

Bethan Jenkins AM  
Chair, Culture, Welsh Language and Communications  
Committee

18 July 2016

Dear Bethan

### **Wales Bill**

We are currently scrutinising the Wales Bill as it goes through the UK Parliament. Its Committee stage was completed on 11 July in the House of Commons, and we envisage Report Stage and Third Reading will be in September, before the Bill progresses to the House of Lords.

We have already taken evidence from a range of academics and legal experts, as well as the First Minister and y Llywydd. We have invited the Secretary of State for Wales to give evidence but he has, so far, declined the invitation.

We held an excellent stakeholder event to discuss the Bill in Siambr Hywel earlier this month, which brought together stakeholders from the legal profession, academia and devolved policy areas. Building on this event, we have launched an online engagement forum to continue the discussion with stakeholders as the Bill progresses.

Our predecessor Committee was able to draw on the excellent work undertaken by your predecessor Committee when considering the draft Bill. The work of the Committees was incredibly helpful, especially in considering the policy impact of the specific reservations within their remits and the ability to make coherent, joined-up laws. I enclose a copy of the correspondence for your reference.

We would therefore welcome any views you have on the Wales Bill, particularly in respect of the impact of the reservations on your remits and whether the pre-



legislative scrutiny has changed the position outlined in your predecessor Committee's letters.

Our Committee is hoping to influence the House of Lords' scrutiny of the Bill, as well as informing the Assembly's debate when the Legislative Consent Motion is tabled. While we do not have a set timeframe for our deliberations, if you do wish to respond, it would be helpful to us, if we had this information in the first few weeks of the autumn term.

Yours sincerely

*Huw Irranca-Davies*

Huw Irranca-Davies

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



David Melding AM  
Chair, Constitutional and Legislative Affairs  
Committee

18 November 2015

Dear David

**Draft Wales Bill: implications of the proposed reserved powers model on the Assembly's legislative competence**

At its meetings on 4 and 12 November, the Communities, Equality and Local Government Committee ('the Committee') met to consider the draft Wales Bill ('the draft Bill'), in particular the implications of the draft Bill for the Assembly's legislative competence in areas relevant to our remit. The Committee agreed that I should write to you to outline our views on these issues.

While the current 'conferred powers' model has enabled the Assembly to pass laws in a range of key policy areas, this process has not been without its difficulties. The lack of clarity and the complexity inherent within the conferred powers model has been demonstrated most notably by the referral of three Assembly Acts to the Supreme Court in as many years.

To this end, the Committee supports a move to a reserved powers model that delivers a more coherent and workable devolution settlement. However, we had expected such a model to be a development of the current settlement; one which, at the very least, reflects the will of the Welsh electorate in the 2011 referendum to enable the Assembly to legislate on all matters in the 20 subject areas it has powers for, without needing the UK Parliament's agreement. We are deeply disappointed that the proposed model fails to meet these expectations. Indeed, it



appears that the draft Bill does little more than apply the conferred powers approach to a reserved powers model.

In addition, while we understand the rationale for the continuation of certain reservations, such as the constitution of the United Kingdom, foreign affairs and defence, it is not clear to most of the Committee why other matters, in particular policing, should not be within the Assembly's competence as recommended by the Silk Commission. It is even more surprising that matters of general social policy such as entertainment and late night refreshment, the sale and supply of alcohol, and knives are to be reserved.

Related to the above, we believe it is difficult to ignore the question of legal jurisdiction. The historical context of the "England and Wales" jurisdiction is not, in and of itself, a sufficient justification for the continuation of a single jurisdiction. We are concerned that, without a distinct legal jurisdiction for Wales, a reserved powers model would be extremely difficult to operate in practice.

We note the Secretary of State for Wales's intention for the draft Bill to give effect to the St David's Day commitments "to create a stronger, clearer and fairer devolution settlement that will stand the test of time". While the draft Bill provides an opportunity for the UK Government to deliver on these commitments, we believe that, as currently drafted, it fails to do this.

In reporting on Assembly Bills within our remit, we have referred to the need for legislation passed by this place to be both clear and accessible. These criteria should apply to all legislation, regardless of its origin. This is particularly relevant in the case of the draft Bill, which seeks to address difficulties resulting from the conferred powers model and to make lasting changes to Wales' devolution settlement. We believe that the draft Bill fails to meet these basic criteria, and that the proposed model, as currently drafted, would be more complex than existing arrangements, thus leaving the Assembly more vulnerable to challenge when exercising its new powers.

