

The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales.)

Current membership

Dr Hywel Francis MP (Chairman) (*Labour, Aberavon*)
Mr Stephen Crabb MP (*Conservative, Preseli Pembrokeshire*)
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Jessica Morden MP (*Labour, Newport East*)
Hywel Williams MP (*Plaid Cymru, Caernarfon*)
Mark Williams MP (*Liberal Democrat, Ceredigion*)

Betty Williams MP was a Member of the Committee during the inquiry.

Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm. A list of Reports of the Committee in the present Parliament is at the back of this volume.

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1 Introduction

Background to the Government's Proposals

Historical Perspective

1. Following the conquest of Wales by Edward the First in the 13th century, the Acts of Union of 1536 and 1543 formalized the assimilation of Wales into England, establishing the single legal jurisdiction of England and Wales.¹ It was not until the 19th century that a cultural awakening in Wales, alongside the issue of Home Rule for Ireland, raised the issue of devolution for Wales.² Whilst Parliament rejected this pressure, the Liberal Government of 1880-1885 succeeded in passing the Welsh Sunday Closing Act 1881, the first piece of legislation that set out different principles of legislation for Wales and England.³ The 1920s and 1930s saw renewed pressure for devolution, partly as a result of the creation of Plaid Genedlaethol Cymru in 1925. However, devolution was rejected as a distraction from the harsh economic realities of life in Wales during the interwar recession.⁴

2. The Conservative Government of 1951 established a Ministry of Welsh Affairs, later upgraded to a Minister of State in 1954.⁵ The first Secretary of State for Wales, Jim Griffiths, was appointed by the Labour Government in 1964.⁶

3. During the 1970s devolution resurfaced as significant political issue. Parliament passed legislation for devolution which was put to the Welsh public in a post legislative referendum on the 1st March 1979, and was rejected by a majority of 4-1.⁷

4. Following the failed referendum, the focus of pro-devolution campaigners largely shifted to cultural and linguistic issues. The 1980s witnessed a flurry of publications of Welsh history texts,⁸ and a dramatic increase in Welsh medium education provision in Wales.⁹ In 1982, S4C, the Welsh language television channel was established.¹⁰ The Welsh Language Act, establishing the Welsh Language Board was passed in 1993.

1 John Davies (1992), *Hanes Cymru: A History of Wales in Welsh*, (Penguin, London), pp 225-226.

2 K.O. Morgan (1981), *Wales 1880-1980: Rebirth of a Nation* (Oxford University Press), p 32.

3 Further Acts followed, including: Intermediate Education Act 1889; the Welsh Courts Act 1942; the Disestablishment of the Church (Wales) Act 1920 and the Welsh Language Act 1967.

4 John Davies Op cit pp 526-527.

5 K.O.Morgan Op cit p 379.

6 John Davies Op cit p 641.

7 Gwyn Alf Williams (1985), *When was Wales?* (Penguin, London), p 294.

8 E.g. Morgan (1981), Williams (1985) and Davies (1992).

9 Gareth E Jones (1997), *The Education of a Nation* (University of Wales Press, Cardiff).

10 John Davies, Op cit pp, 680-81.

5. At the same time administrative devolution continued to expand dramatically. By 1997, the Welsh Office employed over 2500 civil servants, administering a range of policy areas from agriculture to education.¹¹ Between 1979 and 1994 the number of QUANGOs (Quasi Autonomous Non-Governmental Organisations) in Wales doubled from 40 to 80. By 1995, an estimated 1,400 people had been nominated to Quangos, which were responsible for an annual expenditure of around £2000 million a year.¹²

Devolution in Wales

6. In 1994, the Labour party made democratic devolution for Wales a manifesto commitment. Six months after its 1997 General Election victory, the Welsh public voted in favour of devolution in a referendum by a margin of 6,721 votes.¹³ In November 1997, the Labour Government introduced the Government of Wales Bill. That Bill provided for the establishment of the National Assembly for Wales; a Corporate Body, which would work along similar lines to that of local Government. The corporate body was a single executive body, setting and implementing policies in Wales within the frameworks created by primary legislation passed in Westminster. This structure was intended to reflect and promote the principles of inclusiveness and power sharing in the new Assembly.¹⁴ The Bill received its second reading on 8th and 9th December 1997 and received Royal Assent on 31st July 1998. As a result, the Secretary of State for Wales' powers passed to a democratically elected body of 60 members, the first body of its kind to exist in Wales for over 600 years. Following the first National Assembly elections on 6 May 1999, it was formally opened by Her Majesty Queen Elizabeth II on 26 May 1999.

Assembly Review of Procedure

7. A consensus quickly grew that while the Corporate Body model was adequate, it was not the most effective form of devolution for Wales. During July 2000, after the first year of the National Assembly, Rt. Hon. Rhodri Morgan AM, the then First Secretary of the National Assembly, instigated an Assembly Review of Procedure.¹⁵ That Review among other things considered “the Corporate Body vs. separation of the ‘executive’ and ‘legislative’ arms - roles and relationships”.¹⁶ It recommended the widest possible split between the “Government” and “Legislature”, which was possible within the Corporate Body model contained within the 1998 Act.¹⁷ The result was the creation of the term Welsh Assembly Government. The First Minister explained that the title “was agreed across the four parties in the Assembly that we needed to stretch the elastic – not break the elastic, but stretch the elastic – of the Government of Wales Bill of 1998, so as to make as clear as possible the distinction between the executive branch and the legislative branch”.¹⁸ The title First

11 See the Report of the Richard Commission, p 8 for a full list.

12 See John Osmond (1995), The Contradictions of Welsh politics, in *Scottish Affairs*, no.11, pp 31-47.

13 The referendum was held on 18th of September 1997.

14 Report of the Richard Commission, pp 48 and 50.

15 The Review was announced in July 2000.

16 Assembly Review of Procedure para1.3.

17 Assembly Review of Procedure, main findings.

18 Q199

Secretary (which was contained within the 1998 Act) was replaced by the term First Minister. While this did go some way to making clear the delineation between the Executive and Legislative functions, the continued existence of the Corporate Body in Statute meant that a high level of confusion remained.

Richard Commission

8. In July 2002, the First Minister followed up the Assembly Review of Procedure with the establishment of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (hereafter known as the Richard Commission). The Commission was chaired by Lord (Ivor) Richard; and was given a wider remit to consider the powers of the National Assembly and its electoral arrangements.¹⁹ The Commission's Report was published on the 31 March 2004.²⁰ It set out a series of recommendations for reform of the National Assembly of Wales. Those recommendations included the abolition of the Corporate Body status of the National Assembly, the creation of an 80 Member Assembly (elected by proportional representation, based on the Single Transferable Vote (STV) model), and a proposed timetable for the transfer of primary legislative powers by 2011.²¹

9. Although the Government did not formally respond to the Richard Commission—it was a National Assembly commissioned Report—it acknowledged the need for a revised settlement. A commitment to a revised settlement was set out in the Labour party manifesto for the 2005 General Election. The manifesto stated that:

“In Wales we will develop democratic devolution by creating a stronger Assembly with enhanced legislative powers and a reformed structure and electoral system to make the exercise of Assembly responsibilities clearer and more accountable to the public”.²²

10. On 15th June 2005, the Government published the White Paper: Better Governance for Wales. Rt. Hon. Peter Hain MP, the Secretary of State for Wales, described the publication of the White Paper as putting devolution on “a road towards a better Wales with our devolved government more accountable, more participatory and more effective, giving more powers to the Assembly”.²³

19 The full terms of reference can be found at annex 1 to the Richard Commission Report.

20 The Report of the Richard Commission, Spring 2004, is available at www.richardcommission.gov.uk/content/template.asp?ID=/content/finalreport/index-e.asp

21 www.richardcommission.gov.uk/content/template.asp?ID=/content/finalreport/index-e.asp, Chapter 14

22 www.labour.org.uk/fileadmin/manifesto_13042005_a3/flash/manifesto_2005.swf

23 www.walesoffice.gov.uk/pn_20050615.html

Scrutiny of the White Paper

Wales Office Consultation

11. Following the publication of the White Paper,²⁴ the Government sought comments from interested parties and set a closing date for the receipt of submissions of 16 September 2005. The responses to that exercise can be found on the Wales Office website.²⁵

National Assembly for Wales: Committee on the Better Governance for Wales White Paper

12. The most significant response to the consultation exercise was that from the National Assembly for Wales, which established a Committee to scrutinise the White Paper (hereafter referred to as the National Assembly Committee).²⁶ The Committee's terms of reference were to:

i. Consider the proposals set out in the White Paper so far as they relate to the proposed new structure and its proposed legislative powers;

ii. Take evidence from organisations and individuals with a direct interest in the proposed new structure of the Assembly and its proposed legislative powers.²⁷

The terms of reference excluded the issues in Chapter 4 of the White Paper (electoral matters). The Committee published its report on 16 September 2005 and that report was considered in Plenary on 21 September 2005.²⁸ We refer to its recommendations during this Report.

Welsh Affairs Committee Inquiry

13. This Committee was reconstituted on 19th July 2005, following the 2005 General Election. At its first meeting it agreed to undertake scrutiny of the White Paper, announced the inquiry and sought written evidence.²⁹ However, the fact that the summer recess commenced two days after the Committee's first meeting resulted in the evidence sessions beginning in October. The importance of publishing this Report in time for the Second Reading debate necessitated a truncated programme of evidence sessions. However, we were able to draw upon both the evidence provided to the National Assembly Committee and the responses to the Wales Office consultation exercise, in addition to the evidence presented directly to our Committee.

24 Better Governance for Wales, Cm6582

25 www.walesoffice.gov.uk/bgfw.html

26 www.wales.gov.uk/keypubassembettergov/index-e.htm

27 National Assembly Committee Report, para 2.

28 www.wales.gov.uk

29 www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm.

