

# Briefing on Presiding Officer’s proposed Amendments for House of Lords consideration of the Wales Bill

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### Summary table of amendments

Clause / Schedule	Purpose and effect of proposed amendments
Clause 2	<p>The amendments include provision for Parliament to legislate on devolved matters in “exceptional circumstances” and specifies what those circumstances are. They include matters relating to public safety or national security, or urgent economic issues where there is not sufficient time to seek the Assembly’s consent.</p> <p>The amendments also define “devolved matters”, to provide that the statutory expression of the convention applies at least as broadly to Wales as is currently the case in Scotland’s Standing Orders.</p>
Schedule 2, paragraph 7	<p>These amendments enable the Assembly to amend sections 120(1) and 124(3) of the Government of Wales Act 2006, which provide for ‘relevant persons’ who receive funding directly from the Welsh Consolidated Fund.</p>
Schedule 2, paragraph 8	<p>These amendments give the Assembly competence to impose or confer functions on reserved authorities in an incidental or consequential way without the need for UK Government consent. But Ministers of the Crown and government departments are carved out from the meaning of reserved authorities in these amendments.</p>
	<p>This amendment clarifies that paragraph 8(1)(a) of proposed new Schedule 7B only applies when the Assembly imposes or confers functions that apply only to reserved authorities.</p>
Schedule 2, paragraph 10	<p>This amendment allows the Assembly to remove or modify the functions of certain public bodies in an incidental or consequential way without the need for UK Government consent.</p>
Schedule 2, paragraph 11	<p>This amendment limits the scope of the Minister of the Crown functions specified in paragraph 11(1) to pre-commencement functions / powers (i.e. functions / powers that were exercisable before 5 May 2011).</p>
	<p>This amendment gives the Assembly competence to modify the Minister of the Crown functions specified in paragraph 11(1) in an incidental or consequential way without UK Government consent.</p>
	<p>This amendment removes the need for UK Government consent before the Assembly removes or modifies the Welsh language functions of a Minister of the Crown.</p>

## **Clause 2 - Convention about Parliament legislating on devolved matters**

### **Circumstances in which the Assembly's consent is not required**

This clause as written will not achieve a robust statutory basis for the legislative consent convention. Clause 2 contains a provision that Parliament will not “normally” legislate with regard to devolved matters without the consent of the Assembly. The use of the word “normally” is unsatisfactory as it is potentially open to a broad interpretation.

The proposed amendments provide that Parliament should only legislate on devolved matters without Assembly consent in exceptional circumstances and those circumstances are specified. The word “normally” is deleted because it is unclear – there is no definition of what is a “normal” situation.

The UK Parliament should only legislate on devolved matters when: (a) there is an imminent risk of serious harm to national security, public safety, the health of the public, plants and animals and economic stability in the UK, (b) the UK Parliament legislation specifically addresses the risk, (c) the imminence of the risk in relation to Wales means that it is not practical to seek consent, **and** (d) the Assembly has not already introduced legislation to specifically address the risk.

Combined, these amendments provide greater clarity as to when the UK Parliament should seek consent from the Assembly, by establishing a proper statutory recognition of how consent should work. They also recognise the maturity of the Assembly as a legislature and that its consent should be obtained before UK Parliament legislates on devolved matters.

Finally, it is worth noting that there is no attempt to interfere with Parliamentary sovereignty here, as section 107(5) of the Government of Wales Act 2006 makes clear.

### **Provisions which require consent**

Secondly, in relation to the scope of the clause, the purpose of this amendment is to provide that the statutory expression of the convention applies at least as broadly to Wales as is currently the case in Scotland's Standing Orders.<sup>1</sup>

The clause as currently drafted deals only with the UK Parliament's ability to legislate on matters within devolved competence. It should also deal with the situation where a UK Bill seeks to amend that competence.

