolution. The implications of devolution for the governance arrangements of the UK as a whole need to be addressed.

The Proposed Reserved-Powers Model

6. The model of devolution chosen in the referendum is one which requires an Assembly with power to legislate without needing Westminster's agreement. It differs therefore from the legislative powers given to the Church of England, the Measures of which may 'relate to any matter concerning the Church of England'. While the power is broad, such Measures to 'have the force and effect of an Act of Parliament' must be approved by resolution of both Houses of Parliament before they can be submitted for royal assent. To obviate the need for such approval, the breadth of the devolved legislative power requires definition.

7. At the referendum, the people of Wales voted in favour of the Assembly having power 'to make laws on all the matters in the 20 subject areas it has powers for'. The intention of moving from that conferred-powers model of devolution to a reserved-powers model is to give the Assembly the power to make laws on all matters other than those reserved to the UK Parliament. The change should not affect the nature of the settlement with regard to the Assembly being free from the need to have its legislation approved by the UK Parliament and should not affect its power to make laws on all the matters in the 20 subject areas it had powers for, as decided by the people of Wales in the 2011 referendum.

What are those powers?

8. Under the Assembly Act provisions, the Assembly can make laws within its legislative competence. To be within competence, a provision must relate to one or more of the subjects set out under the headings in Part One of Schedule 7 to the 2006 Act, and the provision must not fall within an exception. The Supreme Court has determined that it was Parliament's intention that the subjects should be interpreted as 'objects of legislative activity', and that it was immaterial that a provision might be characterized as relating to an unlisted subject provided that it did relate to one of those listed. That being what Parliament intended, that is what the people of Wales must be taken to have voted for in 2011. In relation to those subjects in that sense, the Assembly may also enact provisions to enforce provisions within its subject-matter competence or which are otherwise appropriate for making such provisions effective, as well as provisions which are otherwise incidental to, or consequential on, such provisions. In total, these might be characterized as the things about which the Assembly may legislate.

9. When legislating in relation to those things, the Assembly may not enact provisions which are incompatible with European Union law or the Convention rights protected by the Human Rights Act 1998. Further, the Assembly's powers are restricted by the General Restrictions set out in Part 2 of Schedule 7, to be read as subject to the exceptions to those restrictions contained in Part 3 of the Schedule. These include the restrictions on conferring and imposing functions on Ministers of the Crown without consent, and on removing or modifying their pre-commencement functions without consent, unless the provision doing so is incidental to, or consequential on, a provision which is otherwise within competence. Altogether, these limits might be characterized as things which the Assembly may not do even when legislating about the things for which it has power to legislate.

10. In addition to being limited by its legislative competence, the provisions of a bill passed by the Assembly are also vulnerable to being prevented from being enacted by means of the Secretary of State's power of intervention. This power enables the Secretary of State to prevent an Assembly bill from becoming law even when all of its provisions are entirely within competence. The power is exercisable when the Secretary of State has reasonable grounds to believe that a bill or any of its provisions would have an adverse effect on a matter which is not devolved, would have a serious adverse impact on water supply, water resources or water quality in England, would have an adverse effect on the operation of the law as it applies in England, or be incompatible with the UK's international obligations or the interests of national security or defence. Unlike questions regarding legislative competence, the use of this power would be an exercise of judgement, and that judgement could be overruled by either House of Parliament. The power could be characterized as stopping the Assembly from doing what is within its powers to do. Arguably, the existence of this power contradicts what the people of Wales decided the Assembly should have, namely the power to legislate without the agreement of the UK Parliament, for ultimately – if the Secretary of State exercises his power – it is the UK Parliament which will decide whether the provisions become law. There is no doubt however that Parliament intended that this should be the case if the people of Wales voted affirmatively to move to the Assembly Act provisions.

11. In the case of both the discretion of Ministers of the Crown to consent to the conferral, imposition, modification or removal of their functions and the discretion of the Secretary of State to intervene, the UK government has the power to agree or disagree with what the Assembly wishes to use its legislative powers to achieve.

