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## Abstract

(Chair), former Director of the Wales Office

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Head of Wales Office, The Law Society

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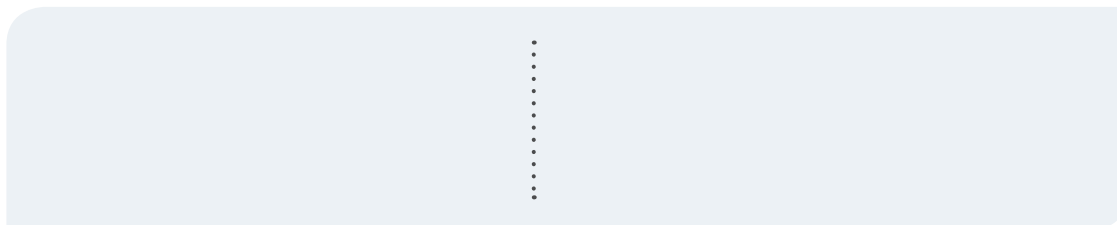
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first Report, *Delivering a Reserved Powers Model of Devolution for Wales*

*Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales*

The Report has been produced by a Review Group of experts in the field of devolution

Richard Rawlings who drafted the final version of the Report. We are also most grateful for





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7.4. Justification and scrutiny ..... 50

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be avoided. Workability and clarity are also key. Reasoned justification is needed for what

subjects were flipped over to become reservations. There was no process of principled defect in the draft Bill. Consultation with the Welsh Government was insufficient and the

There is no quick-fix drafting solution through replacing 'necessary' with an alternative such



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frustration associated with a constitutional journey that in turn reflects and reinforces this backdrop, the official imagery of the draft Bill moving 'towards a lasting devolution *Delivering a Reserved Powers Model of Devolution for Wales*, our first report on the subject published in

described by Presiding Officer Dame Rosemary Butler as 'unprecedented' in the history of 'the draft Bill is not fit for purpose'.

Our first report was produced in the light of *Powers for a Purpose* but not wholly – based. Looking more closely, draft clauses are seen to reflect successive Whitehall departments, including of course the Wales Office.

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## 1.2. Challenge and opportunity

'It is vital that we get the Welsh devolution settlement right'. In the light of a difficult



Illuminating the importance of interaction and mutual benefit, or of flexible, federal-type

union', as with an integrated market underpinned by a single currency and central d

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Asymmetry remains a defining feature of the 'devolution revolution'. We need only

seen to demonstrate the risks of legal transplantation when insufficient attention is paid to

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### 2.3. Two constitutional imperatives







requirement for a party wielding a veto to offer any justification of their position, let alone

*Powers for a Purpose*

*Annexes*

*Powers for a Purpose*

Day process prior to publication. Save where they flow directly, they cannot, therefore,

confines of Whitehall.

*Powers for a Purpose*

in our first report,

Most importantly, Annex B began to lift the curtain on a set of official preoccupations destined





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single legal jurisdiction of England and Wales is put firmly on the shoulders of the small

*Squeeze 2: occupation of legislative space*

form of general and specific reservations. While this way of occupying legislative space

*Squeeze 3: executive veto*

*a Purpose*

*Powers for*

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These benefits are far outweighed by the disadvantages and difficulties highlighted in

(3) Fiscal reform directed to greater financial accountability

Benefits accruing under the first two headings relate directly to the St David's Day process

the financial developments are part of a broader process of constitutional reform for Wales

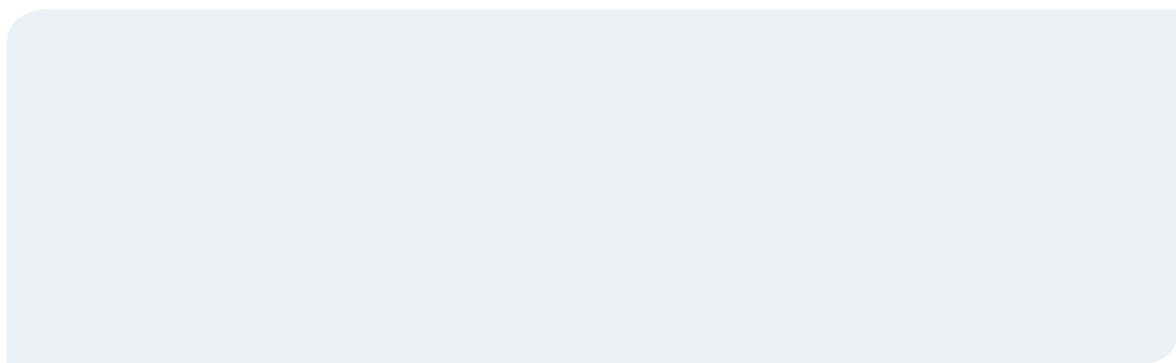
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### 4.1. Additional powers

for devolution in the field of policing and justice was vetoed through the St David's Day

recommendations for devolution of executive powers to Welsh Ministers in the field

