### Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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### Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.
The telephone number for general enquiries is 020 7219 5960/1228
The Committee’s email address is: constitution@parliament.uk
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### Oral Evidence

*The Rt Hon Peter Hain, MP Secretary of State for Wales*

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Government of Wales Bill

INTRODUCTION

1. Our terms of reference are to “examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.\(^1\) The subject-matter of the Government of Wales Bill clearly demands attention under both these heads. We have followed our usual practice of focusing only on those issues of principle that affect a principal part of the constitution, and therefore do not comment on the merits of the Government’s devolution policy, as these are for the House as a whole to consider.

2. The report summarises the aims of the bill, sets out some of the background to the developments in Welsh devolution, and goes on to examine in outline the main issues of constitutional principle that emerge from the bill. We are grateful to the Secretary of State for Wales for agreeing to give evidence on the bill on 15 February 2006. A transcript of that meeting is set out as an appendix to our report, as are a written memorandum from the Secretary of State and a copy of a letter from the Parliamentary Under-Secretary for Wales to the Shadow Secretary of State for Wales, which helpfully gives illustrative examples of proposed legislative competence Orders of the type envisaged by Part 3 of the bill.

AIMS OF THE BILL

3. It is often acknowledged that “devolution is a process, not an event”. The Government of Wales Bill seeks to take the next step, and the one after that, in this process. In essence, the bill seeks to achieve five main goals:

- Parts 1 and 2 alter the corporate status of the National Assembly for Wales (“the Assembly”) to differentiate the Assembly and the Assembly Government. This aspect of the bill has broad cross-party support. Indeed, to some extent it formalises in law some of the practical developments that have occurred since 1999.

- The bill retains an Additional Member System for elections to the Assembly, but clause 7 seeks to prevent persons standing simultaneously as a candidate on a regional list and for a constituency. This proposed bar has aroused considerable controversy.

- Part 3 of the Bill creates a complex process by which the Assembly may acquire enhanced law-making powers. The Government says that this “is not about broadening the terms of devolution but deepening it”.\(^2\) Over the areas that the Assembly currently enjoys executive powers, it will be able to enact a new form of law called Assembly Measures. The power to do so will be delegated by Parliament on a subject-by-subject basis. The Secretary of State for Wales retains considerable control over the

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\(^1\) The Government’s proposals have also been scrutinised by the House of Commons Welsh Affairs Committee, 1st Report (2005-06): Government White Paper: Better Governance for Wales (HC 551) and the National Assembly for Wales (Committee on the Better Governance for Wales, Report 2005).

\(^2\) HC Hansard 23 Jan 2006, col 1255 (Nick Ainger MP, Parliamentary Under-Secretary of State for Wales).
acquisition of those powers by the Assembly, and all delegations of power will be subject to approval by both Houses of Parliament.

- Part 4 of the bill is a blueprint for the future. It sets out a scheme for the devolution of primary legislative powers to the Assembly. The model chosen is different from that of the Scottish Parliament. Part 4 will be brought into force at an unspecified point in the future and only after a “yes” vote in a referendum of the Welsh people. The Bill has been criticised for not including the wording of the referendum question.

- Part 5 of the bill deals with finance and the creation of a Welsh Consolidated Fund.

BACKGROUND

4. The Secretary of State told us that although the scheme of devolution established by the Government of Wales Act 1998 has in many respects worked well, “there has been a number of shortcomings exposed in the process and experience”\(^3\).

Corporate status

5. Only months after the first elections to the National Assembly in 1999, there was growing concern about one feature of the scheme established by the 1998 Act—that the Assembly was a corporate body without a formal separation between its legislative and scrutiny activities on the one hand, and executive functions on the other. The corporate body model of government, by subject-specific committees, had been borrowed from local government. Powers were conferred on the Assembly as a whole and then delegated to the First Secretary by Assembly Members. Many people took the view that this arrangement generated considerable confusion among the public and provided inadequate scrutiny of policy initiatives and implementation. A cross-party review of Assembly procedures in 2001–02 resulted in a greater de facto separation between the Assembly and the executive. Parts 1 and 2 of the bill put the separation on a statutory footing and have broad cross-party support.

Richard Commission

6. Other dissatisfactions also arose. In July 2002 the First Minister (as the First Secretary was by then styled) set up a ten person Commission on the Powers and Electoral Arrangements of the Assembly, chaired by the Rt Hon the Lord Richard QC. Its remit was to review the adequacy of the Assembly’s powers and its electoral arrangements. The Richard Commission held nine public meetings and issued two consultation papers before the publication of its report in March 2004.\(^4\) The report was commended by one commentator as supplying “a clear constitutional vision, more especially in terms of legal and political accountability”.\(^5\) The Commission worked on two assumptions in relation to constitutional principles: “First, those gains in democracy and accountability are valuable in themselves. Second, that more open, participative and responsible governance is likely to produce better policy

\(^3\) (Q 2)

\(^4\) The report is available on the Commission’s website www.richardcommission.gov.uk.

outcomes”. The majority of the Commission reached the following conclusion:

“We do not think the status quo is a sustainable basis for future development. Although there has been significant evolution in the Assembly’s powers since 1999, it has been an ad hoc, piecemeal development, on a case by case basis, not founded upon any agreed general policy, or informed by any clear set of devolution principles. The legislative relationship between Cardiff, Whitehall and Westminster has grown significantly, but remains dependent upon particular situations and even individual departmental inclinations”.

7. In Box 13.5 of their report, the Commission set out their preferred model for a reformed legislative Assembly for Wales. They recommended a bill to confer primary law-making powers on the Assembly along the lines of the Scotland Act 1998, with specified reserved areas of policy on which Westminster would legislate and everything else devolved. The reserved areas could include: defence; fiscal and monetary policy; immigration and nationality; competition; monopolies and mergers; employment legislation; most energy matters; railway services (excluding grants); social security; election arrangements (except local elections); most company and commercial law; broadcasting; equal opportunities; police and criminal justice. The Commission suggested that the Assembly’s corporate body structure be replaced with a separate executive and legislature. The Commission took the view that the membership of the Assembly should be increased from 60 to 80, elected on a Single Transferable Vote system. Tax-varying powers would be desirable but not essential. The Commission stated that these changes should be put in place by 2011, or sooner if practicable. Although the issue was not within the Commission’s terms of reference, they considered whether a referendum of the people of Wales should be held. The Commission concluded that the “judgement is one for the UK Government and Parliament to make in the light of their assessment of the response to our report and the ensuing debate in Wales”.

The May 2005 General Election

8. The May 2005 General Election took place before the Government formally responded to the Richard Commission report. The Welsh Labour Party manifesto 2005 stated:

“The nations and regions of the UK. In our first term, we devolved power to Scotland and Wales and restored city-wide government to London. Britain is stronger as a result. In the next Parliament, we will decentralise power further. Labour is the party of devolution in Wales. We campaigned for and secured a “Yes” vote in the 1997 referendum and since 1999 have led an Assembly Government committed to achieving full employment and record investment in our schools and hospitals. But the experience of the last six years shows the need for further reform. In a third term we will legislate for a
stronger Assembly with enhanced legislative powers. We will improve the accountability of Ministers by ending the confusing corporate status of the Assembly, thereby ensuring that the people of Wales know who is responsible for the decisions taken in their names. Alongside these changes we will prevent candidates from standing on both the list and in a constituency in order to make all candidates genuinely accountable to the electorate and to end Assembly Members being elected via the backdoor even when they have already been rejected by voters.”

Wales Office White Paper

9. The Government’s formal response to the Richard Commission report came in June 2005 in the White Paper Better Governance for Wales (Cm 6582). In one important respect the White Paper accepted recommendations made by the Commission—that there should be a parliamentary style of government, with a separation between executive and legislature. The White Paper differed from the Richard Commission in relation to other central questions. The Commission’s “Box 13.5” model for the future of the Assembly, and the timetable for achieving it, was rejected. Instead the Government proposed “to give the Assembly, gradually over a number of years, enhanced legislative powers in defined policy areas where it already has executive functions”.12 This gradualist approach has attracted criticism in some quarters, being described as “something of a messy compromise between the status quo and a swift move to full legislative devolution, as enjoyed by Scotland and as recommended in the Richard Report”.13

10. The White Paper rejected the Richard Commission proposals for changes to the size and electoral arrangements of the Assembly. Instead, the Additional Member System of election would be retained, but with a new bar on candidates simultaneously standing for both a constituency and also being on a regional list.

11. The Government envisages three broad phases in Welsh devolution:

- Phase 1 is the current situation. This includes framework provisions in Acts of Parliament granting broad powers to the Assembly to make delegated legislation14 and the enactment from time-to-time of Wales-only Bills.15

- Phase 2 is to provide a system to enable the Assembly to request the Secretary of State and Parliament to confer law-making powers in relation to a list of “fields”. This power to make Assembly Measures is provided for in Part 3 of the bill.

- Phase 3 is to confer powers to make primary legislation (Acts of the Assembly) in relation to a list of defined fields over which the Assembly will have full legislative competence. This would only occur after a “yes” vote in a referendum. Part 4 of the bill makes provision for this.

12 Cm 6582, para 1.23.
14 For example the “framework” power contained in clause 17 of the NHS Redress Bill [HL].
THE MAJOR CONSTITUTIONAL ISSUES

12. At our meeting on 15 February 2006, we examined three key areas:

• The operation of Part 3 of the bill, which will in the near future bring about the next phase of devolution by enabling the Assembly to make Assembly Measures.16

• The constitutional implications of Part 4 of the bill, which provides for devolution of primary law making powers at some point in the future, after a referendum.17

• The proposed alteration to electoral arrangements for the Assembly, to bar candidates standing concurrently for a constituency seat and on a list.18

We also draw attention to:

• the bill’s provisions relating to the party political composition of Assembly committees;

• the calls that have been made for the bill to provide a referendum in relation to Part 3;

• the dormant condition of the Joint Ministerial Committee, a subject previously examined by this Committee in their report Devolution: Inter-Institutional Relations in the United Kingdom,19 and discussed with the Lord Chancellor in 2004.20

We discuss these issues in the order in which they arise in the bill.

PART 1 OF THE BILL

Electoral Arrangements

13. Under the Government of Wales Act 1998, elections for the 60 Assembly Members (AMs) take place under a proportional representation system known as the Additional Member System (also known as a Mixed Member System). 40 AMs are elected on a first-past-the-post basis for 20 constituencies which are coterminous with the parliamentary constituencies. To achieve some degree of proportionality, a further 20 AMs are elected from party lists in five regions. Thus there are two types of AMs—constituency AMs and regional AMs.

14. The Richard Commission recommended that the number of AMs be increased to 80, elected on a Single Transferable Vote system. The Government rejected this proposal. The bill retains 60 AMs and the Additional Member System, but with one controversial modification—the banning of dual candidacy. Clause 7 seeks to prevent a candidate simultaneously standing for one of the 20 constituencies and having his or her name on a party list for election as an additional member. The White Paper stated “In the Government’s view, for losing candidates to be able to

16 QQ 3–8, 48
17 QQ 9–14, 23–27
18 QQ 35–39
become Assembly Members regardless of their constituency election results both devalues the integrity of the electoral system in the eyes of the public and acts as a disincentive to vote in constituency elections”.21

15. The bar on dual candidacy was debated at length in the House of Commons.22 We note that, among other organisations, the Electoral Commission (the public authority established in 2000 to foster public confidence and participation in elections) and the Electoral Reform Society (an organisation that campaigns for electoral reform) have criticised the proposed reform.23 It is said that the bar on dual candidacy has very few international precedents; and that, on the contrary, dual candidacy is a common and accepted feature in proportional systems across the world. It is also said that the bar will disadvantage opposition parties more than the Labour party in Wales. Moreover, critics add that in January 2006 a bar on dual candidacy was considered and expressly rejected by the Arbuthnott Commission in relation to the Scottish Parliament.24

16. The Secretary of State told us that when he helped to take the Government of Wales bill forward in 1998, and put forward the Additional Member System, he “never anticipated the consequences in terms of regional list members competing with constituency members, in the bulk of cases people who had defeated them”25.

17. We note that the Government’s commitment to introducing a bar on dual candidacy was contained in the Labour Party’s General Election manifesto in 2005 and do not seek to comment on the merits (as opposed to the constitutional implications) of the policy. We hope, however, that the Government will take care to explain to the House what other options have been considered (for example replacing the regional lists with a single national list across the whole of Wales) and why they have been rejected. All electoral systems have defenders and critics, and the Additional Member system is no exception.

Composition of Assembly committees

18. Clause 29 of the bill requires the standing orders of the Assembly to make specific provision as to the party political composition of committees. The Explanatory notes explain that “Generally speaking, political groups’ entitlement to membership of each committee is to be determined by the d’Hondt method of distribution which is used to allocate regional seats at Assembly elections; but standing orders permitting, some other distribution method may be applied in the case of a particular committee if two-thirds of Assembly members voting on a resolution support such a proposition”. There is no comparable provision in the Scotland Act 1998 in relation to committees of the Scottish Parliament, though the d’Hondt formula is used under the Northern Ireland Act 1998 to determine chairs

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21 Cm 6582, para 4.5.
25 Q 35
and deputy chairs of committees in the Northern Ireland Assembly. It may be thought that clause 29 is an inappropriate incursion into matters that should be left for the Assembly to determine for itself.

PART 3 OF THE BILL

19. Part 3 of the bill sets out the procedures to be followed in the next phase of devolution. This will provide the Assembly with enhanced legislative powers in relation to subject areas which are broadly similar to those over which it currently has executive powers. Schedule 5 to the bill contains a list of 20 “matters” over which the Assembly may seek to have legislative competence. They include, for instance, “Field 1: agriculture, fisheries, forestry and rural development”, “Field 2: ancient monuments and historic buildings” and “Field 3: culture”. Clause 94(1) creates a Henry VIII power for the Minister to add a new field, vary or remove any field. The Government have, however, said that they have no plans at present to extend the responsibilities of the Assembly.