14. During the inquiry we took evidence from both Wales Office and Welsh Assembly Government Officials;³⁰ Professor Richard Rawlings, Chair in Law, London School of Economics; Professor David Miers, Cardiff Law School, Cardiff University; Dr Richard Wyn Jones, Senior Lecturer and Director of the Institute of Welsh Politics, and Dr Roger Scully, Senior Lecturer in European Politics and Director of the Jean Monnet Centre for European Studies, University of Wales, Aberystwyth;³¹ Rt. Hon. Lord Richard QC, Chair of the Richard Commission;³² Glyn Matthias, Electoral Commissioner for Wales and Kay Jenkins, Head of Office, Wales, Electoral Commission;³³ Rt. Hon. Lord Elis-Thomas, AM, Presiding Officer and Paul Silk, Clerk, National Assembly for Wales;³⁴ and Rt. Hon Peter Hain MP, Secretary of State for Wales and Rt. Hon. Rhodri Morgan AM, First Minister of the Welsh Assembly Government.³⁵

15. In addition to our witnesses we also received a number of written submissions and we offer our thanks to everyone who contributed to our inquiry.

16. The reconstitution of our Committee and the Parliamentary timetable meant that our inquiry concluded outside of the consultation period set out for the White Paper. However, we trust that the Government and Members of the House will wish to draw upon our Report and its findings during the Second Reading debate and the debate in Committee on the Bill during its passage through Parliament.

30 Ev 1 to 7

31 Ev 7 to 26

32 Ev 27 to 36

33 Ev 37 to 46

34 Ev 47 to 57

35 Ev 57 to 81

Production of a New Government of Wales Bill

The benefits of stand-alone legislation

17. The Government of Wales Act 1998 defined the constitutional powers and functions of the National Assembly; while Schedule 2 of the Act listed the eighteen “fields” in which functions were originally to be transferred. Those fields are described in very general terms such as “highways” and “social services”.³⁶ In 1999, the National Assembly for Wales (Transfer of Functions) Order 1999 transferred to the National Assembly specified statutory powers within those fields, in terms of functions exercisable by a Minister of the Crown under a specified list of enactments.³⁷

18. Since the original Transfer of Functions Order, further powers and functions have been conferred on the National Assembly in a variety of ways. A second Transfer of Functions Order was passed,³⁸ and further entries have been added to the Transfer of Functions Orders by direct amendments contained in the provisions of new Acts.³⁹

19. In addition to those amendments, changes have been made indirectly to the Transfer of Functions Order by treating a reference to a particular Act listed in the original Order as including a reference to textual amendments to that Act contained in a later, usually differently named Act.⁴⁰ Further powers have also been conferred directly on the National Assembly by new primary legislation; both in respect of England and Wales legislation⁴¹ and “Wales-only” legislation.⁴²

20. Changes to the functions of the National Assembly have also been made by amending the Government of Wales Act;⁴³ while additional functions have been conferred by delegated legislation made by the National Assembly,⁴⁴ by the National Assembly and a UK Government Minister acting together,⁴⁵ or by the Secretary of State for Wales.⁴⁶

21. During our predecessor Committee’s inquiry into the Primary Legislative Process as it affects Wales, Keith Patchett, Emeritus Professor of Law at Cardiff University, described the ability to identify Welsh law as akin to being “lumbered with a chained elephant...which blunders around the Statute Book and causes mayhem for the ordinary

36 The other fields are agriculture, forestry, fisheries and food, ancient monuments and historic buildings, culture (including museums, galleries and libraries), economic development, education and training, the environment, health and health services, housing, industry, local government, sport and recreation, tourism, town and country planning, transport, water and flood defence, and the Welsh language.

37 For further information see Third Report from the Welsh Affairs Committee, the Primary Legislative Process as it affects Wales, HC79 of Session 2002-03.

38 The National Assembly for Wales (Transfer of Functions) (No.2) Order 1999 (S.I., No. 2787).

39 For example, the Health Act 2000, s.66(4)-(5).

40 For example, changes to the Children Act 1989 made by the Carers and Disabled Children Act 2000.

41 For example, the Learning and Skills Act 2000.

42 For example, the draft Public Audit (Wales) Act.

43 For example, the Government Resources and Accounts Act 2000.

44 For example, the New Schools (Admission) Wales Regulations 1999, SI No. 2800.

45 For example, the Animal Products (Import and Export) (England and Wales) Regulations 2000, SI No.1673.

46 For example, the Structural Funds (National Assembly for Wales) Regulations 2000, SI No.906.

user”.⁴⁷ Should an additional raft of legislation be added to the already complex devolution settlement, there was a risk that it would only serve to increase that mayhem.

22. We questioned the Wales Office about their intentions for the new legislation and the form in which it would take. Alan Cogbill, Director of the Wales Office told us that the Bill would be “offered as a coherent and freestanding Bill which restates, with necessary qualifications, things from the previous Government of Wales Act, so that you will be able to go to the new Act and find everything there in a self-sufficient way”.⁴⁸ The Secretary of State acknowledged that an Amendment Bill would not have been the best route forward and that it was better to have a single piece of legislation which he described as being “the Bible for devolution”.⁴⁹ Rt. Hon. Rhodri Morgan AM, the First Minister of the Welsh Assembly Government, confirmed that the approach would make for a longer, but better Bill that would give the reader of devolution a “coherent single viewpoint”.⁵⁰

23. We welcome the intention of the Wales Office to introduce a coherent and freestanding Bill and hope that it will bring a greater level of clarity to the devolution settlement for Wales.

Draft Legislation

24. Given the breadth and complexity of this constitutional legislation, the Presiding Officer of the National Assembly expressed his concern that the Bill had not been published in draft form, and argued that while one could undertake scrutiny of the White Paper, it was not the same thing as scrutinising a draft Bill. He argued that “as it was not published as a draft bill, that is an even stronger argument for having wide consultation, even consultation with officials who worked for the Assembly Parliamentary Service, apart from those of us who are political leaders. As I say, I am disappointed that that did not occur”.⁵¹

25. The 1998 Government of Wales Act began its Parliamentary progress at the end of November 1997, and received Royal Assent at the end of July 1998.⁵² The Bill was large and complex containing 159 clauses and 18 schedules.⁵³ It was considered in a long session of Parliament which, in common with this Session, followed a May General Election.⁵⁴

26. The Secretary of State explained that the new Bill would contain around 160 Clauses. Around 120 of the clauses in the new Bill would be transposed, in some cases with

47 Fourth Report from the Welsh Affairs Committee The Primary Legislative Process as it affects Wales, HC 79 of Session 2002-03, Q82.

48 Q4

49 Q189

50 Q190

51 Q146

52 Sessional Returns 1997-98, HC142, p42

53 A full text of the 1998 Act can be found at www.opsi.gov.uk/acts/acts1998/19980038.htm.

54 The 1997-98 Session began on 7th May 1997 and was prorogued on 19 November 1998.

modifications, from the Government of Wales Act 1998, with the remaining 40 clauses being new clauses, dealing with the enhanced powers and the reforms.⁵⁵

27. The Secretary of State told us that a draft Bill was not possible within the Government's timeframe. He explained that the proposals contained within the White Paper would need to be in place in advance of the National Assembly elections in May 2007. Furthermore, the National Assembly would need time to address the substantial restructuring of its practices and procedures.⁵⁶ However, the length of the current Session –from May 2005 to November 2006 - should have been sufficient to provide for both a draft Bill and a Bill for Parliament, even if the length of Parliamentary consideration of the 1998 Act was repeated this time around.

28. The Government could have published a draft Bill for consideration in July 2005, with a closing date for consideration of the beginning of December. Even allowing for amendments, the Bill could have been introduced in February and with a similar amount of Parliamentary consideration, be enacted by November 2006.

29. Whilst we welcome the publication of the White Paper, it is short on the detail necessary for proper pre-legislative scrutiny. A draft Bill would have been more appropriate. We are not convinced that the deadline of the 2007 National Assembly elections would have debarred the Government from publishing a draft Bill and still completing the Parliamentary process for the Bill in this very long session. Given that it is a constitutional Bill, we are disappointed that the Government have shied away from its commitment to publish draft legislation on this occasion.

Welsh Statute Book

30. Our predecessor Committee's report on the Primary Legislative Process as it affects Wales, considered the accessibility of Welsh legislation. It came to the conclusion that

“In our view, a clear and comprehensive register of Welsh legislation is not merely desirable, it should be a requirement of the devolution settlement”.⁵⁷

The National Assembly Committee also considered this issue in its Report and recommended that “the Governments in both London and Cardiff agree on the means by which a “Welsh statute book” can best be made available”.⁵⁸ **We agree that a “Welsh statute book” would be highly beneficial and reiterate our predecessor's view that a clear and comprehensive register of Welsh legislation should be a requirement of the devolution settlement. Furthermore, we add our voice to that of the National Assembly Committee in recommending that the Governments in both London and Cardiff agree on the means by which a “Welsh statute book” can best be made available.**

55 Q189

56 Q188

57 Fourth Report from the Welsh Affairs Committee, *the Primary Legislative Process as it affects Wales*, HC79 of Session 2002-03, para 24.

58 National Assembly Committee Report, para 115.

2 The Separation of the Executive and the Legislature

Background

31. The National Assembly for Wales was created as a single corporate body which discharged both legislative and executive functions.⁵⁹ The original reasons for that approach was that it matched existing practice in local government. However, as the White Paper notes, “Welsh local authorities have since moved to a Cabinet style of government, with executive members taking decisions and being held to account by overview and scrutiny committees”.⁶⁰ Both the Assembly Review of Procedure⁶¹ and the Report of the Richard Commission⁶² concluded that the National Assembly should follow that trend.