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it may be thought folly to do otherwise. Matching provision would also properly reflect

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that the mechanism by which the 'floor' is implemented is both transparent and mutually



with modifications of 'the law on reserved matters', which extends to any non-statutory rule of law the subject-matter of which is a reserved matter; modifications to the 'private law, expansively defined in terms of contract, tort, property, trusts, etc.; and modifications to

jurisdiction)' reserved. This general reservation is followed by a cluster of specific but widely-

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## 5.2. 'Necessity'?

in the draft Bill cannot be justified by reference to Scotland.

Parliamentarians will wish to reflect on which branch of government should have the final word

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## **a d . d c**

way forward in terms of territory and jurisdiction. Building on our first report, this Chapter outlines two possible approaches. The first involves territorial rules for applying Welsh law

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the law in Wales, with the UK Supreme Court as the final court of appeal. The National

draft Bill. With the focus firmly on the advantages and disadvantages of a fully separate

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## 6.2. Territorial rules

An approach based on 'territorial rules' essentially means sharper definition of the extent of

### *Method 1*

There are two methods by which this approach might be delivered. The first is to define in

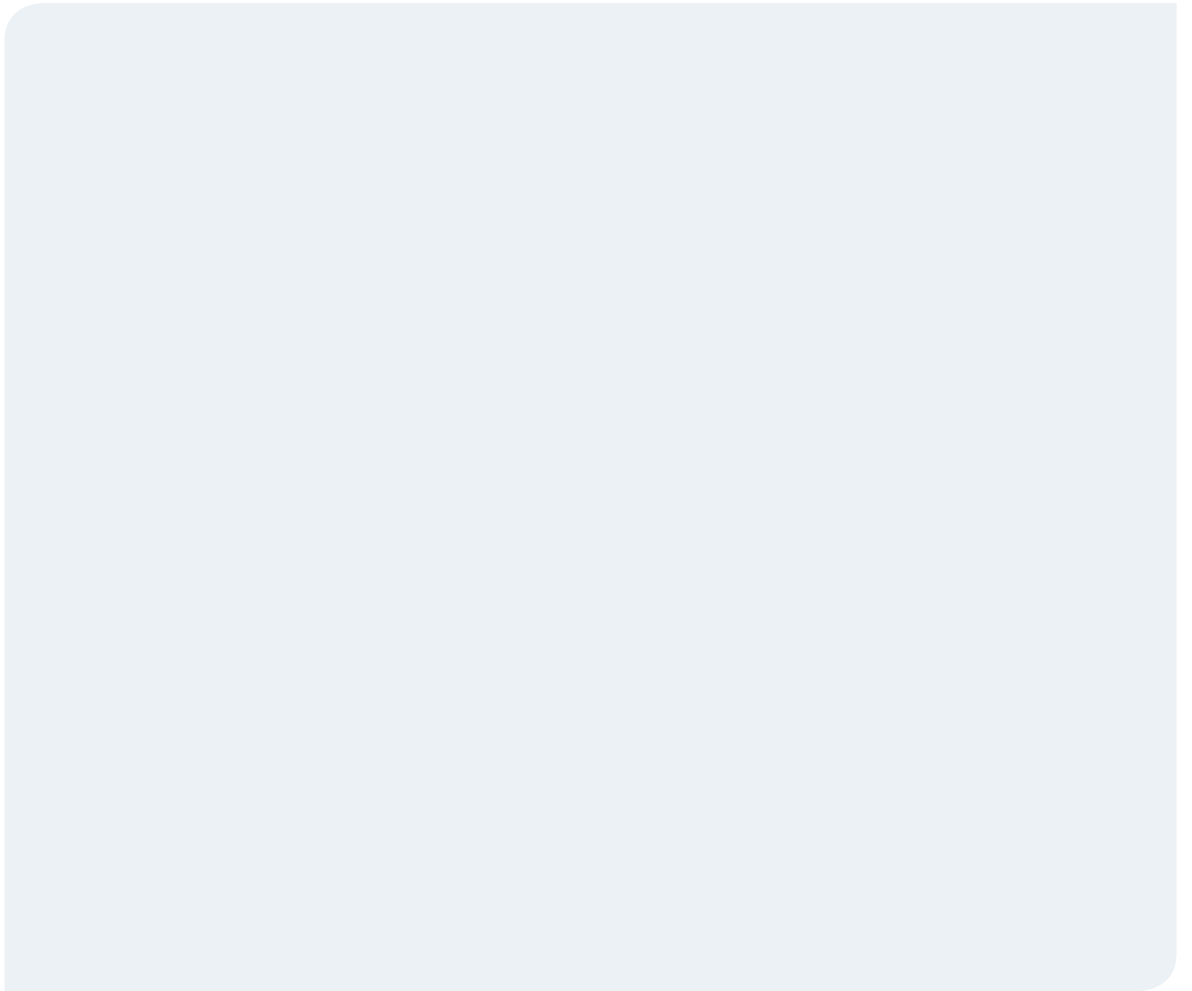
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*Powers for a Purpose*