20. If the Assembly wishes to have greater legislative powers over a field than it already possesses, it will request that the Secretary of State take steps to create a “matter” under the appropriate “field”. If the Secretary of State agrees, he will seek approval by Parliament for a “legislative competence Order”, which will have the effect of amending Schedule 5 to the bill to include the new “matter”. The process envisaged by the bill is broadly as follows:

(a) There will be debate in the Assembly about the desirability of seeking powers to make Assembly Measures in relation to a particular field;

(b) If the Counsel General or the Attorney General takes the view that a proposed “matter” does not relate to a “field”, they may refer the issue to the Supreme Court. The Court is likely to consider “the pith and substance” and “the true nature and character” of the provision. The Government have given the following as an illustration of the type of issue that may arise: “We will soon be debating the Health Bill, which deals with, among many other things, a ban on smoking in public places. Within that bill there are provisions to give the Assembly secondary legislation powers. Some may argue that that is a licensing issue rather than a health issue, but the purpose of the regulations that will ban smoking in public places is clearly health-related”;

(c) Assuming the Secretary of State, Counsel General and Attorney General are all content with the Assembly’s initiative, a “proposal for an Order” (also referred to as a “preliminary draft Order”) will be laid before both Houses of Parliament, along with an explanatory note. The Secretary of State has said that “the Order will not be long and will not set out the detail of the policy that the Assembly wishes

26 Clause 49 seeks to put the post of Counsel General on a statutory footing. The Counsel General is the chief legal adviser to the Assembly Government and the office may (but need not be) held by an Assembly Member.

27 Or the Judicial Committee of the Privy Council until the new Supreme Court, established by the Constitutional Reform Act 2005, becomes operational on 1 Oct 2008.

to implement, although that will be explained in an explanatory memorandum, because that will be a matter for the Assembly to determine”;29

(d) There will be pre-legislative scrutiny of the proposal for an Order by Parliament and the Assembly. Amendments may be suggested at this stage. The Assembly will reconsider the proposal for an Order in the light of comments from the parliamentary committees and any committee of the Assembly that has conducted pre-legislative scrutiny. A final text of the Order (“the draft Order”) will be produced;

(e) The Secretary of State will have 60 days to consider whether to lay the draft Order before each House, or give notice in writing to the First Minister of his refusal to do so and the reasons for that refusal. There have been calls for the Secretary of State’s power at this stage to be limited to refusing to proceed with the draft Order on procedural grounds rather than on the merits of the policy which the Assembly wishes to pursue.30 There is a possibility of litigation to challenge the Secretary of State’s decision. No specific procedure for legal challenge is set out, so the matter would be dealt with at first instance by a claim for judicial review in the Administrative Court (sitting in London or Cardiff);

(f) The draft Order in Council will be laid before both Houses of Parliament. The text will not necessarily incorporate amendments suggested during the process of pre-legislative scrutiny, as these will not be binding on the Secretary of State. The procedure for scrutiny and debate will be for each House to decide. Both Houses must approve the draft Order before it is made. Once made, the Order will amend Schedule 5. Parliament will have no further routine role in the process after this point;

(g) Within the ambit of the legal competence conferred by the new “matter”, the Assembly will be free to make Assembly Measures in accordance with its Standing Orders. Assembly Measures will have similar legal effect to Acts of Parliament: they may modify the effect of legislation made or enacted before or after this bill is enacted, or make entirely new provision:

(i) The bill requires that the Assembly provide three stages of consideration—on the principle, the detail and the final text of draft Measures. The Assembly’s Standing Orders will provide more detailed requirements on the procedure to be followed;

(ii) The Secretary of State has a power to intervene on specified grounds to prohibit the Clerk of the Assembly from submitting a proposed Assembly Measure to Her Majesty in Council (clause 100). The Counsel General or Attorney General may refer a draft Assembly Measure to the Supreme Court if there are doubts as to whether it is within the legislative competence

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29 HC Hansard 9 Jan 2006, col 36 (the Rt Hon Peter Hain MP, Secretary of State for Wales). Illustrative examples of proposed Orders and explanatory memoranda can be found in Appendix 3.

of the Assembly. If they do not intervene, other persons may be able to make a claim for judicial review in relation to the draft Measure in the Administrative Court;

(iii) The proposed Assembly Measure is submitted to Her Majesty in Council for formal approval;

(iv) An Assembly Measure may confer on the Assembly Government powers to make subordinate legislation, so there is the likelihood of a further level of delegation here. Scrutiny of that delegated legislation will be a matter for the Assembly;

21. The relative breadth or narrowness of the “fields” set out in Schedule 5 and the “matters” that may come to be added by Orders under each field is of obvious practical importance. The fields in Schedule 5 are generally similar to those in Schedule 2 to the Government of Wales Act 1998 (which stipulates the functions initially transferred to the Assembly). There are three new fields: “fire and rescue services and the promotion of fire safety”; “National Assembly for Wales” (which will allow the Assembly to make legislation under Assembly Measures); and “Public Administration”. The 1998 field of “social services” is widened to “social welfare”. As already noted, there are Henry VIII powers in clause 94 enabling the Secretary of State to vary, remove and add new fields to Schedule 5. The illustrative examples of “matters” provided by the Government suggest that at least in some contexts these are going to be fairly broadly drafted. Thus one illustration in relation to “Field 10: highways and transport” is “Matter 10.1: Provision requiring the making of plans and strategies relating to public transport facilities and services by the Welsh Ministers or local or other public authorities”.

Parliamentary pre-legislative scrutiny of proposed Orders in Council

22. The provision of effective pre-legislative scrutiny in Parliament of requests for enhanced powers (stage (d) in paragraph 14 above) is clearly essential. We were concerned that in debates so far little has been said about what role the House of Lords might play at this stage. Informed estimates are that there are likely to be five or six legislative competence Orders coming before Parliament each year. It has often been assumed that the House of Commons Welsh Affairs Committee, perhaps working in conjunction with members of the Assembly, will have a monopoly over this important scrutiny work. The Secretary of State told us that the Government sees the House of Lords as having a “crucial role”. The precise arrangements will, of course, be a matter for the House not the Government. It is however clear from the Secretary of State’s remarks that the Government foresees limits on the role for the House of Lords in this particular context. The Government accepts that there would be scope for both Houses to conduct concurrent (but not consecutive) pre-legislative scrutiny of proposed legislative competence Orders but that it would “create quite a difficulty” if a process of scrutiny in

31 Contained in a letter of 17 Jan 2006 from Nick Ainger MP to Cheryl Gillan MP (Shadow Secretary of State for Wales), reproduced in Appendix 2.

32 Indeed an amendment was proposed at third reading in the House of Commons which would have created a statutory parliamentary committee, consisting of 10 members of the House of Commons and 10 Assembly Members, to scrutinise proposed legislative enhancement Orders: HC Hansard, 28 Feb 2006, col 162 (Dominic Grieve, MP).
the House of Lords were to reach a different view from that of the House of Commons Welsh Affairs Committee.

23. In due course the House will need to consider how best to contribute to scrutiny of proposed legislative competence Orders. This work might be done by the Delegated Powers and Regulatory Reform Committee or by the Constitution Committee. In this context we may recall the recommendation made in 2000 by the Royal Commission under Lord Wakeham’s chairmanship that the “reformed second chamber should be so constructed that it could play a valuable role in relation to the nations and regions of the United Kingdom whatever pattern of devolution and decentralisation may emerge in future”.34

24. The scale of work involved in scrutinising the proposed and draft legislative competence Orders is likely to be relatively modest. It will be necessary for the Procedures and Liaison Committees to decide how this should be done. If the task is undertaken by one or more of the existing committees (for example, the Delegated Powers and Regulatory Reform Committee or the Constitution Committee, on the basis that the Orders are a form of delegated power but may raise constitutional issues), a clear demarcation of roles would be desirable to ensure effective scrutiny and avoid repetition of effort. It will be important for the committee involved to have sufficient expertise and experience of Welsh affairs. Thought will also need to be given as to how the work of this House, and its committees, can complement rather than merely duplicate the work of the Welsh Affairs Committee in the House of Commons. In reviewing the options for scrutiny, the House may wish to view the situation strategically and consider whether there is a case for a new committee charged with a broad responsibility for keeping the whole of the United Kingdom’s devolution settlement under review.

Legislative powers and scrutiny by the Assembly

25. Part 3 of the bill will delegate significant legislative power from Parliament to the Assembly to make Assembly Measures. The Secretary of State reminded us that the delegation of law-making powers to an elected body that is itself accountable to the Welsh people is a different proposition from the situation where the delegation of powers is to a Minister.35 This is clearly correct. Nonetheless, it is legitimate for the delegator of legislative power to express an interest in how that legal authority will be exercised. It is generally acknowledged that the Assembly needs to improve its capacity to provide detailed scrutiny of draft legislation. The Richard Commission, in the context of their proposals that the Assembly should have primary legislative powers, concluded that “if the powers of the Assembly are increased, scrutiny will have to be given a greater priority in the work of the Assembly, particularly of committees” (p.258). It needs to be remembered that at least a dozen Members will form the Assembly Government. The Richard Commission recommended that the number of Assembly Members should be increased from 60 to 80. Moreover, it needs to be remembered that at

33 Q 5
34 A House for the Future (Cm 4534), recommendation 25.
35 Q 33
least a dozen will be members of the Assembly Government. The Secretary of State told us that it was not a “particularly attractive proposition at the moment” for the Government to advocate more politicians and that the solution instead lay in the Assembly “just actually working harder”\textsuperscript{36}. Currently the Assembly has a 33-week working year and meets for two or three days a week.

26. **Part 3 of the bill will require a significant step-change by the Assembly.** We share the concerns expressed by the House of Commons Welsh Affairs Committee about the strains that the new law-making powers may place on the ability of the Assembly to carry out effective scrutiny of proposed legislative competence Orders and the draft Assembly Measures that will follow.\textsuperscript{37} It will be important for the Assembly to keep the arrangements under review. We also believe that it is legitimate for Parliament to take an interest in the matter under the regime created by Part 3 of the bill, which creates shared responsibilities for law-making stopping short of full devolution of primary law-making powers.

**Feedback from the Assembly to Parliament**

27. A related issue is how, if at all, Parliament might be provided with information about how the Assembly has actually used the powers delegated to it. During the bill’s Committee stage in the House of Commons, an unsuccessful attempt was made to introduce an amendment that would have added a further stage to the process described above (paragraph 14, after “(g)(ii)”\textsuperscript{38}). This would have required an Assembly Measure, after it had been debated and passed by the Assembly, to then be approved by resolution of both Houses of Parliament. Mr Dominic Grieve MP explained that:

> “the Assembly might produce a Measure substantially different in detail from the draft proposal on which this House votes. That problem must be inherent in the procedure that the Secretary of State proposes. Although this House will retain responsibility for primary legislation in this country, there is a danger that it will abdicate some of that responsibility.” \textsuperscript{38}

28. We explored a different idea with the Secretary of State, namely that the Assembly or Assembly Government might lay before Parliament an annual report of its work that could provide the basis of a dialogue with Parliament\textsuperscript{39}. The First Minister already publishes an informative annual report.\textsuperscript{40} The Secretary of State was against any legislative requirement that the Assembly produce an annual report specifically for Parliament, on the grounds that it would be a novel and odd constitutional principle “for Parliament to hold a separately elected legislature to account” and he suggested that would “signal an unravelling of the political settlement, and indeed the very principles of devolution”\textsuperscript{41}. The Secretary of State said that there is already “constant communication” between this House and Assembly Members and that there

\textsuperscript{36} Q 8
\textsuperscript{38} HC Hansard 23 Jan 2006, col 1178.
\textsuperscript{39} QQ 15–19
\textsuperscript{40} Most recently The Report of the First Minister 2005, Delivering Our Promises.
\textsuperscript{41} Q 15
was nothing to stop committees of this House conducting inquiries into particular aspects of Welsh affairs.

29. **There are dangers associated with over-reliance on informal methods of communication between members of institutions.** Most public bodies, including this House, produce annual reports explaining their achievements and challenges. We see much to be gained by both the Assembly and Parliament for having in place a requirement (or expectation) that a summary of the exercise of its Part 3 powers be included within the Assembly Government’s annual report laid before Parliament. Such an arrangement would provide a valuable formal channel of communication with this House and its committees.

**Complexity of sources of law**

30. A further issue we raised with the Secretary of State was that of the proliferation of sources of law in Wales, a problem that will be exacerbated after Part 3 of the bill comes into force. Professor Keith Patchett has identified that there will be nine sources of Welsh-related legislation and he has expressed concern about accessibility of law. The House of Commons Welsh Affairs Committee in its December 2005 report called for progress to be made on developing a Welsh statute book, which would act as a register of relevant legislation. While this would go some way to addressing the most pressing problems of accessibility of law, it is not a panacea. The Secretary of State responded to our concerns by saying that “several sources of legislation is not a new phenomenon, and certainly is not unique to Wales” and was “probably a feature of any devolved or federal system of government in which political power is exercised at different levels”.

31. As Professor Himsworth has noted in a paper commissioned by this Committee in September 2004, “we can expect not a simpler but a more complex future” for legislative processes and legislation relating to Wales. **Part 3 of the bill does nothing to simplify either the sources of law relating to Wales or the process by which those laws are made. Problems with access to law, whether for citizens, public authorities or legal professionals, are not merely practical inconveniences but go to the heart of the constitutional principle of the rule of law. Confusion about who makes legislation, caused by complexity in the legislative processes, also risks undermining public confidence.**

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43 “Developing principles for primary legislation for Wales”, July 2005, Institute of Welsh Affairs submission to the Presiding Officer’s Committee Scrutinising the Wales Office White Paper *Better Governance for Wales* (http://www.wales.gov.uk/keypubassembettergov/content/evidence-e.htm). The sources listed by Professor Patchett are: Wales-only Acts of the UK Parliament; provisions in Acts of the UK Parliament applying to Wales specifically; Acts of the UK Parliament applying to England and Wales as a single jurisdiction; general subordinate legislation made by the Assembly under Acts or exceptionally under Whitehall subordinate legislation; subordinate legislation made by Whitehall specifically for Wales; subordinate legislation made by Whitehall for England and Wales as a single jurisdiction; Measures made by the Assembly under Orders in Council modifying or supplementing existing legislation; general subordinate legislation made by the Assembly Government under provisions of Acts; and general subordinate legislation made by the Assembly Government as delegate under Assembly Measures.

44 para 30.

45 Q 20

believe that there is a clear risk that the gains in transparency and promotion of public understanding by ending the corporate status of the Assembly in Parts 1 and 2 of the bill may be obscured by the intricacies created by Part 3.