32. The Government has acknowledged that the Corporate Body, “generated considerable confusion [and that] while those closely involved in the system understand how it works, the wider public in Wales generally is confused about who is responsible for decisions that affect them”.⁶³ The White Paper proposes to end the Corporate Body, and the informal separation between the National Assembly and the Welsh Assembly Government, and replace it with a formal separation. It argues that “this change would make for better government and better public understanding of the differences between the responsibilities of Minister on the one hand and the roles of opposition parties and backbenchers of all parties on the other”.⁶⁴

33. In general that view has been backed up by witnesses to this Committee, the National Assembly Committee and also witnesses to the Richard Commission. The latter concluded that the corporate body was “no longer a sustainable structure, and has also contributed significantly to the public’s confusion as to who takes decisions”,⁶⁵ while the Assembly White Paper Committee described the corporate body as “misconceived and confusing”.⁶⁶ In its evidence to us, the Welsh Council for Voluntary Action, giving a view from the outside, argued that the separation would also provide “clarity and increased understanding amongst the public and the voluntary sector of how Wales is governed”.⁶⁷

34. In written evidence to the National Assembly Committee inquiry, two former Members of the Richard Commission restated their positions in favour of the separation of the Executive and the Legislature. Sir Michael Wheeler-Booth, who had also served on the Royal Commission on House of Lords Reform and on the National Assembly Standing

59 Cm6582, para 1.7

60 Cm6582, para 1.8

61 www.wales.gov.uk/subiassemblybusinessreview/index.htm

62 Report of the Richard Commission, para 20-26.

63 Cm 6582, para 1.10

64 Cm 6582, para 1.18

65 Report of the Richard Commission, p 79

66 National Assembly Committee Report, para 7.

67 Ev 82

Orders Commission, commented that the proposals for separation were “extremely welcome”,⁶⁸ while Professor Laura McAllister of the University of Liverpool, also argued that it offered greater clarity.⁶⁹ Professor Lord Morgan of Aberdyfi, also in response to that inquiry, described the separation as “unquestionably right” and asserted that it removed “a major anomaly in the original scheme, perhaps drawn unwisely from the analogy of local government”.⁷⁰

35. We welcome the proposals to make formal the separation of the Legislature and the Executive of the National Assembly for Wales.

Powers to appoint and dismiss Assembly Ministers

36. The White Paper proposes that the terms “First Minister” and “Assembly Minister” be put on a statutory footing, with the First Minister appointed by Her Majesty from amongst AMs on the nomination of the National Assembly. The First Minister would then, with Her Majesty’s approval, appoint other Ministers”.⁷¹ That move towards a Statutory position has been widely welcomed.⁷² The National Assembly Committee compared that approach to that of the Scottish Parliament. It found that in that Parliament, Ministers appointments were subject to the approval of the Parliament. It concluded that the approval of Ministerial appointments by the Plenary was sensible and appropriate and recommended accordingly. **We conclude that the approval of Ministers by Plenary of the National Assembly is an attractive proposition and therefore we recommend that provisions to that effect be included in the Bill.**

Dissolution of National Assembly

37. Some of our witnesses questioned the procedure for dismissing those Ministers. Kate Cassidy, Head of Policy, Constitutional Affairs Unit, at the Welsh Assembly Government, told us that she envisaged the situation whereby a vote of no confidence in the Welsh Ministers would trigger a process in which those Ministers would resign. However, she argued that there needed to be provision for one Minister to carry on in office, because the officials who are acting derived their authority from the Minister; “we therefore envisage that the First Minister would remain in office until he was replaced but the very act of a vote of no confidence would have triggered the resignation of the rest and would trigger the process for identifying a new First Minister”.⁷³

68 National Assembly Committee Report, p 67.

69 National Assembly Committee Report, p 85.

70 National Assembly Committee Report, p 83.

71 Cm6582 para 2.6

72 National Assembly Committee Report pp 11 to 16.

73 Q7

38. In its Report, the National Assembly Committee noted that in Scotland, the First Minister was obliged by law to resign if the Parliament resolved that it no longer had confidence in the Scottish Executive.⁷⁴ A replacement for the First Minister would then be found. If that was not possible, the Scottish Parliament, should it gain a two-thirds majority of its Members, would be able to dissolve itself and call a special General Election.⁷⁵

39. When he gave oral evidence to us, the Presiding Officer told us that the issue of dissolution needed to be tackled by legislation. He explained that “we cannot dissolve ourselves now, and it does limit the possibilities in certain times, when there are minority governments”.⁷⁶ The White Paper does not mention this, even though the Scotland Act 1998, which established the Scottish Parliament included provisions for a dissolution. The Presiding Officer argued for equivalent powers in Wales to be included “on the face of the Bill”.⁷⁷ The Secretary of State reiterated the fact that the National Assembly was a fixed term Assembly, but acknowledged that the possibility of an impasse could prevent the formation of a Government. Therefore he confirmed that the Bill would include provisions for a dissolution in that specific case.⁷⁸

40. We conclude that a mechanism to dissolve the National Assembly in the event of a stalemate between the political parties is a sensible and pragmatic suggestion. Therefore we recommend that the Bill include provision for the National Assembly to dissolve itself in the event of being unable to appoint a Welsh Assembly Government.

Appointment of Deputies

41. At present, the Welsh Assembly Government can appoint Deputy Ministers, albeit on an unofficial basis. Those posts are currently unregulated and therefore, the responsibilities of the Deputy Ministers are unclear. The White Paper proposes to change that position and place the post of Deputy Minister on a statutory footing. In its report on the White Paper, the National Assembly Committee considered this a positive move.⁷⁹ **We agree with the proposal to put Deputy Ministers on a statutory footing. That statutory footing will need to include a clear definition of the roles and responsibilities of the Deputy Ministers. The Government must be alive to the fact an increase in the payroll vote of the National Assembly will have an impact on the size of the backbench body and the potential to cause strains on the scrutiny functions**

74 Scotland Act 1998c 45 (2)

75 National Assembly Committee Report, para 13.

76 Q151

77 Q151

78 Q201

79 National Assembly Committee Report, para 15.

Number of Ministers

42. In the preceding paragraphs we have set out the Government’s proposals for putting Ministers and Deputy Ministers on a statutory footing. The number of those Ministers within the Welsh Assembly Government will have an impact on the size of the backbenches in the new National Assembly. For that reason, several of our witnesses suggested that the number of Welsh Assembly Government Ministers needed be regulated. The Presiding Officer noted that the number of Ministers in Whitehall was regulated by statutory instrument and the a similar approach to the National Assembly would be desirable.⁸⁰ He argued that “a broad limit on the face of the bill would enable flexibility in terms of Ministers, Deputy Ministers or Secretaries”.⁸¹ In a supplementary memorandum the Wales Office confirmed that such a limit would be sensible and undertook to include provisions to that effect in the Bill.⁸² **We believe that a statutory upper limit for the number of Ministers including Deputy Ministers is a sensible approach to the composition of the National Assembly, and we welcome the decision of the Wales Office to include provisions to that effect on the face of the Bill.**

Ability to change the name of the Institutions

43. The White Paper states that “the Welsh Assembly Ministers collectively will be known as the Welsh Assembly Government”.⁸³ At present, that term has no statutory basis as it was not included in the Government of Wales Act 1998. Its origins can be found in the National Assembly’s Review of Procedure.⁸⁴ Part of that separation was a re-branding of the executive as the Welsh Assembly Government.⁸⁵ Rt. Hon. Rhodri Morgan AM, First Minister emphasised the fact that the term Welsh Assembly Government was not in the 1998 Act, but nonetheless that it was important to have a title to distinguish the body that was the Assembly Government.⁸⁶

44. Our witnesses agreed that the establishment of the title Welsh Assembly Government was a step in the right direction, but there were some concerns as whether that title should be changed. Professor Richard Rawlings, Chair in Law, London School of Economics, argued that the UK Government was not referred to as the UK Parliament Government, and the Scottish Executive was not referred to as the Scottish Parliament Government. He asserted that it was important to have “a clear differentiation in terms of the labels” so that on the one hand, there was a clear understanding of a legislature or a parliament – which – comprised all parties; and on the other hand there was a clear understanding of government which comprised a party or parties in coalition.⁸⁷ Professor Rawlings

80 Q150

81 Q150

82 Ev80

83 Cm6582, para 2.6

84 www.wales.gov.uk/subiassemblybusinessreview/index.htm

85 www.wales.gov.uk/subiassemblybusinessreview/index.htm

86 Q198

87 Q61

concluded that terms along lines of “either the Welsh Executive or the Welsh Administration” would be more appropriate.⁸⁸

45. In his written evidence to us, Barry Winetrobe, Reader in Law at Napier University, agreed. He argued that “the obvious solution would be to adopt something like the Scottish and Northern Irish models, of a ‘Welsh Executive’. As in Scotland, this could be a title for everyday use, but with a statutory distinction, if required, between the ‘Executive’ (the ministerial team) and the ‘Administration’ (the combined ministerial and official establishment)”.⁸⁹

46. The Presiding Officer of the National Assembly was more forthright. He argued that it was “constitutionally incumbent upon us” to change the title Welsh Assembly Government. He argued that “I do not believe that you can couple the name of an administrative body with a parliamentary body, because to me the Assembly Government is confusing constitutionally, which reduces the possibility of rational parliamentary democracy in Wales”.⁹⁰

47. In a similar vein, we asked the Presiding Officer whether the National Assembly should consider re-branding itself. He was of the opinion that it was appropriate for the National Assembly to have the right to change its name. In particular he argued that there should not be “anything on the face of the bill that would stop our successors in this place from changing the name to whatever they believed to be appropriate”.⁹¹ That said, he saw no present reason or desire to re-brand the National Assembly for Wales.

48. Our witnesses from the Wales Office explained that it would not be possible to change the statutory titles of the institutions from those that appeared in the Act.⁹² However, the First Minister took a pragmatic view on the issue. He argued that the term Welsh Assembly Government had been common usage for the past four or five years. Therefore he believed the best course of action would be to continue with it. The First Minister concluded that should the public wish to use a different title then that new title would gradually replace the former.⁹³

“I do not know what people will be saying in 10 or 15 years. None of us can predicate that. In the end, the people will rule because it is the people’s convention”.⁹⁴

49. Concerns remain that the current title of the Welsh Assembly Government may have the potential to continue the confusion over the status of the Executive and the Legislature. In respect of the Bill, we believe that Welsh Executive would be a more appropriate term to use in Statute.

88 Q61

89 Ev 87 and 88

90 Q148

91 Q148

92 Q6

93 Q200

94 Q198

Size of the National Assembly

The potential pressures on the current size

50. In its Report, the Richard Commission recommended that the number of Assembly Members be increased from 60 to 80, and that they should be elected through the Single Transferable Vote (STV) system, with all Assembly Members being elected from multi-member constituencies. In the White Paper, the Government disagreed with that recommendation.⁹⁵ Later in this Report we set out the arguments that surround the proposals for electoral reform.⁹⁶ In this section we consider the arguments for and against the increase in the number of members of the National Assembly.

