

Assembly Acts the Welsh Government Claim Could Not Be Made Under the New Reserved Powers Model: UK Government Analysis

Key:

Acts which we believe would be passed under the new model, requiring no greater consents than at present	Acts where new consenting requirements apply under the new model, or where provision could not be made under the new model
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Assembly Act or Measure	Relevant provision(s)	Welsh Government's analysis of why the same provision could <u>not</u> be made under the Draft Wales Bill settlement	Wales Office Legal Advisers' analysis of whether or not the same provision <u>could</u> be made under the Draft Wales Bill settlement
1. Control of Horses (Wales) Act 2014	Section 7 (dispute resolution procedure for disagreements between horse owners and the local authority)	Arguably would engage reservation 184 (arbitration)	<p>The purpose¹ of this Act is a devolved one - animal welfare. It does not “relate to” arbitration, nor have that as its purpose.</p> <p>The creation of a dispute resolution procedure is “ancillary”² to the Act’s purpose, and therefore within the Assembly’s legislative competence.</p> <p>The arbitration reservation in para 184 is designed to prevent the Assembly from legislating about the subject of, and the law and procedures relating to, arbitration (e.g. the subject matter of the Arbitration Act 1996).</p> <p>That reservation does not have the effect of preventing the Assembly from applying a dispute resolution mechanism of its choosing.</p>

¹ The “purpose test” in the new model states that the question of 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 (amongst other things) to its effect in all the circumstances. This is similar to the current test, but expressed in terms of relating to reserved matters rather than conferred subjects.

² An Assembly Act provision is **“ancillary”** if it provides for the enforcement of another provision; or is otherwise appropriate for making that provision effective; or is otherwise incidental to, or consequential on, that provision (clause 3 of the draft bill). Throughout this table, where a provision is said to satisfy the “ancillary test”, it should be read as also satisfying the additional “no greater effect” requirement, as it appears in new section 108A(3) and paras 2, 3 and 4 of new Schedule 7B, as appropriate.

<p>2. Planning (Wales) Act 2015</p>	<p>Section 50 and paragraph 27 of Schedule 5</p>	<p>Engagement of reservation 183 (inquiries under or by virtue of an enactment) Section 50 of the Planning (Wales) Act 2015 inserts new section 323A into the Town and Country Planning Act 1990. This section confers power on the Welsh Ministers to make regulations prescribing the procedure to be followed in connection with planning hearings and inquiries. Planning hearings and inquiries take place under powers contained in section 320 TCPA 1990. WG relied on conferred subjects in S7 (paragraph 18 - town and country planning) and paragraph 14 (inquiries in respect of matters in relation to which the Welsh Ministers exercise functions). MoC consent was received so far as the provision removed or modified functions of the Lord Chancellor under section 9 Tribunals and Inquiries Act 1992. This provision would not be possible under reservation 183. Also, paragraph 27 of Schedule 5 to the Planning (Wales) Act made an</p>	<p>Section 50 is for the enforcement of a provision with a devolved planning purpose. This section required SofS consent because it modified Lord Chancellor functions. Consent was given on 17 September 2014. Had this provision been made under the new reservation model, it would similarly have required consent which would likely have been given. The reservation for the subject matter of the Inquiries Act 2005 in para 183 is intended to reserve the framework under which inquiries, set up by Ministers into events of public concern, can operate effectively to deliver recommendations. Planning inquiries, on the other hand, are a necessary component part of the planning regime and would satisfy the ancillary test.</p>
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3. Planning (Wales) Act 2015	Section 288 creates a right of challenge to the High Court.	These amendments were consequential on changes in Part 5 P(W)A. Depending on the view taken of the meaning of “civil proceedings” and “judicial review of administrative action”, it is possible/ likely that these reservations if in force would have inhibited the Assembly’s ability to pass paragraphs 15 and 16 Schedule 4 P(W)A.	<p>Rights of appeal are for the enforcement of devolved provisions. The section 288 right of appeal would satisfy the ancillary test and be within competence.</p> <p>Proper application of the purpose test would not result in section 288 ‘relating to’ civil proceedings or judicial review of administrative action, because those subjects are designed to protect the fundamental principles of those areas of law and to prevent the Assembly from legislating about them directly. They would not prevent the Assembly creating normal rights of appeal such as section 288.</p>
4. Local Government (Democracy) (Wales) Act 2013	Section 49(7)	<p>Creation of Offences would be considered ancillary but Minister of the Crown consent would be needed.</p> <p>Also confers functions on the Independent Remuneration Panel for Wales (IRP) to make recommendations to relevant authorities about proposed changes to salaries of heads of paid service and any policies about such pay. This may not be possible depending on the interpretation of proposed reservation 154 (Employment and Industrial Relations).</p>	<p>SofS consent is not required to create offences if the offence is being created in order to enforce Assembly provision in a devolved area. Section 49(7) would satisfy the ancillary test.</p> <p>The IRP is a Welsh public authority. The purpose of the provisions relating to the IRP is to enable it to review local authority policies and practice in relation to heads of paid service. Applying the purpose test, this provision relates to the devolved subject of local authorities, rather than employment law. It does not fall within any of the listed enactments in the employment reservation.</p>

