

Chair of the Public Administration and Constitutional Affairs Committee

Rt Hon Bernard Jenkin MP
House of Commons
LONDON
SW1A 0AA

Your ref:
Our ref: PO/RB/BA

7 September 2015

Dear Bernard

The Constitutional implications of the UK Government's proposal to establish a system of 'English Votes for English Laws'

As part of its review of the UK Government's proposals to implement English Votes for English Laws, the Chair of the Commons Procedure Committee has requested details of procedures followed in the National Assembly for Wales to determine whether legislation is within competence. I have submitted the attached paper to that Committee. I believe that the same evidence will be of interest to your Committee in helping to inform its review of the broader constitutional implications of the proposals.

The proposals for implementing English Votes for English Laws give rise, in my view, to a number of concerns relating to the role of the Speaker and the relationship between the National Assembly and House of Commons. The paper brings to your attention certain scenarios which, based on the experience of the Assembly, may bring the Speaker's decisions into political contention and raise important issues for the House. The benefits of basing certification on devolved competence, rather than solely on territorial application, are not clear to me and seem likely to be outweighed by the significant complexities and constitutional uncertainties created. By way of illustration:

- The proposals create considerable **potential for disagreement** between the Speaker and the Presiding Officer - and indeed the Assembly - as well as the potential for conflict between the opinion of the Speaker and judgments of the Supreme Court;

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Proposals to implement English Votes for English Laws – Evidence from Dame Rosemary Butler AM, Presiding Officer of the National Assembly for Wales.

1. Introduction

1.1 The UK Government's proposals to implement English Votes for English Laws (EVEL)¹ require the Speaker to examine each Government Bill and apply two tests. Namely, whether the Bill, or parts of it:

- relate exclusively to England and Wales, and
- fall within devolved competence.

1.2 Essentially this means that the Speaker will decide not only the territorial extent and application of a Bill, or part of a Bill, but also whether it is within the legislative competence of any of the devolved legislatures.

1.3 Within the Assembly, the Presiding Officer is required by law to state, when a Bill is introduced, whether or not in her view it would be within the Assembly's legislative competence. Part 1 of this paper sets out the factual details of the procedure involved in this, including:

- The duties of the Presiding Officer in relation to determining legislative competence of Assembly Bills;
- A detailed description of the procedure followed, legislative tests applied, scale and complexity of the task and resources/expertise required; and
- The potential for dispute or disagreement in relation to determining legislative competence for proposed Bills, and also in relation to Assembly consideration of Legislative Consent Motions.

1.4 Part 2 of the paper highlights some concerns and queries identified in relation to the potential for unintended consequences of the EVEL proposals - in particular the role of the Speaker in determining legislative competence. In order to demonstrate how such issues may arise, a range of illustrative scenarios are included for consideration.

1.5 The procedures, concerns and scenarios presented here, are based upon the **current Welsh settlement**. However, as indicated in Powers for a Purpose,² it is likely that the Welsh devolution settlement will change in the coming years, with a move to reserved powers. Powers for a Purpose states that the intention is to bring the Welsh settlement closer to that in Scotland;

¹ Office of the Leader of the House of Commons and Cabinet Office, [English Votes for English Laws: revised proposed changes to the Standing Orders of the House of Commons and explanatory memorandum](#), July 2015

² Wales Office, [Powers for a purpose: Towards a lasting devolution settlement for Wales](#), February 2015

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however, there are likely to remain significant differences – as there are between the Scottish settlement and that of Northern Ireland.³

1.6 Whilst the Assembly's legislative competence is not currently as extensive as that of the Scottish Parliament and Northern Ireland Assembly, the recent Supreme Court judgment on the *Agricultural Sector (Wales) Bill* revealed that the Assembly's competence is capable of extending beyond that of the Scottish Parliament or Northern Ireland Assembly, in some areas. The Supreme Court ruled that the Assembly could legislate in relation to any matters that are not specifically excluded from competence in Wales, provided that the legislation also aims to deal with subjects where competence has been expressly devolved to the Assembly. Therefore, there is currently scope for the Assembly to legislate on matters that are specifically reserved in the Scottish and/or Northern Irish settlements, but which are not specifically excluded from competence in Wales.

Part 1: Procedure followed to enable the Presiding Officer of the National Assembly for Wales to comply with her duties in relation to legislative competence

2. Duties of the Presiding Officer and procedure for determining legislative competence

2.1 The Presiding Officer has two separate duties in relation to the legislative competence of the Assembly: one statutory, and one arising under the Assembly's Standing Orders. It is worth noting that the two duties are slightly different.

2.2 *Statutory duty* - Under section 110(3) of the *Government of Wales Act 2006 (GOWA)*, the Presiding Officer must, on or before introduction of a Bill,

"decide whether or not [in his or her view] the provisions of the Bill would be within the Assembly's legislative competence, and state that decision."