There is clearly a divergence of opinion between the UK and Welsh Governments about the draft Bill's proposals and how the new settlement would be interpreted, and we are aware of the on-going exchanges between the Secretary of State for Wales, the First Minister and the Presiding Officer on these matters.



In the context of the above, there is increasing uncertainty about what the eventual devolution settlement will look like. We are particularly concerned about the potential impact on the ability of political parties in Wales to develop manifestos ahead of the 2016 Assembly election. It may be difficult for the parties to commit to policies that require legislation to be delivered, because of a potential reduction in the Assembly's competence.

### **Legislative competence and the new competence tests**

We note that the draft Bill proposes a number of tests of competence to be applied to Assembly Bills. Whilst some of these are the same as current tests (for example, compatibility with the European Convention on Human Rights and with EU law), others are new and do not appear to flow inevitably from a reserved powers model. These include four new "necessity" tests which would seem to constrain the Assembly more than at present; something that concerns us greatly.

Looking back at the legislation within the Committee's remit that has been passed by, or is currently proceeding through, the Assembly<sup>1</sup>, if we were to apply the competence tests in the draft Wales Bill to these pieces of legislation, there appear to be a number of examples where there would either have been doubts about the competence of the Assembly to legislate, or where it would have been clear that the Assembly was not able to legislate. These points are expanded in the narrative below and in Annexe A.

### **Reservations**

We have conducted an analysis of the reservations set out in the draft Bill with particular relevance to the areas in our remit. Our detailed findings are included in Annexe A, including a brief assessment of whether competence in these areas is likely to be reduced, increased, or left unchanged.

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<sup>1</sup> During the fourth Assembly, the Committee has considered and reported on 9 Bills: National Assembly for Wales (Official Languages) Act 2012; Local Government Byelaws (Wales) Act 2012; Local Government Democracy (Wales) Act 2013; Mobile Homes (Wales) Act 2013; Housing (Wales) Act 2014; Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015; Local Government (Wales) Bill; Renting Homes (Wales) Bill; Historic Environment (Wales) Bill.



Our analysis has shown that, in certain areas, the Assembly's competence is likely to be extended, for example in relation to specific aspects of local government elections in Wales. Overall, however, in the areas within the Committee's portfolio, the effect of the proposed reservations will mean a likely reduction in the Assembly's competence; something that we oppose strongly. There are also a number of areas where the effect of the reservation on competence would be unclear. We do not consider this to be a satisfactory position.

### **Restrictions on modifying private law**

In addition to examining the reservations proposed in the Bill, we have also considered some of the other competence tests, specifically the restriction on modifying the private law (Test 5, Annexe B).

We understand that this proposed restriction would mean a significant reduction in the Assembly's competence, as the test does not exist under the current settlement and would lead to problems in terms of clarity and workability of the settlement. The wording of the restriction is such that there is likely to be uncertainty about the breadth of the Assembly's competence, which we believe could increase the likelihood of referral of Bills to the Supreme Court. As an example, the Mobile Homes (Wales) Act 2013 implies new terms into mobile home agreements. This requires a modification of the law of contract. Whether or not this would be within competence under the new settlement is unclear and would depend on the application of the necessity tests. A similar point could be made in the case of virtually the whole of the Renting Homes (Wales) Bill.

### **Restriction on modifying criminal law and civil penalties**

We also considered the competence test relating to modifying criminal law and civil penalties (Test 6, Annexe B). Under the current conferred powers model, subject to certain conditions, the Assembly can create criminal offences and change the defences available or penalties applicable. Our analysis of the proposed restriction on modifying criminal law and civil penalties is that it would only permit the Assembly to make the minimum possible changes in these areas to effect its legislative intention and that the courts would be able to review the Assembly's choice in this regard.

We note that a significant number of Bills that we have considered during the course of this Assembly have relied upon the creation of criminal offences and



introduced penalties as a means of ensuring compliance with duties imposed, or prohibitions introduced. For example, the Housing (Wales) Act 2014 contains a series of enforcement provisions, including an offence of appointing an unlicensed agent and the use of fixed penalty notices.