<p>5. Local Government Byelaws (Wales) Act 2012</p>		<p>Creation of Offences in the Act were not ancillary so question whether they would be competent. Minister of the Crown consent would also be needed.</p>	<p>The purpose of this Act was to reform the process for confirming byelaws and to enable local authorities to make byelaws themselves (i.e. it has a devolved purpose).</p> <p>This Act also enables fixed penalties to be imposed for breach of byelaws. This satisfies the ancillary test in relation to the power to create byelaws (and thus a permissible modification of criminal law under para 4 of Schedule 7B).</p> <p>The Supreme Court decided that the power of the SofS to confirm byelaws was a default power exercisable as a consequence of the conferral of powers on Welsh Ministers. Were a comparable default power, exercisable by the SofS in a devolved area, to be modified by the Assembly in future the Supreme Court judgement would apply and so there would be no requirement for SofS consent.</p>
<p>6. Public Audit (Wales) Act 2013</p>	<p>Generally</p>	<p>It is difficult to be certain that the entirety of the WAO and/or the AGW's functions would clearly fall (although if the provisions remain, arguments could perhaps be made) within the definition of functions "exercisable only in relation to Wales" for the purposes of meeting the definition of a "Welsh public authority" in the draft reservation 215 of Schedule 7A and paragraph 8 of Schedule 7B.</p>	<p>Both the WAO and AGW are Welsh public authorities under the new model. It seems WG has overlooked the provision in para 8(4) of Schedule 7B which states that in deciding whether a body is a Welsh public authority, ignore any function which is exercisable otherwise than in relation to Wales. No SoS consent would be necessary.</p>

	<p>Specifically: Schedule 4, paragraph 24</p>	<p>If the AGW or WAO did not meet the definition of a “Welsh public authority” this would mean that the Minister of the Crown consent would have been required for huge parts (if not all of the 2013 Act) under the proposed new settlement, but which was not needed under Part 4 of GoWA 2006.</p> <p>It would also mean that the Assembly would not have been able to rely on the provisions of paragraph 215 in passing the Act.</p> <p>The Employment reservations may consequently have made certain provisions within the Act difficult.</p> <p>Minister of the Crown consent would have been needed for this provision as offence removed from under section 19 of the Public Audit (Wales) Act 2004.</p>	<p>Schedule 4 makes minor and consequential amendments including to the Public Audit Wales Act 2004. This includes repeal of an offence of failing to provide information to local authority auditors. This offence is an enforcement provision for the audit of Welsh local authorities by private sector auditors; the 2013 Act prescribes such audits by the WAO. Not only is this offence therefore otiose, but enforcement provisions like this, in relation to devolved matters fall within the definition of ancillary and do not require SofS consent.</p>
<p>7. Education (Wales)</p>	<p>Sections 9 to 16</p>	<p>These provisions gave the Special Educational Needs Tribunal for Wales</p>	<p>SENTW is a Welsh public authority set up using the competence for education. This Measure gives the tribunal the power to hear</p>

Measure 2009		(SENTW) jurisdiction to hear disability discrimination claims. As these provisions made amendments to the Equality Act 2010, they may well have related to reservation 202 which includes – the subject matter of the Equality Act 2010.	appeals against SEN provision and also disability discrimination in schools. It does not modify the test for when such discrimination occurs, which would engage the equalities reservation. Its purpose is to provide a local enforcement forum relating to the devolved purpose of education.
8. School Standards and Organisation (Wales) Act 2013	Section 61	Local inquiries on proposals submitted or proposed in relation to education provision. It is arguable that this provision may now relate to reservation 183 – Inquiries under or by virtue of an enactment.	As with para 27 of Sch 5 to the Planning (Wales) Act 2015, which is referred to above, it is not correct to interpret the reservation of the subject matter of the Inquiries Act 2005 as reserving local, devolved inquiries like the one in section 61 of the SSO(W)A 2013. A normal application of the purpose test would result in this provision being within competence by virtue of its devolved education purpose.
9. Qualifications (Wales) Act 2015	Section 35	This provision excludes Ofqual’s conditions of recognition from applying in relation to qualifications awarded in Wales. Depending on the finalised legal position, this may amount to a modification of Ofqual’s functions and therefore require consent under paragraph 8 of Schedule 7B. No consent was required during the passage of the Act.	Although this provision would require SofS consent under the new model (para 8 of Sch 7B) such consent would likely be forthcoming. This is evidenced by the Wales Office and DfE working closely with the WG in readiness to take forward any section 150 Order that will be required in consequence of this Act.
10. Mobile Homes (Wales) Act 2013	e.g sections 17, 21, 22	Confers jurisdiction on the court to consider certain questions arising under the Act, this would fall within the reservation in paragraph 6, as there is no exception that it could relate to	These provisions relate to enforcement of the licensing system for mobile homes sites, which is a devolved matter. We consider rights of appeal to the upper-tier tribunal to be part of the enforcement regime and would therefore satisfy