2.3 *Duty under Standing Orders* - Under the Assembly's Standing Order 26.4, the Presiding Officer must make a "statement" on introduction of a Bill. The statement must:

"indicate whether or not the provisions of the Bill would be, in his or her opinion, within the legislative competence of the Assembly, and

³ Differences between the proposed reservations for Wales in Powers for a Purpose, and the settlements in Scotland and Northern Ireland have been considered as part of a joint project between the Wales Governance Centre and UCL Constitution Unit and are summarised by Alan Trench in a [table](#) published as part of his article: [A 'reserved powers' model of devolution for Wales: what should be 'reserved'?](#) August 2015

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indicate any provisions which, in his or her opinion, would not be within the legislative competence of the Assembly and the reasons for that opinion."

2.4 The duty under the Standing Order, therefore, contains a requirement to give additional details which are not required by GOWA – importantly, to identify any provision that the Presiding Officer considers would not be within legislative competence, and to give the reasons for which she has formed that view. This contrasts with the proposed duty on the Speaker to certify a Bill if certain criteria are met – a duty which expressly excludes the giving of reasons.

3. Tests for legislative competence within the Welsh devolution settlement

3.1 In the Welsh settlement, nine tests are applied to check whether a provision of a Bill is within legislative competence under section 108 of, and Schedule 7 to, the GOWA 2006. These tests are detailed below (slightly simplified).

3.2 **Subject-matter** - The provision must relate to a subject in Schedule 7 of GOWA, and must not fall within an exception set out there – unless:

- it is covered by within a carve-out from that exception,
- it is incidental to or consequential on another provision which, itself, relates to a subject, or
- its purpose is to enforce or make effective such another provision).

3.3 The case-law of the Supreme Court has now established that an Assembly Bill will be within competence if it relates to a subject in Schedule 7, notwithstanding the fact that it may also relate to a topic that is neither a subject, nor an exception, in Schedule 7 (see the judgment in the case of *Agricultural Sector (Wales) Bill* [2014]).⁴

3.4 The 2006 Act lays down a specific method for interpreting whether a Bill provision “relates to” a subject or “falls within” an exception. The most important element of the subject-matter test is the purpose of the provision, but the decision-maker must also have regard to its effect “in all the circumstances”, as well as to “other things”.

3.5 **Territory (a)** - The provision must not apply otherwise than in relation to Wales; this means that its practical effect must be in relation to Wales only (unless, again, it is “saved” by one of the caveats set out under test (1) – see the bullet-points in paragraph 3.2 above).

⁴ Re [Agricultural Sector \(Wales\) Bill \[2013\] UKSC 43](#)

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3.6 Some questions about the application of this test, and the third test, have been raised, *obiter*, by the Supreme Court in the case of *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015].⁵

3.7 ***Territory (b)*** - The provision must not extend otherwise than to England and Wales (i.e. it must not modify the law outside the legal jurisdiction of England and Wales).

3.8 ***Protected enactments*** - The provision must not repeal or modify the protected enactments set out in Schedule 7 to the GOWA (with some caveats).

3.9 ***Human Rights*** - The provision must not be incompatible with the Convention rights as set out in the Human Rights Act 1998. This is sometimes complex because it requires competing rights to be balanced by the legislature, sometimes because it is not clear whether a particular right applies (e.g. there is considerable case-law on what is a “public authority” for the purposes of the Human Rights Act, and on what constitutes a “possession” for the purposes of the Convention). Further complexity is added by the fact that the Presiding Officer is required to foresee whether a court would regard a Bill provision as Convention-compatible, rather than reaching her own view on this; and case-law shows that the courts apply different standards to different types of legislation. In some cases, they are likely to find any one of a range of legislative solutions compatible, while in others they will consider that the Convention requires the balance to be struck in a particular place.

3.10 It is also noteworthy that the UK Minister in charge of a Parliamentary Bill will, of course, have to make a statement under the Human Rights Act as to the compatibility of the Bill. Thus the Speaker will be required to assess a legal issue that a UK Government Department has already considered. The Speaker would also need to take a view on this matter to assess whether its provisions are within devolved competence or not.

3.11 ***EU law*** - The provision must not be incompatible with EU law. Again, this is often a complex issue and one that is relevant to UK, as well as Assembly, Bills.

3.12 ***Minister of the Crown functions*** - The provision must not modify or remove Minister of the Crown functions that existed before 5 May 2011, unless doing so is incidental or consequential, or the Secretary of State has consented to the change. Nor can a provision impose a new function on a Minister of the Crown unless the Secretary of State consents. In that case, there is no caveat for incidental or consequential functions.

3.13 Numerous Minister of the Crown functions from the period up to 5 May 2011 still subsist in areas of devolved competence. They are not always

⁵ [Recovery of Medical Costs for Asbestos Diseases \(Wales\) Bill \[2015\]. UKSC 3](#)

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obvious, partly due to the manner in which functions have been transferred between UK Ministers and between the UK Government and devolved governments. This is not the case in Scotland, where pre-existing UK Ministerial functions in areas of devolved legislative competence were all transferred to the Scottish Ministers by the Scotland Act 1998.

3.14 ***Welsh Consolidated Fund*** - The provision must not modify a provision of an Act of Parliament which has charged repayments of borrowing by the Welsh Ministers on the Welsh Consolidated Fund (including interest).

3.15 ***Comptroller and Auditor General*** - The provision must not modify functions of the Comptroller & Auditor General, unless the Secretary of State consents.

