

The Rt Hon Alun Cairns MP
Secretary of State for Wales
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5 July 2016

Dear Alun

Wales Bill – Day 2 of Committee Stage - proposed amendments

Further to my letter of 30 June, I am writing to inform you of the further amendments I have published today relating to clauses in the Wales Bill to be debated on Monday 11 July.

As I set out in my letter of 21 June, I am particularly concerned that the proposed model for competence in the Bill places an absolute prohibition on the Assembly to legislate in any way that ‘relates to’ a reserved matter. My amendments suggest an alternative to this and also address other issues I have raised regarding the tests for legislative competence.

I am giving further consideration to the issue of UK Government Consents as I believe there is more work that we could do to provide more clarity and consistency with the current settlement in terms of what provisions in the Bill will still require UK Government consent.

As I did last week I have written to all Welsh MPs today and I enclose a copy of that letter, along with the detail of these amendments.

I hope we will be able to meet soon to discuss these matters and continue to work constructively together.

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Copies of this letter have been provided to the First Minister; leaders of the political groups in the Assembly and the Chair of the Constitutional and Legislative Affairs Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Elin', is positioned above the printed name.

Elin Jones AM
Llywydd

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House of Commons
LONDON
SW1A 0AA

5 July 2016

To: All Welsh Members of Parliament

Dear Colleague

Wales Bill – proposed amendments for 11 July

Further to my letter last week, I would like to advise you of the further amendments I have published today relating to clauses in the Wales Bill to be debated on Monday 11 July. As previously, I have also written to the Secretary of State and I hope that these proposals will contribute to the important debate on the future of Wales' constitutional settlement.

The amendments I have published today are focused on ensuring the legislative competence of the Assembly is clear, workable and does not roll back on the current settlement.

My biggest concern in respect of the proposed model for competence is the absolute prohibition the Bill now places for the Assembly to legislate on any way that 'relates to' a reserved matter. This will lead to some loss of competence as compared to the current settlement in the following two ways.

First, the current settlement includes an ability for the Assembly to legislate in an "ancillary" way on exceptions from competence (the equivalent to reservations under the proposed settlement). The Bill does not include that "ancillary" latitude for the Assembly.

Secondly, the Supreme Court made clear in the *Agricultural Sector (Wales) Bill* case that the Assembly can currently legislate for "dual purpose" matters – where its legislation is aimed both at matters expressly set out as within competence,

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and matters that are not mentioned at all in the Government of Wales Act – the so-called silent subjects. Again, the Bill would remove that latitude.

The key changes I am proposing aim to:

- Partly restore the Assembly's competence, by enabling it to legislate in an ancillary way in relation to reserved matters;
- Remove the necessity test in relation to the law on reserved matters and where the Assembly's legislation touches on England;
- Revise the criminal law restriction so that is in line with the restriction for private law so that the Assembly can modify criminal law where that modification is for a devolved purpose.

The attached documents contain a detailed description of the changes I am suggesting, alongside the draft amendments. The text of the draft amendments is also included as an annex.

I will continue to discuss with the Secretary of State other matters which require further consideration at later stages in the passage of the Bill such the provisions on UK Government consent.

I would be pleased to discuss any aspect with you further if you wish to contact my office.

Yours sincerely



Elin Jones AM
Llywydd

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Briefing on Presiding Officer's proposed amendments for Day 2 consideration of the Wales Bill

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Summary table of amendments

Clause	Purpose and effect of proposed amendments
Clause 3	The amendments restore the Assembly’s competence by enabling it to legislate in an ancillary way in relation to reserved matters.
Clause 51	The amendments introduce separate provisions for the amendment or repeal of Acts of Parliament, Assembly primary legislation and Assembly secondary legislation by the Secretary of State.
Schedule 1, paragraph 1	The amendment clarifies the reservation so that “the Crown Prosecution Service” is reserved, rather than “prosecutors” more generally, as this could prohibit Assembly legislation enabling devolved authorities to prosecute, such as local authorities.
Schedule 2, paragraphs 1 and 2	The amendment removes the necessity test in relation to the law on reserved matters.
Schedule 2, paragraph 4	The amendment removes the criminal law restriction and replaces it with a restriction that the Assembly cannot modify criminal law unless it is for a purpose other than a reserved purpose. This would bring it into line with the private law restriction.