12. There is no legal restriction however on the Assembly's powers to make changes to the law of England and Wales provided the provisions in question are within its competence. The move to the Assembly Act provisions triggered by the referendum ended the restriction which existed under the previous settlement regarding the creation of some criminal offences. In voting to move to the Assembly Act provisions, therefore, the people of Wales must be taken to have intended that such a restriction should end. As there never was a restriction on making changes to private law, the people of Wales voted for a settlement free of such restrictions. What they did vote for was a settlement in which the Secretary of State might intervene when he had reasonable grounds to believe that provisions "would have an adverse impact on the law as it applies in England". Whether there is such an impact so as to justify intervention is a matter for ministerial and parliamentary judgement. It does not affect the Assembly's legislative competence. It does however affect the ability of the Assembly to legislate without the agreement of the UK government.

Is the proposed model clear, coherent and workable and will it provide a durable framework?

13. The Foreword to the draft bill speaks of the UK government's determination "to ensure the people of Wales have a clear and lasting devolution settlement", and describes the draft bill's objective as being "to create a stronger, clearer and fairer devolution settlement for Wales which will stand the test of time", and provide "greater accountability to the Welsh people". The Explanatory Notes also state that the bill "will create a clearer and stronger settlement in Wales which is durable and long-lasting", and claims that "The reserved powers model set out in the bill will provide a clearer separation of powers between what is devolved

and what is reserved, enabling the Assembly to legislate on any subject except those specifically reserved to the UK Parliament".

14. As described above, the complexity of the current settlement is in part the result of competence not being entirely dependent upon subject matter. Even where the Assembly is permitted to legislate in relation to a particular subject, there are still things it may not do (the General Restrictions) and even when legislating about subjects within its competence and not offending the general restrictions, it is possible for it to be prevented from legislating through executive action (the power of intervention). To assess the clarity and coherence of the settlement therefore requires that the clarity and coherence not only of the reserved matters but also of any restrictions and powers of intervention be examined. Whether the settlement proves durable will depend on whether clarity, coherence and fairness are achieved.

15. It is also important to ask to whom the settlement needs to be clear. While it is obviously necessary that it needs to be clear to those involved in the process of legislating – the Assembly members, the Welsh Government and the UK government – it is also important that it should be clear to the people of Wales so that they know what they are electing AMs to do and for what the Welsh Government is accountable to them. Citizens also have an interest in clarity so that they are able to exercise their right to challenge legislative provisions which affect them personally if the provisions have strayed beyond competence. The professionals advising citizens again need clarity if they are to provide effective services in this regard. This would include not only the legal professions but other bodies giving advice to citizens. At a time when legal aid is becoming more scarce, the significance of this latter category and of citizens seeking to inform themselves of how the law affects them deserves careful consideration.

16. The reserved matters are set out in the bill in a proposed new Schedule 7A to the 2006 Act. There are over 200 reserved matters, some of which are classified as being general (Part 1) while others are specific (Part 2). The specific reservations are grouped into 110 Sections, themselves set out under 13 Heads. Within the Sections, there are also exceptions and interpretation provisions which apply to the matters within the Section concerned but not more generally. The matters vary greatly in terms of their breadth as 'objects of legislative activity', for example, from 'Family law' to 'Distribution of money from dormant bank and building society accounts'. Some are surprising – 'Knives'; others fly in the face of the history of separate law-making for Wales – 'Sunday trading'. 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'. One of the problems which has beset devolution in Wales is the cumulative manner in which first executive powers and later subordinate and then primary law-making powers were acquired. This has been the enemy of both coherence and therefore clarity with regard to what is devolved or not devolved. The manner in which the proposed reservations are presented continues rather than cures that problem. In its July 2015 report *The UK Government's Proposals for Further Devolution to Wal*es, the Assembly's Constitutional and Legislative Affairs Committee recommended that "in drafting the new Wales Act, the UK Government uses the principle of subsidiarity as the starting point". The report concluded that if this recommendation in particular were followed, 'a durable devolution settlement which is simple, clear and workable' might well be the result. It is difficult to discern the recommended approach in the proposals.