*Commission on Devolution in Wales*

*Memorandum to the*

on draft Wales Bill, paragraphs 72-75; National Assembly Presiding Officer, letter to the Secretary of State for Wales, 8



less significant than [their] [the] connections with Wales [by reference to which the

apply in cases with a significant connection with England.

A choice of law method of this type would be compatible with a purpose-based flexibility. A solely court-centred approach would risk engendering uncertainty, including a long and porous border, there was a significant policy need to facilitate Welsh legislation competence, but it would be subject to the choice of law clause unless and until specific



*Model 1: Separate courts and separate bodies of law*

by specific rules for the two countries' legal relations, as with judicial notice of laws

*Model 2: Separate courts and distinct bodies of law*

Formal institutional arrangements would be reconfigured as in Model 1, but the

conflicts of law rules would be correspondingly limited.

*Model 3: Distinct courts and distinct bodies of law*

*Welsh Government suggestions*

Several elements of the Welsh Government's approach are worth highlighting. The first is

*The law extending to England and Wales*

(1) All of the judges and other officers of Her Maŷ

a different vein, provision confirming that, notwithstanding the division of jurisdiction and

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The draft Wales Bill contains a complex set of specific as well as general reservations;

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is a legal definition of reserved matters that begrudges devolved power and would in

reservations there are or how long the list of reserved matters is. Reflecting in large measure the one-sided nature of 'trawling' and 'fishing' in Whitehall, the problems are more deep-

The scale of the difficulty will reflect the impact of the matters specifically reserved to

groups of reservations by reference to the official policy aims of the legislation and through a pathway to a properly justified and constitutionally appropriate list of reservations.

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## 7.2. Policy tools

question. Attention needs to be given both to the policy justification and the impact of reserving a specific item, as well as to the overall shape of the package of reservations

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justification of the reservation is therefore necessary. This may be said to apply to the

50 Knives (defined to include knife blades and razor blades, axes and swords)

the 'integrity' of the unified legal system of England Wales. This appears to necessitate a number of specific reservations:

Again, some 'specific reservations' are less specific than others. As set out below, 'family law' exemplifies a need with sprawling subjects to drill down to the different policy justifications.