Clause 3 – Legislative competence

Purpose and effect of proposed amendments

1. These amendments would restore the Assembly’s competence closer to its current level. Currently, the Assembly is able to affect, in a minor way, matters that are listed as exceptions from competence in Schedule 7 to the Government of Wales Act 2006 (GOWA) (see section 108(5) GOWA).
2. Most of these exceptions have been converted into reservations in the proposed new settlement (e.g. “consumer protection”). However, under the new settlement, the Assembly will have no competence to legislate in a way which touches on reserved matters at all.
3. The Assembly can also currently legislate in relation to “silent subjects” (topics that are not listed as either subjects of competence, nor exceptions from competence, in Schedule 7 to GOWA). The Assembly can do so only where it is also legislating on a subject that is specifically devolved by Schedule 7. Many of these silent subjects e.g. “employment rights and duties”, have been converted into reservations in the Bill. The amendment would restore the Assembly’s competence to affect these topics in a purely ancillary way. However, that ancillary competence would still be narrower than the Assembly’s present competence to legislate on “silent subjects” when that legislation also relates to expressly-devolved subjects.
4. Finally, the amendments would remove the need for the Assembly to show that any provision it passes that touches on England, is not only “ancillary”, but also “has no greater effect ... than is necessary” to give effect to its purpose. The test of necessity should be removed on grounds of clarity and workability, as it is capable of a number of different interpretations. One possible interpretation is extremely restrictive and would constitute a reduction in the Assembly’s current competence.

Text of the clause as amended

3 Legislative competence

(1) For section 108 of the Government of Wales Act 2006 (legislative competence) substitute—
“108A Legislative competence

- (1) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.
- (2) A provision is outside that competence so far as any of the following paragraphs apply—
- (a) it extends otherwise than only to England and Wales,
 - (b) it applies otherwise than in relation to Wales or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales,
 - (c) it relates to reserved matters (see Schedule 7A),
 - (d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions, or
 - (e) it is incompatible with the Convention rights or with EU law.
- (3) But subsections (2)(b) and (2)(c) do ~~does not~~ apply to a provision which ~~(a)~~ is ancillary to a provision which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly). ~~and~~
- ~~(b) has no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision.~~
- ~~(4) For this purpose, a provision of an Act of Parliament is "devolved" if it would be within the Assembly's legislative competence if it were contained in an Act of the Assembly (ignoring paragraphs 8 to 11 of Schedule 7B).~~
- ~~(5) In determining what is necessary to give effect to the purpose of that provision, any power to make laws other than that of the Assembly is to be disregarded.~~
- (6) The question whether a provision of an Act of the Assembly relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.
- (7) For the purposes of this Act a provision is "ancillary" to another provision if it—
- (a) provides for the enforcement of the other provision or is otherwise appropriate for making that provision effective, or
 - (b) is otherwise incidental to, or consequential on, that provision.
- (2) For Schedule 7 to the 2006 Act (Acts of the Assembly) substitute—
- (a) the Schedule 7A set out in Schedule 1 to this Act, and
 - (b) the Schedule 7B set out in Schedule 2 to this Act.

Text of amendments and Explanatory notes

Amendment 1

Clause 3, page 2, line 33 leave out "subsection (2)(b) does" and insert "subsections (2)(b) and (2)(c) do"

Explanatory notes

The amendment restores the Assembly's competence by enabling it to legislate in an ancillary way in relation to reserved matters.

Amendment 2

Clause 3, page 2, line 34 leave out from "provision" to end of line 6 on page 3 and insert "which is within the Assembly's legislative competence (or would be if it were included in an Act of the Assembly)."

Explanatory notes

The amendment restores the Assembly's competence by enabling it to legislate in an ancillary way in relation to reserved matters.

Clause 51 – Consequential provision

Purpose and effect of proposed amendments

5. The amendments introduce separate provisions for the amendment, repeal or revocation of Acts of Parliament, Assembly primary legislation and Assembly subordinate legislation.

6. The amendments provide that where the Secretary of State uses the power in clause 51 to make regulations that amend or repeal an Assembly Act or Assembly Measure, then the regulations must be approved by the affirmative procedure in the Assembly as well as each House of Parliament.

7. The amendments make similar provision in respect of the Secretary of State using the power in clause 51 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly (as it was between 1999 and 2006). These regulations would be subject to the negative procedure, rather than the affirmative procedure.

8. The amendments provide that the Assembly would have no role where the power in clause 51 was used to make regulations that amend or repeal an Act of Parliament or amend or revoke non-Assembly subordinate legislation.

Text of the clause as amended

51 Consequential provision

(1) Schedule 5 contains minor and consequential amendments.