51. Lord Richard explained that his Commission had recommended that increase to take account of the growth in the legislative capacity in the National Assembly and was disappointed that the White Paper had rejected its recommendation.⁹⁷ Professor Miers from Cardiff Law School, Cardiff University, agreed. He argued that a direct result of the creation and transfer of a much more extensive set of powers to the National Assembly would be a higher workload which would place increased time demands on Assembly Members. He was also concerned that it could “impinge upon the capacity of the National Assembly to do the job that it will be enabled to do”.⁹⁸

52. Similar concerns were raised with the Wales Office during its consultation on the White Paper. The Wales Public Law And Human Rights Association told the Wales Office that “an Assembly of 60 members will place unreasonable strains on both government and opposition AMs”.⁹⁹ That point was reiterated by the Standing Committee on Legal Wales.¹⁰⁰

53. Lord Elis-Thomas acknowledged that one option to counter the increased duties of the National Assembly would be for it to reconsider its working hours. He argued that to meet the new demands, “the National Assembly might have to sit on Tuesday morning at half past ten, and from half past two until half past six on Tuesday afternoon. Similar arrangements might have to be established for Wednesday with the possibility of extending those arrangements to Thursday”.¹⁰¹

95 Cm6582, para 4.3

96 paras 146 to 156

97 Ev 27

98 Q53

99 www.walesoffice.gov.uk/2005/bgfw/bgfw_wales_public_law_and_human_rights_association_20050912.pdf

100 www.walesoffice.gov.uk/2005/bgfw/bgfw_standing_committee_on_legal_wales_20050915.pdf

101 Q153

54. Some of the concerns raised about capacity would therefore be addressed by lengthening the sitting hours of the National Assembly, but several structural problems remained; in particular, in relation to the number of Assembly Members. In its report the National Assembly Committee noted that:

“In an Assembly of 60 Members, if one party of, say, 30 forms a Government, it may have 13 Ministers and Deputy Ministers and one of the Presiding Officers. That would leave only 16 other Members of the Government party to make up the majority on all committees. We assume that committees’ workloads are to increase significantly. If committees meet weekly, then it will be impossible to have Members serving on more than one principal committee and perhaps one subsidiary committee. In these circumstances, to distribute 16 Members around committees so that they form half of each means that we could only have three principal committees of 10 Members, or four of eight, or five of six”.¹⁰²

55. That point was not lost on Sir Michael Wheeler-Booth. He was of the opinion that the institutionalising of Deputy Ministers would expand the pay-roll vote resulting in an even greater proportion of National Assembly membership being salaried front benchers, and not part of the back bench section of the National Assembly. He concluded that “in an Assembly of only 60, to lower the percentage of members available to question the Welsh Government seems questionable”.¹⁰³ Lord Richard also questioned the effectiveness of such a small number of backbenchers: “The extent to which 60 AMs, 12 of whom will be Ministers, will be able to cope with this is at this stage unknown”.¹⁰⁴

Increasing the Number of Assembly Members

56. The First Minister was adamant that there was little, if any, support in country for increasing the number of elected politicians. He believed that a better solution would be for the existing membership to use their time more efficiently: “you do not need more Assembly Members, you simply need the existing number of Assembly Members dealing with more important issues which they do not have the ability to do now but they would have the ability to do under the provisions of the White Paper”.¹⁰⁵ The Secretary of State admitted that he had originally considered the inclusion of provisions in the Bill to increase the numbers of Assembly Members. In particular he told us that the decision not to follow that route was down to the complexity of providing those provisions. He argued that any change in the number of Members would require a corresponding change to the electoral system:

“The only way you can sensibly do it, to increase the number of list members, you change the immediate political configurations and balance within the Assembly

102 National Assembly Committee Report, para 46.

103 www.wales.gov.uk/keypubassembbettergov/content/bgw2-ev1.pdf

104 Ev 28

105 Q228

between 20 list and 40 directly elected – which in itself is quite an important decision – but you also change the party balance, potentially”.¹⁰⁶

The Secretary of State concluded that a decision to change the number had a much wider impact on the constitutional balance between constituency members and list members as well as potentially the political balance, and “therefore you cannot do that lightly”.¹⁰⁷

57. The Government has taken a strong line against the possibility of increasing the number of Assembly Members from 60 to 80. However, a 60 Member Assembly may not prove sufficient to carry out its scrutiny and legislative roles. In that event, the National Assembly for Wales and Parliament may at some date in the future wish to reassess the size of the National Assembly, at which time the electoral process will also need to be considered.

National Assembly Committees

58. Paragraph 2.16 of the White Paper states that “the Assembly should generally be able to establish such committees as it sees fit in accordance with its Standing Orders”.¹⁰⁸ It also explicitly stated that “the crucial point is that the Assembly’s committee structure should in future be a matter for Assembly discretion rather than be fixed by statute”.¹⁰⁹ When we took evidence from the Presiding Officer, he voiced his support for that approach. He argued that the National Assembly should be allowed to construct its committee structure as it sees best, so long as it was “within a framework of legislation which is broad and flexible enough to allow it to do that”.¹¹⁰

59. The Presiding Officer highlighted what he saw as the structural problem of a National Assembly of 60 Members: “of 60 people, 15 of them are either in cabinet or are party leaders or are chairs of committees. That is more than 20 out of that number to begin with. Naturally, if they are committee chairs, they are to be counted amongst committee members; but, as you all know, the role of a chair is slightly different to the role of a committee member as far as being part of a committee is concerned. In order to be an ordinary committee member, that only leaves us practically 30 plus members who would be free to carry out committee work”.¹¹¹

60. With respect to Committees, we reiterate the concerns raised with us that the 60 member limit on the National Assembly and the size of the National Assembly payroll vote has the potential to place serious strains on the National Assembly Committees’ ability to carry out its scrutiny of the new Welsh Executive. The Government will need to be alive to this potential danger when it introduces its Bill.

106 Q228

107 Q230

108 Cm6582, para 2.16

109 Cm6582 para 2.17

110 Q161

111 Q152

Regional Committees

61. In evidence, the Presiding Officer also raised the future status of the Regional Committees. He stated his belief that those committees would be abolished in the post 2007 National Assembly. He argued that he did not think that they would be necessary in the future. In their place he wished to see “committees looking at the [Assembly] Measures, and the select committees scrutinising the administration to travel regularly around”.¹¹²

62. The structure of the Committee System in a reformed National Assembly will be a matter for that institution to decide. However, as Members of Parliament for Welsh constituencies, we recognise the important role that the regional committees have played in taking the National Assembly out of Cardiff to other parts of Wales. We recommend that this important part of the Regional Committees’ work is retained in any new Committee structure. We further recommend the retention of the statutory provision for a North Wales Regional Committee.

Removal of Ministers from Committees

63. At present, Assembly Ministers are required to sit on the Committee whose remit mirrors that of the Minister, as full committee members. The White Paper proposes to remove the statutory need for that Minister to sit on the relevant committee.¹¹³ Many of our witnesses agreed that this was a positive proposal. The National Assembly Committee welcomed the proposals, as did Lord Richard, whose Commission also recommended the removal of Ministers from committees.¹¹⁴ In evidence to us Lord Richard argued that current position was “cosy” and that the “high level of intimacy between the Chairman, the Committee and the Minister” limited the level and effectiveness of committee scrutiny.¹¹⁵

64. Hugh Rawlings, the Director of the Local Government, Public Service and Culture Department, Welsh Assembly Government, confirmed that the position of the Minister on a Committee had been one of the main criticisms of the 1998 Act, and that the Government’s intention was to remove that requirement so that “committees will be able to take evidence or call ministers before them, but those ministers will not be members of the committee”.¹¹⁶

65. Although there was a high degree of agreement on this issue, the National Assembly Committee did highlight the fact that it was normal in Parliament for Ministers to participate in committee proceedings when legislation was being considered. Its Report also highlighted the position of the Leader of the House at the House of Commons who despite being a Cabinet Minister, was able to Chair the House of Commons Modernisation

112 Q153

113 Cm6582, para 2.16

114 Richard Commission Report, Chapter 14, para 258.

115 Q74

116 Q8

Committee. For that reason the National Assembly Committee recommended that “there should not be any statutory prohibition on appointing Ministers to Committees”.¹¹⁷

66. We agree with the Government’s proposals to remove Ministers from being members of scrutiny Committees of the National Assembly. However, we note the recommendation of the National Assembly Committee that flexibility on this issue is necessary with respect to legislation and other specific Committees. We look to the Government to ensure that the necessary flexibility is contained within the Bill.

Powers

67. Although it is for the National Assembly to decide upon the structure of its committee system, certain powers will need to be provided in the Bill for those Committees to be effective. The National Assembly Committee considered the issue of powers and in evidence to that Committee the First Minister argued that National Assembly Committees should have the same powers as committees of the House of Commons.¹¹⁸ In the opinion of the Presiding Officer, the important issue was “for us to act as proper scrutineers of the powers of the Ministers who are accountable to us”.¹¹⁹

68. As a Parliamentary Committee we would not wish to see a committee of another institution hamstrung by not having sufficient powers. Those powers would need to be given in legislation. In Scotland, they were given to the Scottish Parliament by sections 23 to 26 of the Scotland Act 1998. In a supplementary note the Presiding Officer explained that the Scotland Act “only makes provision for witnesses and documents to be called if the subject is one for which a member of the Scottish Executive has general responsibility. The Parliament may only impose this requirement on a person outside Scotland when it directly relates to discharge of functions of the Scottish Administration or those of a Scottish public authority or cross-border public authority”.¹²⁰ We agree with the National Assembly Committee that these powers should be replicated in Wales. **We recommend that provisions equivalent to Sections 23 to 26 of the Scotland Act be enacted in respect of the powers of Committees of the National Assembly for Wales.**

69. A related issue is the ability for a National Assembly Committee to demand the attendance of a representative of the Welsh Assembly Government. In Parliament, House of Commons Committees expect Ministers and civil servants to give evidence, while the Government may choose whether a Minister or a civil servant presents that evidence. The National Assembly Committee was in favour of a similar model for the National Assembly. In its Report that Committee recommended that “there should be a rule in Wales that if a Committee insists on attendance by Government witnesses, then the Government will always send either a Minister or an official”.¹²¹ The Presiding Officer confirmed that he

117 National Assembly Committee Report, para 45.

118 National Assembly Committee Report, Q447.

119 Q158

120 Ev 57

121 National Assembly Committee Report, para 54.

wished to ensure that National Assembly committees were able to “call witnesses in the same way as a parliamentary committee does”.¹²²

70. We agree with the National Assembly Committee that the Welsh Assembly Government should send either a Minister or an official when a National Assembly committee insists on attendance by Government witnesses.