In addition, there are provisions within the Historic Environment (Wales) Bill that seek to limit the current ‘defence of ignorance’ for charges of damage to historic monuments.

Given the wording of the proposed reservation, it is reasonable to suggest that there would have been scope for some of the above changes to criminal law and civil penalties to be subject to challenge. While this, in itself is undesirable, of greater concern to us is that the proposed restriction could potentially lead to the passing of ‘toothless’ and largely ineffectual laws in Wales.

### **Reserved authorities and Minister of the Crown functions**

Having considered the proposed competence test relating to reserved authorities and Minister of the Crown functions, we are concerned that it is significantly wider than the current test, and that the likely effect of this will be to greatly increase the number of instances in which the Assembly needs the consent of the UK Government to legislate.

By way of illustration, the Welsh Language (Wales) Measure 2011 enables the Welsh Ministers to prescribe standards that certain public bodies must meet in relation to Welsh language provision. However, if the proposed settlement came into force, the Assembly would not be able to amend the Measure so as to affect reserved authorities in new ways not already contained within the scope of the current Measure, unless Minister of the Crown consent was given. Nor would the Assembly be able to pass a new Act imposing new Welsh–language duties on reserved authorities without that consent.

There are several other examples of legislation within the Committee’s remit where consent would have been needed if the proposed test were to be applied:

- The Housing (Wales) Act 2014, which requires the co–operation between local authorities (and other bodies) in England and Wales in respect of homelessness;



- The Mobile Homes (Wales) Act 2013, which creates various rights of appeal to a tribunal;
- The Renting Homes (Wales) Bill, which creates numerous rights to refer matters to the county court, the high court or the Residential Property Tribunal;
- The Historic Environment (Wales) Bill, which creates a right of appeal against an enforcement notice to a magistrates' court.

It is fair to say that the legislative competence order ('LCO') process in place prior to the move to Part 4 of the Government of Wales Act 2006 was particularly onerous and meant delays in the introduction of legislative proposals that were supported in principle by all political parties in Wales. While we do not wish to comment on the principle of consent, we consider the proposed competence test relating to reserved authorities and Minister of the Crown functions would be a retrograde step. We have some concerns about the possible lack of efficiency of the consent process, particularly given our experience of LCOs. The need for increased intergovernmental communications in negotiating consents is likely to lead to greater delays being built into the process. This is particularly pertinent given the potential increase in the number of Bills requiring consent as a result of the proposed changes to the competence test. There is, of course, no guarantee that consent will be given in all cases.

To help inform our consideration of the draft Bill, we wrote to the Welsh Language Commissioner and Public Service Ombudsman for Wales ('PSOW') seeking their views on the impact of the Bill on the areas in which they have statutory responsibilities. In the PSOW's response, he refers to "ambiguity" and "uncertainty" about whether the Office and functions of the PSOW will remain within the Assembly's competence under the new settlement. The concerns expressed by the PSOW further illustrate that the proposed model fails to provide sufficient clarity, even on matters such as these, which should be straightforward. A copy of the PSOW's letter is attached at Annexe C.

The Committee welcomes this opportunity to contribute to your work and trust that you will find our views useful. We look forward to the publication of your report.



I am copying this letter to the First Minister, the Presiding Officer and the Secretary of State for Wales.

Yours sincerely,

*Chris Chapman*

**Christine Chapman AC / AM**

Cadeirydd / Chair



## Annexe A: Reservations related to the Communities, Equality and Local Government Committee's remit

### Local Government elections in Wales

*(Section B1, reservations 20 – 26)*

1. The current settlement confers competence on the Assembly as regards 'electoral arrangements' for local government. This wording has not been tested in the courts, but it has been taken to encompass the voting system (e.g. first past the post, single transferable vote, etc) as well as the conduct of elections, matters such as boundaries and the number of councillors elected for each ward (this list is not exhaustive). There is a specific exception excluding competence for the 'franchise' – i.e. who is allowed to vote.
2. Under the draft Bill, almost all aspects of local government elections would be within the Assembly's competence. Most notably, the franchise for local elections would clearly come within the Assembly's competence, as it is not reserved. This would represent an **increase** in the Assembly's competence.
3. There are reservations from this increased competence, however. The Assembly would not have competence to do the following:
  - Change the position concerning the combination of devolved and non-devolved elections, including the proposed new powers of the Welsh Ministers in this regard (reservations 20 and 21); ("devolved elections" here means Assembly and Welsh local government elections, while "non-devolved" elections means UK Parliamentary and European elections, elections of Police and Crime Commissioners and any other elections or referendums that would be outside the Assembly's competence such as, obviously, Scottish Parliamentary elections);
  - Change the limits on election campaign expenditure for non-devolved elections (reservation 25);
  - Change the limits on election campaign expenditure where local elections are combined with non-devolved elections (reservation 24);
  - Change the registration and financial rules that apply to political parties (reservation 26).