The amendments also reflect the conclusions of the previous Assembly's Constitutional and Legislative Affairs Committee,<sup>2</sup> that consent should go beyond the current Scottish

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<sup>1</sup> Chapter 98 of the Standing Orders of the Scottish Parliament

<sup>2</sup> National Assembly for Wales, Constitutional and Legislative Affairs Committee, [Report on the Legislative Consent Memorandum, Wales Bill](#), June 2014

convention, so as to require Assembly consent for UK Bills which alter the functions of the Assembly, without altering its legislative competence.

Devolved matters are therefore defined to include matters that:

- (a) are within the legislative competence of the Assembly,
- (b) modify the legislative competence of the Assembly,
- (c) modify functions of the Assembly, and
- (d) modify functions of members of the Welsh Government (mainly the Welsh Ministers) where such functions are within devolved areas.

### **Text of the clause as amended**

#### **2 Convention about Parliament legislating on devolved matters**

In section 107 of the Government of Wales Act 2006 (Acts of the National Assembly for Wales), after subsection (5) insert—

“(6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly unless all of the following conditions apply—

(a) there is an imminent risk of serious adverse impact on—

(i) the national security of the United Kingdom, or

(ii) public safety, public, animal or plant health or economic stability in any part of the United Kingdom,

(b) the legislation specifically addresses that risk,

(c) the imminence of the risk in relation to Wales makes it impractical to seek the consent of the Assembly,

(d) no Bill has been passed under section 110(1)(a) specifically to address the risk, and

(e) no subordinate legislation specifically to address the risk has been laid before the Assembly and has come into force.

(7) In this section, “devolved matters” means matters that—

(a) are within the legislative competence of the Assembly;

(b) modify the legislative competence of the Assembly;

(c) modify a function of the Assembly;

(d) modify any functions of any member of the Welsh Government exercisable within devolved competence (and “within devolved competence” is to be read in accordance with section 58A).”

### **Text of 3 amendments**

#### Amendment 1

Page 2, line 12, leave out “normally”

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#### Amendment 2

Page 2, line 13, after “Assembly” insert “unless all of the following conditions apply—

(a) there is an imminent risk of serious adverse impact on—

(i) the national security of the United Kingdom, or

(ii) public safety, public, animal or plant health or economic stability in any part of the United Kingdom,

(b) the legislation specifically addresses that risk,

(c) the imminence of the risk in relation to Wales makes it impractical to seek the consent of the Assembly,

(d) no Bill has been passed under section 110(1)(a) specifically to address the risk, and

(e) no subordinate legislation specifically to address the risk has been laid before the Assembly and has come into force.”

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#### Amendment 3

Page 2, line 13, at end insert—

“( ) In this section, “devolved matters” means matters that—

(a) are within the legislative competence of the Assembly;

(b) modify the legislative competence of the Assembly;

(c) modify a function of the Assembly;

(d) modify any functions of any member of the Welsh Government exercisable within devolved competence (and “within devolved competence” is to be read in accordance with section 58A).”

## Schedule 2 - Paragraph 7(2) (d) of New Schedule 7B

### Allowing the Assembly to add to the list of relevant persons who receive funding directly from the Welsh Consolidated Fund

Paragraph 7 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) sets out the sections of the Government of Wales Act 2006 which the Assembly will have competence to modify. Paragraph 7(2)(d) specifically refers to those sections of Part 5 of the Government of Wales Act 2006 which are amendable without restriction.

As it stands this does not include the ability to amend sections 120(1) or 124(3) of the Government of Wales Act 2006 which provide for 'relevant persons' – otherwise known as 'direct funded bodies' – which receive funding directly from the Welsh Consolidated Fund i.e. Welsh Government, the Assembly Commission, the Auditor General and the Public Services Ombudsman for Wales.

The proposed amendments to paragraph 7(2)(d) would allow the Assembly competence to add to, but not remove from, the list of 'relevant persons'. This would allow the Assembly to enable a body which is independent of Welsh Government to also be financially independent, where this is deemed appropriate. Any use of such competence to add to the 'relevant persons' would require an Act of the Assembly.