4. Procedure to comply with duties in relation to legislative competence

Time-table

4.1 The Welsh Government sends a pre-introduction copy of a Bill at least four weeks before the planned date of introduction, in order to enable the Presiding Officer to fulfil her duties under GOWA and Standing Orders.

4.2 Within these four weeks, Assembly lawyers aim to provide the Presiding Officer with advice after around two and a half weeks. This is to allow the Presiding Officer a further week and a half to consider the advice and, if necessary, to take up any issues with the Member in charge of the Bill – for Government legislation a Minister.

Resources and expertise required

4.3 In preparing to make the statement under Standing Order 26.4, the Presiding Officer is principally supported by the Legal Services Directorate of the National Assembly for Wales Commission (“the Commission”). However, other officials, notably clerks and the Private Office, are also involved.

4.4 The formal advice to the Presiding Officer will be completed by one or more Assembly lawyers, depending on the size and complexity of the Bill. For instance, the advice on the Regulation and Inspection of Social Care (Wales) Bill was prepared by three Assembly lawyers, because of the length of the Bill.

4.5 Exceptionally, expert external advice may be sought, on novel and complex issues of Human Rights law or European law.

4.6 In addition, every formal piece of advice on legislative competence to the Presiding Officer is reviewed by the Director of Legal Services. Assembly clerks will then prepare a draft of the statement required by Standing Order 26.4, on the basis of the advice from Assembly lawyers.

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4.7 The Presiding Officer will then consider the advice in detail. Normally, if the advice is that any provisions of the Bill are outside competence, or of doubtful competence, the Presiding Officer will wish to discuss in person with the relevant Assembly lawyer and/or the Director of Legal Services.

Scale of the task

4.8 Assembly lawyers consider legislative competence for a Bill section by section (in Westminster terms, clause by clause). For each section, they complete a report in standard template form, designed to show that they have applied all the tests from legislative competence to that section. A copy of the template, with brief annotations, is attached at [Annex A](#).

4.9 As there is one template per section, a 200-section Bill will give rise to a report of some 400 pages. The task is lengthy and detailed but has shown its worth in revealing competence issues that might have been overlooked in a more “broad-brush” approach.

4.10 If Assembly lawyers identify a problem in terms of competence with any section of the Bill, they immediately raise it with Welsh Government lawyers or legislative drafters. It is important that this is done as quickly as possible, as the four-week period for competence scrutiny can be challenging for a long and/or complex Bill.

4.11 If issues were not raised with the Welsh Government until the scrutiny process had been completed, it is likely that a higher number of Bill provisions would be stated to be outside legislative competence, on a precautionary basis, or that the introduction of a number of Bills would be delayed for issues to be resolved.

4.12 When the section-by-section report on the Bill has been completed, and as many issues as possible resolved with Welsh Government lawyers and drafters, Assembly lawyers draw up formal advice to the Presiding Officer on the legislative competence for the Bill. This advice will:

- Set out succinctly Assembly lawyers’ grounds for advising the Presiding Officer that particular provisions are within competence;
- Set out, in more detail, the grounds for advising the Presiding Officer that any provisions are of doubtful competence, or are outside competence.

4.13 Formal pieces of advice on competence vary from around 5 pages to around 70 pages, including annexes containing detailed analysis of particular issues.

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5. Information considered in preparing the decision/statement on legislative competence

5.1 The following information, as a minimum, is considered in preparation for making the Presiding Officer's statement:

- the pre-introduction draft of the Bill;
- the draft Explanatory Memorandum, prepared by the Member in charge (normally a Minister) relating to the Bill;
- any correspondence to the Presiding Officer from the Member in charge (this is particularly important with regard to whether consents have been sought from UK Secretaries of State for provisions removing, modifying or conferring functions of/on UK Ministers);
- any other legislation amended or repealed by the Bill;
- any relevant case-law on legislative competence (both in the context of the Welsh and Scottish settlements; there has been no relevant case-law on the Northern Irish settlement).

5.2 As set out above, the first test for whether a provision of a Bill is within the Assembly's legislative competence is whether that provision "relates to" one or more subjects set out in Schedule 7 to GOWA. In order to answer this question, section 108(7) GOWA mandates us to look at the "purpose" of the provision. Where there is any doubt as to this purpose, it will be necessary to consider any further documents that can shed light on the purpose. For Government Bills, this will usually include any documents issued by the Welsh Government in the process leading up to the drafting of the Bill, such as:

- previously published consultation drafts of the Bill
- White Papers
- Green Papers
- other consultation documents
- Ministerial statements and press releases.

6. Approach to questions of competence where there is doubt or dispute over the state of the law

6.1 The Welsh devolution settlement is both unique and young. Primary legislative competence on a list of conferred subjects was acquired only in May 2011 (the previous settlement, which lasted for 4 years, being based on piecemeal grants of competence, tailored for specific Bills).

6.2 There is little case-law on how the devolution settlement should operate to guide the Presiding Officer in her decision; only three judgments

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in Welsh cases and a handful, relating to the Scottish settlement, that are also relevant to the Welsh situation.

6.3 Moreover, there is frequently uncertainty about the law applying to individual tests for competence: particularly questions of human rights, which often require competing rights to be balanced by the legislator, and as-yet-undecided issues of EU law.