Does the proposed new framework change the breadth of the Assembly's competence to make laws?

17. It is also demonstrably the case that the proposed reservations remove competence from the Assembly. School-teachers' pay and conditions are not excepted from the subject-matter competence of the Assembly at the present time, and provisions concerning them could 'fairly and realistically' be said to relate to Education as 'an object of legislative activity'. This reservation appears to be aimed at regaining ground which it was discovered, following the judgment of the Supreme Court, had been yielded under the existing settlement. This is also clear from the fact that 'The subject-matter of the Agricultural Sector (Wales) Act 2014' forms an exception to the reserved matter 154 in Section H1 Employment and industrial relations.

18. The exception of the Agricultural Sector (Wales) Act from the Employment and Industrial Relations reservation raises a further issue concerning the reduction of competence. The Attorney-General argued before the Supreme Court in the reference on that bill that it did not relate to Agriculture but to employment and industrial relations. The Supreme Court held unanimously that the bill related to Agriculture as 'an object of legislative activity' and that it was therefore irrelevant that it might also be characterized as relating to a subject which was not mentioned as an exception. The inclusion of the subject-matter of that Assembly Act as an exception to the employment reservation confirms that, without the exception, the H1 reservation would prevent the Assembly legislating in a similar manner. There can be no doubt therefore that in other such areas where the Assembly now has competence, the H1 reservation will confiscate it. It is no argument to say that those preparing the 2006 Act may not have intended such breadth of competence. It has been authoritatively determined by the Supreme Court that the breadth was intended by Parliament. Accordingly, such breadth was what the voters of Wales agreed the Assembly was to have when they answered the question posed by the 2011 referendum affirmatively.

The Proposed Tests for Determining Competence

19. This 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.

20. To avoid the loss of competence which results from the application of the 'relates to' test to such a large number of reservations, a different test would need to be employed. Given that the 'relates to' test in that used in the Scottish devolution settlement and that some of the proposed reserved matters would be common with that settlement, to adopt a different test regarding those matters would risk giving the Welsh Assembly greater powers than the Scottish Parliament. Given that the proposed new Schedule 7A already divides the reserved matters into General and Specific, there should be little difficulty in further grouping the reserved matters into those to which the 'relates to' test would apply and those to which a

different test would apply, which did not threaten to invade the competence already given. This might for instance be based on the distinction between 'relates to' and 'falls within' currently used in Schedule 7 to the 2006 Act. As it stands, whenever an exception under the present settlement is converted into a reserved matter, competence is lost. There are numerous such conversions.

21. The effect of the 'relates to' test is not the only example of competence being reduced under the proposals. Again, this occurs in an area where the UK government failed to prevent an Assembly bill from becoming law by arguing in the Supreme Court that its provisions exceeded its competence. The case was the reference by the Attorney-General of the *Local Government Byelaws (Wales) Bill*, and the issue was whether consent was needed for the removal of a function of a Minister of the Crown or whether the removal was incidental to, or consequential on, the bill's other provisions. The Supreme Court held that consent was not necessary.

General Restrictions and Discretion

22. Under the General Restrictions set out in the proposed new Schedule 7B, consent would always be required for the conferral, imposition, modification or removal of Minister of the Crown functions. It would be immaterial that the removal or modification was not of a pre-commencement function or that it was incidental or consequential. In both instances, this is a loss of competence. The proposal reflects what has already been enacted regarding HMRC functions and the need for Treasury consent under the Wales Act 2014. It is indeed the case that the change increases clarity – consent is simply always needed. However, the greater clarity is obtained at the expense of competence, and the result is a reduction in the Assembly's powers to make laws on all the matters in the 20 subject areas it currently has powers for, without needing the agreement if not of the UK Parliament then of the UK government. 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.