#### Text of paragraph 7(2)(d) of Schedule 2 as amended

- (d) the following provisions in Part 5 (finance)—
- (i) section 120(1) as regards a modification that adds a person or body;
  - (ii) section 120 (2);
  - (iii) section 124(3) as regards a modification that adds a person or body;
  - (iv) sections 125 to 130;
  - (v) sections 131 to 135;
  - (vi) sections 137 to 143;
  - (vi) any provision of Schedule 8;

#### Text of the amendments

##### Amendment 1

Page 84, line, 41, at end insert—

“( ) section 120(1) as regards a modification that adds a person or body;”

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##### Amendment 2

Page 84, line 42, at end insert –

“( ) section 124(3) as regards a modification that adds a person or body;”

## Schedule 2 – Paragraph 8 of new Schedule 7B – UK Government consent requirements for reserved authorities

### Providing ability to confer or impose functions in a consequential or incidental way

Paragraph 8 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) prevents the Assembly from conferring or imposing functions on reserved authorities, unless the UK Government consents.

These amendments say that the Assembly could confer or impose functions on reserved authorities in a **consequential or incidental** way without UK Government consent.

#### Example

For example, the Assembly wishes to pass legislation encouraging equal opportunities (which is an exception to the reservation of equal opportunities). The Assembly legislation would seek to encourage equal opportunities generally across Wales.

To aid understanding of equality issues, the Assembly legislation wants the Equality and Human Rights Commission to have a discretionary power (not a duty) to advise the Welsh Government about the effectiveness of equality legislation.

This would be conferring a discretionary power on the Equality and Human Rights Commission in an incidental way – it is a relatively small part of the overall scheme to encourage equality, it is merely incidental to the main thrust of the Assembly legislation.

Under the current settlement, there are no restrictions on the Assembly's power to confer or impose functions on reserved authorities like the police, DVLA and Land Registry (provided the Assembly legislation relates to a devolved subject and doesn't breach human rights and EU law etc.).

Therefore this amendment is intended as a modest and reasonable proposal which would allow the Assembly some flexibility to confer or impose functions in a purely incidental or consequential way in future.

But the proposed power to make incidental or consequential provision does not extend in relation to conferring or imposing functions on Ministers of the Crown or government departments. This is because including such an incidental or consequential power would be giving the Assembly more power in this area than it has under the current settlement.



**Text of paragraph 8 (1) & (2) as amended**

8 (1) A provision of an Act of the Assembly cannot—

(a) confer or impose, or confer power by subordinate legislation to confer or impose, any function on a reserved authority,

(b) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority, including modifications relating to its assets and liabilities and its funding and receipts, or

(c) confer, impose, modify or remove, or confer power by subordinate legislation to confer, impose, modify or remove, functions specifically exercisable in relation to a reserved authority,

unless the appropriate Minister consents to the provision or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) Sub-paragraph (1) is subject to the exceptions in paragraph 9.

(3) In this paragraph “reserved authority” means—

(a) a Minister of the Crown or government department;

(b) any other public authority apart from a Wales public authority;

but the Assembly’s legislative competence to make incidental or consequential provision in sub-paragraph (1) does not apply in relation to a Minister of the Crown or government department.

**Text of amendments**

Amendment 1

Page 86, line 16, at end insert “or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly”

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Amendment 2

Page 86, line 21, at end insert “;

but the Assembly’s legislative competence to make incidental or consequential provision in sub-paragraph (1) does not apply in relation to a Minister of the Crown or government department”

## Schedule 2 – Paragraph 8 of new Schedule 7B – UK Government consent requirements for reserved authorities

### Ensuring application of functions generally across Wales

Paragraph 8 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) prevents the Assembly from conferring or imposing functions on reserved authorities, unless UK Government consents.