Co-opted Members

71. Lord Elis-Thomas explained that specific National Assembly Committees, including the Equality Committee, have had co-opted non-voting members—for example organisations like Stonewall Cymru.¹²³

72. Mr Silk explained that there had been an issue over co-optees in Scotland in relation to their status and protection in terms of defamation. He explained that the National Assembly Committee report had raised the need to protect the position of these co-optees in the future, so that it was absolutely clear that they were participating in proceedings of the National Assembly, and therefore covered in the protection from defamation for Members of the National Assembly and proceedings in committee.¹²⁴

73. The use of co-opted members is a matter for the National Assembly. However, we agree that, should the National Assembly wish to continue with that practice, the protection of those Members needs to be made explicit. We look to the Government to ensure that co-opted Members of National Assembly Committees are protected from defamation to the same level as Members of the National Assembly, when serving on Committees.

122 Q157

123 Q155

124 Q155

Standing Orders

74. The proposal that legislative procedure should largely be regulated by Standing Orders—together with the proposed separation of the Executive and Legislative arms of the National Assembly, and the proposal that the National Assembly’s committee structure should in future be regulated by Standing Orders rather than prescription in statute—will all require major amendments to the National Assembly’s current Standing Orders. The content of those Standing Orders is a matter for the National Assembly and we do not make comment on how those Standing Orders should look. However, we did consider the proposal in the White Paper that the Secretary of State take powers to make a new set of Standing Orders for the National Assembly, to take effect when the separation of the executive and the legislative elements comes into force.

75. The Secretary of State agreed that redrafting the National Assembly’s Standing Orders was a task for the National Assembly, and he explained that he had made that position clear to the Presiding Officer. The National Assembly is already considering how to proceed in this area to ensure that a draft of the Standing Orders will be ready in advance of the next National Assembly elections in 2007.¹²⁵ The Secretary of State has two functions with regard to Standing Orders. First, he has the legal power to make the Orders.¹²⁶ Second in the event of the National Assembly being unable to reach an agreement on its Standing Orders, he would act as the final arbiter. The White Paper states that the Secretary of State would be assisted in this task by an advisory committee with a broad-based representative membership, which would prepare a draft of the new Standing Orders for his approval.¹²⁷

76. Witnesses to both our inquiry and that of the National Assembly took exception to that role. Barry Winetrobe argued that the role of the Secretary of State appeared to be “wholly unnecessary and inappropriate for an already functioning Assembly”,¹²⁸ while Sir Michael Wheeler-Booth commented that parliamentary procedure was “normally left to the Assembly concerned to regulate”.¹²⁹

77. When we asked the Wales Office why it was necessary for the Secretary of State to be involved, we were told that “ultimately there needs to be the possibility of someone away from the proceedings themselves deciding. There has to be a capacity to press to decision on what Standing Orders should be”.¹³⁰ That position was reinforced by Hugh Rawlings from the Welsh Assembly Government who averred that “the overriding concern is that there must be a set of Standing Orders available to the Assembly from the beginning of the new regime”.¹³¹

125 Q202

126 Q203

127 Cm5682, para 3.31

128 Ev 88

129 National Assembly Committee Report, p69.

130 Q10

131 Q11

78. The Presiding Officer remained unconvinced by this argument. He was strongly of the opinion that it was for the National Assembly itself to select its Standing Orders so long as they were within the law and within the tradition of parliamentary procedure.¹³² He put it to us that “I do not believe that it is appropriate for anyone except the Members of the National Assembly for Wales to write their own standing orders”.¹³³ This view was also the view of the National Assembly in general. The Presiding Officer continued:

“we have clearly indicated that we wish to be responsible for our own Standing Orders, which has cross-party support in this report; and our wish is to go ahead and begin drafting our Standing Orders as soon as practical”.¹³⁴

79. When pressed on the role of the Secretary of State as the final holder of decision making power, the Presiding Officer stated that “where there is no agreement, then a Presiding Officer is in a more appropriate position to impose a rational solution upon the Members and an elected Assembly, than is a Secretary of State of another Government”.¹³⁵

80. The Secretary of State was at pains to reassure us that he did not wish to interfere with the drafting of the Standing Orders, but he argued it was important to have that fallback power in the event that the National Assembly could not agree on a set of Standing Orders.¹³⁶ Rt. Hon. Rhodri Morgan AM, was confident that it would not come to that, but reaffirmed that it was necessary to avoid the possibility of having “an Assembly with enhanced legislative powers but no *modus operandi*”.¹³⁷

81. We understand the legal requirement for the Secretary of State for Wales to give statutory effect to the Standing Orders for the National Assembly for Wales. We are less convinced with the need for that Office to be the final arbiter of any disagreement over those Orders. We believe that the Presiding Officer of the National Assembly, not a Government Minister of another institution, is a more appropriate location for that role. Therefore we recommend that the Government include in the Bill, provisions to ensure that the Presiding Officer, subject to the approval of the Secretary of State for Wales, be the arbiter on Standing Orders for the National Assembly.

132 Q164

133 Q164

134 Q164

135 Q164

136 Q202

137 Q202

Human Resources

82. The separation of the Executive from the Legislature has an impact on the staff that serve the National Assembly. The White Paper proposes that “staff serving the Welsh Assembly Ministers would continue to be civil servants. Staff supporting the National Assembly would, like servants of both the UK and Scottish Parliaments, not be part of the civil service. The National Assembly as a legislature and scrutinising body would employ its own staff”.¹³⁸ This is a sensible proposal and one that has universal support. However, there are a number of practical issues that need to be clarified.

83. The first issue was that of the relative strengths of the staff that would support the two institutions. Paul Silk, Clerk of the National Assembly, told us that while there were around 285 staff currently working for the Assembly Parliamentary Service, the number of staff working for the Welsh Assembly Government was roughly 4,200. That figure would be supplemented by a further 1,300 people who currently work for the Assembly-Sponsored Public Bodies, (ASPBs).¹³⁹ The Wales Office confirmed that the staff carrying out the functions of the ASPBs would become Welsh Assembly Government staff.¹⁴⁰ That difference in resources available to the two institutions is marked, and will be put into stark relief when the new National Assembly undertakes its enhanced scrutiny and legislative roles.

84. Paul Silk reminded us the National Assembly’s new roles would necessitate enhanced resources in areas such as research, Committee and Table Office services. He further argued that the National Assembly would also benefit from additional resources for legal advice to committees and to members in general. Without setting out a precise figure, Paul Silk confirmed that all those services would probably need some enhancement.¹⁴¹ In addition, the Presiding Officer also highlighted the fact that additional legal resources would need to be found to support back-bench Assembly Members and National Assembly committees in the instigation and preparation of Orders in Council.¹⁴²

85. It would be undesirable to include in the Bill provisions for specific increases in staff for the National Assembly as they have yet to be identified in detail. Furthermore, future demand will best dictate the level of necessary resources. However, it is clear, that in moving from the Corporate Body model to a “free-standing” legislature, enhancements will be necessary to support Assembly Members in their new tasks. We look to the Government to provide those resources where they are clearly necessary.

138 Cm6582, para 2.20

139 Q177

140 Ev 80

141 Q179

142 Q170

86. The White Paper states that under the proposals “staff supporting the Assembly would, like civil servants of both the UK and Scottish Parliaments, not be part of the civil service”.¹⁴³ Those staff would be employed by the National Assembly, which the White Paper expects would maintain terms and conditions for staff broadly comparable to those applying to the Assembly Government civil service.¹⁴⁴ The National Assembly Committee highlighted the need to establish a statutory “broadly in line” provision in relation to National Assembly staff.¹⁴⁵ It also confirms that National Assembly Staff would continue to be eligible for membership of the Principal Civil Service Pension Scheme, along the same lines as House of Commons and Scottish Parliament staff.¹⁴⁶

87. In its Report the National Assembly Committee welcomed the separation of Government and National Assembly Staff but recommended that the Bill include “a Statutory ‘broadly in line’ provision” with respect to the salaries of National Assembly staff. We agree with the recommendation of the National Assembly Committee.

143 Cm6582, para 2.20

144 Cm6582, para 2.20

145 National Assembly Committee Report, para 28.

146 Cm6582, para 2.20

3 Recommendations of the National Assembly Committee

88. The National Assembly Committee made a number of specific recommendations in its Report that were of a more technical nature and concerned the new working practices for both the National Assembly for Wales and the Welsh Assembly Government. We decided that it would have been a duplication of work to revisit those areas.

The Statutory Duties of the National Assembly for Wales

89. Under the Government of Wales Act 1998, there are a number of statutory duties placed on the National Assembly:

- To conduct its business giving equality to the English and Welsh language (section 47)
- To conduct its business with regard to the principle of equality of opportunity (section 48)
- To make a Local Government Scheme and establish a Local Government Partnership Council (section 113)
- To make a voluntary sector scheme (section 114)
- To consult with business (section 115)
- To exercise its functions with regard to the principle of equality of opportunity, and to report annually on this (section 120)
- To make a sustainable development scheme and to report on it annually (section 121).¹⁴⁷

90. Following any separation of the executive and the legislature, the National Assembly Committee considered whether any of the statutory obligations outlined in the 1998 Act should remain, and whether the obligations should fall on the Government, the Legislature or both.¹⁴⁸ They recommend that:

- separate equality of opportunity duties be placed upon the Government and the Assembly Commission as is appropriate to their different roles, and that both be required to lay a report annually before the National Assembly.¹⁴⁹
 - section 121 obligations should in future fall upon the Government, which should be obliged to lay an annual report before the National Assembly and the Commission should report on its compliance.¹⁵⁰
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¹⁴⁷ National Assembly Committee Report, Paragraph 32.