23. It is also pertinent to ask to whom UK ministers are accountable for the exercise of this discretion. In that their decisions affect the people of Wales, is it sufficient that they are accountable to the UK Parliament? Does that not resurrect the democratic deficit regarding decision making by the Secretary of State which the Assembly was created to overcome, albeit that it returns in the form of a veto? The danger is that the veto might be exercised on the grounds of policy or political difference, and therefore be in direct conflict to the objectives of devolution. Where the Secretary of State exercises his powers of intervention, he is required to give reasons for so doing. It may be thought appropriate that Ministers of the Crown generally should be required to give reasons for withholding consent regarding the conferral, imposition, modification or removal of functions, and that they should be accountable to the Assembly or one of its committees for their decisions on these matters.

Modification of Private Law and Criminal Law

24. General restrictions are also introduced by the proposed new Schedule 7B regarding the making of modifications of the private law and the criminal law. As the move to the

Assembly Act provisions in 2011 involved the lifting of restrictions on competence with regard to the criminal law, the introduction of this restriction appears to deliberately ignore the express decision of the people of Wales regarding their Assembly's legislative powers. Likewise, the Assembly Act provisions imposed no restrictions on modification of the private law.

25. The term private law has no fixed doctrinal meaning in the law of England and Wales. In many legal systems, law is regarded as being either private or public, with the distinction being based upon whether or not both parties to a legal relationship are private persons as opposed to one or both being a public body or person performing public functions. The proposed Schedule defines private law as meaning 'the law of contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession'. These again are not doctrinally defined legal categories in the law of England and Wales, unlike countries with codified laws where the categories would correspond with distinct parts of and identifiable provisions in, for instance, a civil code.

26. It is not clear where this will leave some subjects which are currently within competence but are not mentioned under the proposed reserved-powers model, for example nuisances. Nuisance is a tort. The Assembly currently has powers to legislate free from the kind of restriction proposed, in relation to nuisances. That general competence will be lost.

27. According to the private/public law dichotomy, criminal law is part of public law. In effect, therefore, the only part of the law of England and Wales which the Assembly will be able to modify without restriction will be that part of public law which is not criminal law. Its legislative competence will be very restricted.

28. 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.

29. The draft bill accepts that Assembly Acts are a form of primary legislation. The making of such legislation involves scrutiny and debate by the democratically-elected representatives of the people affected by it with the opportunity to propose amendments. This is precisely because their legal relationships – their freedoms, rights and duties – may be affected by the outcome. The proposals seek to restrict the relationships which may be affected to those they have with public bodies or which relate to public functions. No such restriction exists at present.

30. It is proposed that the Assembly have competence to make modifications to private law where it is necessary for a devolved purpose or ancillary to a provision which has a devolved purpose, *and* is limited to modifications which have no greater effect on the general application of the private law than is necessary to give effect to that purpose. The same concession is made with regard to modifying the criminal law, other than it is implicitly

denied that modification of the criminal law can be necessary for a devolved purpose as opposed to being ancillary to a provision which has a devolved purpose.

31. This begs the question of who is to decide whether a modification to private law is necessary for a devolved purpose, and more generally whether proposed modifications to private or criminal law have no greater effect than is necessary to give effect to a provision's purpose. In that this is a statutory test concerning the powers of the Assembly, it would appear that it would be for the courts to determine these issues. The effect on policy development and the choice of means for giving effect to policies will probably be dire, as the risk of exceeding competence is likely in practice to further restrict the choices made regarding the enforcement or implementation of provisions. The purpose of the legislative process for making primary legislation is to allow the democratically-elected representatives of the people to decide what is necessary to achieve their aims. To restrict their choice undermines their rôle as primary law-makers.

32. This also raises the question as to whether the courts are to respect choices of this sort made by the Assembly. It is relevant that this issue divided the Supreme Court in the reference on the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*. While the majority of the justices were prepared to give weight to the legislature's views, they did not endorse the minority's view that great weight should be given to it. If Assembly legislation is to be open to challenge before and after enactment on the grounds that its provisions go further than necessary to give effect to the purpose, very considerable uncertainty will be the result or else a certainty obtained at the price of ensuring a very timid approach to modifying private and criminal law. It may be worth considering whether challenges to competence on the grounds of modifications having been made which have a greater effect on the general application of the private or criminal law than is necessary to give effect to the purpose of a provision should themselves be restricted to pre-enactment challenges by the law officers. That would serve to terminate the uncertainty at that time, but it would not alleviate the likely tendency towards timidity in preparing policy.