This amendment says that, if the Assembly chooses to confer or impose functions generally across Wales or generally across the public sector in Wales, thereby catching reserved authorities, then the Assembly can do that without UK Government consent.

#### Example

For example, if the Assembly prohibited the use of e-cigarettes in all workplaces in Wales and required those workplaces to put up signs and take steps to stop the use of e-cigarettes in their workplaces, then that would capture workplaces such as the offices of the police, DVLA and Land Registry (all of which are reserved authorities).

This amendment clarifies that imposing such functions on those reserved authorities would not require consent; the law on e-cigarettes would need to apply consistently across workplaces in Wales, so it would be inappropriate to require UK Government consent.

However, if the Assembly seeks to confer or impose functions that apply **only** to reserved authorities (including just one reserved authority), the amendment says that UK Government consent will be required.

Under the current settlement, there are no restrictions on the Assembly's power to confer or impose functions on reserved authorities like the police, DVLA and Land Registry (provided the Assembly legislation relates to a devolved subject and doesn't breach human rights and EU law etc.).

Therefore this amendment is intended as a modest and reasonable proposal which would allow the Assembly some flexibility to confer or impose functions on reserved authorities that apply generally across Wales.

### **Text of paragraph 8 as amended**

8 (1) A provision of an Act of the Assembly cannot—

(a) confer or impose, or confer power by subordinate legislation to confer or impose, any function ~~on a reserved authority~~ specifically on one or more reserved authorities,

(b) make modifications of, or confer power by subordinate legislation to make modifications of, the constitution of a reserved authority, including modifications relating to its assets and liabilities and its funding and receipts, or

(c) confer, impose, modify or remove, or confer power by subordinate legislation to confer, impose, modify or remove, functions specifically exercisable in relation to a reserved authority,

unless the appropriate Minister consents to the provision.

(2) Sub-paragraph (1) is subject to the exceptions in paragraph 9.

(3) In this paragraph “reserved authority” means—

(a) a Minister of the Crown or government department;

(b) any other public authority apart from a Wales public authority.

### **Text of the amendment**

Page 86, line 6, leave out “on a reserved authority” and insert “specifically on one or more reserved authorities”

## Schedule 2 – Paragraph 10 of new Schedule 7B UK Government consent requirements for public bodies

### Providing ability to remove or modify functions in a consequential or incidental way

Paragraph 10 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) prevents the Assembly from removing or modifying the functions of certain public authorities (excluding Wales Public Authorities and Ministers of the Crown) without UK Government consent. Examples of bodies caught by paragraph 10 include the DVLA, Land Registry, Crown Prosecution Service, BBC, and police.

This amendment says that the Assembly could remove or modify the functions of such reserved authorities in a **consequential or incidental** way without UK Government consent.

#### Example

The Public Services Ombudsman (PSOW) has a discretionary power to investigate matters relating to “listed authorities” under the Public Services Ombudsman (Wales) Act 2005. A police and crime commissioner for a police area in Wales is a listed authority under the 2005 Act.

Currently, if an investigation is conducted in respect of a listed authority and the PSOW sends a copy of the report to the listed authority, the listed authority must make copies of that report available for three weeks.

If, for example, the Assembly wished to legislate with regard to PSOW investigations, including a requirement that listed authorities must make copies of such reports available for four weeks instead of three weeks, that would be modifying the duty of all listed authorities.

The great majority of listed authorities are Wales Public Authorities, and therefore would not be captured by paragraph 10. However, the Welsh police and crime commissioners are reserved authorities under the Wales Bill. In order for the PSOW legislation to operate effectively across all listed authorities, the duty to publicise reports for four weeks should apply to all listed authorities, including Welsh police and crime commissioners.

As the Wales Bill is drafted, the Assembly would not be able to modify the functions of that reserved authority in this consequential way.