4. As well as the increase in the Assembly's competence, the Welsh Ministers would have some **increased executive powers** in relation to local government elections in Wales. They would be able to provide for the combination of certain Assembly and local government elections in Wales, though the rules on combining Assembly **ordinary** general elections and local government **ordinary** elections would not be within that power. Similarly, the Assembly would not have competence to change the timing of ordinary local government elections if they were due to coincide with an Assembly general election.

5. The Welsh Ministers would also have the power to make regulations to allow for digital registration of voters in local elections.

### **Immigration**

*Section B2, reservation 28: Immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens*

6. The homelessness duties imposed on local authorities under **Chapter 2 of Part 2 of the Housing (Wales) Act 2014** ('the 2014 Act') make special provision for those who are subject to immigration control.

7. It is **unclear** whether the proposed reservation 28 means that provisions like this, making specific provision for asylum-seekers and others subject to immigration control, could be made under the proposed new settlement. If not, the implications are uncertain. It could mean that a future Assembly Act on housing or homelessness would have to treat those individuals in the same way as British citizens. Alternatively, it could mean that an Assembly Act would simply not be law in so far as those persons were concerned – although this appears an extreme interpretation.

### **Crime, public order and policing**

*Section B5 reservation 38: Prevention, detection and investigation of crime*

8. Local authorities are responsible for the investigation of regulatory offences (crimes) in many areas, such as non-payment of council tax and environmental matters. This reservation might **reduce** the Assembly's competence to give local authorities new duties or powers of investigation.



9. This reservation would have had significant implications for the **Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015**. Most of the 26 sections of that Act are, in one way or another, aimed at reducing crime. The specific reservation of ‘prevention...of crime’ means it is likely that the whole Act **would have been outside competence** if introduced under the proposed new settlement.

### **Anti-social behaviour**

*Section B6, reservation 42: The subject matter of the Anti-social Behaviour, Crime and Policing Act 2014*

10. Currently, an exception in the Government of Wales Act 2006 (‘GOWA’) prevents the Assembly from legislating about ‘*orders to protect people from behaviour that causes or is likely to cause harassment, alarm or distress.*’

11. Reservation 42 in the draft Bill would link the subject of anti-social behaviour to a definition set out in the Anti-social Behaviour, Crime and Policing Act 2014. It would prevent the Assembly passing an Act that related to (i.e. had more than a loose or tenuous connection with):

*‘(a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,  
(b) conduct capable of causing nuisance or annoyance to a person in relation to that person’s occupation or residential premises, or  
(c) conduct capable of causing housing-related nuisance or annoyance to any person.’*

12. This is considerably wider than the current exception, which only prevents the Assembly legislating on existing ‘orders’.

13. The proposed new settlement would mean that the Assembly could not legislate in respect of anti-social behaviour in a housing context. As such, **section 55 of the Renting Homes (Wales) Bill** (which imposes obligations on contract-holders not to engage in this behaviour) would have been **outside** competence.

14. It is also likely that **section 145 of that Bill** (which permits supported housing providers to exclude occupants from their homes for up to 48 hours in cases of anti-social behaviour) would have been **outside** competence.



15. Tackling anti-social behaviour is closely linked to preventing crime. The **Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015** might, therefore, have fallen **outside** competence on the basis of this reservation, as well as on the basis of the reservation relating to the prevention of crime, if the proposed new settlement had been in force.