Divergence and the 'Unified Legal System'

33. The Explanatory Notes provide the rationale for these restrictions. They state that the restrictions 'are intended to provide a general level of protection for the unified legal system of England and Wales', and to ensure 'protection for the broad principles of private law of England and Wales'.

34. The 'unified legal system of England and Wales' is the creation of statute in the 1870s, and has subsequently been substantially modified on several occasions. It was designed to serve the law district of England and Wales as it then existed. The jurisdictions of the three common law courts of Queen's Bench, Common Pleas and Exchequer, that of the Court of Chancery those of the recently created Probate Court and Divorce Court, as well as that of the Admiralty were all transferred to the new High Court and Court of Appeal, which statute created. Separate courts for Wales, the Great Sessions, had previously been abolished (1830), and the new County Courts since created (1846). There was only one legislature, and local government in its modern sense was in its infancy.

35. It is highly unlikely that the structures created to administer justice according to the unified law of England and Wales would be replicated in the same fashion today when there are three bodies of law existing in England and Wales: one which applies in both countries;

one which applies for England only, and one which applies only in relation to Wales. For the people of Wales to have chosen to have a primary law-making body which the UK Parliament recognizes as a permanent part of the UK's constitutional arrangements only for that body's work to be restricted so as to protect a unified legal system which was not designed to deal with the current arrangements is fundamentally misplaced. Structures for the administration of justice should keep pace with developments within the society which they serve. This does not mean that the administration of justice in Wales needs to be entirely separate from that in England, but it does mean that as the law is no longer completely unified, the legal system which administers it needs to develop so as to reflect that new reality not restrict it.

36. If protection for the unified legal system for the broad principles of private law of England and Wales require restrictions upon the Assembly when making laws which apply only in Wales, this begs the question of how that protection will be furnished when legislation which applies only to England is made by the UK Parliament. Will it too be restricted to making only such modifications as do not have a greater effect on the general application of the private law or the criminal law than is necessary to give effect to the purpose in view? The answer will undoubtedly be that the UK Parliament is a sovereign legislature and that its law-making cannot be so restricted. However, the answer is not a solution to the problem but an integral part of it. Does the UK Parliament even intend to impose a self-denying convention of similar import upon itself when legislating for England only? If the UK Parliament legislates for England only in a manner which causes the private law or the criminal law to diverge between the two nations, that will in effect extend the competence of the Assembly in this regard. It is interesting to ask, but not to explore here, how the system chosen to address the issue of 'English Votes for English Laws' would operate in this scenario.

37. It is also worth remarking here on the fact that Parliament has on at least three occasions in recent decades approved of the Church of England legislating by Ecclesiastical Measure so as to change the law in England regarding the solemnization of marriages, which law had previously been the law of England and Wales. The consequence on two of these occasions was that the disestablished Church in Wales had to introduce private bills into Parliament to bring the law applicable in Wales back into alignment with that in England. The issue has been the subject of an inquiry by the Assembly's Constitutional and Legislative Affairs Committee. Yet, it does not appear to be intended that the law relating to the solemnization of marriages should be devolved, as Family law is a reserved matter, and is normally taken to include the law relating to the solemnization of marriage, at least in textbooks on the subject. Whether Family Law as an 'object of legislative activity' includes the law on the solemnization of marriages is another question, the answer to which would appear to be – unsatisfactorily – uncertain.

38. The import of the restrictions regarding the making of modifications to private and criminal law also sends out the wrong message to the legal professions and the law schools of England and Wales. It says that the Assembly is not meant to make laws which affect too greatly the general application of the law of England and Wales as it applies in both countries. It entrenches the view that the law as it applies in Wales is an appendix only to the law which applies generally, and need be seen only as a body of exceptions to that general law. The areas concerned are those which are the foundation or core subjects of the legal curriculum – contract, tort, property, trusts and criminal law, to which must be added constitutional law (the subject of the general reservations in Part 1 of Schedule 7A) and

European Union law which the Assembly cannot contravene. In other words, the Assembly should not choose to use it powers to affect the *status quo* unless it is necessary to do so. That is hardly allowing it to 'make any provision that could be made by an Act of Parliament' as it would have been understood by those who voted for the Assembly Act provisions, and is certainly short of what the UK Parliament can do when legislating for England only.