6.4 In view of all these factors, it is not surprising that the Presiding Officer has had to reach a view in a number of cases where there is doubt or dispute as to the state of the law.

6.5 As mentioned above, the Director of Legal Services at the Assembly signs off all formal advice on competence to the Presiding Officer. As also mentioned, exceptionally, expert advice from external lawyers – usually senior Counsel – may first be obtained on novel and complex matters of human rights or EU law.

6.6 Where the arguments on both sides are finely-balanced, the approach of the present Presiding Officer has been to state her decision that the Bill is within competence, so as to allow the Assembly the opportunity to debate the Bill and, if applicable, to scrutinise further the underlying issues relevant to competence (e.g. whether the Bill strikes an acceptable balance between competing human rights).

6.7 In those circumstances, the Presiding Officer also informs the Assembly Committees which will be scrutinising the Bill of the arguments for and against competence that she has considered. Where no Committee will be doing so, as in the case of the *Agricultural Sector (Wales) Bill*, she informs all Members accordingly.⁶

6.8 To date, the Presiding Officer has not expressed the view that any provision of an Assembly Bill was outside competence, other than provisions which required the consent of a Secretary of State and in relation to which that consent had not been received at the date of introduction (for more on this test for competence, see paragraphs 3.12 and 5.1 above). However, as mentioned above, engagement with the Welsh Government before introduction of the Bill provides an opportunity for the Bill to be amended so as to prevent such an outcome.

Part 2: Potential for unintended consequences and queries arising from EVEL proposals

⁶ For example: [Note to Members from Director of Legal Services in relation to the Recovery of Medical Costs for Asbestos Disease \(Wales\) Bill](#), a similar note from the Presiding Officer on Agricultural Sector (Wales) Bill was provided to all Assembly Members and is available on request.

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7. Competence decisions in political debate

7.1 From experience within the Assembly, the determination of legislative competence inevitably instigates much political debate. As set out above, the Presiding Officer must make a formal statement to the Assembly on the introduction of each Bill, setting out her view on whether the Bill is within competence.

7.2 There have been instances where Ministers have sought to use the Presiding Officer's statement as a shield later in the Bill process, when Members have raised questions of competence in relation to certain provisions. For example, Ministers have referred to the statement to defend their position in respect of human rights.

7.3 In the Assembly Chamber on 7 July 2015, the Minister for Communities and Tackling Poverty said in relation to the Renting Homes (Wales) Bill:

"The Presiding Officer determined the Bill was within the legislative competence of the Assembly and compliance with the [European Convention on Human Rights] is one aspect of competence."

"A very thorough assessment of provisions has been undertaken within the Bill to ensure that they are compatible with human rights and Members will be aware, as I mentioned, that the Presiding Officer has determined that the Bill was within the legislative competence of the Assembly."

7.4 The Presiding Officer then wrote to the Minister (and shared the letter with relevant Committees), pointing out that her view on whether a Bill is within competence should not be used by the Welsh Government to constrain detailed scrutiny of the Bill or as justification for a particular position.⁷

7.5 On 13 July 2015, David Melding, the Chair of the Constitutional and Legislative Affairs Committee referred to the Minister's statements:

"We had the debate in principle in the Chamber last week, in which the Minister did refer to the human rights issues that are in our report, but in a fairly, sort of, cursory fashion, saying, more or less, that she felt that, as the Presiding Officer had ruled on competence, that was the main factor. It wasn't a terribly reassuring exchange, I thought, but it's on the record now and people will make of it what they will. But, the Presiding Officer, obviously, has felt the need to point out to

⁷ National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Letter from the Presiding Officer in relation to the Renting Homes \(Wales\) Bill](#)

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Ministers that the initial ruling on competence in no way prejudices the full scrutiny that the Assembly committees then engage in.”⁸

7.6 Legislative competence is also an issue which often arises during Committee proceedings, during which Members have sought to make political use of statements on legislative competence.

8. Potential for disagreement

8.1 An area of particular concern is the potential for perceived conflict between the Speaker and the Presiding Officer – and indeed the Assembly – should there be disagreement as to whether a Bill, clause, schedule or statutory instrument is within legislative competence. There is also the potential for conflict between the opinion of the Speaker and a judgment, or judgments, of the Supreme Court.

8.2 This potential for disagreement was highlighted by Lord Wallace during the recent debate on the proposals in the House of Lords.⁹

8.3 In order to illustrate how such potential disagreements may arise, [Annex B](#) provides a range of scenarios outlining some of the practical and legal difficulties which could arise as a consequence of the proposals.

8.4 These scenarios are not fanciful. They are backed by real-life examples which demonstrate the potential difficulties which can arise.