¹⁴⁸ National Assembly Committee Report, Paragraph 33.

¹⁴⁹ National Assembly Committee Report, Paragraph 34.

- the Government considers seriously the proposal for a statutory obligation upon them to consult business and trade unions through a Business Partnership Council, but we see no need for such an obligation in respect of the Legislature.¹⁵¹

Special Provision for the Welsh Language

91. The National Assembly Committee received evidence requesting that responsibility for the whole of the field of the Welsh language should be able to be transferred to the National Assembly by a single Order in Council. This would not mean that all matters relating to the Welsh language would be transferred, e.g. broadcasting is currently non-devolved, so S4C would not be devolved. In response, the National Assembly Committee asked the “appropriateness question;” “is it appropriate for the NAW to have legislative control over the Welsh language in devolved areas? The answer to that question appears to be ‘yes’”.¹⁵² It therefore recommended that consideration be given to special provision in the Bill in respect of legislation on the Welsh language.¹⁵³

Resource Budget

92. The National Assembly Committee argued that it is important for Members to be able to examine the way money has been spent as well as planned expenditure. This is an essential prerequisite for Members to be able to scrutinise devolved public expenditure in Wales.¹⁵⁴ The Committee therefore recommended that the Bill requires budgets to be presented in such a way as will enable Members to compare outturn with approved expenditure.¹⁵⁵

93. We note the recommendations of the National Assembly Committee in relation to the statutory duties of the National Assembly, the special provision for the Welsh language and the examination of the Resource Budget. We look forward to hearing the response of the Government on those recommendations.

150 National Assembly Committee Report, Paragraph 35.

151 National Assembly Committee Report, Paragraph 37.

152 National Assembly Committee Report, Paragraph 76.

153 National Assembly Committee Report, Paragraph 76.

154 National Assembly Committee Report, Paragraph 121.

155 National Assembly Committee Report, Paragraph 21.

4 New Legislative Powers

The Current Position

94. At present, powers are conferred on the National Assembly in a number of ways as set out earlier in this Report.¹⁵⁶ In relation to the current powers available, the most noticeable form is that of the Wales-only Bill. This is a Bill introduced to Parliament that is solely concerned with Wales. The Wales Office has made a practice of introducing a draft Wales-only Bill to Parliament each year, with the Bill being introduced to Parliament in the following session. Our predecessor Committee conducted pre-legislative scrutiny of those draft Bills. In recent sessions of Parliament the Government has introduced draft Bills which led to the Public Health (Wales) Act,¹⁵⁷ the Public Audit (Wales) Act,¹⁵⁸ the Transport (Wales) Act,¹⁵⁹ and the Public Services Ombudsman (Wales) Act.¹⁶⁰

95. The White Paper stated that “Parliament will continue for at least some years into the future to enact ‘Wales-only Bills’ at the request of the Assembly”.¹⁶¹ Alan Cogbill, Director of the Wales Office, told us that the reason for this proposal was that there would be a time lag between the present situation and that of the new regime established under Orders in Council. He explained that it was important not to interrupt the flow of “necessary Wales-only measures” and that the Wales-only Bill method would ensure that continuity.¹⁶² Cedric Longville, Legal Adviser at the Wales Office, also told us that there remained the possibility that a Wales-only Bill would be necessary to deal with legislation that concerned devolved and non-devolved matters.¹⁶³

96. Should Wales-only Bills continue to be introduced to Parliament, we would expect the Government to maintain its policy of publishing them first in draft form so that they could be subjected to pre-legislative scrutiny by this Committee in conjunction with the appropriate Committee of the National Assembly.

156 Paras 17 to 20

157 The Bill was considered in draft form by the Welsh Affairs Committee in its Third Report, *the draft National Health Service (Wales) Bill*, HC959 of Session 2001-02.

158 The Bill was considered in draft form by the Welsh Affairs Committee in its Fifth Report, *the draft Public Audit (Wales) Bill*, HC763 of Session 2002-03.

159 The Bill was considered in draft form by the Welsh Affairs Committee in its Fourth Report *the draft Transport (Wales) Bill*, HC759 of Session 2003-04.

160 The Bill was considered in draft form by the Welsh Affairs Committee in its Third Report, *the Public Services Ombudsman (Wales) Bill*, HC 234 of Session 2004-05.

161 Cm6582 para3.33

162 Q15

163 Q15

Stage 1

Monitoring of UK Government's adherence to the new policy

97. The first stage of legislative reform for the National Assembly involves the UK Government adopting, with immediate effect, a “more permissive” attitude to Wales-only clauses in Westminster Bills which cover both England and Wales. In practice this would mean drafting Parliamentary Bills in a way that gave the National Assembly wider and more permissive powers to determine the detail of how the provision should be implemented in Wales.¹⁶⁴ That stage does not require any change to the 1998 Act, but builds on precedents set in health and education legislation.¹⁶⁵ However, the White Paper acknowledged that this approach “does not fully address the weaknesses that have become apparent in the present system”.¹⁶⁶

98. In evidence to us, Alan Cogbill, Director at the Wales Office, confirmed that Stage 1 was possible now, without the need for new legislation. He told us that it entailed the drafting of framework provisions in Bills, which would “give the Assembly greater legislative discretion in the application, whatever the main Bill said”.¹⁶⁷ Zenny Saunders, Head of Legislation and Strategic Policy Branch at the Wales Office, explained that to reflect the new arrangements, Devolution Guidance Notes were being amended to advise Whitehall Departments on how to “engage Wales in any legislation that they are bringing forward”.¹⁶⁸ Furthermore, the Wales Office was also working with the devolution unit in the Department of Constitutional Affairs, which was assisting in the dissemination of that material. Zenny Saunders also told us that the Wales Office had “set up a legislation branch within the Wales Office as a focal point for any government department, so that they know they have one unit to contact if they need any advice, and there is a similar unit established within the Assembly that can give advice internally and also externally to government departments”.¹⁶⁹ Kate Cassidy confirmed to us that a similar approach was being taken by the Welsh Assembly Government.¹⁷⁰

99. The Secretary of State told us that Devolution Guidance Note No.9¹⁷¹ had been amended to take account of that change in approach. He explained that note specified that in “drafting primary legislation of an England and Wales character, if there were to be clauses devolving power in it [...] then, instead of a series of, as it were, clauses which specify in some detail what the Assembly could or could not do, it simply said the Assembly will have the power to do as it wishes in detail on this”.¹⁷²

164 Cm6582, para 1.24.

165 For example, new powers in the areas of animal health, and in taking responsibility for the Children and Family Court Advisory and Support Service, CAFCASS, in Wales).

166 Cm6582, paras 3.12-3.13

167 Q13

168 Q16

169 Q16

170 Q16

171 www.dca.gov.uk/constitution/devolution/guidance/dgn09.pdf

172 Q204

100. The revision of the Guidance Note is to be welcomed, but it is not necessarily reassuring. The experience of the previous Committee was that in spite of clear departmental guidance on devolution, actual understanding of the relationship between the National Assembly and the UK Government varied significantly. Therefore we pressed the Secretary of State on how the new procedures would be monitored. He responded by telling us that all legislation affecting Wales was monitored extremely closely and that the Devolution Guidance Note would assist the Wales Office in making sure that the new regime was upheld.¹⁷³ He did not, however, provide any real detail about how individual Government departments were being monitored.¹⁷⁴ **We look to the Wales Office to play an active and visible role in the education of Government Departments in this respect. We recommend that the Wales Office, in its response to this Report, set out clearly, the precise procedures that are in place to ensure that those roles are carried out effectively.**

The role of the Welsh Affairs Committee

101. The Secretary of State anticipated an aspect of our future scrutiny of legislation with his suggestion that our Committee could play a role in the monitoring of the new procedures.¹⁷⁵ In order to assist us in that work it would be helpful for us to have an early understanding of clauses in major England and Wales Bills that apply to Wales, and a commentary on how those clauses would affect Wales. **We recommend that the Wales Office supply the Committee with quarterly memoranda setting out those Bills which contain significant Welsh clauses.**

Statements in Explanatory Memoranda

102. While the efforts made by the Wales Office are to be welcomed, the Presiding Officer aired a note of caution. He drew the Committee's attention to the written parliamentary answers to Peter Law MP, and that some of them read rather too closely for comfort;¹⁷⁶ the implication being that it was nothing more than a standard Whitehall response. He also highlighted the response from the Home Office which did not say that it intended to implement the Government's policy; but only to state that it was in discussions with the Welsh Assembly Government.¹⁷⁷ Professor Miers agreed. He stated that his concerns about Whitehall adherence towards devolution were "in the main prompted by history and the evidence to date that some Departments have been less willing to concede to allocate functions to the National Assembly than others"¹⁷⁸.

103. Professor Richard Rawlings saw an opportunity for the Government to enhance the use of the Explanatory Notes that accompany Parliamentary Bills. He argued that if the UK Government and the Welsh Assembly Government were serious about the immediate use of framework legislation, a statement could be attached to the Explanatory Notes, which

173 Q205

174 Q203 to 205

175 Q205

176 Q168, the answers can be found at www.parliament.uk.

177 Q169

178 Q32

would “first of all list the relevant clauses relating to Wales and then, secondly, explain how the Government’s new commitment to consistently permissive legislation has been played out in relation to those clauses”.¹⁷⁹ **We recommend that the Wales Office include under the heading Territorial Extent in the Explanatory Notes to Bills, a statement listing the clauses in Bills that relate to Wales; and explaining how the Government’s new commitment to more *permissive legislation* for Wales has been enacted in relation to those clauses.**

Stage 2

Introduction

104. The White Paper also sets out the Government’s proposals for a second Stage of legislative reform for Wales. That second stage could be described as a “fast track” approach to legislation. It would involve a streamlined procedure that enabled Parliament to give the National Assembly powers to modify legislation, or to make new provision on matters not covered by statute. Those powers would apply only to devolved matters: “the purpose would be to allow the Welsh Assembly Government to carry out its programme, without having to wait for a suitable Bill, or time-slot, at Westminster”.¹⁸⁰ However, that procedure would retain the sovereignty of the UK Parliament as the principal law maker for Wales. Should Parliament not approve an Order in Council, the proposed transfer of powers would not take place.