		devolved matters. Minister of the Crown consent is also likely to be required as the right of appeal is to the upper tribunal by virtue of section 231 of the Housing Act 2004.	the ancillary test. It is not the intention for SofS consent to be required.
11, The Agricultural Sector (Wales) Act 2014	Section 24 (of the National Minimum Wage Act 1998) provides that “A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 23	Minister of the Crown consent would be needed for this provision.	<p>Section 5 of the 2014 Act modifies a number of provisions of the National Minimum Wage Act 1998 (“NMWA”), including its section 24.</p> <p>It would clearly satisfy the purpose test because it ‘relates to’ the express exception for the 2014 Act in Section H1 (i.e. agricultural wages are devolved in the new model). The existence of the exception means it would not relate to the NMWA reservation.</p> <p>It would also be a permissible modification to ‘the law on reserved matters’ (for the purposes of para 2 of Sch 7B) because it satisfies the test of being ancillary to a devolved provision.</p> <p>It would not modify the functions of a ‘reserved authority’ under para 8 of Sch 7B, because complaints to employment tribunals would simply be part of the tribunal’s ordinary functions and not amount to the imposition of a new duty. SofS consent would therefore not be required.</p>
12. NHS Redress (Wales) Measure 2008	The whole Measure	The preamble to the Measure provides that the purpose of the Measure is to: “to make provision about arrangements for redress <i>in relation to liability in tort</i> in connection with services provided as part of the health	The purpose of this Measure relates to funding of the NHS by providing an ADR mechanism for complaints relating to medical negligence (a head of tort) to be dealt with before the complainant goes to court. The NHS in Wales, as in England, self-insures and a redress process could potentially save on the costs of lawyers representing claimants.

		<p>service in Wales; and for connected purposes.” Arguably the whole Measure is outside competence as a result of the restriction on modifying the private law in paragraph 3 of Schedule 7B.</p> <p>In addition, section 6 of the Measure (suspension of limitation periods) arguably relates to Reservation 6(2) (g) (Single legal jurisdiction of England and Wales- limitation of actions) and Reservation 180 (Claims management services).</p> <p>As the effect of the Measure is to impose functions on NHS bodies in England, Minister of the Crown consent would also have been needed (paragraph 8 of Schedule 7B).</p>	<p>S.6 of the Measure does modify the private law but would satisfy the ancillary test. No SofS consent would be necessary.</p> <p>Similarly, the Assembly can legislate for England (clause 3 of the draft Bill introducing new s108A(3)) and so NHS and private sector bodies providing services to the NHS in Wales can be covered by this Measure because it would also satisfy the ancillary test.</p>
13. Food Hygiene Rating (Wales) Act 2013	Section 14	The imposition of functions on the Food Standards Agency (FSA) would have breached the restriction on imposing functions on reserved authorities (paragraph 8 of Schedule 7B). Minister of the Crown consent would have been needed.	The FSA would be a reserved authority in the new model (paragraph 8, Schedule 7B). SofS consent would therefore be needed for provisions such as s.14, which would likely be given.
14. Human	Section 15	The imposition of functions on the	Although this provision would require SofS consent under para