Currently, there are no restrictions on the Assembly’s power to remove or modify the functions of reserved authorities (provided the Assembly legislation relates to a devolved subject and doesn’t breach human rights and EU law etc.). In other words, the Bill reduces the Assembly’s competence.

The reasons for this are, to an extent, understandable: reserved authorities are wholly or largely funded by UK Ministers and are accountable to them. Therefore this amendment is intended as a modest and reasonable proposal which would allow the Assembly some

flexibility to remove or modify their functions in a purely incidental or consequential way in future.

**Text of paragraph 10 as amended**

10 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a public authority other than a Wales public authority, unless the appropriate Minister consents to the provision or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

(2) This paragraph does not apply in relation to—

- (a) a Minister of the Crown (as to which, see paragraph 11);
- (b) the Electoral Commission;
- (c) the Food Standards Agency;
- (d) the Water Services Regulation Authority;
- (e) a water or sewerage undertaker;
- (f) the Consumer Council for Water;
- (g) the Chief Inspector of Drinking Water for Wales or any other person appointed by the Welsh Ministers under section 86 of the Water Industry Act 1991 (assessors for the enforcement of water quality).

(3) This paragraph does not apply to the removal or modification of a function of the traffic commissioners relating to—

- (a) the registration of local bus services, or
- (b) the application and enforcement of traffic regulation conditions in relation to those services.

(4) This paragraph does not apply to—

- (a) the removal or modification of a devolved function (within the meaning of paragraph 6 of Schedule 7A) of a court;
- (b) the removal or modification of a function of a tribunal involving, or connected with, making a decision in relation to a matter that is not a reserved matter.

(5) In this paragraph “public authority” and “appropriate Minister” have the same meaning as in paragraph 8.

**Text of the amendment**

Page 87, line 11, at end insert “or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly”

## Schedule 2 Paragraph 11 of New Schedule 7B – UK Government consent requirements for Ministers of the Crown functions

### Three groups of amendments to paragraph 11

#### Group 1 Amendments

##### Restoring ability to remove or modify functions exercisable after 5 May 2011

Paragraph 11 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) lists certain Minister of the Crown functions that the Assembly could not remove or modify without UK Government consent.

These amendments limit the scope of those Minister of the Crown functions that require consent to those functions that were exercisable by Ministers of the Crown **before** 5 May 2011. The significance of the date 5 May 2011 is that it is the date when the Assembly first had powers to make Assembly Acts.

This means that, for any of those Minister of the Crown function that were exercisable **on or after** 5 May 2011, the Assembly would not require UK Government consent before removing or modifying them. Such functions would then fall into paragraph 11(2), so that removing or modifying those functions would only require the Welsh Ministers to consult UK Government.

Limiting the scope of paragraph 11(1) to pre 5 May 2011 functions would reflect the current settlement; UK Government consent is currently only needed to remove or modify **pre** 5 May 2011 functions, but it is not needed to remove or modify **post** 5 May 2011 functions.

#### Text of paragraph 11 as amended

11 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify—

- (a) any pre-commencement function of a Minister of the Crown that relates to a qualified devolved function,
- (b) any pre-commencement function of a Minister of the Crown exercisable in relation to the Welsh language,
- (c) any pre-commencement function of a Minister of the Crown exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection,
- (d) any pre-commencement function of a Minister of the Crown under the Marine and Coastal Access Act 2009 or the Marine Works (Environmental Impact Assessment)

Regulations 2007 (S.I. 2007/1518), or

(e) any pre-commencement power of the Secretary of State under section 6 of the Railways Act 2005 (financial assistance relating to railway services etc),

unless the appropriate Minister consents to the provision.

(2) In this paragraph—

“pre-commencement function” means a function which was exercisable by a Minister of the Crown immediately before 5 May 2011;

“pre-commencement power” means a power which was exercisable by a Minister of the Crown immediately before 5 May 2011.