39. It would also appear that the imposition of these restrictions upon the legislative competence of the Assembly does not affect the continuing existence of the Secretary of State's power to intervene to prevent an Assembly bill being forwarded for Royal Assent on the grounds of reasonably believing that its provisions may have an adverse effect on the operation of the law as it applies in England. This also begs the question, in the wake of 'English Votes for English Laws', what mechanism will exist to protect modifications to the law in England having an adverse effect on the operation of the law as it applies in Wales This is hardly a 'fairer devolution settlement'.

The UK Parliament legislating on devolved matters

Much the same might be said about the proposed insertion by clause 2 of the bill of a new subsection (6) into section 107 of the 2006 Act. This *recognizes* that the UK Parliament "will not normally legislate with regard to devolved matters without the consent of the Assembly". The key word is, of course, *normally*, although one can readily concede that there will be extraordinary circumstances, such as national emergencies, where the norm would not apply.

40. However, the key question is what can be done to ensure that the principle is adhered to in circumstances which are 'normal'. What, for instance, is to be done if the UK Parliament chooses to legislate upon an issue which it states relates to a reserved matter but the Assembly or the Welsh Government disagrees. When, for instance, under the current settlement a similar situation arose regarding the abolition of the Agricultural Wages Board, the Assembly had to pass emergency legislation which had then to be challenged before the Supreme Court before the issue could be resolved. Some quicker mechanism than having to pass challengeable primary legislation to repeal the UK provisions is needed. It might be desirable to allow the Welsh Ministers or the First Minister a power to lay a statutory instrument before the Assembly disapplying disputed provisions in Wales, which if approved by the Assembly (possibly with the requirement of an absolute and/or weighted majority) could then be challenged far more quickly to resolve the issue of competence. Provided the power to disapply was a statutory power, it could be interpreted as being compatible with UK parliamentary sovereignty.

41. Clause 30 of the draft bill gives the Secretary of State a 'Henry VIII power' to amend, repeal, revoke or otherwise modify enactments contained in primary legislation, including Assembly Acts and Measures. The exercise of that power requires approval of the draft statutory instrument containing it by both Houses of Parliament. While that seems entirely satisfactory with regard to the power being exercised to alter Acts of Parliament, it is questionable whether it is sufficient with regard to Assembly legislation. Should not a draft instrument altering the law which applies only in Wales and made by the Assembly be approved by the Assembly as well as, or instead of, by Parliament?

Powers available in specific subject areas

42. To comment on the manner in which specific reservations would impact on law-making and policy development requires a detailed knowledge of law and practice in the relevant devolved areas and experience with regard to how policy initiatives, particularly future initiatives, might be affected by the reservations. Not having that familiarity with the areas, I do not intend to comment on this issue, other than to make a few comments on areas in which I do have some experience or interest, and in which I fear difficulties may occur.

Welsh Language

43. Although the 'purpose and effect' test may resolve the issue of whether a provision actually relates to a reserved matter, it strikes me that there is a risk of uncertainty regarding whether the Assembly's current competence to enact provisions in relation to Welsh language could be affected by reservations 6 (Tribunals), 30 (Travel documents), 47 (Criminal records), 59 (Provision of advice and assistance overseas by local authorities), 61 (Charities), 62 (Raising funds for charities, etc.), 70(f) (Regulation of price indications), 82 (Internet services), 84 (Postal services, post offices, etc.), 123 (Railway services), 133 (airports), 140 (b) & (d) (keeping records and supplying information in connection with social security schemes), 173 (Broadcasting and other media) and 174 (the BBC). 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.