### **Dangerous items**

*(Section B11, reservations 48–50: The subject matter of the Firearms Act 1968 to 1997; the subject-matter of the Poisons Act 1972; knives)*

16. These reservations include knives, blades, axes, swords, poisons and firearms. There is no current exception in GOWA for the matters covered by the proposed reservations. These matters may seem remote from the Assembly's competence but the Assembly could in fact currently legislate in relation to these dangerous items, provided that the purpose of the Assembly Act related to one of the conferred subjects in GOWA, such as prevention of injury, protection of children and young adults, or education.<sup>2</sup> For instance, the Assembly could in principle legislate on dangerous items for the purpose of protecting children and young people on the streets of Welsh communities, or in schools and colleges. As a result of the Supreme Court judgment in the *Agricultural Sector (Wales) Bill* case, the Assembly could therefore legislate on those matters provided that the purpose of the legislation was genuinely directed at one of the subjects of competence.

17. The proposed reservations would, therefore, represent a **reduction** in competence.

### **Misuse or dealing in drugs and psychoactive substances**

*(Section B12, reservation 51)*

18. This reservation appears to be wider than the current exception in GOWA, which is only for "Misuse of and dealing in drugs". However, we consider that

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<sup>2</sup> This was established by the Supreme Court judgment in the case of the *Agricultural Sector (Wales) Bill*. Like employment, which was an issue in that case, dangerous items such as knives are "silent subjects" – topics which are neither subjects nor exceptions in Schedule 7 to GOWA.



these substances would, in practice, be held to fall within the existing exception. Moreover, Assembly competence to legislate about them would currently be blocked by the existence of a UK Ministerial function which, under the current settlement, could not be removed or modified without UK Government consent. Therefore, this reservation produces no real change to competence.

**Entertainment and late night refreshment, including classification of films and video recordings (including video games), and the sale and supply of alcohol**  
*(Section B14, reservations 53 and 54 and Section B15, reservation 55)*

19. An exception in GOWA currently prevents the Assembly from legislating about ‘licensing of sale and supply of alcohol, provision of entertainment and late night refreshment’.

20. The proposed reservation would apply only to ‘late night’ entertainment. It would appear that the Assembly would be able to legislate about entertainment at other times of the day and therefore this would be a slight **increase** in the Assembly’s legislative competence.

21. On the other hand, GOWA currently prevents the Assembly from legislating in respect of classification of films and video recordings, but not video games. The Assembly’s competence would be slightly **reduced** by the draft Bill, as video games would be reserved.

**Charities and fund-raising**

*Section B21, reservation 61: Charities*

22. Many registered social landlords are charities. Currently, the Assembly may impose duties on them under the heading ‘housing’. As an example, **section 95 of the Housing (Wales) Act 2014** requires registered social landlords to co-operate with local authorities in housing homeless people. It is **unclear** whether this provision would be outside competence, in so far as it affected charities, under the proposed new settlement.

**Health and safety**

*Section J6, reservation 171: Fire safety*



23. Currently, the Assembly has the competence in relation to the following subjects:

- Fire and rescue services;
- Provision of automatic fire suppression systems in newly constructed or newly converted residential premises;
- Promotion of fire safety otherwise than by prohibition or regulation.

24. Reservation 171 is simply “Fire safety”. There are specific exceptions for provision of automatic fire suppression systems in newly constructed or newly converted residential premises and for promotion of fire safety otherwise than by prohibition or regulation. However, there is no exception for “fire and rescue services”.

25. The reservation, on its own, probably does not reduce competence; that it is sufficient that “fire and rescue services” are not reserved. However, the draft Bill contains a restriction on the Assembly legislating in relation to public authorities whose functions are not wholly or mainly within competence. Given that the function of “fire safety” would be reserved, the combined effect of the reservation and the restriction **causes some uncertainty** about the Assembly’s power to legislate on the constitution, functions etc. of fire and rescue authorities.

## **Media culture and sport**

### *Reservations under Head K*

26. Competence in this area is largely **unchanged**, but there are some noteworthy points. In the current settlement, ‘Broadcasting’ is an exception. The proposed new settlement refers to ‘Broadcasting *and other media*’ (reservation 173) and ‘*The British Broadcasting Corporation*’ (reservation 174). The reservation of the BBC is likely to be for clarity only; under the current settlement, the BBC was always regarded as non-devolved. So, the only change which may be of significance is ‘other media’. It is unclear what this means, although it appears likely to encompass social media. Consequently, it is **unclear** whether this represents a reduction in the Assembly’s competence.

