1.0 Introduction

1.1 This supplementary evidence is submitted by the Director of Legal Services of the National Assembly for Wales ("the Assembly"), on behalf of the Presiding Officer, in response to a request made by the Commission at an oral evidence session on 12 April 2013.

1.2 The Presiding Officer has stated, both in her written evidence to the Commission of 28th February 2013 and in her oral evidence of 12 April 2013, that the reserved powers settlement in force in Scotland is significantly clearer than the Welsh settlement. This means both clearer in technical terms – as explained in the Annexe to the Presiding Officer’s written evidence – and in terms of ease of understanding for the public.

1.3 However, the Assembly Commission’s oral evidence of 12th April also recalled that the Supreme Court had said that the Scottish settlement “[might] not strike one as a model of clarity”. The Commission referred to the potential for learning lessons, in making any change to the Welsh system of devolution, from technical complexities in the Scottish system of devolution. This supplementary evidence expands on that oral evidence.

1.4 That said, the Presiding Officer’s written evidence also recognised that no devolution settlement would ever be 100% certain. The Supreme Court has itself recognised that is the case. In the words of Lord Hope, sitting in the Supreme Court in the case of Martin and Miller v Lord Advocate, ²:

“the Scotland Act 1998 … recognises that it [is] not possible, if a workable system [of devolution is] to be created, for reserved and

¹ Martin and Miller v Her Majesty’s Advocate (Scotland) [2010] UKSO 10, per Lord Hope, at paragraph 3. ² Martin and Miller v Her Majesty’s Advocate (Scotland) [2010] UKSC 10, per Lord Hope, at paragraph 11.
devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap [is] inevitable ...”

2.0 Potential lessons from the Scotland Act 1998 for any revision of the Welsh settlement

A. Complexity

2.1 The Supreme Court has pointed to a high degree of complexity in a key part of the Scotland Act 1998 which deals with legislative competence (section 29(4) and Schedule 4, paragraphs 2 and 3).

2.2 These provisions deal with the relationship between cross-cutting areas of law (e.g. the criminal law and the law of contract, tort and property) and those matters specifically reserved to the UK Parliament by Schedule 5 to the Scotland Act 1998.

2.3 Section 29(4) of the Scotland Act is itself complex. It relates to provisions of Acts of the Scottish Parliament (“ASPs”) which modify Scots private law or Scots criminal law. Those matters are not reserved, so in principle the provisions are WITHIN competence.

2.4 Moreover, section 29(4) applies only if the modifications meet the first test for competence – i.e. their purpose and effect mean that they do not “relate to” a reserved matter. So, again, WITHIN.

2.5 But if the modifications nevertheless “apply” to a reserved matter – despite having passed the purpose and effect test – they will be OUTSIDE competence.

2.6 There is then a further twist, in that the provision will come back WITHIN competence if its purpose is to make the law consistent as between reserved and non-reserved matters.

2.7 The position becomes further complicated by the fact that the provision in question also needs to survive the tests set out in Schedule 4, paragraphs 2 and/or 3 to the 1998 Act³. If the provision in question is not “special to a reserved matter” (hard to imagine if it has passed the tests in section 29), it will continue to be WITHIN

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³ Martin and Miller v Her Majesty’s Advocate (Scotland) [2010] UKSC 10, per Lord Hope, at paragraph 21.
competence. But if it is special to a reserved matter, it will be OUTSIDE competence – unless it meets the criteria set out in paragraph 3(1), in which case it will come back WITHIN competence.

2.8 Any new “reserved powers” Welsh settlement will need to deal with this relationship between cross-cutting areas of law and specifically-reserved matters. However, the fact that Wales does not have its own criminal or civil law systems may mean – perhaps counter-intuitively – that the relationship can be dealt with more simply than it is in the Scottish settlement. It may be appropriate simply to continue to prohibit provisions that “apply otherwise than in relation to Wales”, but to allow exceptions for incidental, consequential (etc.) provisions. (However, contract law, where the law that applies to the contract is crucial, is likely to be a more complicated issue).