8.5 Possibly the most concerning aspect is how the proposals draw the Speaker into debate about what is devolved across the UK. This has potentially far-reaching consequences and may exacerbate difficulties across what is already an uneven playing field. This point was raised during evidence to the Assembly’s Constitutional and Legislative Affairs Committee recently by Professor Thomas Glyn Watkins:

“As far as the devolved legislatures are concerned, where they seek to say that something is devolved, then their decisions are reviewable in the courts, but where the UK Parliament makes a decision that something is not devolved, that’s the end of the story because, once it’s legislated, that is law and it has the sovereignty of the UK Parliament behind it. That is an extremely un-level playing field, and it’s poised to become even less level, because, if we move in the UK Parliament to a system of English votes for

⁸ [Transcript from Constitutional & Legislative Affairs Committee](#) 13 July 2015, [para 5]

⁹ House of Lords Hansard, 21 July 2015 [Column 1010](#)

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English laws, and a decision as to what is an English matter or what is an England-and-Wales matter is a matter solely to be determined under the standing orders of the House of Commons or by the Speaker, that, in effect, means that, on one side of the boundary, Parliament, protected by parliamentary privilege and sovereignty, decides the issue on a case-by-case basis, whereas, on the other side, it is a matter for judicial determination. Now that strikes me as being something that can only lead to very serious conflict.”¹⁰ [emphasis added]

9. Legislative Consent Motions (LCMs)

9.1 The potential for tension also arises in relation to Legislative Consent Motions (LCM). In circumstances where the UK Government wishes to legislate in relation to a devolved area, there is a constitutional convention¹¹ to the effect that it would not normally do so without first seeking the consent of the Assembly. This convention should soon be captured in statute via the forthcoming Wales Bill. The procedure by which the Assembly provides or refuses consent is by considering and voting on an LCM in Plenary.

9.2 By providing consent via an LCM, the Assembly in effect agrees that the UK Parliament can legislate in a specific area on its behalf, through a particular Bill. Should the Assembly refuse to consent, the convention requires that the UK Government remove or amend the clauses identified in the LCM and accompanying memorandum from the Bill in question.

9.3 Since 2011, the Assembly has considered 33 LCMs¹². There have been several occasions where there has been disagreement between the Assembly/Welsh Government and the UK Government as to whether an LCM was necessary, and some where the LCM has been refused. For example:

- *Policing and Social Responsibility Bill* - the Assembly has legislative competence to make law to provide for local authority joint committees to be established for particular purposes, thus an LCM was required relating to the provisions for Police and Crime Panels in Part 1 of the Bill. The Welsh Government, therefore, found itself bringing forward an LCM for a Bill to which it was opposed. The Assembly subsequently rejected the LCM and the UK Government removed the

¹⁰ National Assembly for Wales, Constitutional and Legislative Affairs Committee [RoP 22 June 2015 \[para129\]](#)

¹¹ This convention is set out in the [Memorandum of Understanding and Supplementary Agreements](#) which outlines the principles of co-operation underpinning the relationship between the UK Government and devolved administrations.

¹² LCMs considered by the National Assembly for Wales are listed on the [website](#)

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impact on devolved matters by removing the proposed Police and Crime Panels from local government structures.

- *Anti-social Behaviour Crime and Policing Bill* - a supplementary LCM was laid by the Welsh Government in relation to the provision to amend the Anti-Social Behaviour Orders exception in Schedule 7 to the GOWA. The view of the UK Government was that this was a consequential amendment which did not require an LCM. The Welsh Government opposed the LCM as it alters the competence of the Assembly by amending Schedule 7. The amendment to widen the definition of anti-social behaviour was defeated in the Lords and was not included in the Bill at Third Reading.
- *Enterprise and Regulatory Reform Bill* – provisions in the Bill abolished the Agricultural Wages Board. The UK Government did not believe this lay within the Assembly’s competence and legislative consent was not required. It refused therefore to amend the Bill. The Welsh Government believed it was within competence and subsequently introduced the Agriculture Sector (Wales) Bill. This was passed by the Assembly but was referred to the Supreme Court by the Attorney General. The Supreme Court subsequently found that the Bill was within the competence of the Assembly.
- *Local Audit and Accountability Bill* – The Welsh Government supported an LCM to make audit arrangements for the two Internal Drainage Boards which are partly in England and partly in Wales as a stopgap measure until new arrangements were made. However, the LCM was opposed by other parties within the Assembly and was rejected on the casting vote. The UK Government subsequently agreed to amend the Bill to remove cross-border Boards from the English audit regime.
- *Medical Innovation Bill* (as introduced in the House of Lords on 5 June 2014) – in this case the UK Government view was that the Bill related to modifying the law of tort, a non-devolved matter, and therefore there was no need for an LCM. The Welsh Government disagreed stating that the Bill relates to health, which is devolved. The Welsh Government tabled the LCM, which the Assembly unanimously refused. The Bill was a Private Member’s Bill and did not proceed beyond the First Reading in the House of Commons. However, the Bill has been introduced again in the House of Lords; the First Reading was on 8 June 2015.

9.4 The EVEL proposals clearly offer the potential for the Speaker’s certifications to be drawn into such disputes over LCMs.

9.5 Clearly, there is also a need for parliamentary procedure to take account of the Assembly’s decision on LCMs and to consider how this will interplay with these proposals for England and Wales Bills.

10. Other concerns and queries raised by the proposals

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Secondary legislation

10.1 Under the proposals, secondary legislation which is subject to the affirmative procedure - or that is subject to the negative procedure and has been prayed against and scheduled for debate - will also be certified by the Speaker using the same criteria as for Bills. Unlike Bills, statutory instruments are to be considered in their entirety.