27. There is a further reservation (177) relating to payments made to HMRC in respect of property accepted instead of tax. This is wider than the current exception from competence: at present, the Assembly may legislate for payments



in lieu of tax in the form of property of ‘*Welsh national interest*’. Therefore, this would represent a **reduction** in competence.

### **Local land charges**

*(Section M2, reservation 198: Local land charges)*

28. Under the current settlement, local land charges are within competence, except for fees. The proposed new settlement would **reduce** the Assembly’s competence by taking away its power to legislate on local land charges **in any way**.

### **Equal opportunities**

*(Section N1, reservation 206: Equal opportunities, including the subject-matter of the Equality Act 2006 and the Equality Act 2010)*

29. The current settlement permits the Assembly to legislate on equal opportunities in relation, broadly, to public bodies in Wales which would be regarded as “devolved”.

30. This would no longer be possible under the proposed new settlement. Equal opportunities, including the subject-matter of the Equality Act 2006 and the Equality Act 2010, are reserved in the draft Bill. This would be a **reduction** in the Assembly’s competence.

31. However, the following would be within competence, by virtue of exceptions from the reservations:

*(i) Encouragement of equal opportunities;*

*(ii) Imposing duties on “Welsh public authorities” and “specified public authorities” (both these terms are defined in the Bill) to make arrangements to ensure that their functions are carried out with due regard for their legal obligations as to equal opportunity;*

*(iii) The subject-matter of Part 1 of the Equality Act 2010 (which requires public bodies to have regard to the desirability of reducing socio-economic*



*inequalities in exercising their functions). Otherwise, affecting the Equality Act would be outside competence.*

32. This competence is limited in scope. The competence to “encourage” (point (i)) falls short of a power to impose duties. Indeed “encouragement” in itself is something that does not require legislative action and therefore legislative competence is somewhat theoretical. The competence in point (ii) is merely to impose duties on public bodies as to how they carry out an existing legal duty. Point (iii) is however of more significance.

33. The definition of ‘equal opportunities’ does not include language. So, the Assembly’s competence to legislate in order to promote the Welsh language **appears to be unaffected**. However, restrictions on the Assembly’s competence may in fact reduce competence in this area, as already outlined in our letter.



## Annexe B: Proposed competence tests in the draft Wales Bill

Test 1	Must not extend beyond the England and Wales jurisdiction.
Test 2	Must not apply otherwise than in relation to Wales or confer, impose, modify or remove functions exercisable otherwise than in relation to Wales (or give the power to do so), unless the modification is ancillary to a core competence provision AND has no greater effect beyond Wales than is necessary to give effect to the purpose of the core competence provision.
Test 3	Must not “relate to” reserved matters listed in draft Schedule 7A, which will be inserted into GOWA, replacing the present Schedule 7 (Schedule 7A can be found in Schedule 1 to the Bill).
Test 4	Must not modify the law on reserved matters (or give the power to do so), unless the modification is ancillary to a core competence provision AND has no greater effect on reserved matters than is necessary to give effect to the purpose of the core competence provision.
Test 5	<p>Must not modify private law (or give the power to do so) unless the modification is necessary for a devolved purpose, or is ancillary to a core competence provision AND has no greater effect on the general application of the private law than is necessary to give effect to that devolved purpose.</p> <p>“The private law” is defined as meaning contract law, agency law, the law of bailment, tort law, the law of unjust enrichment and restitution, property law, trusts law and succession law). This is extremely wide.</p>
Test 6	Must not modify the criminal law (or civil penalties), or give the power to do so, unless the modification is ancillary to a core competence provision AND has no greater effect on the general application of the criminal law/civil penalties than is necessary to give effect to that devolved purpose, AND is not a road traffic offence.