A referendum on Part 3

32. There have been calls in the House of Commons for the bill to require a referendum before Part 3 of the bill is brought into force. It is said that Part 3 will transfer significant legislative competence from Parliament to the Assembly, and the fact that this will be done on a piecemeal basis and brought about by secondary legislation does not diminish the significance of the change. In short, Part 3 is a major constitutional shift. In opposing calls for a referendum, the Government present Part 3 of the Bill as an incremental change and point also to the mandate for enhancing the Assembly’s powers flowing from the Labour Party’s 2005 General Election manifesto. **We draw the issue to the attention of the House, noting that the absence of well-developed conventions and criteria in the United Kingdom as to when and why referendums should be held makes it difficult to assess the rival arguments against the benchmark of constitutional principle.**

**PART 4 OF THE BILL**

33. Part 4 of the bill is intended to provide a blueprint for the future development of the Assembly and will not be brought into force until after a “yes” vote in a referendum. The Secretary of State told us that he did not expect there to be any popular demand for a referendum “soon”. Given this state of affairs, we discussed why Part 4 of the bill needs to be put on the statute book now. The Secretary of State accepted that this was a good question and explained that the Government had reached this view after a lot of thought. In essence, the Government’s reason for deciding to go down this route is that it is important that the constitutional status of the Assembly is settled. The Secretary of State told us that it was destabilising for the future of the Assembly to be under constant challenge and debate as this diverts “attention from the policy, so instead of focusing on whether a policy being adopted by the Assembly is good or bad, or whether the delivery is effective, people always say that there is a shortcoming because there are not enough powers, whereas in fact that is not usually the case.”

34. **We do not, in this report, seek to comment on the merits of the Government’s general policy on devolution. We note, however, that the Government’s 2005 General Election manifesto, while promising that “In a third term we will legislate for a stronger Assembly with enhanced legislative powers”, did not contain an express commitment to legislate for an Assembly with fully devolved primary law-making powers. It will be for the House as a whole to consider the policy contained in Part 4 and the wisdom of seeking to place onto the**

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47 HC Hansard, 8 Feb 2006, col 161.
48 Q 9
49 Q 13
50 Q 13
statute book a scheme of devolution that is unlikely to be brought into force for several years.

The Part 4 referendum question

35. Previous referendum questions have been specified on the face of the Act of Parliament that makes provision for them. Under the bill, a referendum will be triggered by a two-thirds majority of Assembly Members voting in a plenary session, followed by the Secretary of State tabling an Order in Council to be approved by both Houses of Parliament. The bill does not set out what the question will be and leaves this to be settled in the Order. The Secretary of State explained to us that “Political Parties, Elections and Referendums Act sets out the principles and the template for conduct of referendums and section 104 of the Act clearly envisages that referendum questions could be set out in subordinate legislation, which is what the bill proposes, an Order in Council at the appropriate time”. He added that “if, say, you had a referendum in the next decade we do not know what the political circumstances might be”.

36. We accept that Part VII of the Political Parties, Elections and Referendums Act 2000 provides a framework for consultation about a proposed referendum question. Nonetheless we share the view of the House of Commons Welsh Affairs Committee that wording of the referendum question should be included on the face of the bill rather than laid down in secondary legislation at some future time. A referendum is one of the few opportunities for individual citizens to express a formally binding view on a matter of great constitutional significance. It is therefore preferable that elected representatives be able to scrutinise the question fully and, if needs be, to move amendments to the proposed question in Parliament. This House, too, has a special responsibility to ensure the constitutional acceptability of the question. Secondary legislation provides an inadequate means of achieving this.

Model for defining the Assembly’s legislative competence

37. In any federal or devolved system of government there are two main options for setting out the relative legal competence of the two levels.

(a) The lower level (state/region/province) has competence over all matters except those which are expressly reserved to the higher (federal/national) level. This model was chosen for Scotland in the Scotland Act 1998.

(b) The higher (federal/national) level retains competence over all matters except those which are expressly conferred on the lower (state/region/province) level. This was the model chosen for Wales.

51 For example, under the Referendums (Scotland and Wales) Act 1997, voters were asked to place a cross next to “I agree that there should be a Welsh Assembly” or “I do not agree that there should be a Welsh Assembly”.

52 Q 11

53 Q 11

under the Government of Wales Act 1998, and also under the Scotland Act 1978 which of course never came into force.

38. The Richard Commission preferred option (a). The Government has opted for (b) in the bill. The bill therefore has the effect of perpetuating the fundamentally asymmetric character of the devolution settlement in the UK. We acknowledge that the arguments for and against the method of definition adopted in the bill are finely balanced. The Secretary of State told us that the Government did not choose this model “in any kind of dogmatic way”\textsuperscript{55}. The Government did consider model (a), but rejected this option after advice from the Law Officers and Parliamentary Counsel that it would be “extremely difficult to draft and its effect would be rather uncertain”\textsuperscript{56}. Different models were appropriate in Scotland and Northern Ireland because they are separate legal jurisdictions, “whereas Wales is part of a single England and Wales jurisdiction, so what works well in relation to Scotland and Northern Ireland cannot simply just be, as it were, transferred across to Wales”\textsuperscript{57}.

39. \textbf{We note the Government’s reasons for adopting the model of division of powers contained in Part 4 of the bill. It will be for Parliament to decide whether it concurs.}

THE JOINT MINISTERIAL COMMITTEE

40. In our December 2002 report \emph{Devolution: Inter-Institutional Relations in the United Kingdom}, \textsuperscript{58} we drew attention to the “heavy reliance on good will in intergovernmental relations”. We stated:

“We would certainly not seek to recommend the absence of goodwill as an element of intergovernmental relations. We are pleased to note that goodwill exists and acknowledge its value to date. However, we are concerned by the sheer extent of the reliance on goodwill as the basis for intergovernmental relations within the United Kingdom. We are also concerned that goodwill appears to have been elevated into a principle of intergovernmental relations: it is used to explain the avoidance of disputes and to justify maintaining the present informality of the system. Some also argue that it works against the pluralist concept of devolution in that informality helps perpetuate previous practices. While matters may be relatively straightforward now, we wish to ensure that good and effective relations between governments can continue even if the present level of goodwill should decline.”\textsuperscript{59}

41. The Committee speculated that the levels of goodwill present in the early years of devolution would diminish over time and recommended that:

“further use should be made of the formal mechanisms for intergovernmental relations, even if they seem to many of those presently involved to be excessive. Formal mechanisms, such as the Joint Ministerial Committee (JMC), are not intended to serve as a substitute for good relations in other respects, or for good and frequent informal contacts, but rather to serve as a framework for such relations and to act as a fall-back in case informal

\textsuperscript{55} Q 23
\textsuperscript{56} Q 23
\textsuperscript{57} Q 23
\textsuperscript{59} \emph{op. cit.} para 25.
personal relations cease to be sufficient. Such mechanisms are likely to become increasingly important when governments of different political persuasions have to deal with each other.”  

42. The Memorandum of Understanding establishing the JMC sets out two formats for JMC meetings. There should be a plenary session meeting at least once a year attended by the UK Prime Minister, UK Deputy Prime Minister, Secretaries of State for Wales, Scotland and Northern Ireland, and the First and Deputy First Ministers from Scotland, Wales and Northern Ireland. The Memorandum also provides for “functional” meeting of the JMC with relevant Ministers gathering to discuss policy areas (currently specified as Health, the Knowledge Economy, Poverty and Europe). Of these four, only the JMC on Europe meets most regularly (though there is no public notification of the dates, attendance or agendas). There was no plenary meeting of the JMC during 2003, 2004 or 2005.

43. We continue to be concerned about the dormant condition of the JMC arrangements. It is important for the long-term future of devolution for the formal machinery of inter-governmental relations to be kept in good working order.

CONCLUSION

44. The bill plainly contains provisions of constitutional significance not only for Wales but for the future of the United Kingdom’s scheme of devolution generally. The new forms of legislation provided for in Part 3 of the bill—legislative competence Orders (made by Parliament) and Assembly Measures (made by the Assembly)—also have broad implications for Parliament’s role as a legislature. The legislative competence Orders are secondary legislation in which both Houses of Parliament would have less influence than is the case with the passage of bills. This is because each House would consider proposals for Orders and draft Orders simultaneously rather than (as with a bill) consecutively, and there are no opportunities to move amendments to draft Orders; any influence over Government proposals must be made more informally and in a non-binding manner during whatever pre-legislative scrutiny takes place.

45. The Government of Wales Bill, which makes extensive use of secondary legislative powers to achieve important constitutional ends, is introduced to the House against a backdrop of controversy about delegated powers provisions in other recent bills. The Company Law Reform Bill has sought to give Ministers “a Henry VIII power of enormous proportions” to make Orders for the purpose of reforming the law relating to companies. As we

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60 op. cit. para 29.
61 Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales (Cm 4444), and Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm.5240).
62 The Rt Hon Peter Hain, MP holds the offices of Secretary of State for Wales and Secretary of State for Northern Ireland.
63 HC Hansard 9 Jan 2006 Col 243W. No Joint Ministerial Committee (Europe) meetings were held in 1999 and 2000, two meetings were held in 2001, two in 2002, four in 2003, eleven in 2004 and nine in 2005: HC Hansard 10 Jan 2006 Col 465W.
64 Part 31.
have pointed out elsewhere, the Legislative and Regulatory Reform Bill seeks to confer even broader powers to change the law by Order\textsuperscript{66}. Understandably, the Secretary of State expressed the hope that the Government of Wales Bill will be considered on its own merits with the interests of Wales in mind, and kept separate from concerns about delegating legislative powers on Ministers\textsuperscript{67}. \textbf{We accept that this should be so in that the delegation of law making powers to an elected body is indeed very different from delegating them to Ministers.}

\textsuperscript{66} Letter of 23 January 2006, to be published with a future report on the Legislative and Regulatory Reform Bill, but currently available through the Constitution Committee’s web site: (http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm)

\textsuperscript{67} Q 34
APPENDIX 1: CORRESPONDENCE ON THE GOVERNMENT OF WALES BILL

Letter from the Chairman to the Rt Hon Peter Hain, MP Secretary of State for Wales

On return from a business trip overseas, I have only just read the second reading debate in the House of Commons on 9 January. I see you are reported as saying, at column 38:

“I have discussed this matter with the Chairs of both the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords. They agree that there is an important distinction to be made between powers conferred on an elected legislature and those delegated to a Secretary of State. There should therefore not be the same concerns expressed over powers conferred on an elected, accountable law-making body such as the Assembly, with its own scrutiny processes, as have been expressed over powers delegated to Ministers”.

I do of course recall the meeting on 1 December, at your invitation, when you briefed me personally, with an impressive array of your officials in support, on the proposals in the bill. The upshot of that meeting, which I welcomed, was that you agreed to appear before my Committee (now fixed for 15 February) to explain the measures in more detail once the bill had been published.

I do not disagree that distinctions of principle can be drawn between powers proposed to be conferred on an elected legislature and those delegated to a Secretary of State, and I said as much when reporting to my Committee on the substance of our discussion. But clearly both I and the Committee as a whole must reserve judgement on the constitutional merits of this particular proposal until after we have been able to study the bill in detail and questioned you about it.

It would therefore be unfortunate if some were to infer from your statement, and particularly the third sentence quoted above, that the Constitution Committee or its Chairman have expressed a definitive view on a bill they have not seen. This is manifestly not the case.

I am sending copies of this letter to the Leader of the House of Lords and to the Libraries of both Houses.

13 January 2006

Reply from the Rt. Hon Peter Hain, MP

Thank you for your letter of 12 January about the Second Reading Debate in the Commons on the Government of Wales Bill.

At the outset let me say that I should regret it enormously if you see what I said in the debate as misrepresenting what we discussed in Gwydyr House. You were at pains in our meeting to emphasise that you were not speaking for your Committee and equally I sought to emphasise that I wanted to work with your Committee on our proposals. Indeed I am glad that arrangements have been made for me to meet the Committee on 15 February.

In my comments at Second Reading, I sought to convey the position I had outlined, that there should be a distinction between delegation to a Secretary of State and to a fully democratically elected body such as the National Assembly for
Wales. I thought we had agreed on that point, but I cannot and would not presume on you or your Committee and so I look forward to our meeting so that we can review this issue further. I am grateful however that you say in your letter that you do not disagree that such distinctions of principle can be drawn.

I am copying this letter to the Leader of the House of Lords, and to the Libraries of both Houses.

23 January 2006
APPENDIX 2: LETTER FROM NICK AINGER, MP PARLIAMENTARY UNDER-SECRETARY OF STATE FOR WALES TO CHERYL GILLAN, MP SHADOW SECRETARY OF STATE FOR WALES

GOVERNMENT OF WALES BILL: PART 3

To further assist in understanding the process of Orders in Council adding to the legislative competence of the Assembly, I enclose copies of two illustrative examples of Orders in Council under Clause 94 of the Bill, together with the accompanying material to which I referred in the Second Reading debate (Hansard 9 January, col 121). I am placing these in the Vote Office, the Minute Room and the Library of both Houses.

These “Legislative Competence Orders” would have the effect of adding a matter to what is now Schedule 5 of the Bill. This would enable the Assembly to legislate by Assembly Measure on those matters. The examples provided one on public service “ombudsman” services and one on transport—are based on cases where the Assembly could not have legislated within its existing powers. The UK Government has brought forward primary legislation to enable the Assembly to legislate in these areas. These examples show how this would have worked if they arose after the Government of Wales Bill had been enacted.

These documents are examples of what I would expect to be submitted for pre-legislative scrutiny. You will see that they refer to a “proposal” for an Order in Council. The term “proposed Order in Council” has been adopted to distinguish it from the draft Order in Council which would be laid for approval following completion of pre-legislative scrutiny.

The process would normally start with discussions taking place between the Welsh Assembly Government and UK Government on the scope of the proposed Order in Council. If broad agreement was reached on this, the Secretary of State would forward to the appropriate Parliamentary body—the Welsh Affairs Committee for example—a Memorandum enclosing both the proposed Order in Council and a Memorandum from the Welsh Assembly Government explaining the scope of the proposal and the background to the request. In order to explain the scope fully, it would be necessary to draw attention to the provisions of the Act itself which restrict the extent of the Assembly’s legislative competence.