Conclusion

44. Inevitably, this paper focuses on what I believe are areas of concern regarding the proposals. There is much else which is in my view welcome. These include the powers given to the Assembly over its composition and elections to it. The proposed use of weighted, absolute majorities for 'constitutional' changes is, in my view, desirable. It is also good to see that the power given to restate the law allows the Assembly to restate the law on reserved matters, which would allow it to produce consolidated texts of legislation including all the relevant legislation on a particular subject.

45. Regrettably, however, overall, I cannot accept that these proposals will provide the Assembly, the Welsh Government or the people of Wales with a clearer settlement, nor do I believe that the approach to defining the reserved matters is coherent. For both of these reasons, it is difficult to believe that the settlement proposed will be durable. If it is stronger, then the strength is that employed to strait-jacket the exercise of the Assembly's law-making powers, and the difference which this creates between the Assembly's ability to legislate for Wales on matters which are devolved and the corresponding ability of the UK Parliament to legislate for England only on those subjects prevents the settlement being fair. The various losses of competence which the proposals entail also make them unfair to the people of Wales who chose that their Assembly should have **all** of the powers it now enjoys.

Thomas Glyn Watkin
2 November 2015

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INQUIRY INTO THE DRAFT WALES BILL

Observations submitted to the Joint Meeting of the Constitutional and Legal Affairs Committee of the National Assembly for Wales and the Welsh Affairs Committee of the House of Commons

Emyr Lewis[1]

I largely agree with Professor Thomas Watkin's paper, so what follows is just to expand on two issues (one practical and one technical) which may be in danger of getting lost.

1 The New Restrictions and the Courts

My first issue relates to the likely practical impact in the courts of new restrictions on the Assembly's legislative competence, especially in relation to private and criminal law.

The main concerns expressed so far have been about further references by the Attorney General or Counsel General to the Supreme Court prior to a Bill becoming law, similar to those we have already seen since the 2011 referendum.

My concern is broader. It 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 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 subject-matter 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 be asked to 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. If these constraints were removed,

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that would not mean carte blanche, of course. The Assembly would still be constrained by its subject matter competence, and by overarching constraints relating to EU and the Convention rights.

The second concern relates to the impact on the administration of justice. If passed, the new restrictions are likely in my view to bring about a substantial increase in litigation. In the criminal sphere in particular (but also in the civil sphere where the interests of sufficiently resourced parties are concerned), it may be possible to derail, lengthen and delay processes by raising arguments that the Assembly legislation being considered is outside competence, because it does not pass the tests in Schedule 7B(3) or 7B(4). The effect on criminal prosecutions in particular could be similar to the impact of the Human Rights Act, but not so benign in its consequences.

2 Jurisdiction and the England and Wales paradox

The Second issue is that of a jurisdiction. I attach an article which I published about this in Click on Wales (the IWA website) in 2013. My thinking has moved on a bit since then and become clearer, but it sets out the core of my views.

By now I think 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 (see the passage on jurisdiction in the Wales Governance Centre and Constitution Unit's paper *Delivering a Reserved Powers Model of Devolution For Wales* pp24-27, which can be found here: http://sites.cardiff.ac.uk/wgc/files/2015/09/Devolution-Report-ENG-V4.pdf).

CLICK ON WALES ARTICLE Feb 27th 2013

http://www.clickonwales.org/2013/02/wales-continues-raggedy-devolution-path/

An interesting, if not entirely unexpected, feature of the Welsh Government's evidence to the Silk Commission published last week is that it puts the case for a so-called "reserved powers" model of law-making powers for the Assembly, but shies away from calling for a distinct Welsh legal jurisdiction.

Some commentators have raised the question of whether it is possible to have the one without the other. Indeed, in the run-up to passing the Government of Wales Act 2006, in a joint Memorandum to the Welsh Affairs Committee, Rhodri Morgan and Peter Hain explained that a "conferred powers" as opposed to a "reserved powers" model of legislative devolution is appropriate to Wales because England and Wales is (and implicitly should remain) a single jurisdiction.