Test 7	Must not modify a protected enactment (listed in draft Schedule 7B, including some provisions of GOWA and some other legislation).
Test 8	<p>Must not affect Minister of the Crown functions, or those of government departments or other “reserved authorities” in a range of ways without the consent of ‘the appropriate Minister’.</p> <p><b>This test is similar to an existing one but has been significantly widened, i.e. has been made more restrictive of competence, in six ways:</b></p> <p>(i) the Assembly will not be able to remove or modify any UK Ministerial functions, current or future, unless the UK Government consents; whereas at present the prohibition only applies to functions created before 5 May 2011;</p> <p>(ii) the Assembly will not be able to remove or modify such functions where to do so would be merely incidental or consequential, unless the UK Government consents; this is a new prohibition and reverses the effect of the Supreme Court judgment in the <i>Local Government Byelaws (Wales) Bill</i> case;</p> <p>(iii) the same prohibitions apply to affecting the functions of “reserved authorities” (public authorities whose functions relate wholly or mainly to reserved matters, and public authorities which have any functions beyond Wales, even if their functions relate wholly or mainly to devolved matters) – this is a new prohibition;</p> <p>(iv) the Assembly will not be able to confer or impose any function on a reserved authority without UK Government consent (currently, this prohibition applies only to giving UK Ministers new functions);</p> <p>(v) the Assembly will not be able to confer, impose, modify or remove functions specifically exercisable in relation to a reserved authority, without UK Government consent; this is a new prohibition;</p> <p>(vi) the Assembly will not be able to modify the constitution of a reserved authority without UK Government consent; this is a new prohibition.</p>
Test 9	Must not be incompatible with the Convention rights.



Test 10

Must not be incompatible with EU law.



Our ref: NB/SMH

Ask for: Nick Bennett

Your ref:



01656 641150

Date: 6 November 2015



Mrs Christine Chapman  
Chair of the Communities, Equality  
and Local Government Committee  
National Assembly for Wales  
Cardiff Bay  
CARDIFF  
CF99 1NA

Dear Mrs Chapman

### **Draft Wales Bill: Request for information**

Thank you for your letter dated 23 October 2015 seeking my views on the draft Wales Bill published a fortnight ago. It would not be appropriate for me as Ombudsman to comment on the impact of the Bill in relation to bodies within my jurisdiction; however, I do welcome the opportunity to comment on its possible impact in relation to the office of the Public Services Ombudsman for Wales (PSOW).

First and foremost, there is ambiguity as to whether under the 'reserved model' arrangements set out in the draft Wales Bill, the office of PSOW and the functions of the office of the PSOW remains within the legislative competence of the National Assembly for Wales. Clearly this is a matter of concern and, of course, a live issue with the Assembly currently considering introducing a new PSOW Act.

As members of the Communities, Equality and Local Government Committee will be aware, currently, the Assembly has the competence to legislate for a new Public Services Ombudsman (Wales) Act, pursuant to Part 4 of the Government of Wales Act 2006 ('GOWA 2006'). The relevant provisions of GOWA 2006 are set out in section 108 and Schedule 7. Paragraph 14 of Part 1 of Schedule 7 sets out the subjects on which the Assembly may legislate under the heading of 'Public administration' and this includes 'Public Services Ombudsman for Wales'.

As members of the Committee will also be aware it is intended that Schedule 7 of the GOWA 2006 be repealed. Although there is no direct reference to the PSOW within the draft Wales Bill (apart from Schedule 7B, paragraph 7(7)(b)), it is possible that the PSOW remains within the Assembly's competence through the provision at Schedule 7A, paragraph 2(1)(b), whereby the "functions exercisable by any person acting on behalf of the Crown" is not reserved. It may be that it is this that is applicable given that the PSOW is a Crown appointment.

With the above uncertainties, however, I sincerely hope that the new draft Wales Bill will not delay or affect the Assembly's ability to introduce a new PSOW Act, should this remain its wish.

With regard to the additional areas being proposed for devolution contained in the draft Wales Bill, the key consideration from the PSOW's perspective is the potential increase in complaints to the office as a consequence. It is my view that the devolved areas being proposed (that is, elements of energy and transport, and Assembly and local government elections in Wales) will not generate a significant increase in complaints. Had the area of welfare, for example, been included in the draft Wales Bill, then that would have been a different matter. However, as things stand, I cannot see that there will be a major impact on the Ombudsman's office. I have previously given the Assembly the undertaking that, in seeking financial resources for the running of my office, I would not seek more than 0.03% of the Welsh Block. On the basis of the provisions within the draft Wales Bill, I believe that I would still be able to honour that undertaking.

I hope that this response is of at least some assistance to the Committee's considerations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Bennett', with a stylized flourish at the end.

Nick Bennett  
Ombudsman