As the Secretary of State indicated (Hansard Jan 9 col 36) the practice of joint scrutiny between the Welsh Affairs Committee and the relevant Assembly committee has worked well in the past. This could provide a good model for the scrutiny of proposed Orders in Council if the Welsh Affairs Committee so chooses, although it remains important that any Member should be able to scrutinise and comment on them.

In the light of any comments received on the scope of the proposed Order in Council—which could be in the shape of a Committee report, as is currently the case for draft Bills submitted for pre-legislative scrutiny—the Secretary of State would liaise with the Welsh Assembly Government to finalise the draft Order in Council. The agreed draft would then be laid before the Assembly for debate and approval; if approved, the First Minister would then send it to the Secretary of State who would lay it before both Houses of Parliament for debate, inviting their approval. Clearly at that stage, both the Assembly and Parliament must approve the same text.
Although it is anticipated that that would be the usual process, the Assembly could decide to approve a proposed draft Order in Council without its having undergone any pre-legislative scrutiny in Parliament. In that case the Secretary of State could either refuse to lay the draft Order before Parliament, or alternatively, could ask for pre-legislative scrutiny to be undertaken. If the Secretary of State refused to lay the draft order, that refusal would have to be communicated, with reasons, within 60 days (not including periods of dissolution or prorogation, or adjournments of both houses for more than 4 days). If the Secretary of State asked for scrutiny to be undertaken, and following that, no amendments were made to the draft, the same draft could be laid before Parliament inviting approval. If the 60 days were insufficient for Parliamentary scrutiny, then the Secretary of State also has discretion to refuse to lay the draft Order in Council within that period but could lay it unamended when the Parliamentary scrutiny is completed. Alternatively, if amendments were proposed as a result of Parliamentary scrutiny, an amended draft Order in Council would then first have to be approved by the Assembly before it could be laid before both Houses of Parliament.

I am copying this letter to other Opposition spokespeople in the House of Commons; to the Chairs of the Welsh Affairs Committee, Liaison Committee and Procedures Committee of the House of Commons; to the Chairs of the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords; and to the First Minister for Wales.

17 January 2006
APPENDIX 3: ILLUSTRATIVE EXAMPLES OF PROPOSED ORDERS AND EXPLANATORY MEMORANDA

Government of Wales Bill, Clause 94: Illustrative Example: Highways and Transport

Swyddfa Cymru
Wales Office

[Date]

Memorandum from the Secretary of State for Wales to the Welsh Affairs Committee

I have received a proposed Order in Council and a corresponding explanatory note from the Welsh Assembly Government with a request for enhanced legislative competence in the field of 'highways and transport'. I hereby forward to you a copy of the proposed Order in Council and I invite you to consider whether it would be appropriate for the legislative competence to be conferred on the Assembly.

It is anticipated that the Welsh Assembly Government will make a formal request for an Order in Council under the provisions of the 2006 Government of Wales Act and this proposed Order in Council will form the basis of the draft Order in Council to be formally laid before Parliament and the National Assembly for Wales for approval, following pre-legislative scrutiny by the Welsh Affairs Committee and the relevant Assembly Committee. Additionally, I attach a copy of the Memorandum from the Welsh Assembly Government that explains the background and context to the request. I am placing a copy of these documents in the Library of the House of Commons and House of Lords.

[signed Secretary of State]
The National Assembly for Wales (Legislative Competence) (Highways and Transport) Order 2008

Made ...........................9th January 2008

Coming into force ...... 1st March 2008

At the Court at Buckingham Palace, the 9th day of January 2008

Present,

The Queen’s Most Excellent Majesty in Council

Whereas a draft of this Order has been laid before, and approved by a resolution of, each House of Parliament and of the National Assembly for Wales:

Now, therefore, Her Majesty, in pursuance of section 94 of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows—

Citation and commencement

1. This Order may be cited as the National Assembly for Wales (Legislative Competence) (Highways and Transport) Order 2008 and comes into force on 1st March 2008.

Enhancement of legislative competence

2. Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended by inserting under “Field 10: highways and transport” -

“Matter 10.1

Provision requiring the making of plans and strategies relating to transport facilities and services by the Welsh Ministers or local or other public authorities

Matter 10.2
Government of Wales Bill, Clause 94: Illustrative Example:
Highways and Transport

Provision in relation to -

(a) Arrangements for the discharge of local authority transport functions;

(b) The creation of, and conferral of functions on, bodies to discharge local authority transport functions; and

(c) Financial support for such bodies by levy or precept or by payments made (whether directly or indirectly) from the Welsh Consolidated Fund."

EXPLANATORY NOTE

(This Note is not part of the Order)

Section 94 of the Government of Wales Act 2006 ("the Act") empowers Her Majesty, by Order in Council, to enable the National Assembly for Wales ("the Assembly") to make laws by Assembly Measure, in accordance with the provisions of the Act and the Order.

The effect of this Order is to enable such laws to be made in relation to the matters set out in the words to be added to Part 1 of Schedule 5 to the Act. The Act provides for an Order under section 94 to add a matter which relates to one or more of the fields listed in that Part.
Proposal for a Legislative Competence Order in the field of Highways and Transport

[NB this memorandum is drafted as if the Transport (Wales) Bill did not exist and an Order in Council under what is currently clause 94 of the Government of Wales Bill was required to enable the Assembly to make provision in relation to strategic transport planning by the Welsh Ministers and local or other public authorities and arrangements for the discharge of local authority transport functions.]

Introduction

1. The Government of Wales Act 2006 ("the 2006 Act") empowers Her Majesty, by Order in Council, to confer continuing competence on the National Assembly for Wales ("the Assembly") to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred by the Order in Council but subject to the provisions of the 2006 Act.

2. The attached document is a proposed Order in Council. It sets out a matter which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of a draft of the Order by the Assembly and by both Houses of Parliament.

3. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

Scope

4. The matter set out in the proposed Order in Council would confer on the Assembly the competence to make statutory provision concerning plans
Government of Wales Bill, Clause 94: Illustrative Example: Highways and Transport

and strategies relating to transport facilities and services and in relation to arrangements for the discharge of local authority transport functions in Wales.

5. Under the provisions of the 2006 Act, a matter can only be brought within the legislative competence of the Assembly if it relates to a field set out in Part 1 of Schedule 5 to the 2006 Act. The fields correspond broadly with the executive competence of the Welsh Assembly Government; the intention behind this provision is that the Assembly should acquire legislative competence only in fields in which the Welsh Assembly Government has executive functions.

6. The Welsh Assembly Government is the trunk road authority for Wales and has powers through primary and secondary legislation to promote public transport. Local authorities are the local transport authorities with the main statutory duty to promote transport in Wales. The Transport Act 2000 placed a statutory duty on local authorities to draw up, for the first time, an integrated transport strategy for their area. The strategies were set out in local transport plans. The Welsh Assembly Government influences local authority developments through partnership working, guidance and the provision of funding.

7. In addition to pursuing transport strategies at a local level, since 1996, groups of local authorities have come together, on a voluntary basis, to form consortia to facilitate joint working on transport matters. There are currently four transport consortia in Wales following some recent movements and mergers, covering South East Wales (SEWTA); South West Wales (SWWITCH); Mid Wales (TraCC); and North Wales (TAITH). The consortia have drawn up regional public transport strategies. These are not statutory documents but act as a focus for planning public transport on a regional basis.

8. The main limits to the current arrangements are:

- There is no express statutory duty on the Welsh Ministers to promote integrated transport in Wales and in particular to prepare and publish a national transport strategy. This means that there is uncertainty as to the Welsh Assembly Government’s role in relation to transport and as to the ability of Welsh Ministers to use their general statutory powers (for example the general statutory authority to incur expenditure in connection with their functions) in this field.

- There is no statutory mechanism for ensuring that transport planning and delivery at the local level is consistent with the national transport strategy.

1 These include:
The Ministry of Transport Act 1919, which enables financial support – either revenue or capital – to be given to any form of land or water transport, although with Parliamentary approval required for payments over £1 million; The Transport Act 1968, which allows financial support for capital expenditure on public transport schemes; The Local Government Finance Act 1988, which allows financial support for capital expenditure by local authorities on highways and public transport schemes; The Transport Act 2000, which enables grants to be paid to bus operators as well as to local authorities for passenger transport services and facilities.
Government of Wales Bill, Clause 94: Illustrative Example: Highways and Transport

and takes adequate account of regional issues. The Welsh Assembly Government is handicapped, therefore, in taking forward its strategy.

• There is no statutory provision which would enable the Welsh Assembly Government to ensure that local authorities work together to address regional transport issues. Regional working is based on voluntary arrangements with varying degrees of commitment from local transport authorities towards co-ordinating transport provision.

• There is no strong link between the current local transport plan and the transport funding that local authorities receive from the Assembly. This contrasts with the position in England where much of local transport spending is based on bids contained in local transport plans.

• Local authorities are hampered by being too small to attract specialist staff to plan and implement significant transport projects.

9. The proposed Order in Council, if made in terms of the draft before the Committee, would enable the Assembly to address these issues.

Background

10. Inadequacies in the Welsh Minister’s transport powers were highlighted by the Assembly’s former Environment, Planning and Transport (EPT) Committee in their report on public transport published in December 2006.

11. In July 2007, the Minister for Environment, in the Welsh Assembly Government’s response to the report, said: “I intend to seek powers along the lines of the Greater London Authority Act 1999 whereby the Mayor and Authority can develop and implement policies for the promotion and encouragement of safe, integrated, efficient and economic transport facilities… I will seek to incorporate further powers to enable joint authorities to be established…. I shall put in hand the preparation of a request to enable the necessary provision to be made by Assembly Measure.”

12. In a plenary session in March 2008 the Assembly resolved that the First Minister should request the UK Government to bring forward an Order in Council to confer on the Assembly legislative competence on these matters.

Effect of other provisions in the 2006 Act

13. The effect of this Order needs to be considered in the context of the overall provisions of the 2006 Act.

Geographical limits of any Assembly Measure
Government of Wales Bill, Clause 94: Illustrative Example: Highways and Transport

14. Section 93 of the 2006 Act provides that no Assembly Measure will be law if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

15. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales.

Minister of the Crown functions

16. There are several transport functions in Wales which are not devolved, for example the regulation of road freight transport services, aviation, railways and shipping. The proposed Order in Council would not enable the Assembly to alter this. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of Ministers of the Crown without the consent of the Secretary of State.

Conclusion

17. The Welsh Assembly Government invites the Welsh Affairs Committee to consider whether it would be appropriate for legislative competence to be conferred on the Assembly with regard to plans and strategies relating to transport facilities and to arrangements for the discharge of local authority transport functions in Wales, in the terms of the proposed draft Order in Council attached.

June 2007
Memorandum from the Secretary of State for Wales to the Welsh Affairs Committee

I have received a proposed Order in Council and a corresponding explanatory note from the Welsh Assembly Government with a request for enhanced legislative competence in the field of ‘public administration’. I hereby forward to you a copy of the proposed Order in Council and I invite you to consider whether it would be appropriate for the legislative competence to be conferred on the Assembly.

It is anticipated that the Welsh Assembly Government will make a formal request for an Order in Council under the provisions of the 2006 Government of Wales Act and this proposed Order in Council will form the basis of the draft Order in Council to be formally laid before Parliament and the National Assembly for Wales for approval, following pre-legislative scrutiny by the Welsh Affairs Committee and the relevant Assembly Committee. Additionally, I attach a copy of the Memorandum from the Welsh Assembly Government that explains the background and context to the request. I am placing a copy of these documents in the Library of the House of Commons and House of Lords.

[signed Secretary of State]
Government of Wales Bill, Clause 94: Illustrative Example:
Public Administration

The National Assembly for Wales (Legislative Competence) (Public Administration) Order 2007

Made 1st December 2007

Coming into force 1st February 2008

At the Court at Buckingham Palace, the 1st day of December 2007

Present,

The Queen’s Most Excellent Majesty in Council

Whereas a draft of this Order has been laid before, and approved by a resolution of, each House of Parliament and of the National Assembly for Wales:

Now, therefore, Her Majesty, in pursuance of section 94 of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows—

Citation and commencement

1. This Order may be cited as the National Assembly for Wales (Legislative Competence) (Public Administration) Order 2007 and comes into force on 1st February 2008.

Enhancement of legislative competence

2. Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended by inserting under “Field 14: public administration” -

“Matter 14.1

The creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about relevant public sector persons, social landlords and members and co-opted members of local authorities, remedies where such complaints are upheld and the abolition of offices or bodies with similar functions; and for this purpose a person is a relevant public sector person if the person has functions of a public nature exercisable in
Government of Wales Bill, Clause 94: Illustrative Example:
Public Administration

relation to Wales or a part of Wales all or some of which are in a field listed in
this Part of this Schedule and either-

(a) at least one-half of the expenditure on the exercise of the person’s
functions of a public nature in relation to Wales or a part of Wales is
charged on the Welsh Consolidated Fund or is met directly or
indirectly from payments made out of that Fund or from payments
made by one or more other relevant public sector persons, or

(b) the person has the power to issue a precept or levy."

EXPLANATORY NOTE
(This Note is not part of the Order)

Section 94 of the Government of Wales Act 2006 (“the Act”) empowers Her
Majesty, by Order in Council, to enable the National Assembly for Wales (“the
Assembly”) to make laws, by Assembly Measure, in accordance with the
provisions of the Act and the Order.

The effect of this Order is to enable such laws to be made in relation to the
matter set out in the words to be added to Part 1 of Schedule 5 to the Act. The
Act provides for an Order under section 94 to add a matter which relates to
one or more of the fields listed in that Part.
CONSTITUTIONAL LAW: DEVOLUTION, WALES

Proposal for a Legislative Competence Order in the field of Public Administration

[NB this memorandum is drafted as if the Public Services Ombudsman Act 2005 did not exist and an Order in Council under what is currently clause 94 of the Government of Wales Bill was required to enable the Assembly to reorganise by Assembly Measure the provision of public sector Ombudsman’s services in Wales.]

Introduction

1. The Government of Wales Act 2006 ("the 2006 Act") empowers Her Majesty, by Order in Council, to confer continuing competence on the National Assembly for Wales ("the Assembly") to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred by the Order in Council but subject to the provisions of the 2006 Act.

2. The attached document is a proposed Order in Council. It sets out a matter which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of a draft of the Order by the Assembly and by both Houses of Parliament.

3. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

Scope

4. The matter set out in the proposed Order in Council would confer on the Assembly the competence to legislate to reorganise the arrangements for the provision of public sector Ombudsman’s services in Wales. These services are currently provided via the offices of the Commission for Local
Government of Wales Bill, Clause 94: Illustrative Example: Public Administration

Administration in Wales, the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Social Housing Ombudsman for Wales.

5. Under the provisions of the 2006 Act, a matter can only be brought within the legislative competence of the Assembly if it relates to a field set out in Part 1 of Schedule 5 to the 2006 Act. The fields correspond broadly with the executive competence of the Welsh Assembly Government; the White Paper “Better Governance for Wales” explains that the policy intention behind this provision is that the Assembly should acquire legislative competence only in fields in which the Welsh Assembly Government has executive functions.

6. Executive responsibility for matters concerning the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Commission for Local Administration in Wales lies with the Welsh Assembly Government. The related funding in all cases comes from the Welsh Consolidated Fund.

7. The legislation governing the offices of the existing Ombudsmen’s services (the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Commission for Local Administration in Wales) is contained respectively in the Government of Wales Act 1998; the Health Service Commissioners Act 1993; the Local Government Acts 1974 and 2000; and the Housing Act 1996. The existing legislative competence of the Assembly would not allow it to modify or repeal provisions in those Acts, nor to make new provision creating any new ombudsman’s office for Wales. The Order in Council, if made in terms of the draft before the Committee, would enable the Assembly to take such legislative action.

8. The Ombudsman services in relation to which the Assembly would be able to legislate would be those whose investigation function can only apply to persons (which includes bodies as well as individual office holders) who have functions of a public nature within devolved fields and which are dischargeable in relation to Wales or part of Wales and provided they receive at least half their finance (directly or indirectly) from the Assembly Government or from another body which is itself subject to investigation, or they have the power to issue a precept or levy. The investigation of complaints against social landlords would be within the scope of the legislative competence, as would the investigation of complaints about the conduct of local authority members.

Background

9. This request for legislative competence derives from a manifesto commitment made at the Assembly general election in May 2007.
Government of Wales Bill, Clause 94: Illustrative Example:
Public Administration

10. Currently, three out of the four statutory Ombudsman offices in Wales – the Health Service Commissioner for Wales, the Commissioner for Local Administration in Wales, and the Social Housing Commissioner for Wales - are held by the same person. The third office, however, cannot be held by the same person because provisions in the Government of Wales Act 1998 and Local Government Act 1974 make it clear that a Commissioner for Local Administration in Wales (the local government ombudsman) exists in addition to the Welsh Administration Ombudsman. The post of Welsh Administration Ombudsman is currently held on an acting basis by the Parliamentary Commissioner for Administration.

11. The Commissioner for Local Administration in Wales is also responsible for investigating of complaints in relation to standards of conduct of members and employees of local authorities in Wales under Part 3 of the Local Government Act 2003.

12. Although staff of the Health Service Commissioner for Wales and the Welsh Administration Ombudsman share offices and – to a certain extent – workload, the offices of the Commission for Local Administration (and Social Housing Ombudsman for Wales) are completely separate. Arrangements, both statutory and administrative, exist for the sharing of information between the different offices. However the statutory requirements applying to the work of each of the four offices are different. Most importantly, those in receipt of public services are faced with sometimes complex decisions about which Ombudsman should deal with a complaint about maladministration which the public bodies concerned have been unable to resolve to the complainant’s satisfaction.

13. The First Minister’s strategic statement of 22 May 2007 [hyperlink to Assembly record of proceedings], confirmed the Welsh Assembly Government’s manifesto commitment, to seek to introduce legislation at the earliest opportunity to give the public a single point of reference for complaints of maladministration in the Welsh public service. This is part of a wider programme of reform to create citizen-centred, seamless public services.

Effect of other provisions in the 2006 Act

14. The effect of this Order needs to be considered in the context of the overall provisions of the 2006 Act.

Geographical limits of any Assembly Measure

15. If an Order in Council were made in substantially the form proposed, the Assembly would by Measure be able to reform the provision of public sector ombudsman’s services in Wales, even though the Local Government Acts 1974 and the Health Service Commissioners Act 1993, which provide the authority for the existing arrangements also make
provision concerning Ombudsman’s services in England. Section 93 of the 2006 Act provides that no Assembly Measure will be law if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation. Such provision is likely to be necessary, for example, to ensure that any new Ombudsman’s service for Wales could share information as necessary with counterparts in other parts of the UK; to ensure that courts throughout England and Wales could enforce any remedies ordered by an Ombudsman (if such remedies are provided for in a Measure); and to amend references in other legislation to any existing offices which an Assembly Measure had abolished.

16. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on an Ombudsman the power to investigate matters which did not relate to Wales.

*Minister of the Crown functions*

17. There are several public service functions in Wales which are not devolved, for example the administration of social security and the employment service and the operation of police authorities. Complaints of maladministration in relation to these public service bodies are within the remit of the Parliamentary Commissioner for Administration (PCA). The proposed Order in Council would not enable the Assembly to alter this. Although the office of PCA is independent of government, functions concerning that office lie with the UK Government, in particular the Cabinet Office and Treasury. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of Ministers of the Crown without the consent of the Secretary of State but in any event the requirement that persons who may be investigated must discharge functions within devolved fields and must (except in the case of precepting or levying bodies) receive at least one-half of their finance from the Welsh Ministers or from other persons themselves subject to investigation means that an Assembly Measure could not affect bodies within the remit of the PCA.

**Conclusion**

18. The Welsh Assembly Government invites the Welsh Affairs Committee to consider whether it would be appropriate for legislative competence on Ombudsman’s services in Wales, in the terms of the proposed draft Order in Council attached, to be conferred on the Assembly.

June 2007
Memorandum from the Secretary of State For Wales:
The Rt Hon Peter Hain, MP

INTRODUCTION

1. This memorandum is submitted in advance of the Committee’s meeting on 15 February 2006 to consider the provisions of the Government of Wales Bill. Its purpose is to set out both background information and an explanation of the policy behind certain provisions of the Bill which appear to be of constitutional significance.

BACKGROUND

2. The Bill delivers on the commitment set out in the White Paper, “Better Governance for Wales”, published on 15 June 2005. This in turn was based on three Government manifesto commitments: to legislate for a National Assembly for Wales (Assembly) with enhanced legislative powers; to end the confusing corporate status of the Assembly; and to prevent candidates from standing for both the regional list and for a constituency seat.

3. The White Paper set out proposals to:
   — Separate the legislating and scrutinising roles of the Assembly from the Welsh Assembly Government to create a clear distinction between the legislature and the executive;
   — Enhance the Assembly’s legislative powers by putting in place a procedure enabling Parliament to give the Assembly powers to modify existing legislation or make new provision on specific matters or within defined areas of policy in fields where the Assembly currently has functions;
   — Provide for the longer term possibility of the Assembly acquiring powers to make primary legislation. This would be subject to approval by the Welsh electorate in a referendum;
   — Legislate to provide that candidates for election to the National Assembly for Wales should be able to stand either in a constituency or on the regional list, but not both (dual candidacy).

4. The Bill sets out the devolution settlement as amended by the White Paper proposals. 93 out of the 165 clauses are based on sections in the Government of Wales Act 1998. 48 concern further modifications or additions to those provisions to take account of the separation of the legislature from the executive—a policy which has all party support. Only 24 clauses are concerned with the new provisions relating to the Assembly’s enhanced (and, subject to a referendum, primary) legislative powers. The bulk of the 1998 Act will be repealed, leaving a few provisions concerning other Welsh public bodies.

ELECTIONS AND SEPARATION

5. The Bill restates the electoral arrangements for the National Assembly for Wales, with changes to incorporate the bar on dual candidacy and provision for extraordinary elections. It sets out provisions applying to the Assembly itself and separately establishes the Welsh Assembly Government as a distinct entity in its own right, comprising the First Minister, other Welsh Ministers, Deputy Welsh Ministers and the Counsel General to the Welsh Assembly Government.
6. Most of the current functions of the existing Assembly will transfer to the Welsh Ministers when the legal separation takes effect following the May 2007 election. This reflects the fact that most of the functions acquired by the National Assembly for Wales upon its establishment and subsequently (through transfer of function orders under Section 22 of the Government of Wales Act 1998; through designations under Section 2 (2) of the European Communities Act 1972 or through other enactments) have been of an executive nature, appropriate for exercise by Ministers. However there has been a gradual development of the scope of the powers which Parliament has been willing to grant the Assembly in recognition of its status as a democratically elected body. This is discussed further below.

7. The Bill does not in itself transfer any existing functions of UK Ministers to the Welsh Ministers. It does however, by Clause 58, re-enact the provision in the 1998 Act which allows for such transfers of functions to take place.

**The Assembly’s Legislative Powers**

**Stage 1: framework powers**

8. Since the establishment of the Assembly in 1999, the approach to the definition of powers to be conferred on the Assembly through primary legislation has varied between Bills. Some have defined those powers in detail; others have given the Assembly greater discretion as to what should be contained in secondary legislation. This latter approach has gone further, to a stage where Parliament has been willing to confer on the Assembly powers which are somewhat broader than those which it would consider appropriate to confer on Ministers. One recent example is in the Education Act 2005, where the Assembly has been given (by section 62) wide powers to shape the inspection framework for schools. In the Government’s view, this properly reflects the fact that the Assembly is not a Ministerial department, but a democratically elected body with its own rigorous procedures for scrutinising legislation. These procedures are set out not only in the Government of Wales Act 1998 but also in the standing orders of the Assembly.

9. The White Paper proposed a three-stage enhancement of the Assembly’s legislative powers. In Stage 1, which would begin immediately, provisions in Parliamentary Bills relating to matters devolved to the Assembly would be drafted on a more permissive “framework” basis so as to give the Assembly more “policy space” to decide the detail of the implementing secondary legislation. The NHS Redress Bill, currently before Parliament, was drafted on this basis.

10. This more consistent and more permissive approach to provisions in primary legislation conferring powers on the Assembly recognises the fact that legislation made by the Assembly is subject to scrutiny procedures as rigorous as those available to Members of Parliament. It was also a recommendation of the Richard Commission.

11. It would not be appropriate, however, for framework powers such as those in the NHS Redress Bill to be transferred to the Welsh Ministers upon separation. The Bill therefore contains provision (in Schedule 11, para 29 (2)) for any such powers not to be conferred on the Welsh Ministers following separation, but to be converted instead into Assembly Measure making powers. This will be done through an Order in Council. Only the Assembly, as a legislature, will be able to pass Assembly Measures.

**Stage 2: assembly measures**

12. Stage 2, which is given effect by the proposed procedures in Part 3 of the Bill for giving the Assembly enhanced legislative competence is, in the Government’s view, a logical development of what Parliament has already agreed to date. Part 3 of the Bill provides a mechanism whereby Parliament can, by Order in Council, authorise the Assembly to legislate (pass “Assembly Measures”) on particular matters which relate to fields in which the Welsh Ministers have functions. Assembly Measures will be enacted by being passed by the Assembly and approved by Her Majesty in Council.

13. Parliament will be able to decide in each case whether it is appropriate to grant legislative competence to the Assembly on a matter. It is intended that each proposed Order in Council will be subject to pre-legislative scrutiny before the draft Order in Council is laid before the Assembly and both Houses of Parliament for approval. Each new “matter” added to the Assembly’s legislative competence will be added by the Order in Council to the list of matters in Part 1 of Schedule 5 to the Bill. The competence to legislate on the matters thus listed will be granted on an enduring basis. An Order in Council is also the method used for devolving further matters to the Scottish Parliament and, when sitting, the Northern Ireland Assembly.
GOVERNMENT OF WALES BILL: EVIDENCE

15 February 2006

14. These Stage 2 proposals address a practical constitutional issue for the Assembly and the Welsh Assembly Government. Parties can be elected and obtain a governing majority in the Assembly on the basis of manifesto commitments which the electorate have supported. The delivery of those manifesto commitments, even though they are confined to devolved issues, is however currently dependent either on the Assembly securing Wales-only Bills in the legislative programme of the UK Government (which has its own legislative priorities); or on its seeking to take advantage of UK Government Bills which may provide an appropriate vehicle, if they happen to be available. Although a considerable amount of Wales specific legislation has been achieved by these routes, there have been occasions when there has been no time for a Wales only Bill, and no suitable England and Wales Bill in the Government’s programme, to enable the Assembly to make the legislative changes necessary for the Welsh Assembly Government to implement fully its proposals.

15. The Government’s proposals, as set out in Part 3 of the Bill, would offer the Assembly a third option. They will enable the Assembly to take the initiative in seeking legislative powers, rather than it having to work within the limitations of the existing mechanisms; but they do so in a way which retains for Parliament the final decision as to what legislative powers the Assembly should have.

16. The rationale for this approach is set out in paragraphs 3.1 to 3.7 of the White Paper. It will strike a new balance of legislative authority for Wales as between Parliament on the one hand and the Assembly on the other, without affecting the overall constitutional supremacy of Parliament as regards Wales within the United Kingdom. While Assembly Measures will be able to make new provision and amend existing legislation, they will only be able to do so within the parameters set by the Bill itself and by Parliament.

17. The Bill sets out certain overarching limits on the competence of the Assembly to legislate by Assembly Measure: it can only legislate in relation to Wales and in relation to the matters which are specified. The only matters over which the Bill directly gives the Assembly legislative competence concern certain arrangements for the functioning of the National Assembly for Wales itself: these are the matters specified under Field 13 of Part 1 of Schedule 5.

18. Part 2 of Schedule 5 identifies general restrictions (with the exceptions to those restrictions given in Part 3) on the Assembly’s legislative competence, for example an Assembly Measure cannot modify, confer or remove functions from a Minister of the Crown without the Secretary of State’s consent.

19. There are also checks and balances within the Bill aimed at ensuring that these provisions can operate effectively. Clause 94 gives the Assembly certain ancillary powers which will enable it for example to make consequential amendments to England and Wales legislation to maintain the coherence of the statute book; while Clause 100 gives the Secretary of State certain powers to intervene to prevent an Assembly Measure from being enacted, on specified grounds.

20. The Bill also contains provision for the determination of devolution issues. In addition to Schedule 9, which is an adaptation of existing provision regarding issues which arise in court proceedings, Clause 95 contains provision for referring to the Supreme Court questions as to whether a matter on which it is proposed to give the Assembly legislative competence concern certain arrangements for the functioning of the National Assembly for Wales itself: these are the matters specified under Field 13 of Part 1 of Schedule 5.