10.2 The majority of the executive powers of the Welsh Ministers to make secondary legislation are found under UK Acts - unsurprising as the Assembly has only been passing primary legislation since 2008.

10.3 Thus, there is no direct correlation between the legislative competence of the Assembly and the executive powers of the Welsh Ministers to make secondary legislation. For example, the Welsh Ministers have powers to make regulations relating to speed limits (under the Road Traffic Regulation Act 1984) but this is not within the legislative competence of the Assembly (speed limits are specified as an exception under Schedule 7 to GOWA).

10.4 Accordingly, this will add a further layer of complexity for the Speaker in applying the test for certification to secondary legislation.

Financial implications

10.5 The concern has been raised, during numerous Westminster debates, that the proposals do not take account of the fact that Bills certified as being England-only may have an impact on the block grant for the devolved administrations due to the inherent link within the Barnett formula to spending policy in England (i.e. the Barnett calculation is based on the level of spending in the relevant UK Government department).

10.6 To illustrate this concern, it is possible that a UK Government Bill could impact on funding for the NHS in England (for example by privatising some services, thus reducing the funding provided to the Department of Health). This would likely be certified as an England-only matter, but by the workings of the Barnett formula, would have an impact on the block grants of the devolved administrations.

10.7 The new Standing Orders would not apply to votes on the Estimates, nor to Supply and Appropriation Bills providing statutory authority for the Estimates. However, although it is the case that the block grants are included in the relevant Estimates and Supply and Appropriation Bills, and can be voted on by all Members, the level of detail provided, and the limited opportunity for detailed scrutiny, is unlikely to make clear any impact of England-only legislation on the block grants.

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10.8 It is also clear from the revised proposals that, where there are financial implications associated with a Bill, all MPs will be able to vote on the associated money resolution (for spending) or ways and means resolution (for taxation). The Leader of the House has stated that this provides the opportunity for all Members of the House to vote on issues relating to the block grants for the devolved administrations arising from Bills.

10.9 However, at present, money resolutions are not considered by the House, separately from the relevant Bill, as a rule. The Leader of the House has however stated that he is “*open to looking at whether we can find another way to ensure that money resolutions can be debated*”,¹³ which may provide an opportunity for the financial impact of a Bill on the block grants to be considered, if sufficient detail is provided for scrutiny.

Wales-only Westminster legislation

10.10 The proposals are not clear in their intention towards Wales-only Westminster legislation. Though this is not a matter for the Presiding Officer, the House may wish to satisfy itself that its procedures treat Wales-only Bills equitably with any applying solely to England, Scotland or to Northern Ireland.

11. Conclusion

11.1 This paper illustrates the complexity associated with any comprehensive assessment of Welsh legislative competence. It also highlights how the proposals risk drawing the Speaker into matters of political debate and/or creating the potential for the Speaker and Presiding Officer to be seen as at odds with one another in respect of devolved competence. Given the close and positive relationship that has always existed between the two offices, this would be highly undesirable. A simpler and clearer test for certification would be a territorial test alone.

¹³ [HoC Deb 15 July 2015: Column 942](#)

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Annex A: Bill Section template for determining legislative competence

<i>Provision:</i>	
Does it relate to a Subject? <i>(S. 108(7) GOWA plus Agricultural Sector Bill test)</i>	
Does it fall within an exception? <i>(S. 108(7) test)</i>	
Is it compatible with the Convention Rights?	
Is it compatible with EU law?	
Does it have a prohibited effect on Minister of the Crown functions existing before 5 May 2011? <i>(NB Schedule 7 parts 2 and 3)</i>	
Only <u>applies</u> in relation to Wales?	
Only <u>extends</u> to England and Wales? <i>(Consider comments in Asbestos Bill case)</i>	
Does it modify any protected enactment in a prohibited way? <i>(NB Schedule 7 parts 2 and 3)</i>	
Does it have a prohibited effect on any C & AG function? <i>(NB Schedule 7 parts 2 and 3)</i>	
Does it have a prohibited effect on the Welsh Consolidated Fund? <i>(NB Schedule 7 parts 2 and 3)</i>	
Queen/Duke's Consent <i>(Not a competence point as such but can block a Bill from being passed)</i>	
Wholly within Competence?	Yes <input type="checkbox"/> No <input type="checkbox"/>

Annex B: Scenarios highlighting practical and legal difficulties with EVEL proposals

B.1 The following scenarios highlight some of the practical and legal difficulties that could arise under the proposals to implement EVEL. These scenarios are backed up by examples to demonstrate those practical and legal difficulties. The scenarios use the term 'Bill', but the scenarios apply equally to clauses of Bills, Schedules to Bills, and statutory instruments.

B.2 The scenarios focus on the test for legislative competence as it applies in the current devolution settlement for the Assembly. Other legal tests will be relevant in determining whether a Bill, clause, Schedule or statutory instrument is within the legislative competence of the Scottish Parliament and/or the Northern Ireland Assembly.