(2) The Secretary of State may by regulations make such consequential provision in connection with any provision of this Act as the Secretary of State considers appropriate.

(3) Regulations under subsection (2) may amend, repeal, revoke or otherwise modify—

(a) an enactment contained in primary legislation, or

(b) an instrument made under an enactment contained in primary legislation.

(4) Regulations under subsection (2) may make—

(a) different provision for different purposes or cases;

(b) provision generally or for specific cases;

- (c) provision subject to exceptions;
- (d) provision for the delegation of functions;
- (e) transitional or saving provision.

(5) The power to make regulations under subsection (2) is exercisable by statutory instrument.

(6) A statutory instrument containing regulations under subsection (2) that includes provision amending or repealing any provision of an Act of Parliament ~~primary legislation~~ may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(6A) A statutory instrument containing regulations under subsection (2) that includes provision amending or repealing any provision of a Measure or Act of the National Assembly for Wales may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament and the Assembly.

(7) Subject to subsection (7A), any other statutory instrument containing regulations under subsection (2), if made without a draft having been approved by a resolution of each House of Parliament, is subject to annulment in pursuance of a resolution of either House of Parliament.

(7A) A statutory instrument containing regulations under subsection (2) that includes provision amending or revoking subordinate legislation made by—

(a) the Welsh Ministers, or

(b) the National Assembly for Wales as constituted by the Government of Wales Act 1998,

if made without a draft having been approved by a resolution of each House of Parliament and the Assembly, is subject to annulment in pursuance of a resolution of either House of Parliament or the Assembly.

~~(8) In this section “primary legislation” means—~~

~~(a) an Act of Parliament;~~

~~(b) a Measure or Act of the National Assembly for Wales.~~

Amendment 1

Clause 51, page 39, line 4, leave out “primary legislation” and insert “an Act of Parliament”.

Explanatory notes

The amendment introduces separate provisions for the use of the power in clause 51 in relation to an Act of Parliament.

Amendment 2

Clause 51, page 39, line 6, at end insert –

“(6A) A statutory instrument containing regulations under subsection (2) that includes provision amending or repealing any provision of a Measure or Act of the National Assembly for Wales may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament and the Assembly.”

Explanatory notes

The amendment provides that where the Secretary of State uses the power in clause 51 to make regulations that amend or repeal an Assembly Act or Assembly Measure, then the regulations must be approved by the Assembly and each House of Parliament.

Amendment 3

Clause 51, page 39, line 7, at beginning insert “Subject to subsection (7A),”

Explanatory notes

The amendment is linked to the provision that where the Secretary of State uses the power in clause 51 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly, the regulations would be subject to annulment by the Assembly and each House of Parliament.

Amendment 4

Clause 51, page 39, line 10, at end insert –

“(7A) A statutory instrument containing regulations under subsection (2) that includes provision amending or revoking subordinate legislation made by—

(a) the Welsh Ministers, or

(b) the National Assembly for Wales as constituted by the Government of Wales Act 1998,

if made without a draft having been approved by a resolution of each House of Parliament and the Assembly, is subject to annulment in pursuance of a resolution of either House of Parliament or the Assembly.”

Explanatory notes

The amendment provides that where the Secretary of State uses the power in clause 51 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly, the regulations would be subject to annulment by the Assembly and each House of Parliament.

Amendment 5

Clause 51, page 39, line 11, leave out subsection (8).

Explanatory notes

The amendment removes the definition of “primary legislation”.

Schedule 1, paragraph 1, reservation 6 – Single legal jurisdiction of England and Wales

Purpose and effect of proposed amendment

9. Reservation 6 provides that “prosecutors” are generally reserved. The amendment provides that it would just be “the Crown Prosecution Service” that is reserved. This would allow the Assembly to legislate in relation to other prosecutors, such as local authorities, Natural Resources Wales and the RSPCA (that are often specified as prosecutors). The amendment therefore clarifies an important area of the Assembly’s competence.

Text of the paragraph as amended

Single legal jurisdiction of England and Wales

6 (1) The following are reserved matters—

- (a) courts (including, in particular, their creation and jurisdiction);
- (b) judges (including, in particular, their appointment and remuneration);
- (c) civil or criminal proceedings (including, in particular, bail, costs, custody pending trial, disclosure, enforcement of orders of courts, evidence, sentencing, limitation of actions, procedure, the Crown Prosecution Service ~~prosecutors~~ and remedies);
- (d) pardons for criminal offences;
- (e) private international law;
- (f) judicial review of administrative action.