Transplantation (Wales) Act 2013		Human Tissue Authority would have breached the restriction on imposing functions on reserved authorities (paragraph 8 of Schedule 7B). Minister of the Crown consent would have been needed.	8 of Sch 7B, such consent would likely have been forthcoming. This is evidenced by the fact the SofS for Wales took forward the Human Transplantation (Wales) Act 2013 (Consequential Provision) Order 2015 so that tissue collected from patients in Wales could be used elsewhere in the UK, even though the consent provisions differ, and vice versa.
15. Welsh Language (Wales) Measure 2011	The whole Measure	If the purpose of the Measure is to promote equality for Welsh language speakers and to prevent Welsh language speakers from discrimination, then the Measure will engage the equal opportunities reservation (202) and would be outside competence under the proposed new settlement.	The purpose of the Measure would be within competence under the reserved powers model published in the draft Bill because it relates to the devolved subjects of Welsh language; not any reserved matter.
16. Welsh Language (Wales) Measure 2011	Part 4 (standards)	The imposition of standards on certain bodies will relate to the named bodies reservation (216) and/or breach the restriction on imposing functions on reserved authorities (paragraph 8 of Schedule 7B) for which Minister of the Crown consent will be required under the proposed new settlement, but which was not obtained under Part 3 of GoWA 2006.	The Measure provides that standards can only be imposed on MoC with consent (thus mirroring the Welsh Language Act 1993), but it also lists Named Authorities, such as the Bank of England, and reserved authorities, such as government departments and the Charity Commission, as being subject to the standards. Named Authorities in the new model could not have functions imposed on them by the Assembly, and thus could not be subject to the standards if the Bill were passed under the new model. In future, an Order made by the Secretary of State under s.150 of GoWA 2006 would be the appropriate mechanism to modify the standards regime as it applies to Named Authorities. It would now be necessary to obtain SofS

			consent to impose duties (standards) on reserved authorities.
17. Social Services and Well-being (Wales) Act 2014	Section 134	Section 134 designates the chief officer of police as a partner on safeguarding boards. This would be outside competence as a result of one or more of reservations 33-35.	<p>The reservations for crime, public order and policing prevent the Assembly from creating provisions that have those matters as their purpose. Creating safeguarding boards and specifying the partners thereof however, would be within competence for the purposes of section 108A(2)(c) because the purpose of the provision is a devolved one - social welfare.</p> <p>It was necessary to obtain SofS consent to membership of such boards by probation services and NOMs.</p> <p>However, because of the way the SofS policing functions are expressed in statute, they were not being modified and so no SofS consent was necessary. As police forces are reserved authorities under the new model, SoS consent would now be necessary for compulsory membership and contributions to the funding of boards by police forces in Wales (para. 8 of Sch 7B).</p>
18. Violence Against Women, Domestic Abuse and Sexual Violence (Wales) act 2015	Various provisions	<p>The stated purposes of the Act are set out in section 1: (a) arrangements for the prevention of gender-based violence, domestic abuse and sexual violence;</p> <p>(b) arrangements for the protection of victims of gender-based violence, domestic abuse and sexual violence;</p> <p>(c) support for people affected by gender-based violence, domestic abuse and sexual violence.</p> <p>The Act could be outside competence</p>	<p>The reservation for anti-social behaviour in the draft Bill as published refers to the subject matter of Parts 1 to 6 of the Anti-social behaviour, Crime and Policing Act 2014. However, proper application of the purpose test means the 2015 Act would not relate to this reservation and would be within the Assembly's competence under the new model.</p>

		under the new settlement due to the “anti-social behaviour” reservation (36).	
19. Housing (Wales) Act 2014	Section 95	Paragraph 8 of Schedule 7A would mean that Minister of the Crown consent would be required for the conferral of the function of co-operation of local authorities and other public bodies in England. Was not needed under current settlement.	Section 95 of this Act confers functions on certain bodies in England which would be reserved authorities in the new model (para. 8, Sch 7B). As such, section 95 would need SofS consent but this would likely have been forthcoming.
20. Housing (Wales) Measure 2011	Part 2	Minister of the Crown consents would be needed when not required under current settlement. RSLs can be charities and therefore provisions within Part 2 of the Measure which impose functions in relation to RSLs which are charities may now have been outside competence due to the Charities reservation.	The reservation for charities is intended to reserve charities law. It is not intended to prevent the Assembly from imposing housing functions on bodies in Wales , some of whom may be registered charities. Housing remains a devolved subject.
21. Well-being of Future Generations (Wales) Act 2015	s.30 in relation to bullet point 1.	<ul style="list-style-type: none"> Section 30 authorises a public services board to invite the participation of the relevant PCC and chief constable. This would be outside competence as a result of one or more of reservations 33-35. Highly likely that provisions of the Act would constitute ‘regulation’ therefore falling outside the 	<p>We do not consider that any of WG’s concerns would prevent the Assembly from legislating.</p> <p>Invitations to PCCs and Chief Constables to participate in public services boards would not relate to crime, public order or policing reservations. The creation of public service boards and their possible membership does not have these reservations as their purpose.</p>