Scenario 1

B.3 The UK Government introduces a Bill which provides for the listing of care workers who are unsuitable to work with vulnerable adults. The Bill applies to England only and the Speaker decides it is within devolved competence and certifies the Bill. Thus, the House treats it as an England-only Bill.

B.4 The Assembly and Welsh Government agree that the Bill relates to a devolved subject. However, the Bill raises difficult issues under the Human Rights Act 1998, and the Assembly and/or Welsh Government consider that the Bill is not compatible with those rights. Parliament has expressly provided that such a Bill is outside the legislative competence of the Assembly (the same applies to the Scottish and Northern Irish devolution settlements). In this situation, therefore, the Speaker would be forced to reach a view on the compatibility of the Bill with the Human Rights Act, in order to apply the devolution test envisaged by the EVEL proposals. This is an exercise that the Speaker has not previously been called upon to undertake – it has been for Ministers to state, when introducing a Bill, that it is compatible with the 1998 Act. The Speaker could be in a difficult position if he or she was asked to agree either with that Minister or with the view of the devolved authorities. In either case the public airing of the disagreement would make it more likely that the resulting UK Act would be challenged in the courts on human rights grounds by those affected.

B.5 The fact that this is a realistic scenario is illustrated by the number of pieces of UK legislation which have breached human rights, including several in areas devolved to the Assembly:

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- The listing of care workers as unsuitable to work with vulnerable adults under the Care Standards Act 2000 was held by the House of Lords to breach human rights.¹⁴
- Remedial orders were used to remedy human rights breaches in several sections of the Mental Health Act 1983.¹⁵
- The Court of Appeal held that sections of the Housing Act 1996 breached human rights.¹⁶ New legislation was introduced in order to address those breaches.¹⁷
- The blanket ban on prisoner voting under section 3 of the Representation of the People Act 1983 is another example, albeit not in the context of an area currently devolved to the Assembly. However, the UK Government have committed to devolving competence relating to Assembly and local government elections, as set out in Powers for a Purpose.¹⁸

B.6 The same principles would apply if Parliament introduced legislation which breached EU law. Legislation would be outside the legislative competence of the Assembly if it breached EU law.¹⁹

Scenario 2

B.7 A Bill is introduced to specify the limits of fines for certain smoking-related offences. The Bill applies in England only and the Speaker decides its subject-matter is within devolved legislative competence and so certifies the Bill. The House treats the Bill as England-only.

B.8 The Assembly and Welsh Government agree the Bill relates to a devolved subject, but consider the Bill modifies significant functions vested in a Minister of the Crown prior to 5 May 2011. Parliament has expressly stated that the Assembly does not have legislative competence to modify such functions without Secretary of State consent. Thus, although the Bill may relate to a devolved subject, it is outside Assembly competence. In order for it to be within competence, there would need to be an assumption that the UK Minister would provide consent were it to be a provision in a Bill proposed by the Assembly.

B.9 For example, Part 1 of the Health Act 2006 gives powers to the Secretary of State to set the maximum limit of fines for certain smoking-related offences. These powers were given to the Secretary of State before 5

¹⁴ [R \(Wright\) v Secretary of State for Health \[2009\] UKHL 3](#)

¹⁵ For example, see the [Mental Health Act 1983 \(Remedial\) Order 2001 \(SI 2001/3712\)](#)

¹⁶ R (Morris) v Westminster City Council and First Secretary of State [2005] EWCA Civ 1184.

¹⁷ New measures were introduced in [Schedule 15](#) to the Housing and Regeneration Act 2008

¹⁸ Wales Office, [Powers for a purpose: Towards a lasting devolution settlement for Wales](#), February 2015

¹⁹ If required, examples of infringement cases instigated by the European Commission against the UK under Article 258 of the Treaty of the Functioning of the EU can be provided.

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May 2011, therefore their subject matter is not within the legislative competence of the Assembly.

Scenario 3

B.10 A Bill is introduced to create a social care wages board in England and Wales. The Bill applies in England and Wales but the Speaker does not consider it to be within devolved legislative competence, and so does not certify the Bill.

B.11 The Assembly raises concerns, on the basis the Bill relates to an area devolved to the Assembly (applying the test set out by the Supreme Court in the Agricultural Sector (Wales) Bill case).²⁰ An LCM is considered by the Assembly, and subsequently rejected. Thus, the decision of the Speaker is called into question in political debate in the Assembly and any related debate in Westminster as the Bill progresses.

B.12 On the basis that the Welsh Government and Presiding Officer consider this is within competence, a corresponding Welsh Bill is introduced and passed by the Assembly, but is referred to the Supreme Court for a definitive answer on competence. The Supreme Court decides that the Assembly legislation is within competence – thus generating a conflict between the Speaker's opinion and Supreme Court judgment.

B.13 This scenario reflects many of the events that led to the Supreme Court judgment in the Agricultural Sector (Wales) Bill case.²¹

- An amendment to the Enterprise and Regulatory Reform Bill was tabled in the House of Lords on 19 December 2012. The amendment sought to abolish the Agricultural Wages Board for England and Wales.
- The UK Government did not believe that the subject of the amendment was devolved.
- The Welsh Government believed that the subject of the amendment was devolved, and it tabled an LCM before the Assembly.
- The Assembly rejected the LCM, but the Enterprise and Regulatory Reform Bill went ahead and abolished the Agricultural Wages Board for both England and Wales.
- The Assembly then decided to make its own primary legislation, the Agricultural Sector (Wales) Bill, to reinstate a regime for the regulation of agricultural wages in Wales (by establishing an Agricultural Advisory Panel for Wales).
- The UK Government believed that the Agricultural Sector (Wales) Bill was outside the legislative competence of the Assembly, and referred it to the Supreme Court.