### **Text of the amendments**

#### Amendment 1

Page 87, line 38, after “any” insert “pre-commencement”

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#### Amendment 2

Page 87, line 40, after “any” insert “pre-commencement”

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#### Amendment 3

Page 87, line 42, after “any” insert “pre-commencement”

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#### Amendment 4

Page 87, line 47, after “any” insert “pre-commencement”

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#### Amendment 5

Page 88, line 3, after “any” insert “pre-commencement”

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Amendment 6

Page 88, line 6, at end insert—

“( ) In this paragraph—

“pre-commencement function” means a function which was exercisable by a Minister of the Crown immediately before 5 May 2011;

“pre-commencement power” means a power which was exercisable by a Minister of the Crown immediately before 5 May 2011.”



## Group 2 Amendment

### Restoring ability to remove or modify functions in an incidental or consequential way

Paragraph 11 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) lists certain Minister of the Crown functions that the Assembly could not remove or modify without UK Government consent.

This amendment provides that such consent is not required to remove or modify Minister of the Crown functions in an incidental or consequential way. This reflects the current settlement, as the Assembly currently has power to remove or modify pre 5 May 2011 Minister of the Crown functions in an incidental or consequential way. (That incidental / consequential power is being taken away under the Wales Bill; this means that the Assembly would not, under the Wales Bill, have been able to pass the Local Government Byelaws (Wales) Act 2012 which removed certain Minister of the Crown functions in an incidental way.)

The significance of the date 5 May 2011 is that it is the date when the Assembly first had powers to make Assembly Acts.

#### Text of paragraph 11 as amended

11 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify—

- (a) any function of a Minister of the Crown that relates to a qualified devolved function,
- (b) any function of a Minister of the Crown exercisable in relation to the Welsh language,
- (c) any function of a Minister of the Crown exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection,
- (d) any function of a Minister of the Crown under the Marine and Coastal Access Act 2009 or the Marine Works (Environmental Impact Assessment) Regulations 2007 (S.I. 2007/1518), or
- (e) any power of the Secretary of State under section 6 of the Railways Act 2005 (financial assistance relating to railway services etc),

unless the appropriate Minister consents to the provision or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.

#### Text of the amendment

Page 88, line 6, at end insert “or the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly”

### Group 3 Amendment

#### Providing ability to remove or modify Welsh Language functions

Paragraph 11 of proposed Schedule 7B to the Government of Wales Act 2006 (as inserted by paragraph 1 of Schedule 2 to the Bill) lists certain Minister of the Crown functions (including Welsh language functions) that the Assembly could not remove or modify without UK Government consent.

At the moment UK Government consent is not required to remove any post 5 May 2011 functions, no Welsh Language functions – or any others - are currently specified.

This amendment removes all reference to the Welsh language functions of UK Ministers so that no UK Government consent would be needed before the Assembly could remove or modify any Welsh language functions of UK Ministers.

Removing the Welsh language functions of Ministers of the Crown from this list means that those Welsh language functions fall into paragraph 11(2) instead, in which case there is only a requirement to consult UK Government before the Assembly can remove or modify them.

This would bring Welsh language functions in-line with the vast majority of Minister of the Crown functions in devolved areas, i.e. by bringing them within paragraph 11(2) of proposed Schedule 7B.

#### **Text of paragraph 11 as amended**

11 (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify—

(a) any function of a Minister of the Crown that relates to a qualified devolved function,

~~(b) any function of a Minister of the Crown exercisable in relation to the Welsh language,~~

(c) any function of a Minister of the Crown exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection,

(d) any function of a Minister of the Crown under the Marine and Coastal Access Act 2009 or the Marine Works (Environmental Impact Assessment) Regulations 2007 (S.I. 2007/1518), or

(e) any power of the Secretary of State under section 6 of the Railways Act 2005 (financial assistance relating to railway services etc),

unless the appropriate Minister consents to the provision.

#### **Text of the amendment**

Page 87, line 40, leave out paragraph (b)