		<p>competence of the Assembly in respect of the first exception in reservation 202.</p> <ul style="list-style-type: none"> • The narrower definition of ‘Welsh Public Authority’ would also restrict competence. • Minister of the Crown consent would now be required • Reservation 58 (charities) would have caused difficulties. 	<p>We do not consider that reservation 202 would apply because the exceptions in relation to the devolved areas of equal opportunities would be relevant.</p> <p>We do not see the relevance of the “Welsh public authority” definition and therefore do not see that it would limit competence in relation to s.30.</p> <p>Police and crime commissioners are “Named Authorities” in the new model, and so the Assembly would not be able to impose duties on them (even with SofS consent). Chief constables are reserved authorities. However, we do not consider an <i>invitation</i> to participate (without any obligation to do so) amounts to the conferral of a function. Therefore, neither the Named Authority nor the reserved authority restriction would apply.</p> <p>The charities reservation would not apply because that is not the purpose of section 30.</p>
22. Children and Families (Wales) Measure 2010	Part 2	Offences relating to regulation of child minding and day care services may relate to reservation 36 on detection and investigation of crime.	<p>Social welfare, including the protection and care of children, is a devolved subject. Applying the purpose test in new subsection 108A(5), it seems clear that the purpose of the Measure, which is to create a framework of regulation is a devolved one – social welfare.</p> <p>The Assembly may enforce provisions in an Assembly Act by creating offences and imposing penalties (so long as those provisions are for a devolved purpose).</p>
23. Further and Higher	Section 4 and section 9	We have concerns around the definition of ‘business association’ in	Further and Higher Education institutions would not be caught by the exception to the C1 business associations

<p>Education (Governance and Information) (Wales) Act 2014</p>		<p>section C1 (reservations 60 and 61). This may catch designated institutions (a type of further education institution – usually companies limited by guarantee) which may not satisfy the exception relating to public bodies. This may have complicated the passage of section 4 of the Bill which deals with the governance of designated institutions.</p>	<p>reservation because they are Welsh public authorities.</p> <p>The C1 business associations reservation relates to the law about such bodies and the benefits and responsibilities of incorporation. It does not apply to specific classes of such corporate bodies such as those in the further and higher education sector (which are devolved).</p>
<p>24. Higher Education (Wales) Act 2015</p>	<p>Entire Act</p>	<p>Questionable whether the Higher Education Funding Council for Wales (HEFCW) is a 'Welsh public authority' for the purposes of paragraph 8 of Schedule 7B, as it exercises some functions in England. The Assembly may therefore have required Secretary of State consent, which it did not require under the existing settlement.</p>	<p>HEFCW would fall within the “Welsh public authority” definition because, even though it may have some functions exercisable in England, its functions are wholly or mainly exercisable in relation to institutions whose main establishment is in Wales (para 8(3)(b)(i) of Sch 7). SofS consent would not be required.</p>
<p>25. Social Services and Well Being (Wales) Act 2014</p>	<p>Sections 34, 78, 85, 127, 138, 139 and Part 11.</p>	<p>Section 127 (adult protection orders) and section 78 (protecting members of the public from serious injury) may now relate to reservation 36 (anti social behaviour) and therefore fall outside competence.</p> <p>Section 85 and Schedule 1 (payments in respect of care from those with</p>	<p>The purpose of section 78 is to create an intervention power for local authorities to take action in respect of looked-after children. On that basis, it does not relate to the antisocial behaviour reservation.</p> <p>Similarly, section 127 is an enforcement mechanism for the purpose of protecting vulnerable adults.</p> <p>Section 85 and Schedule 1 make provision for payments where a</p>

		<p>parental responsibility) may now be found to relate to reservations 141 and 142 on child support.</p> <p>Part 4 - elements of duties relating to those detained in secure estate may relate to reservation 192 - Offender Management.</p> <p>Section 138 and 139 (safeguarding board partners) would have required Secretary of State consent under paragraph 8 of Schedule 7B.</p>	<p>local authority is looking after a child. In that sense, it is a local authority funding mechanism. In contrast, the child support maintenance reservation in Section F2 reserves the Child Support Agency and the payment obligations <i>between</i> parents in respect of a child's living costs following the parents' separation. This reservation is therefore not engaged.</p> <p>The Part 4 provisions relate to social welfare and the provision of social care to those in need in Wales. None of the provisions have as their purpose the management of offenders.</p> <p>S.138 and 139 would continue to require SofS consent pursuant to para 8 of Sch 7B, which would again likely have been forthcoming.</p>
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