The link between separate laws and a separate jurisdiction is made explicit in that Memorandum in the following passage:

If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

The problem with this analysis is that basic principles of law and rules of general application are not immune from being changed within the conferred powers model. Indeed, adopting the arguments applied here: http://www.clickonwales.org/2012/10/the-assemblys-legislative-limbo-land/ , they may be susceptible to more radical treatment in certain contexts under the conferred powers model. The law in England has diverged, and will continue to diverge, from that in Wales, as much by the UK Parliament legislating differently for England as by the Welsh Assembly legislating differently for Wales.

Jurisdiction means different things to different people. For many academics, the distinguishing features of a separate jurisdiction are a distinct body of laws, a distinct territory and a distinct system of courts and legal institutions. Wales already has the first two, and in many respects has the third, so how come we can't say that Wales doesn't already have a distinct jurisdiction?

The reason is rather obvious, if we use the word "jurisdiction" in the practical sense in which it is used in the UK constitutional arrangements, i.e. a system of courts which has exclusive power to determine cases arising within a particular territory. So there are 3 UK Jurisdictions - Scotland, Northern Ireland and "England and Wales". Each has its own judges and court system. Such a system of courts with exclusive powers to determine cases on a territorial basis (and having no, or only limited, reach outside their territory) cannot "emerge" from nowhere. It needs to be recognised and accepted in law. In the context of Wales, that would mean an Act of Parliament creating such a system, and delineating its powers and institutions, in much the same way as was done for Northern Ireland in the early years of the last century.

It seems that the Welsh Government's line is that it is not yet the right time to put such a system in place, but this should not hold back the reserved powers model (although, since the Welsh Government does not envisage a reserved powers model from being in place for eight years, things might change).

So how would Wales cope with a reserved powers model but no separate jurisdiction? One imagines that it would do so, at least to begin with, pretty much as it has done under the present arrangements. The Government of Wales Act 2006 squares the circle by providing that while Assembly Acts can relate only to Wales, they can extend only to England and Wales. This rather opaque formulation means (among other things) that Assembly Acts can be enforced in England. As a result courts in England can hear cases which involve questions of Welsh law only. So if (for instance) the Assembly legislated to ban the smacking of children (ie remove the defence of reasonable chastisement), a parent being tried in Nottingham on a charge of assaulting his or her child while on holiday in Aberystwyth would not be able to raise the defence of reasonable chastisement, even though he could do so if the incident had occurred in Nottingham. It is of course unlikely that Nottingham magistrates would end up hearing the case described above. Most likely it would be heard in Aberystwyth. Nevertheless, it is totally conceivable that other types of cases arising from Wales and involving questions of Welsh law would be heard in England.

That anomalous situation existed before the 2011 referendum, exists now and would still exist after a reserved powers model were put in place, unless something were done.

One answer (my preference) would be to establish by Act of Parliament a distinct jurisdiction for Wales, putting Wales on the same footing as Scotland and Northern Ireland. However that is not the only solution. Another proposal would be to remove the "extend to England and Wales" wording for the purposes of which courts can hear which cases, and give the courts in Wales exclusive power to determine Welsh cases at first instance without necessarily formally creating a distinct jurisdiction. This is (on a broader scale) much like how things used to be when only local courts had the power to hear cases relating to their territory (from Pontlotyn Magistrates in recent times to the Court of Great Sessions, abolished in 1830 which for almost 300 years had exclusive power to hear certain cases in Wales). In other words, the England and Wales system of courts can have (and has had) some courts within it which are the only ones allowed to hear certain types of cases, geographically defined. So the England and Wales jurisdiction would remain, in formal terms.

Even if this were not done, however, it seems probable that such a system would develop informally over time, building on the foundations of legal practice which already exist. After a few years, this might become a true distinct legal jurisdiction (through statute), much as the Assembly itself evolved from de facto separation of powers within a single body to true separation of powers. It's the raggedy way things happen for Wales. If so, we must hope that it happens on the basis of rational planning, rather than ad hoc reaction to changing circumstances.

By virtue of paragraph(s) vi of Standing Order 17.42

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