The content of Orders in Council

105. This Order in Council procedure for Wales is new and therefore, the White Paper suggested three possible examples of the form those Orders could take.¹⁸¹ The first related to something very specific, such as the functions of the Ombudsmen in Wales.¹⁸² The second related to a broader issue, for example, the protection and welfare of children, described as a “limited policy area, but one cutting across a range of the National Assembly’s functions, such as education, local government and social care”.¹⁸³ The third related to something much wider; for example the structure of the NHS in Wales. The White Paper reinforced the view that it would be limited to policy areas which were within the responsibility of the Assembly Minister, and could not be extended to alter primary legislation relating to non-devolved matters.¹⁸⁴ Furthermore, the power would be framed to ensure that no Order could confer on the National Assembly powers over the whole of any of the fields listed in Schedule 2 to the Government of Wales Act.¹⁸⁵

179 Q32

180 Cm6582, para 1.12

181 Cm6582 para 3.18

182 Cm6582, para 3.18(a)

183 Cm6582 para 3.18(b)

184 Cm6582, para 3.17

185 Cm6582, para 3.18

Proposals for the passage of Orders in Council

106. In its written evidence to the Committee, the Wales Office explained how it envisaged Orders in Council progressing from instigation to enactment. The first part of the process would be the preparation of a draft Order in Council which would follow on from discussions between the Welsh Assembly Government, relevant Whitehall Departments, and the Wales Office. Those discussions would focus on ensuring clarity about the vires and scope of the Order in Council, and whether it would provide the National Assembly with the necessary legislative competence in that area.¹⁸⁶

Pre-Legislative Scrutiny of Orders in Council

107. Once a proposal for a draft Order was published, the Government expects that it would be subjected to pre-legislative scrutiny both in Parliament and by the National Assembly. As the Government noted, the precise nature of that pre-legislative scrutiny would be a matter for each institution to determine.¹⁸⁷ At that stage it would be possible for amendments to be suggested to the proposal for a draft Order in the light of that scrutiny.¹⁸⁸ Alan Cogbill, the Director of the Wales Office, told us that it was the Wales Office's intention that there should be full scrutiny of the proposal for draft Orders: "in every case a proposal for a draft Order would be published to allow for pre-legislative scrutiny both at Westminster and in Cardiff".¹⁸⁹ It would be open to the Minister to take into account any amendment suggested during this pre-legislative scrutiny by laying the subsequent draft Order in an amended form.

108. That scrutiny will be best performed by our Committee in conjunction with the appropriate Committee of the National Assembly. We will explore the most effective way in which we can undertake such a task. It is already evident to us that we will need to receive more information than just the proposal for the draft Order. **We recommend that when submitting a proposal for a draft Order in Council for pre-legislative scrutiny the Wales Office also provide a detailed explanatory note which would make clear the scope of the proposal, the practical effects of the proposal on Wales, and the legislative authority that would pass to the National Assembly.**

109. In respect of Regulatory Reform Orders – another form of secondary legislation which can amend primary legislation – when a proposal is laid, it must lie before Parliament for a period of 60 days, not including any time during which parliament is dissolved or prorogued, or either House is adjourned for more than four days. A draft Order consequent on the proposal may not be laid before Parliament until the end of that period. That guarantees a period of time for the Regulatory Reform Committee to consider the proposal for a draft Order.¹⁹⁰

186 Ev 59

187 Ev 59

188 Ev 59

189 Q19

190 The period for Parliamentary consideration is defined by section 8 (2) and (3) of the Regulatory Reform Act 2001 as the period of sixty days beginning on the day on which a proposal was laid before Parliament, but not including any

110. We recommend that any proposal for a draft Order in Council be laid before the Parliament. Once it is laid, we recommend that it must lie before Parliament for a period of 60 days, not including any time during which parliament is dissolved or prorogued, or either House is adjourned for more than four days. We recommend that a draft Order consequent on the proposal may not be laid before Parliament until the end of that period.

Draft of Orders in Council

111. The formal process for approving the Order in Council would follow that pre-legislative scrutiny. The National Assembly would formally approve the draft Order (although the Order would not come into effect until it was approved by Parliament), and at Westminster, the Secretary of State would lay the draft Order before Parliament. At that stage the Order in Council would not be amendable as both the National Assembly and Parliament would need to approve an identical text.¹⁹¹

112. There would be a fallback procedure whereby a draft Order in Council can be laid before, and approved by, the National Assembly, without a draft Order having been laid before Parliament. The First Minister will then notify the Secretary of State, who will then have 60 days in which either to lay before Parliament the draft Order approved by the National Assembly or to give notice to the First Minister of his refusal to do so and his reasons. It will be open to the National Assembly to use this procedure in instances where prior discussion and agreement between Cardiff and London has not been possible.¹⁹² Nonetheless, it would still have to be approved by Parliament.

Parliamentary consideration of draft Orders in Council

113. The White Paper explained that draft Orders in Council would follow the affirmative resolution procedure which means that draft Orders “must be debated and agreed by both Houses of Parliament before Her Majesty can be asked to make them.” The White Paper however, does not set this out in detail. There appear to be two options for debating draft Orders in Council. They could be considered on the floor of the House – for one and a half hours – followed by a vote, or considered in the Welsh Grand Committee – possibly for up to three hours – followed by a non-debatable motion on the floor of the House at a later date.

114. Changes would need to be made to the Standing Orders to allow for either of those debates. At present, Statutory Instruments (S.I.s) under the affirmative procedure (which is proposed for these draft Orders in Council) are referred automatically to a Standing Committee on Delegated Legislation.¹⁹³ That Committee would consider the S.I. and report ‘that the committee has considered [the instrument].’ The motion to approve the S.I. would then be put forthwith on the floor of the House. In our opinion it would be

time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.

191 Ev 59

192 Ev 59

193 Standing Order No. No.118 (3)

inappropriate for a draft Order in Council to be considered in a Standing Committee on Delegated Legislation. In our opinion, there are however, two exceptions to the Standing Order. They are when:

“(a) notice has been given by a Minister of the Crown of a motion that the instrument shall not so stand referred, or

*(b) the instrument is referred to the Scottish Grand Committee or to the Northern Ireland Grand Committee”.*¹⁹⁴

115. If a draft Order is to be debated on the floor of the House, and not in a Standing Committee, a Minister would have to give notice under Standing Order 118(3)(a). If on the other hand the draft Order in Council is to be debated in the Welsh Grand Committee, the Minister would have to move a motion to refer the draft Order to that Committee.

116. At present, the Welsh Grand Committee can consider, amongst other issues:

*“such specified matters relating exclusively to Wales as may be referred to it in accordance with Standing Order No. 107 (Welsh Grand Committee (matters relating exclusively to Wales))”*¹⁹⁵;

It may also consider Bills:

(1) A motion, of which at least ten days’ notice has been given, may be made by a Minister of the Crown at the commencement of public business, that a public bill be referred to the Welsh Grand Committee, and the question thereon shall be put forthwith; and if, on the question being put, not fewer than twenty Members rise in their places and signify their objection thereto, the Speaker shall declare that the noes have it:

Provided that no such notice shall be given until the bill has been printed and delivered to the Vote Office.

(2) The committee shall report to the House either that it recommends that the bill ought to be read a second time or that it recommends that the bill ought not to be read a second time, and in the latter case it shall have power to state its reasons for so recommending.

*(3) Upon a motion being made for the second reading of a bill reported from the committee, the question thereon shall be put forthwith.*¹⁹⁶

¹⁹⁴ Standing Order No. 118.

¹⁹⁵ Standing Order No. 102

¹⁹⁶ Standing Order No. 106

117. The Standing Orders that apply to the Welsh Grand Committee unlike those for the Scottish Grand Committee, do not include specifically, consideration of Statutory Instruments whether or not in draft. Standing Order No. 98 (Scottish Grand Committee (delegated legislation)) states:

98—(1) Where

(a) a Member has given notice of a motion for an humble address to Her Majesty praying that a statutory instrument be annulled, or of a motion of a similar character relating to a statutory instrument or to any other instrument (whether or not in draft) which may be subject to proceedings in the House in pursuance of a statute, or of a motion that the House takes note of a statutory instrument, or

(b) a Minister of the Crown has given notice of a motion to the effect that an instrument (whether or not in draft) upon which proceedings may be taken in pursuance of an Act of Parliament (other than a draft regulatory reform order) be approved,

a motion may be made by a Minister of the Crown, 'That the instrument be referred to the Scottish Grand Committee'; and the question on such motion shall be put forthwith and may be decided at any hour, though opposed.

(2) The committee shall consider each instrument referred to it on a motion, 'That the Committee has considered the instrument'; and the chairman shall put any question necessary to dispose of the proceedings on the motion, if not previously disposed of, not later than one and a half hours after the commencement of proceedings thereon; and shall thereupon report the instrument to the House without any further question being put.

(3) If any motion is made in the House of the kind specified in paragraph (1)(a) or (1)(b) of this order, in relation to any instrument in respect of which a report has been made to the House in accordance with paragraph (2) of this order, the Speaker shall put forthwith the question thereon; which may be decided at any hour, though opposed.

Similar provisions for the Welsh Grand Committee would need to be made.

118. Replicating those provisions for the Welsh Grand Committee would not be difficult. The debate in the Scottish Grand Committee is limited to one and a half hours. We do not believe that one and a half hours would be sufficient for considering these draft Orders. Instead we believe that a three hour debate in the Welsh Grand Committee would be appropriate for considering these draft Orders (which are subordinate primary legislation). **Therefore we recommend that provisions similar to those for the Scottish Grand Committee under Standing Order 115 should be made for the Welsh Grand Committee.**

119. We believe that in principle, debates on all Orders in Council should be on the floor of the House. For that to happen, Standing Orders would need to be amended to disapply Standing Order 118 in respect of draft Orders in Council made under the proposed Act. This would not preclude the referral of a draft Order to the Welsh Grand Committee should the Government move such a motion and the House agree to it.