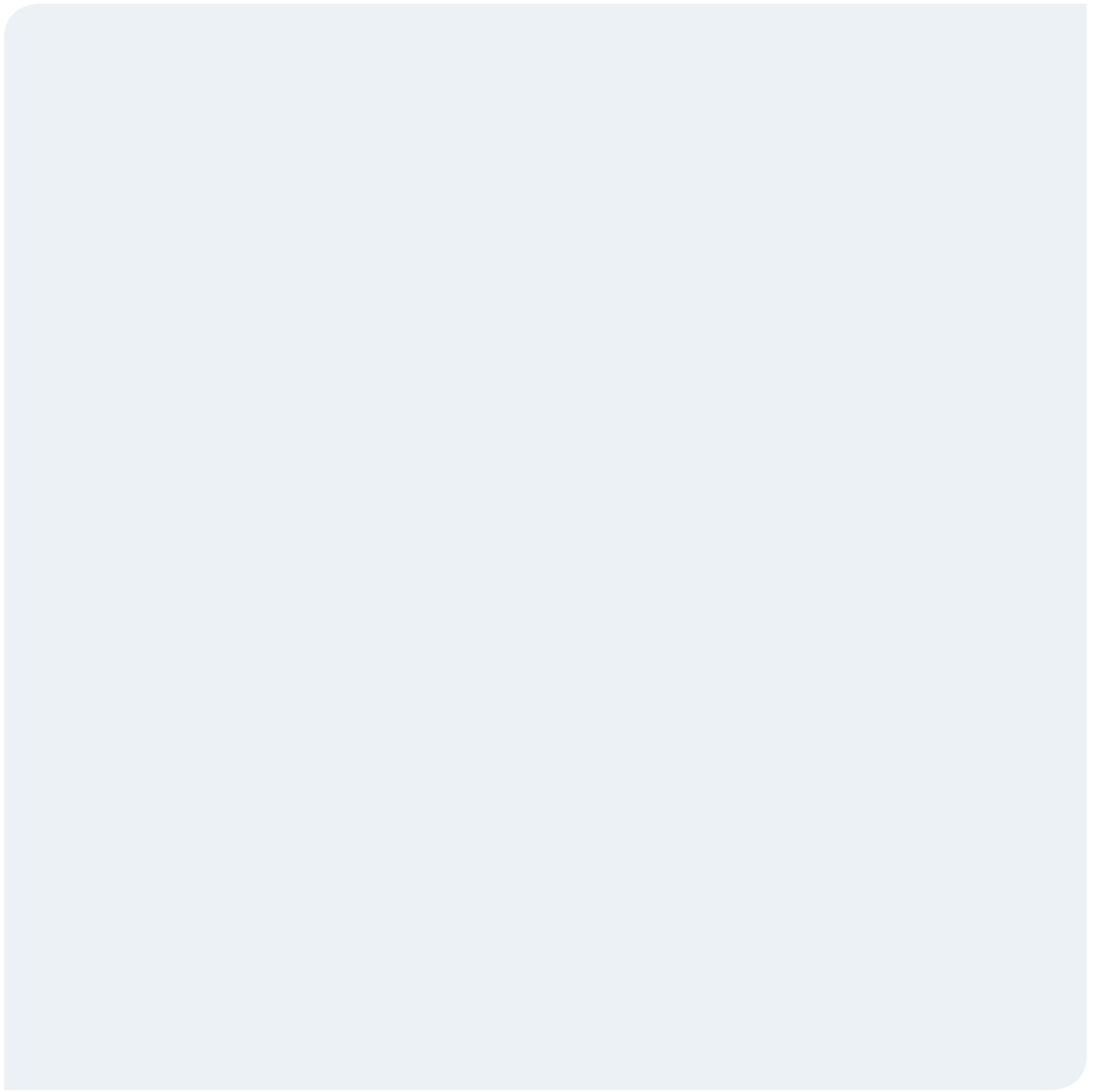
The difficulty partly arises because of the imprecision of the term 'family law'. Family

officers. The proposed new powers to legislate on advice generally (not restricted









*Control of land and non-energy natural resources:*

*Skills training:*

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reflect existing non-devolved matters or a one-sided bureaucratic process within Whitehall (Chapter 3). The list certainly does not reflect the hope that the Silk Commission expressed

We cannot over-emphasise the need for principled justification and scrutiny. Some of the

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was earlier identified as the third main kind of squeeze on the devolved institutions in the

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### 8.1. Constitution, law and practice

day significance for citizens.

existing public bodies as part of policy development, not least in order to promote efficient policy fields. Conversely, UK ministers may have good reasons based on collective and/or





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### 8.3. Transparency and streamlining

Direct or indirect resource implications – changed financial requirements, liabilities



fixed periods. Such procedural requirements would operate to overcome the impediment to rapid and responsive making and implementation of policy and law that is a significant



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fine policy objectives of a stronger, clearer, fairer and more robust devolution settlement short-sighted. At the heart of the difficulty is the triple squeeze on the devolved institutions

proper protection of UK-level powers and functions, as well as the benefit for the people

more unfortunate than that conditions have been ripe, first, with the opaque and veto-

*Agricultural Wages* case) a significant constitutional issue waiting to be tackled. But the

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### 9.1. Reconstruction

general legal restriction especially as regards private law and criminal law ('lock'), reflects

This approach to the internal design of the reserved powers model is fundamentally flawed

It invites constitutional and political difficulty because the seeming desire to protect every feature of a unified legal system generates provision that cuts deeply into the policy-making

difficulty because of the fresh uncertainties produced and the awkward demands placed

The draft Bill is incomplete. A conferred powers model of devolution can fit inside the unified legal system of England and Wales in its present form, but a properly constituted

The list of reservations in the draft Bill reflects the lack of a coherent overall approach overlaid with untested and uneven layers of specific reservation. Some of the reservations are untested. Simply jettisoning the stranger ones will not suffice. The listing as a whole must be subjected to the disciplines of reasoned justification, public debate and legislative scrutiny in order to

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The Secretary of State correctly stresses that the draft Bill is a first step in the formal legislative



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of Schedule 7 and does not fall within any of the exceptions specified in that Part of it neither applies otherwise than in relation to Wales nor confers, imposes, modifies

within any of the exceptions specified in that Part of that Schedule) is to be determined

competence)

it applies otherwise than in relation to Wales or confers, imposes, modifies

*Introductory*

*Separation of the law*

All of the judges and other officers of Her Majesty's Court of Appeal in England or Her Majesty's High Court of Justice in England become judges or officers of both of the