21. The Bill sets out in Clauses 96 and 97 the minimum procedures for the consideration of proposed Assembly Measures by the Assembly, including provision for a general debate on the principles; consideration of the details, with an opportunity to vote on them; and a final stage at which a proposed Assembly Measure can be passed or rejected. This signals that Assembly Measures are to be given the same degree of scrutiny, with opportunities for amendment, as—for example—Bills of the Scottish Parliament. The standing orders of the Assembly will be rewritten to take account of the changes introduced by the Bill: they will undoubtedly contain further provision as to the procedures to be followed.

1 References to the Supreme Court will be construed as references to the Judicial Committee of the Privy Council until the coming into force of section 23 (1) of the Constitutional Reform Act 2005.
Stage 3: primary legislative powers

22. Devolution in Wales has been characterised by a gradual transfer of responsibilities and a gradual deepening of the Assembly’s powers. The procedure for granting the Assembly enhanced legislative competence on a case by case basis follows this established pattern. It will enable the Welsh Assembly Government that is elected in May 2007 to pursue its legislative programme more effectively but only as sanctioned by Parliament. However the Government has recognised that the procedure for granting enhanced powers to the Assembly under Stage 2 might still prove insufficient to enable the Assembly to carry out its legislative role fully. The White Paper therefore proposed that the Bill should contain provision for the Assembly to gain primary legislative powers over all the devolved fields, if endorsed by a referendum; and that it should set out the conditions which would trigger a referendum.

23. In the Government’s view there is broad support for the proposition that the Assembly should in future be able to gain primary legislative powers over those subjects for which the Welsh Ministers have responsibility, provided there is a “yes” vote in a referendum. It is entirely appropriate to legislate now to enable this to happen. In this way, the framework within which the devolution settlement for Wales is to develop will be clearly defined for a generation to come. The Welsh Assembly Government and the Assembly will be able to concentrate on defining and implementing the policies which will make a real difference to the people of Wales. The focus of debate will be able to shift from the question of the Assembly’s powers to the question of what is actually being achieved with them.

24. While the Government believes that there is a broad consensus over the principle of primary powers subject to a referendum, it is equally clear that there is not broad agreement at present over when would be the right time to hold such a referendum. It would be seriously detrimental to devolution if there were to be a “no” vote in such a referendum: this is something which the Government has borne in mind in developing these proposals.

25. The Bill therefore establishes carefully both the circumstances in which a referendum could be triggered and the means of presenting the Welsh electorate with a clear picture of the subjects over which the Assembly would have primary powers, if the voters decided that it should have them.

26. The Bill provides for a referendum to be held on whether the Assembly should have primary legislative powers. Any Order for a referendum would have to be approved by both Houses of Parliament and by two thirds of all Assembly Members. The Assembly will be able to trigger a formal request for a referendum also by a two thirds vote. The Secretary of State will not be obliged to lay a draft Order in response to such a formal request but would have to give reasons for not doing so. The Secretary of State will also have a duty to consult before laying a draft Order. If there was a “yes” vote in a referendum, the Assembly would acquire powers to make Assembly Acts. The Assembly’s primary legislative competence will then be defined by reference to subjects listed in Schedule 7 to the Bill which can be amended by Order in Council.

27. The decisions which would have to be made by the Assembly; the Secretary of State; and Parliament before a referendum order could be made are there to ensure that no referendum could be held before there was a genuine consensus that the time was right for it to happen. The focus of the referendum question, and the consequences of a “yes” vote at any time in the future, are established clearly in the Bill; but the actual referendum question and the Order which would determine both the date and the question will be subject to consultation at the time, in accordance with the general principles for referendums which have been established in the Political Parties, Elections and Referendums Act 2000.

Conclusion

28. This memorandum has concentrated on the main issues of constitutional interest as they appear to the Government. However the whole Bill is a constitutional Bill and as such, the Government would be happy to provide the Committee with such further information or elucidation as it requires.

The Rt Hon Peter Hain MP  
Secretary of State for Wales  
8 February 2006
Examination of Witnesses

Witnesses: Rt Hon Peter Hain, a Member of the House of Commons, Secretary of State for Wales, Mr John Williams, Senior Policy Adviser, Wales Office, and Mr Keith Bush, Legal Adviser, Welsh Assembly, examined.

Q1 Chairman: Welcome, Secretary of State. It is good of you to come and share your thoughts with us. Could I just say that the proceedings are being televised, so would you be kind enough just to say who you are and who your colleagues are for the purpose of the cameras and for identification?

Mr Hain: Thank you, my Lord Chairman. Peter Hain, Secretary of State for Wales. Keith Bush is my legal adviser and John Williams is the Strategic Policy Officer, a rather more important title than mine, I think. I do apologise for there being another vote in the Commons, which means I will have to leave here at 3.35 pm, but I will pop back as soon as I can.

Q2 Chairman: I am impressed by how accurately the Commons knows what time votes are going to occur! We would certainly appreciate it if you could give us a little bit of opening context as to why this Bill in this form, at this time. I think it would be very useful for the Committee.

Mr Hain: My Lord Chairman, thank you for inviting me along and giving me this opportunity to explain why we are approaching this matter in the way we are. Devolution has worked very well since it was up and running in 1999, and it has had two strategic effects: it has buried the pressure for nationalism and separatism on the one hand, and it has also stopped the practice whereby London could be blamed for any shortcoming in Wales, because responsibility is now largely in Cardiff and taken by people directly elected from Wales. So although it has worked well, there has been a number of shortcomings exposed in the process and experience, and the Richard Commission, chaired by Lord Richard, discussed some of these in some detail. For example, the fact that it was a corporate body and no distinction of any clarity between the legislature on the one hand and the Executive on the other blurred accountability and scrutiny and was not seen to be satisfactory. Secondly, there have been some shortcomings identified, including in the Richard Commission, about the way the electoral system operates. Thirdly, there has been a general recognition that the Assembly does need to be given more powers and a greater clarity of powers. That is why this Bill puts forward a series of reforms to deal with the issue separating the legislature from the Executive on the one hand, secondly to deal with the reform of the electoral system, thirdly in three stages to give enhanced powers. The first apply now, framework powers within existing primary legislation, giving the Assembly much greater scope for making its own decisions, and secondly moving, as the Bill proposes, through Orders in Council towards greater scope for tailoring policies by the Assembly and legislating in a much more effective way. Thirdly, if (and only after if) a “yes” vote in the referendum, full-scale primary powers being the end third stage. I think that pretty well summarises where the Bill is its essence, although I know you probably have a lot more detailed points to put to me.

Q3 Chairman: Clearly this Committee, which has in one of its earlier reports studied how devolution is proceeding, is well aware that devolution has to be work in progress and is not a steady state because it is implicit in devolution that the powers will move between the centre and the nation, but I think we will all have been struck by the relative clarity of Lord Richard’s recommendations and be curious why the Government, instead of adopting those, which would have the merit of clarity, felt it necessary to have what does seem to be an interim state. I am not sure we understand that.

Mr Hain: First of all, we have followed Lord Richard’s guidelines in respect of reforming the corporate structure and getting rid of the corporate structure in the Assembly. We followed that to the letter and there is all-party support for it. The difference between us on powers is this: the Commission thought that you could go straight to primary powers without the need for a referendum in one go. There was absolutely no doubt in my mind that if I put such a Bill to Parliament it would have been amended to have a referendum attached to it, and also that is what I believe. The existing settlement where this Parliament is sovereign (not only in the sense that it is always sovereign over everything but in respect of the Welsh devolution settlement) had been endorsed by a referendum. I know that because I helped organise the “yes” votes and it was very narrow. Any substantial change to that of the kind envisaged under an extension to primary powers would, in my view, for democratic reasons as well as for political reasons in this House, have to occur only if triggered by a referendum. Once you accept that, you then have a choice between doing nothing, since nobody really seriously thinks a referendum can be won now, until those conditions occurred or actually making progress in the meantime, which is why (you can call it an interim phase if you like) I have got the first stage operating now, framework clauses in existing primary legislation. The second stage is this different, more streamlined procedure, giving the Assembly greater scope but within the existing
settlement because Parliament remains in overall charge of whether it decides to agree these Orders in Council or not.

Q4 Chairman: Would it be part of your contention that this reflects the reality of those in Wales who would wish to go forward more quickly and those who would wish to move more slowly so that it reflects the political reality of the situation in Wales? Mr Hain: Yes, it would. I would submit that this Bill is right at the centre of gravity of public and political opinion in Wales in the sense that there is substantial support for a move to primary powers, a policy I have always personally supported and continue to. Welsh Labour, probably a majority, some might say not, but at least a substantial body of opinion in Welsh Labour supported primary powers, trades union movements, Plaid Cymru, the Liberal Democrats, some Welsh Conservatives, but there is a substantial body against primary powers and there is in addition a body of scepticism which says, “Well, we may well accept a move to primary powers in the medium term, but we want to see more progress made more incrementally instead of a sudden big leap.” That is why I think the Bill sits at the centre of gravity, but only if it is passed in its present form.

Q5 Chairman: Perhaps I can move from the general to the specific before I invite my colleagues to join in. Of course, the Bill as published really invites the House of Lords to leave the stage, and being invited to leave the stage is not always something which commends itself to Members of the House of Lords, so what role do you think this House can usefully play when we come to the scrutiny of legislative enhancement orders under Part 3 of the Bill? Obviously it is a matter for the House, but do you see any way in which this House (which is a centre of considerable expertise, including expertise on Welsh affairs) could complement the role which you envisage the Welsh Affairs Committee playing in another place? Mr Hain: I think so, but first of all could I gently dispute the proposition that the Bill invites the House of Lords to leave the stage. On the contrary, I defended the House of Lords’ crucial role in our Parliament, which you might or might not be grateful for, during the passage in the Committee stage of this Bill when Plaid Cymru sought to move an amendment saying that the House of Lords should have no role in it at all. In one respect, principally things are exactly as they are. An Order in Council would have to be passed in both Houses, so in that sense nothing has changed. In addition, on the pre-scrutiny issue, I am very strongly of the view that because an Order in Council is unamendable in either House, pre-legislative scrutiny is absolutely vital. I have suggested the model in respect of the House of Commons, which has worked very well, whereby the Welsh Affairs Select Committee sits and takes joint evidence with the relevant Assembly Committee. This is an interesting constitutional development and it has worked very well on pre-legislative scrutiny of existing primary legislation going through, for example the Commissioner for Older People (Wales) Bill and the Transport (Wales) Bill, currently before both Houses. That model could be applied here. Although it is up to the House of Lords how this would happen—it is not a matter for the Government because I do not think this should be legislated for; it is a matter for both Houses how scrutiny is conducted—I think there would be scope for, as it were, concurrent scrutiny by the Lords. Not consecutive scrutiny, because I think if we got into a position where, as it were, the Commons and the relevant Welsh Assembly Committee had come to a common view and then somewhere down the track some process of scrutiny interposed itself in the House of Lords, that could create quite a difficulty. But if it could be concurrent and some arrangement arrived at, I think that would be very positive and I would welcome it.

Chairman: Thank you for that. Let us try and get a few questions in before you have to go off and vote.

Q6 Lord Elton: Part 3 of the Bill provides the machinery for altering really very considerable areas of existing law. You have talked about the need for pre-legislative scrutiny, which I think is not actually written on the face of the Bill, so one wonders why it is not. But if it is not, presumably there will be Government guidelines laid down for the drafting of measures to be provided by this means. What will be their scope and how will they be published? Mr Hain: Exactly, and there is a devolution guidance note now which has been operable for a number of years and was recently updated following the publication of our White Paper, Better Governance for Wales, in June, which gave guidance on how the framework powers approach would operate. For example, in the NHS Redress Bill there is a framework clause providing for the Assembly to have much greater scope to tailor policies in its own way. So that devolution guidance note would be further updated once Royal Assent has been granted, assuming it is, to take account of the Part 3 powers.

Q7 Lord Elton: Are you saying that for each area of policy there will be different guidance? What I was really looking for was central guidance on all policies. Mr Hain: No, this would be one document covering whatever policy it might be on how it operated and the procedure. As I think I indicated to the Committee, I placed copies in the library of Part 3 Orders in Council, ideas of what they might look like, and in addition there would always be an explanatory
memorandum with each one which went into some detail on the policy consequences which the Assembly was seeking, because of course those are not necessarily spelt out in any great detail in the Order in Council. So I think that would provide guidance for the settlement.

Q8 Baroness O’Cathain: Talking about the Assembly carrying out effective scrutiny of proposed Assembly measures, what needs to be done to be sure that the Assembly can fulfil its role by the time Part 3 comes into force? Also, is it realistic to expect an Assembly of 60 members to be able to do this scrutiny when there is more than a dozen who are part of the Government?

Mr Hain: A dozen would certainly be ministers specified in the Bill. I think it would, although the Richard Commission disagreed, and I need to acknowledge that. I think it would for the reason that the Presiding Officer, Lord Elis-Thomas, has agreed when I put this point of view. The Assembly appears to have only a 33 week working year. They spend only two afternoons in plenary, which means they spend around 231 hours a year in plenary compared with well over 1,000 hours in the House of Commons. So they are working for less than a quarter of the time the House of Commons sits. I think the solution could well be that the Assembly starts sitting longer and working harder, convening on a Monday afternoon and running through to Thursday; indeed the Presiding Officer himself said in an interview in The Daily Post on Boxing Day, “I agree with the Secretary of State, we all have to work harder here. There should be three to four days of proper scrutiny. We should sit for at least 40 weeks a year. We finished for Christmas at least a fortnight before Parliament.” I think both Houses here would rather cherish that ambition! So I think this problem can be solved by just actually working harder. The problem which the Richard Commission set for us, and which you are quite properly referring to is, if we went for a lot more members I do not think many more politicians is a particularly attractive proposition for the Government to put at the moment.

Q9 Baroness O’Cathain: Probably not! Could I just ask another quick question before the division? This is really going back to the opening point. What makes you think that this Bill will help you win a referendum, because you said you would not be able to win a referendum now? If people are against it now, what will change their minds?