Text of amendment and Explanatory notes

Schedule 1, page 42, line 20, leave out “prosecutors” and insert “the Crown Prosecution Service”

Explanatory notes

The amendment clarifies the reservation so that “the Crown Prosecution Service” is reserved, rather than “prosecutors” more generally, as this could prohibit Assembly legislation enabling devolved authorities to prosecute, such as local authorities.

Schedule 2, paragraphs 1 and 2 – The law on reserved matters

Purpose and effect of proposed amendment

10. The amendment would remove the need for the Assembly to show that any provision it passes that affects “the law on reserved matters” is not only “ancillary”, but also “has no greater effect ... than is necessary” to give effect to its purpose. The test of necessity is objectionable on grounds of clarity and workability, as it is capable of a number of different interpretations. One possible interpretation is extremely restrictive and would represent a reduction in the Assembly’s current competence.

11. The difference between a “reserved matter” and the “law on reserved matters” is explained in paragraphs 409-411 and 413-414 of the Explanatory Notes to the Bill. The Notes give the example of an Assembly Bill which related entirely to planning, which is not a reserved matter, but which modified a provision of a UK Parliamentary Act concerning telecommunications. That modification might be within the Assembly’s competence, as its purpose might relate entirely to planning and so it would meet the test set out in new section 108A(6) of the Government of Wales Act 2006, inserted by clause 3 of the Bill. But by modifying a provision of a UK Act of Parliament, which concerned a reserved matter, it would modify “the law on reserved matters”. The Assembly should be able to do so in a purely ancillary way without also having to show that the modification made has “no greater effect ... than is necessary”.

12. An equivalent to the Bill provision is contained in the Scotland Act 1998. However, in the context of the Scottish devolution settlement, it is much less restrictive, as the Scottish Parliament has competence over considerably greater fields, including, of course, justice matters, and the Scottish system of civil and criminal law. Therefore, what might appear to be wider latitude for the Assembly would in practice still amount to narrower competence than that of the Scottish Parliament.

Text of the paragraph as amended

The law on reserved matters

1 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters.

(2) “The law on reserved matters” means—

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and

(b) any rule of law which is not contained in an enactment and

the subject-matter of which is a reserved matter,
and in this sub-paragraph “Act of Parliament” does not include
this Act.

2 ~~(1)~~ Paragraph 1 does not apply to a modification that ~~(a)~~ is ancillary to a provision made (whether by the Act in question or another enactment) which does not relate to reserved matters. ~~and~~
~~(b) has no greater effect on reserved matters than is necessary
to give effect to the purpose of that provision.~~

~~(2) In determining what is necessary for the purposes of this
paragraph, any power to make laws other than the power of the
Assembly is disregarded.~~

Text of amendment and Explanatory notes

Schedule 2, page 77, line 21, leave out from “matters” to end of line 26.

Explanatory notes

The amendment removes the necessity test in relation to the law on reserved matters.

Schedule 2, paragraph 4 – Criminal law

Purpose and effect of proposed amendment

13. This amendment removes the criminal law restriction in paragraph 4 of Schedule 7B and replaces it with a restriction which provides that the Assembly cannot modify criminal law unless it is for a purpose other than a reserved purpose. It reflects the Assembly's current competence (i.e. the criminal law is a silent subject, and the Assembly can modify the criminal law if it relates to a devolved subject, or if the modification is ancillary).

14. The Assembly, therefore, could not modify the criminal law if it was for a reserved purpose, thus protecting the criminal law around the 200+ reservations in the Wales Bill. The amendment also makes it clear that the Assembly could not modify the criminal law for its own sake – there must be a devolved purpose behind the modification of the criminal law.

15. The amendment aligns the criminal law restriction with the private law restriction (see paragraph 3 of Schedule 7B). This would provide consistency and clarity.

16. It should be noted that the criminal law includes civil penalties, such as fixed penalty notices, which, in effect, will protect civil penalties in relation to the 200+ reservations.

Text of the paragraph as amended

Criminal law and civil penalties

4 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the criminal law.

(See also paragraph 6 of Schedule 7A (single legal jurisdiction of England and Wales).)

(2) Sub-paragraph (1) does not apply to a modification that has a purpose (other than modification of the criminal law) which does not relate to a reserved matter.

(3) This paragraph applies to civil penalties as it applies to offences; and references in this paragraph to the criminal law are to be read accordingly).