²⁰ [Agricultural Sector \(Wales\) Bill \[2014\] UKSC 43](#)

²¹ [Agricultural Sector \(Wales\) Bill \[2014\] UKSC 43](#)

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- The Supreme Court unanimously decided that the Agricultural Sector (Wales) Bill was within the legislative competence of the Assembly.

B.14 Under the current proposals the Speaker would be required to consider the amendment to the Enterprise and Regulatory Reform Bill to determine whether it should be certified.

B.15 Had the Speaker been of the opinion that the amendment was not within the legislative competence of the Assembly, the Speaker and the Supreme Court would have reached different conclusions on whether the matter was within the legislative competence of the Assembly.

B.16 A similar issue arose under the Medical Innovation Bill (considered further in Scenarios 4 and 4A). The UK Government considered that the Bill was about the law of tort and was not within the legislative competence of the Assembly. The Assembly and the Welsh Government (applying the Supreme Court test for legislative competence) considered that the Bill related to health and was within the legislative competence of the Assembly. An LCM was considered by the Assembly. The Assembly rejected the LCM by 54 votes to 0.

Scenario 4

B.17 The UK Government introduce a Bill seeking to encourage innovative medical treatment by doctors. The Bill applies in England and Wales only, but the Speaker does not consider the Bill is within devolved legislative competence, and so does not certify the Bill.

B.18 Similar issues arise as outlined in Scenario 3, leading to an LCM being rejected by the Assembly. The Assembly and Welsh Government make representations to the UK Government that the Bill relates to a devolved subject, setting out the Supreme Court test. The UK Government reviews its decision, anticipating a reference to the Supreme Court were the Assembly to decide to legislate on it and accepts that the Bill is within the legislative competence of the Assembly.

B.19 This means that the Speaker's opinion is now in disagreement with the UK Government's, and the Bill should have been certified. The Bill is subsequently amended to apply in England only. The Speaker considers the amendment and decides the Bill should be certified. It should be noted that inter-governmental discussions proceed in parallel to the Bill's passage through Parliament and such amendments can of course be made at the final stages. The reverse scenario may also arise, where a Bill may be certified at the outset and later as a result of amendments, it is de-certified.

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Scenario 4A

B.21 As Scenario 4, but the Speaker initially decides that the Bill is within devolved legislative competence and certifies the Bill. The Assembly and Welsh Government agree with the Speaker that the Bill is within the legislative competence of the Assembly (applying the Supreme Court test).

B.22 The UK Government considers the Bill relates to the law of tort and not to a devolved subject, and thus the Speaker and UK Government are in disagreement.

B.23 These scenarios set out the real differences of opinion that arose during the passage of the Medical Innovation Bill. While the Bill would not have been within the scope of Standing Order 83J(1), the UK Government's legal position was clear – the Bill was about the law of tort, and did not relate to a devolved subject.



Llywydd
Presiding Officer



- There are potentially significant **financial implications** for Wales arising from some England-only legislation and I am unconvinced that Welsh interests will be sufficiently protected by these proposals;

The proposals do not appear to take account of the **Legislative Consent Motion (LCM) convention**; in particular, it is unclear how the Assembly's decision on granting, or not granting, consent for the UK Parliament to legislate on a devolved matter will interact with the proposed procedure.

In respect of the other part of your inquiry and the future of the Union, I have significant concerns about the piecemeal fashion in which our constitution is developing. The existing devolution settlements for Northern Ireland, Scotland and Wales are very different, and it is not easy to see a rational basis for all of those differences. New devolution and constitutional arrangements for Scotland and England are being implemented at a remarkable pace yet with none of the obstacles and resistance that seem to characterise further devolution to Wales.

This is not a satisfactory way of proceeding. The provisions in the Scotland Bill currently going through Parliament will set a precedent for Wales, yet the Assembly has not been consulted on them and was not involved in developing them. A coherent pan-UK approach is required based on the principle of subsidiarity – the centre should reserve to itself only what cannot be done effectively at devolved level. We must aim, therefore, for genuine joint discussion, to which all four Nations contribute on an equal footing, if we are to reach a settlement that works for all parts of the UK.

I have written previously to the Speaker to bring these matters to his attention and am copying this letter to him. I trust that this information will be helpful and I, or my officials, would be pleased to discuss any aspect further.

Yours sincerely

Dame Rosemary Butler AM
Presiding Officer

Enc

cc: Speaker of the House of Commons, Rt Hon John Bercow MP
First Minister of Wales, Rt Hon Carwyn Jones AM
Secretary of State for Wales, Rt Hon Stephen Crabb MP
Chair of the Welsh Affairs Committee, David TC Davies MP
Chair of the Constitutional & Legislative Affairs Committee, David Melding AM