Mr Hain: First of all, there is perhaps one other point I should add to your first point. Clause 97 of the Bill sets out very specifically the minimum requirement for scrutiny, following the pattern in Parliament whereby there needs to be a general debate to start with, there needs to be a consideration stage and there needs to be a final stage; so effectively a second reading, a committee stage and a third reading. That is specified, the Assembly will have to do that. Why do I think a referendum might be won in the future? For two reasons really. If we get to the point under stage two powers, under the Part 3 powers, what I call the stage two of the way forward, where really over the years the Assembly has accumulated (through Orders in Council and the extra discretion provided) a whole body of policy-making powers conferred upon us, we get to the point where really people will say, “Well, why don’t we just go the full hog?” That could be one scenario down the line. Another scenario might be that if Parliament ever repeatedly refused to accede to requests for Orders in Council so that in a way there was a stand-off of a political and in effect a constitutional kind between two elected legislatures, then I think the conditions in Wales would be created in which there might be a popular demand for a referendum. Others I cannot foresee, but I do not expect it to happen soon.

Q10 Lord Peston: Just two points. I hope I am not cynical. Essentially, you would like the referendum when it will go the way you want it to go, is that the point?

Mr Hain: I do not think there is any point in calling a referendum unless the people of Wales would support what it is designed to achieve, that is to say a “yes” vote triggering primary powers. There is no point in doing that. It would be very damaging, furthermore, to call one and lose one.

Q11 Lord Peston: Yes, you do not need to persuade me of that. On the referendum itself, am I right that the referendum question is not on the face of the Bill, and are there technical reasons for that?

Mr Hain: Yes, indeed. It is not on the face of the Bill and that is for a number of reasons. First of all, the Political Parties, Elections and Referendums Act sets out the principles and the template for conduct of referendums and section 104 of the Act clearly envisages that referendum questions could be set out in subordinate legislation, which is what the Bill proposes, an Order in Council at the appropriate time. I think the political point and the parliamentary point here, in addition, is that if, say, you had a referendum in the next decade –we do not know what the political circumstances might be. There might be a new Electoral Commission, which would have to be statutorily consulted on the nature of the question, and I think it would be preferable to set the question at the time the referendum was held.

Q12 Lord Peston: That is the precise question, really, is what you are saying?
Mr Hain: The precise question, and of course the referendum order would have to be approved in both Houses and clause 102, section 1 of the Bill says that the referendum question has go to be about bringing the provisions of the Act into force. It is not about anything else. For example, it is not about abolishing the Assembly. It expressly says that is what it is for.

Q13 Chairman: Given that, Secretary of State, I am still not absolutely clear why Part 4 of the Bill needs to be put on the statute book now. I understand everything you have said about the balance of opinion in Wales and this being a dynamic situation, but your own acknowledgement is that we are very unlikely to have a referendum for some years, so I am unclear why we are obliged to pre-prepare now in this detail for a future event. The fact that, as you have just said, you do not think now is the appropriate time to arrive at the referendum question inevitably suggests the larger question of why do we have to have Part 4 at all now?

Mr Hain: It is a good question and I thought about it a lot before deciding to go down this road. I think it is very important for the future politics and indeed the whole future of Wales that the constitutional status of the Assembly is settled. One can never settle anything permanently, but certainly for a generation or more (which I think this Bill does), so that it is not subject to constant challenge and debates by different advocates to and fro, which is very de-stabilising. What it also does is divert attention from the policy, so instead of focusing on whether a policy being adopted by the Assembly is good or bad, or whether the delivery is effective, people always say if there is a shortcoming it is because there are not enough powers, whereas in fact that is not usually the case. I think it has created a sort of rather immature and artificial politics. What we would do by putting primary powers on the statute book is to say that the primary powers are sitting there. When there is a consensus to move forward, we move forward. In the meanwhile, we make the best use of the policies and if there is an argument about the timing of the referendum, that is a legitimate political argument, but it is not about the principle any more. So given that there is significant support for primary powers but also a great deal of scepticism, I think it is important to do it now rather than to leave this, as it were, constitutional question hanging in the air for the future when Parliament would not have made its view clear. If Parliament passes this Bill, as I hope and expect it will, primary powers will then have been endorsed in principle by Parliament for the Welsh Assembly, to be triggered when the Welsh people decide that is right. I think it is very important that we just settle this question now.

Q14 Chairman: So you would expect the presence of Part 4 in the Bill, by being there and by being potentially available at some future date, to produce a more settled modus operandi in the Assembly? That would be your hope?

Mr Hain: I do, and that is the objective of it, so that the argument becomes an argument about policy delivery and about policy itself. Then a linked debate, which need not be and should not be adversarial, about when there is a consensus between the two parties. When that might be, I think would be when the Liberal Democrats, Plaid Cymru and Welsh Labour all agree as a minimum, as happened in 1997; and of course even then, when those conditions applied, we only won the referendum very narrowly, which is a salutary lesson to those who want me to leap over the edge of the cliff and call a referendum now.

Chairman: It is interesting that you describe it that way.

Q15 Lord Windlesham: On the all-important matter of the relationship between the Assembly and the Houses of Parliament—the House of Commons—has any thought been given to requiring the Assembly to lay an annual report before both Houses, or if not a formal annual report some other device to ensure that there is a satisfactory linkage between the two elected bodies?

Mr Hain: I think it would be quite a novel constitutional principle for Parliament to hold a separately elected legislature to account, rather than to hold Government ministers like myself and the Government in general to account. I think really this would signal an unravelling of the political settlement, and indeed the very principles of devolution. It is for the Assembly to be accountable to its electors, not accountable to Parliament retrospectively by way of an annual report. By all means, if the Assembly wanted to make an annual report, which would be a matter for it, and the relevant committees in Parliament wanted to look at it to see what was going on in Wales how effective or otherwise it might be, that is a different matter. I suspect the reaction might be quite violent if the European Parliament asked this Parliament to report to it on what legislation it passed to comply with the European Directives. I do not think that would be a happy relationship.

Q16 Chairman: Do you think constitutionally that is an exact analogue?

Mr Hain: I do not, no. It is not an exact analogue at all, or comparison, but I just make the point that it is one thing for this Parliament, as the ultimate sovereign body in the United Kingdom, to take an interest in what is going on in Wales—as indeed the Welsh Affairs Select Committee in the House does,
debates on the floor of the House do, and questions which I answered today as Secretary of State do by various matters being raised—but I think it is another matter to institutionalise, as it were, almost a subsidiary status for the Assembly, being required to report back on what it has done, any more than this has happened up to now. It has not happened up to now and, as I say, I think it would unravel the settlement to start doing that.

Q17 Lord Elton: I just wondered where the word “accountability” had crept into this exchange, because I am not sure that the idea was that there should be a sort of obedient report on duties performed. I imagine that some Members of this Parliament would relish the opportunity of informing Brussels how it thought it was handling the stuff it was required to handle, and I would have thought in the same way the Welsh might be very happy to bring home to this Parliament any aspirations they had which it was restraining or any opportunities they saw they were being prevented from carrying out. Is there a channel for that? I think the question really is, what means are there for, shall we call it feedback rather than report back?

Mr Hain: I think that is a different matter, perhaps constitutionally as well. A lot of feedback happens now. There is constant communication between Assembly Members and MPs. There is constant communication, I think, between this House and the Assembly Members. Welsh Members of this House make contributions about what is going on in the Assembly on the floor of this House, and so on. If your Committee felt it would be helpful to have some greater interest shown by the House of Lords in what was going on in the Assembly of an informative kind, then there is nothing to stop that being done just as in the way the Welsh Affairs Select Committee already makes inquiries into energy policy at the current time, or different aspects of policy delivery and policy generally in Wales, in the House of Commons.

Q18 Chairman: You may recall our report on the state of play of devolution in Wales and Scotland two years ago.

Mr Hain: Indeed, I thought it was a very valuable report.

Q19 Chairman: This thought that there should be interchange on the way things are working was one of the constructive suggestions and Lord Elton’s feedback I think covers that sort of idea quite well. Secretary of State, I have a suggestion to make to you. The Whips have let you down because it is now 15 minutes after your estimated time when the vote was going to come! Would it be sensible just to try and get in one or two more questions, because I understand you have another appointment at 4.15? It might be sensible to get in what we can and then let you escape?

Mr Hain: Absolutely.

Q20 Lord Carter: It has been suggested that there will be nine sources of Welsh legislation when Part 3 comes into force. Would you be concerned that this creates a problem with accessibility to law, and what can be done to simplify the position?

Mr Hain: I think the existence of several sources of legislation is not a new phenomenon, and certainly is not unique to Wales. I think it is probably a feature of any devolved or federal system of government in which political power is exercised at different levels. When we have the creation of Assembly Measures under Part 3, or Assembly Acts under Part 4, that will obviously add to the categories of legislation applying in relation to Wales, but actually it will make it easier to understand the nature and function of legislation affecting Wales. At the moment, Schedule 5 provided for under the Bill for measures and Schedule 7 for primary powers are intended to be the sole source of the Assembly’s legislative competence, so it will be quite easy for the public to see where the Assembly can act and where it does not. As I say, Schedule 5 in the case of Part 3 powers and Schedule 7 in the case of Part 4 powers. It would be possible, if we decided to do this, to confer on the Assembly a power by measure to consolidate or codify the law applying to Wales on a particular devolved subject, which would enable the Assembly to bring together in one place and simplify existing statutory provisions, which at present are often a confusing mixture of provisions relating to this relevant Secretary of State in England and the Assembly in relation to Wales. Just to conclude the point, all Welsh legislation is published by HMSO, and would continue to be, and is available on the website. Assembly Measures will be published by HMSO, similarly, and regulations and orders made by Welsh Members would form part of general statutory instruments, areas again covered by HMSO.

Q21 Lord Carter: Let us say the Assembly decided to codify an area of law. How would that work? Are the powers here already for them to do that?

Mr Hain: No. I think it would need, as I explained, a new power to do that.

Q22 Lord Carter: By Act of Parliament, for this Parliament?

Mr Hain: By Order in Council, in exactly the way I have described.
Q23 Lord Smith of Clifton: Secretary of State, an intriguing point: why are the Assembly’s powers to make primary legislation defined in terms of those fields which are expressly conferred on it, rather than (as the Scottish Parliament’s are) on the basis of powers over all fields except those expressly reserved to Westminster?

Mr Hain: We did not set about this outcome in any kind of dogmatic way. Scotland and Northern Ireland are separate legal jurisdictions, whereas Wales is part of a single England and Wales jurisdiction, so what works well in relation to Scotland and Northern Ireland cannot simply just be, as it were, transferred across to Wales. For example, if the Assembly could change basic legal rules on civil and criminal law in relation to Wales then the unity of a single England and Wales legal jurisdiction would be undermined. So the Scottish model where, as it were, everything is in Scotland unless it is reserved applies where you have a separate legal system, as Scotland has had for many years. In Wales it is necessary to actually define it in a different way, and that is why we have done that. I would just add to that, we did consider the power to legislate generally but with a list of reserved matters, which included basic principles of civil and criminal law, and the advice which we received from law officers and from parliamentary counsel was that that would be extremely difficult to draft and its effect would be rather uncertain, for the reasons I have explained.

Q24 Chairman: Once Part 4 does come into force at this future date unspecified, following a referendum, would you anticipate a reduction in the number of Welsh MPs sitting in the Westminster Parliament?

Mr Hain: No, I would not. The reason why I think the main case for reducing Scottish MPs was made was that the Scottish devolution settlement is much broader, more extensive and wider than applies in Wales for the very simple reason, apart from anything else, that there is a separate legal system. For example, policing and criminal justice remains a reserved matter, it remains a Westminster prerogative, and I do not see that changing, whereas it is devolved in Scotland. There is a whole number of other areas. You will find that Scotland has powers when even the Welsh Assembly would not under Part 4 provision. So there will still be a need for an extremely active representation of Welsh Members of Parliament. Can I make just one other point? It is often suggested that Labour ministers, like myself, make this point in a defensive party sense because we happen to have three-quarters of Welsh MPs. Actually, I think it is a Welsh issue rather than a party issue. The case for reducing the number of Welsh MPs is not only, I think, not made because the settlement is narrower and there is still much more for Welsh MPs to do over here—

Q25 Chairman: Although it will be post the referendum—

Mr Hain: The powers will be greater, so there will perhaps be fewer bits of primary legislation coming through, though there may be Sewell-type conventions, as applies in Scotland. I would expect that to happen, actually, where the Welsh Assembly would find it more convenient for Westminster to legislate, as it were, concurrently. The other reason is that I think it is important for Wales, given where it is geographically, to have a strong force at Westminster speaking for Wales, regardless of party. So it is a Welsh issue rather than a party issue.

Q26 Chairman: Thank you for that, but it does lead to the very deep constitutional question: do you see Part 4 (if and when it happens) as the end of a devolution process, or could you envisage it going to a Scottish model at some point out beyond that, and would that not ultimately at some point in the future be a more consistent model of devolution within the United Kingdom?

Mr Hain: Everywhere is different. Northern Ireland is different for obvious historical reasons. Wales is different and Scotland is different. I think it is more important that devolution develops, as it has done, organically in respect of different traditions and I think that is a more stable basis for its development. Devolution has already developed, even from 1999. A number of powers have been transferred, for example under the transfer of function orders covering animal health. For example, the Fire Services have been transferred under primary legislation and students’ financial support has been transferred. So it has not stood still. But I do see this Bill as ending the devolution process in that sense, though who knows, along the edges it may be possible to have a further transfer of function orders if time suggests that is a sensible thing to do.

Q27 Chairman: But in terms of the evolution of devolution you would not put an artificial end to the process by saying Part 4 is the end, in the Government’s view?

Mr Hain: No, because it has not been the end under the existing view. I would say that as the fundamental constitutional architecture, it would be, in the sense that the next stage would be independence and nobody envisages that. In fact, my argument has always been that not only do I believe as a matter of principle in de-centralisation of power, and always have done, but actually I think it binds the United Kingdom much closer together and, as it were, lances the separatist boil, which could easily have gone in a different direction if we had not devolved in 1997. The conditions could have got very nasty, I think, for what was building up then. So unless you are advocating an entirely separate Wales, which nobody
seriously is except a minority party, then I think this is the end point in terms of the overall constitutional architecture. That is not to say that more policy areas, functions, would not be devolved down, as indeed they have been under the existing settlement.