2.9 Nevertheless, the Supreme Court has highlighted two causes of complexity in the Scotland Act that may still be relevant to the drafters of any new Welsh settlement. These are set out below.

Duplication

2.10 One cause of the complexity, pointed to by the Supreme Court in the Martin and Miller case cited above, is the partial duplication between section 29(4) and Schedule 4, paragraphs 2 and 3 of the Scotland Act 1998.

2.11 While any new Welsh settlement is unlikely to replicate the exact provisions concerned, it will be important to avoid similar issues in the drafting of a new settlement. A key principle of statutory interpretation is that the legislature does not use words in vain. So those seeking to implement the legislation will start from the presumption that there is no duplication in the legislation, but, instead, that the apparently duplicatory provisions mean something different from each other. It can easily be seen that this will lead to a lack of legal certainty, and can lead to unintended consequences when the courts come to interpret it.

Use of “impenetrable language”

\(^4\) Martin and Miller v Her Majesty’s Advocate (Scotland) (cited above), per Lord Hope, at paragraph 21.

\(^5\) See, for instance, Craies on Legislation, 10th ed., para. 8.1.11 and para. 20.1.23.
2.12 The Justices of the Supreme Court did not find paragraphs 2 and 3 of Schedule 4 to the Scotland Act 1998 “entirely easy to follow …”\(^6\). Indeed, Lord Rodger went on to say that “paragraph 2, in particular, can appear to use impenetrable language to erect an arbitrary restriction on the Parliament’s powers”\(^7\).

2.13 It would be both foolish and presumptuous to make a specific submission as to how such difficulties could be avoided in any new legislation amending the Welsh devolution settlement, but, plainly, it is desirable that a lesson from Scotland is learned on this point.

B. Variation in drafting

2.14 In *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, Lord Hope\(^8\) (delivering the leading judgment) said that Schedule 5 to the Scotland Act 1998 – one of the key provisions for defining the competence of the Parliament – “contains a long and complicated list of reserved matters which, at first sight, might have been expected to give rise to frequent disputes”.

2.15 He went on to highlight one of the reasons why the Schedule is “complicated”:

“[The] content [of the reserved matters] ranges from fiscal, economic and monetary policy in Head A to outer space in Head J. Sometimes the subject matter is described in broad terms; sometimes it is identified simply by the name and date of a statute. There is no common characteristic …”

As Lord Hope set out, reserved topics are delineated in different ways in Schedule 5 to the Scotland Act 1998.

2.16 Sometimes the topic is described in broad, conceptual terms, e.g. under Head B, Section B 10. Here, the Section heading and the reserved matter are exactly the same: “Emergency powers”.

2.17 Other topics are drafted in a slightly more detailed, but still broad, manner. For example, Head D (Energy) contains Section D1 which is

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\(^6\) *Per* Lord Brown *in* Martin and Miller v Her Majesty’s Advocate (Scotland) (cited above), paragraph 65.

\(^7\) *Ibid*, page 25, paragraph 67.

\(^8\) *At* page 4, paragraph 6.
“Electricity”. But there is no reserved topic expressed as “Electricity”. The first reserved topic under that Head is “Generation, transmission, distribution and supply of electricity”.

2.18 A third category of topic is couched in a way that breaks up the overall topic into more numerous, and thus more detailed, sub-topics. An example of this approach is Head C, Section C7, “Consumer Protection”, where the first topic consists of 9 sub-topics. This topic was at the heart of the Imperial Tobacco case (cited above).

2.19 A fourth category of topic is drafted by reference to the “subject-matter” of a particular statute (or part of a statute).

2.20 Some reserved topics use a mixture of two or more of these approaches; again, Section C7 is an example of this, as one of the sub-topics is stated to be the subject-matter of a Part of an Act.