Text of amendment and Explanatory notes

Schedule 2, page 78, line 2 leave out paragraph 4 and insert –

“4 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the criminal law.

(See also paragraph 6 of Schedule 7A (single legal jurisdiction of England and Wales).)

(2) Sub-paragraph (1) does not apply to a modification that has a purpose (other than modification of the criminal law) which does not relate to a reserved matter.

(3) This paragraph applies to civil penalties as it applies to offences; and references in this paragraph to the criminal law are to be read accordingly.”

Explanatory notes

The amendment inserts a restriction so that the Assembly cannot modify criminal law unless it is for a purpose other than a reserved purpose. This would bring it into line with the private law restriction.

List of proposed amendments

Clause 3 – Legislative competence

Amendment 1

Clause 3, page 2, line 33 leave out “subsection (2)(b) does” and insert “subsections (2)(b) and (2)(c) do”

Explanatory notes

The amendment restores the Assembly’s competence by enabling it to legislate in an ancillary way in relation to reserved matters.

Amendment 2

Clause 3, page 2, line 34 leave out from “provision” to end of line 6 on page 3 and insert “which is within the Assembly’s legislative competence (or would be if it were included in an Act of the Assembly).”

Explanatory notes

The amendment restores the Assembly’s competence by enabling it to legislate in an ancillary way in relation to reserved matters.

Clause 51 – Consequential provision

Amendment 1

Clause 51, page 39, line 4, leave out “primary legislation” and insert “an Act of Parliament”.

Explanatory notes

The amendment introduces separate provisions for the use of the power in clause 51 in relation to an Act of Parliament.

Amendment 2

Clause 51, page 39, line 6, at end insert –

“(6A) A statutory instrument containing regulations under subsection (2) that includes provision amending or repealing any provision of a Measure or Act of the National Assembly for Wales may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament and the Assembly.”

Explanatory notes

The amendment provides that where the Secretary of State uses the power in clause 51 to make regulations that amend or repeal an Assembly Act or Assembly Measure, then the regulations must be approved by the Assembly and each House of Parliament.

Amendment 3

Clause 51, page 39, line 7, at beginning insert “Subject to subsection (7A),”

Explanatory notes

The amendment is linked to the provision that where the Secretary of State uses the power in clause 51 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly, the regulations would be subject to annulment by the Assembly and each House of Parliament.

Amendment 4

Clause 51, page 39, line 10, at end insert –

“(7A) A statutory instrument containing regulations under subsection (2) that includes provision amending or revoking subordinate legislation made by—

(a) the Welsh Ministers, or

(b) the National Assembly for Wales as constituted by the Government of Wales Act 1998,

if made without a draft having been approved by a resolution of each House of Parliament and the Assembly, is subject to annulment in pursuance of a resolution of either House of Parliament or the Assembly.”

Explanatory notes

The amendment provides that where the Secretary of State uses the power in clause 51 to make regulations that amend or revoke subordinate legislation made by the Welsh Ministers or the Assembly, the regulations would be subject to annulment by the Assembly and each House of Parliament.

Amendment 5

Clause 51, page 39, line 11, leave out subsection (8).

Explanatory notes

The amendment removes the definition of “primary legislation”.

Schedule 1, paragraph 1, reservation 6 – Single legal jurisdiction of England and Wales

Schedule 1, page 42, line 20, leave out “prosecutors” and insert “the Crown Prosecution Service”

Explanatory notes

The amendment clarifies the reservation so that “the Crown Prosecution Service” is reserved, rather than “prosecutors” more generally, as this could prohibit Assembly legislation enabling devolved authorities to prosecute, such as local authorities.

Schedule 2, paragraphs 1 and 2 – The law on reserved matters

Schedule 2, page 77, line 21, leave out from “matters” to end of line 26.

Explanatory notes

The amendment removes the necessity test in relation to the law on reserved matters.

Schedule 2, paragraph 4 – Criminal law

Schedule 2, page 78, line 2 leave out paragraph 4 and insert –

“4 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the criminal law.

(See also paragraph 6 of Schedule 7A (single legal jurisdiction of England and Wales).)

(2) Sub-paragraph (1) does not apply to a modification that has a purpose (other than modification of the criminal law) which does not relate to a reserved matter.

(3) This paragraph applies to civil penalties as it applies to offences; and references in this paragraph to the criminal law are to be read accordingly.”

Explanatory notes

The amendment inserts a restriction so that the Assembly cannot modify criminal law unless it is for a purpose other than a reserved purpose. This would bring it into line with the private law restriction.