Q28 Lord Windlesham: Is support stronger now for complete separation than it has been in the past, or is it about static, in your view? It is difficult to make these judgments, but how do you sense the independence movement in Wales?

Mr Hain: I think it is weaker now than it has been for a considerable time. Polling suggests that, and just common sense and political feel on the ground suggests that. I think that is one of the reasons why, without making a party point, Plaid Cymru, who were doing very well in, say, around 1999, have actually just slid increasingly down the polls because they have positioned themselves as the independence party and I see no appetite for that. I see an appetite for a radical party acting as a pressure on the Government. There is space for that in Welsh politics, but there is not serious space for a separatist party because devolution has shot that fox.

Q29 Chairman: This was, of course, the great argument which preceded devolution, whether it would be the first step to independence or whether it would be a settled state.

Mr Hain: Yes.

Q30 Earl of Sandwich: Secretary of State, a lot of people will be reassured by your latest remarks, I think, about where you pitch this Bill exactly. It is quite a conservative Bill (with a small ‘c’). I can say that as a cross-bencher.

Mr Hain: I am not sure whether I should take that as an insult or not. I think it is a very radical Bill myself, but there we are.

Q31 Earl of Sandwich: My only question is, is it a deliberate response to voter apathy and the very low turn-out which Wales has had in the past?

Mr Hain: I do not know that Wales's turn-out has been any less than other parts of the UK. We have a problem of political disengagement, which is a really serious problem.

Q32 Earl of Sandwich: But is that not all tied up with the special relationship which England and Wales have always had and will continue to have? Those are people who do not want to do down the long road towards the Scottish devolution. There is a large body of opinion in Wales which feels that way, so I felt this might be a response to that.

Mr Hain: There is a large body of opinion in Wales which wants to be part of the United Kingdom, an overwhelming majority; there is only a tiny minority which wants independence and that sort of bubbles up and down according to the political circumstances. I think the special relationship is stronger than historically it has been in Scotland. I agree with you on that, but this Bill is not a defensive response to a worry that this might turn around at all. As I say, that fox has been shot, in my view. What it is, is a feeling that actually there are various parts of the existing settlement which need improving and we need to settle this question. You might describe it as a conservative Bill. I just think it is a Bill which is very radical and the very first time any Secretary of State has ever put primary powers on the statute book. It has never happened before and people did not think I would do it. But it is, as it were, cautious in the sense of not just making a huge big leap and coming unstuck and putting the decision with the Welsh people in the end if it was decided to go for primary powers.

Q33 Chairman: You should know, Secretary of State, there is a certain edginess in this Committee about moving to things which used to be the sphere of parliamentary legislation, moving to Orders in Council as a result of the Legislative and Regulatory Reform Bill, which is in the Commons now, and it has produced considerable edginess about an apparent Government wish to move from the traditional way of legislating to Orders in Council. I think this Committee understands very well, being the Constitutional Committee, that there is the other half of the equation, which is the Welsh Assembly. I think we do understand that very well, but I wonder, since we have got a senior member of the Government here, whether you would care to comment not on the regulation part of that Bill (which I can see a strong case for) but on what apparently are very wide powers envisaged to move from parliamentary legislation to Orders in Council, because I am afraid it is casting a little bit of a shadow over this Bill?

Mr Hain: I understand that, and that was one of the reasons why I was very keen, if I was invited, to talk to you about what underlies the Bill. I think whatever concerns, legitimate perhaps, which the House of Lords has had about Orders in Council and regulatory reform orders, delegating powers to ministers, whatever those concerns, it is a very different proposition in this Bill, which is to confer powers by parliamentary decision, express parliamentary decision in both Houses, on an elected legislature, itself accountable to the Welsh people, itself by this Bill required to have detailed scrutiny procedures of a familiar kind to us in Parliament. It is a very different proposition, and I think that is the difference. If we were proposing a wholesale Orders in Council over to Welsh ministers and, as it were, by-passing the legislature and the accountability and
scrutiny involved in that, then I think we would lay ourselves open to enormous trouble at this end of Parliament, if not at that end at well.

Q34 Chairman: I fear that when the Bill comes here the issues of these two Bills may begin to run together. I think you have been extremely candid and very helpful, if I might say so, in explaining just what you have, but there will be a certain caution, I think, in this House anyhow (and maybe in the other House also) about this being part of a larger pattern rather than being a specific solution, in the way you have explained, to the evolution of devolution in Wales.
Mr Hain: I understand that, and I can accept that that might happen and that this Bill might run into choppier waters than otherwise, because of nothing to do with Wales or actually what is in the Bill, but I just hope that the Bill will be scrutinised by the House of Lords on its own merits as dealing with the interests of Wales rather than concerns about delegating powers to UK Government ministers, and I hope that Wales will not be prejudiced by any concerns, as I say legitimate perhaps, which the House of Lords might have about that problem.

Q35 Lord Smith of Clifton: On the question of dual candidacy in Assembly elections for reasons of principle or pragmatism, is the Government considering extending the bar in relation to the other two bodies, the Scottish Parliament and the Greater London Assembly, which are elected using the Additional Members System?
Mr Hain: Not that I know of, because we have had a unique and completely unexpected experience in Wales. When I helped to take the original Bill forward and put forward this Additional Member System, I never anticipated the consequences in terms of regional list members competing with constituency members, in the bulk of cases people who had defeated them. So we had this extraordinary position, in the case of the Clwyd West constituency, for example, of the three candidates who were defeated by the successful one actually setting up rival camps (in constituency offices in some cases) to seek to undo that previous result next time, using the allowances and all the status they attract as list members. In the case of 15 out of the 20 list members, they have done precisely that in constituencies which they hope to target for next time. This has caused both confusion in the minds of the electorate as to who actually is the Assembly Member because many of the list members go around calling themselves the constituency member for that particular constituency when they are not. In my own constituency of Neath I get list members who have referred to themselves as “the member for Neath” when there is a member for Neath, and she happens to be Gwenda Thomas. She happens to be a Labour member, I am happy to say, and she is the constituency member. So I think this has actually bred a very difficult and de-stabilising situation which we are seeking to put right. What we are saying is that voters should be put in charge. You should have a choice. You decide to stand in the constituency. If you are worried about losing, stand on the list. Do not have a lifebelt, as it were, a second chance. What is interesting, if I could just summarise—I will not go into a great deal of detail unless I am invited to—is that actually a broad cross-section of opinion has supported us, Lord Richard himself, for example. Lord Steel, the former Presiding Officer of the Scottish Parliament, has criticised the effects of dual candidacy. Lord Carlisle, a former leader of the Welsh Liberal Democrats, has said, “I am sure that many in Wales will welcome the removal of the absurd dual candidacy opportunity.” Lord Crickhowell, a former Conservative Secretary of State, says the present arrangements are really pretty indefensible. A Plaid Cymru regional coordinator said that, and even Preseli Pembrokeshire Conservative Association in evidence submitted following the White Paper being published said that as well. I think it was to the White Paper. It may have been to the Richard Commission, but I think it was to the White Paper. There has also been a certain amount of international experience, in New Zealand, in Canada and elsewhere, which has pointed up the problems of this system where people can stand in both and, as it were, have a both-way bet on the outcome of the election.

Q36 Chairman: So you do not read across from that to Scotland or London?
Mr Hain: Well, I am responsible for Wales—

Q37 Chairman: And Northern Ireland.
Mr Hain:—and Northern Ireland. They have a different proportional representation system in Northern Ireland.

Q38 Lord Smith of Clifton: A fair one!
Mr Hain: I am just looking at the experience in Wales and legislating for Wales. What has happened elsewhere, in Scotland or London, depends on the experience. I never envisaged I would be doing this when I brought in the original Bill. It is actually the practical experience. By the way, lest anybody thinks that this is a partisan issue, there are six Labour Assembly Members, three of whom are ministers, who would be vulnerable to losing their seats on swings of less than three per cent in the next elections, next year, and they would not have the protection either. So this is party-neutral, in my view.
Chairman: It is interesting that these systems have derived from a less fair electoral system, which is precisely what you described as a two-way bet. This is the way of the Additional Member System elsewhere,
but I can see the political objections in Wales which you have stated.

**Q39 Lord Elton**: Secretary of State, each part of the United Kingdom is somewhat different and we have developed different methods of governing each. Then we have decided that devolution is not an event but a process. One is beginning to feel that we live not in a constitutional structure but a constitutional laboratory! That feeling would be minimised if there were clearly defined constitutional principles which were adhered to and informed each of the solutions we find to these different problems. Are there such principles, and could you state them?

**Mr Hain**: First of all, I think we have lived more in a policy laboratory, actually, than a constitutional laboratory in this sense: what has been interesting is that in the case of Wales we established a Children’s Commissioner some years ago. It was then seen to be working and followed up in England. We established free bus travel for pensioners, a policy transported back across Offa’s Dyke, as it were. Likewise, the English experience of driving down waiting lists in hospitals—

**Q40 Lord Elton**: Secretary of State, I am sorry to interrupt, but we are short of time. The question I am asking is, what are the principles on which these solutions are founded?

**Mr Hain**: The first one is that I strongly believe in devolution as a principle, de-centralising power. The second point is that some have suggested that devolution could move backwards rather than forwards, and I think it should move forwards. Thirdly, I think where fundamental rather than incremental change is advanced (as in this Bill, in Part 4), it should be endorsed by a referendum, but of course Parliament remains supreme; in different ways depending upon which stage you are at, but ultimately supreme.

**Q41 Lord Elton**: So it is pragmatic rather than philosophic?

**Mr Hain**: I do not know. There are people who have taught philosophy in this room, so I do not think I will get into that! I would just say that I think commitment to power being as close to people as possible is, if you like, a philosophical view of where Britain should be. We have traditionally been a very centralised state. We are now becoming a much more devolved state, and I think that is healthy.

**Q42 Lord Windlesham**: Standing back a little, would you regard Welsh nationalism in its various forms as being in decline, or is it still an active and widely supported political force?

**Mr Hain**: It is active, but there has always been an argument within Welsh nationalism as to whether you go for independence or whether you just want a Wales with more pride and patriotism, as it were. I believe a Wales with patriotic pride is a very strong feature, as it has been and should be, of our public life, our traditions and our culture, but I would say that the idea of separatism and independence is in serious decline to the point of being such a minority that it becomes a burden on any party advocating it, like Plaid Cymru, and that has been shown in its own electoral decline. If I had Plaid Cymru’s interests at heart, which I do not, I would say they ought to jettison that policy because the Welsh public are not interested in it and devolution has provided its own safety valve for any nationalistic or separatist instincts.

**Q43 Lord Carter**: I was thinking back to the devolution period, 1997 and just after. I remember, as Chief Whip, reminding all ministers to have in their brief at every question debate, or whatever, the answer to, “What is the effect of devolution on this?” I am sure my colleagues will remember this was often asked in the House. We have not heard such a question for a very long time now. Does that mean that in purely parliamentary terms it is actually working quite well?

**Mr Hain**: I do think it is working well, and therefore I think the job is to improve it rather than to throw the baby out with the bath water. I have just noticed, and officials working for me have noticed, how over the years it has become an automatic thing within the civil service machine to recognise that any Bill has got Welsh implications, rather than having to fight for it, and so on. So yes, I do agree with you.

**Q44 Chairman**: I cannot resist asking you, Secretary of State, since you have this unique combination of Northern Ireland and Wales to look after and this is the Constitutional Committee, what you think the resemblances and differences are—and I hope you do not mind my asking this, but it is very useful to have you here—between the situation constitutionally speaking in Wales and in Northern Ireland?

**Mr Hain**: My preparatory notes are blank at this point! For a start, of course, there is the history of the island of Ireland, which is a very different one, and the whole historic constitutional status of Northern Ireland as part of the United Kingdom, which is very different, even given, centuries back, Welsh history. Secondly, of course, I am trying to get an Assembly back up and running in Northern Ireland at the moment, in fact we have meetings tomorrow (my deputy, David Hanson, is taking them) and on Monday again to get this process moving forward, as I am confident we can. I think the sooner we can get a legislative Assembly operating in Northern Ireland
again, the better for Northern Ireland and the better for the United Kingdom. That is my point on that. They are different traditions, and there are therefore different solutions, different mechanisms and a different set of policies, which are reflected in the different models.

Q45 Chairman: I suppose what I am getting at is whether in any sense that we talk about Scotland and Wales the Good Friday settlement can be described as devolution? It seems, to express my own view, to be of a different order, for the very historical reasons you have given. It is a different set of arrangements. But from another perspective, in the sense that power should be exercised locally, we hope that that will soon be the case. It resembles devolved power, but it comes from a completely different—

Mr Hain: It is a very different settlement. For example, in the Good Friday Agreement and enshrined constitutionally, and in legislation, is a cross-border element to the Republic, so that is pretty unique, reflecting the unique circumstances, the history and the ambitions which some people have for the future. So yes, it is very different.

Q46 Chairman: It has more of the characteristics of a negotiated outcome than a devolved outcome in many ways, permanent negotiations, as you are well aware.

Mr Hain: Yes.

Q47 Lord Peston: My Lord Chairman asked you earlier about the logic of whether you draw a boundary around what you can do or a boundary around what you cannot do, and you said it depended on the circumstances. Then following my Lord Chairman’s question about Orders in Council, if experience showed that in the case of Wales the boundary was wrong, would Orders in Council enable you to say, “Well, we really needed a different boundary, perhaps a larger one”? Would that be done by Orders in Council, or how would it work?

Mr Hain: Fields could be added by Orders in Council.

Q48 Lord Peston: Fields, yes, I knew I was missing a word. It can be added? But from another perspective, in the sense that power should be exercised locally, we hope that that will be the case. It resembles devolved power, but it comes from a completely different—

Mr Hain: Indeed, the 1998 Act provided for that, and primary legislation, for example, which went through which added new responsibilities in respect of the Fire Service, student support, family courts and services, and so on, for children and that kind of thing. So, yes. For example, the Assembly is anxious to get responsibility for planning permission for energy consents over 50 megawatts. At the moment it has them for under 50 megawatts and it is anxious to get them for over 50 megawatts, so there is that kind of argument happening the whole time. I am not saying that that would ever be static.

Q49 Chairman: I think probably at that point, Secretary of State, we ought to thank you very much for coming. It has been most useful and hopefully it has increased our understanding of the Bill.

Mr Hain: I look forward to seeing your report. Thank you very much.