2.21 This variation in drafting approach causes, in itself, some complexity and uncertainty as to how different topics will be interpreted by the courts. The courts will start from the presumption that Parliament has a deliberate intention behind the precise language it uses. Therefore, if Parliament uses different ways of describing reserved topics, the courts will presume that there is a reason for that difference.

2.22 Moreover, in our view, there are considerable difficulties inherent in the fourth approach (defining reserved topics by reference to the “subject-matter” of particular Acts of the UK Parliament).

2.23 It is clear from the scheme of the Scotland Act 1998 that this means something wider than a prohibition on amending or repealing the particular Acts (or Parts/sections of Acts) cited. This is clear because it is Schedule 4, not Schedule 5, that forbids the modification of particular statutory provisions.

2.24 However, it is not at all clear what this wider reservation means in practice.

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9 See, again, Craies on Legislation, op. cit., para. 20.1.23.
10 This view was also expressed in an unsigned editorial in (1998) 19 Statute Law Review, although the author also saw the drafting device as “elegant”.
2.25 Nor is it clear why the reservation has been expressed as “the subject-matter” of an Act/Part of an Act, rather than a list of the headings to the Parts, Chapters and/or sections within the piece of legislation referred to. In other words, it is not clear why the fourth method of drafting has been chosen, rather than the third.

2.26 Finally, there is the difficulty that reservations are being expressed by reference to the subject-matter of UK Acts as they stood at the point at which Schedule 5 of the Scotland Act 1998 came into force. This is clearly appropriate from a constitutional point of view; the Scottish Parliament’s competence should not be capable of being shrunk (or expanded) by the UK Parliament amending one of its own Acts in an expansive way. However, it is a factor obscuring the true breadth of competence from the Scottish public and even from Scots lawyers, who continually have to check exactly what a UK Act said as at the relevant date in 1999.

2.27 Going back to the variation in the drafting of different reservations, the tool which Lord Hope used, in the *Imperial Tobacco* case cited above, to interpret Schedule 5 to the Scotland Act was to look for “[the] common theme” in those reservations. Lord Hope construed that “common theme” as being that “matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament at Westminster”.

2.28 With every respect to Lord Hope, that theme is itself capable of different interpretations. It could be said that the United Kingdom as a whole has an interest in all of its children receiving a high-quality education, because this would tend to improve the economic performance of the country. Yet education does not appear in the list of reserved matters. On the other hand, is it really of great concern to the United Kingdom to retain control over the regulation of certain professions, while others are under the control of the Scottish authorities?

2.29 Lord Hope went on to say that “these considerations [of theme] cannot be used to override the clear meaning of the words used in the Schedule. But they are part of the overall context”.
2.30 In interpreting statutes, the task of the courts is to ascertain the intention of Parliament. In a matter as important as legislative competence, it appears particularly important for Parliament itself to give the courts clear directions as to its intentions.

2.31 For these reasons, we would submit that any legislation expressing the Assembly’s competence in the form of a reserved powers model should adopt the following principles.

(a) Each reserved topic should, so far as possible, be drafted in one consistent style.

(b) If this is not possible, consideration should be given to grouping reservations by style as well as by subject. In other words, in each subject, any broad reservations would be listed first, followed by any detailed ones.

(c) Reservations should not be drafted in terms of “the subject-matter” of UK Acts. (However, this is not to be read as an objection to the new legislation containing a prohibition on Assembly Acts modifying particular UK Acts, or provisions of those Acts).

2.32 The intention behind the reservation should be explained, either in a “purpose” provision within the legislation, or in the Explanatory Notes to the legislation which should accompany the legislation in its passage through Parliament, unlike the Explanatory Notes to the Scotland Act 1998).

This explanation could either be an explanation of the common purpose behind all the reservations, if that is possible. Alternatively – and, we would submit, more usefully – there could be an overall explanation of this common purpose and then an explanation, in relation to each reservation, of its purpose, showing how that related to the overall common purpose. We would suggest that the discipline of producing such an explanation would be likely to result in a more consistent settlement, as well as one that is easier for the courts to interpret.

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