120. We believe that, in principle, all draft Orders in Council should be debated on the floor of the House. Therefore we recommend that Standing Orders be amended to disapply Standing Order No.118 in respect of draft Orders in Council made under the proposed new Act. Should there be a general agreement that a draft Order be referred to the Welsh Grand Committee the Minister could, on such an occasion, table a motion to refer it to that Committee.

The Role of the Secretary of State

121. The White Paper states that the Bill would include provisions to allow for the Secretary of State to refuse to lay a draft Order in Council before Parliament. If the Secretary of State was to do so he would be required to “reply to the Assembly Government within 60 days, giving his reasons for refusal”.¹⁹⁷

122. Several of our witnesses raised concerns with this power. Lord Richard argued that “on the one hand, the proposal is one which seems to limit the role of Westminster and the Secretary of State to the presentation of the Assembly’s request, but on the other retains residual power to the Secretary of State to reject a request if he thinks it appropriate”.¹⁹⁸ He considered such an approach as “somewhat paternalistic”,¹⁹⁹ and argued that, the legislature in London should be enabling the National Assembly to legislate for itself rather than “putting up barriers in their way”.²⁰⁰

123. The Presiding Officer believed that the only argument that supported intervention by the Secretary of State was to ensure that the Orders in Council were appropriate, in terms of drafting, to come before Parliament.²⁰¹ To that end he argued that the powers could be interpreted as a “constitution for action”.²⁰² He put it that:

“I would be exceptionally angry if we came to any position where the Secretary of State rejected an application for policy reasons, because that would be completely contrary to the whole argument in favour of devolution; namely, if a legislative or parliamentary body in Wales asks for legislation and if that is in order constitutionally, then it is appropriate for that legislation to be considered”.²⁰³

197 Cm6582, para 3.20

198 Ev28

199 Q79

200 Q79

201 Q174

202 Q174

203 Q174

124. The Presiding Officer was particularly concerned with the ability of a UK Government Minister having the power to refuse an Order in Council, “I believe it would be inappropriate for a Secretary of State to reject tabling an application for an Order in Council because there was something regarding a difference in policy”.²⁰⁴

125. Notwithstanding the appropriateness of the Secretary of State’s power to refuse to lay an Order in Council, other witnesses were unhappy with the process of the Secretary of State responding to the Welsh Assembly Government. Professor Rawlings argued that “it seems peculiar, to put it mildly, that the answer does not go back to the Assembly, it goes back to what by then will be a statutorily different body, the Welsh Assembly Government”.²⁰⁵ He highlighted the comparison between the role of the Presiding Officer in Wales to that of the Speaker in Parliament, with both offices being the “titular head” of the National Assembly and the House of Commons respectively. Therefore as the request for an Order in Council came from the National Assembly, “surely the answer would go back to the titular head of the Assembly who is the Presiding Officer”.²⁰⁶

126. Professor Miers also highlighted an inconsistency in the fact that Secretary of State would respond in all cases to the Welsh Assembly Government despite the fact that Orders in Council could be instigated by individual Assembly Members:

“If an Assembly Member were to promote what in effect is a Private Member’s Bill or a Private Member’s request, no doubt the Assembly Government or its successor will want to look at it and will conduct the usual sort of review of it to ensure that it is not incompatible with its own policy, but that request having been initiated by someone who is a member of the Assembly and approved by the Assembly, through what deliberative processes it agrees, it is surely wholly improper that that refusal to lay by the Secretary of State goes back to the First Minister”.²⁰⁷

127. The Presiding Officer of the National Assembly also aired his concerns about the lines of communication. He highlighted the fact that the National Assembly Report recommended that any letter of refusal should be addressed to the holder of his Office and not to the First Minister. In his opinion, “the letter would come to the holder of my office; then that would be a public document; and then there would be an Assembly debate upon the reasons for the refusal and whether they are adequate. Some of you might want debates in Parliament as to whether the reasons for refusal were adequate”.²⁰⁸

128. Our witnesses from the Wales Office and the Welsh Assembly Government were not convinced by these arguments. Mr Hugh Rawlings argued that although the National Assembly approved an Order, it would be the First Minister who would convey that message to the Secretary of State. Should that Order be refused then it was appropriate for the Secretary of State to respond to the First Minister’s request. The First Minister would

204 Q174

205 Q40

206 Q40

207 Q40

208 Q169

then inform the National Assembly.²⁰⁹ Similarly he argued that the fact that the process was initiated by an individual member was “in a sense, neither here nor there, because, once the Assembly endorses it by resolution, the Assembly owns it and the First Minister is acting on the Assembly’s behalf in then handling the correspondence”.²¹⁰

129. The Secretary of State defended his role which he described as the “necessary intermediary between Welsh Assembly Government making a request ultimately to Parliament and a Secretary of State transmitting that request to the floor of both Houses”.²¹¹ The Secretary of State disputed the charge that his was a paternalistic role, but neither did he see it as a purely transactional role. He saw it as “a question of getting the Order in Council in the sort of shape that Parliament is likely to want to endorse”.²¹² The First Minister described that role as “something more than *vires* but something less than merit”.²¹³

130. The First Minister argued that if the proposals came from the elected Government majority of the National Assembly, therefore the refusal should rightly go back to that Government. However, he acknowledged that the Welsh Assembly Government may not be the sole instigator of Orders in Council. He stated that if individual Assembly Members instigated an Order in Councils, “they would not go back to the Government side of the Assembly, because they have not come from the Government side of the Assembly, but they have been voted through on a free vote”.²¹⁴ The Secretary of State was more forthright: “We would deal with the Assembly on a government-to-government basis. We would deal with the issue on a government-to-government basis, although ultimately the Welsh Assembly Government is answerable and accountable to the Assembly just as we are to Parliament”.²¹⁵

131. The Secretary of State has an important role to play in facilitating the progress and passage of Orders in Council. In particular, he will provide advice and support to ensure that Orders in Council are drafted correctly, and conform to Parliamentary rules. We are not convinced that it is necessary for him to act as a filter, and use those powers to refuse to lay an Order in Council based on its policy aspirations. A request from the National Assembly, if it is in order, should be submitted for the approval of Parliament, not for the approval of the Secretary of State. Therefore we recommend that the Secretary of State’s powers be limited to refusing Orders in Council on the basis of procedure, and not on the merits of the policy aspiration.

209 Q20

210 Q22

211 Q217

212 Q218

213 Q218

214 Q221

215 Q221

132. **Orders in Council may be instigated not only by the Welsh Assembly Government, but also by individual Assembly Members or National Assembly Committees. Should a Welsh Assembly Government request be refused we can see some logic in the Secretary of State responding to the First Minister. However, that logic does not apply to Orders in Council that have been instigated through the non-Government route. The procedure for a refusal needs to be consistent. In light of the fact that the National Assembly, as the legislature will approve all Orders in Council, we consider it more appropriate for the response be sent to the Presiding Officer and not the First Minister.**

Stage 3

A Referendum on Primary Powers

133. The third stage of legislative enhancement proposed in the White Paper would involve transferring primary law-making powers over all devolved fields to the National Assembly.²¹⁶ Provision for this would be included on the face of the Bill. However, the Government regard this as a fundamental change to the devolution settlement in Wales and therefore would need to be dependent on the support of the electorate through a post-legislative referendum. That referendum would be triggered by a two-thirds majority of AMs, in a vote in Plenary, followed by the Secretary of State tabling an Order in Council to be approved by both Houses of Parliament.²¹⁷ However, the White Paper introduces an additional filter by proposing that “if the Secretary of State was minded to table an Order in Parliament, he would first be obliged to undertake such consultation as he considered appropriate”.²¹⁸ The Secretary of State confirmed that the consultation was necessary “to assess the situation and then the referendum decision for Parliament would follow”.²¹⁹

134. The First Minister argued that a referendum was fundamentally different to an opinion poll that had the role of “taking the temperature” at particular points in a year. He argued that a referendum was designed to “determine a big constitutional issue for preference to settle matters for at least half a century until an entire generation of politicians and voters have lived, died and gone and different people are around in politics and at the voting stage as well, not as a test of opinion just for this year”.²²⁰

135. The Secretary of State confirmed that there would not be specific provision in the Bill to outlaw repeated referenda, as that would be a “matter for politics”. Rt. Hon. Rhodri Morgan AM believed that should a referendum fail “everybody will have to take a deep breath and decide when they want to do this again” but was of the strong belief that a “No” vote would put the issue “off the agenda for a very long time”,²²¹ probably lasting a generation.²²² Professors Miers and Rawlings suggested that there was a case for “a

216 Cm6582

217 Cm6582, paras 3.23-3.24

218 Cm6582, para 3.24

219 Q225

220 Q225

221 Q226

222 Q226

moratorium on further referendum initiatives for a specified period, for example, two Assembly terms”.²²³ In that event, the effect of a “No” vote would be “simply that the Assembly carried on as it was”.²²⁴

136. We note the proposal for a post-legislative referendum, and its approval by Parliament using the Order in Council procedure. That approach would avoid the need for further primary legislation, and the inevitable delays that such a route would cause. However, the Order in Council mechanism would not allow the question to be put in the referendum to be amended, nor would it allow for the possibility of a number of questions to be put. Therefore, the new Bill that will be presented to Parliament will represent the only opportunity for all Members of Parliament to consider that wording in detail. The wording of that question should be straight forward and therefore one that should survive any length of time between the enactment of the Bill and a possible future referendum. Therefore we recommend that the wording of the question for the referendum be included on the face of the Bill

137. In the event of a referendum returning a majority “No” vote, we agree that a long period of reflection would be necessary. It would be wrong for a series of referenda to be held solely to attempt to force a particular decision. The Bill will need to contain explicit provision to stop repeated referenda in the event of a “No” vote. The period between a “No” vote and a second referendum is open to debate, but we consider two National Assembly terms as an appropriate time-gap before a referendum is called for a second time.

Definition of primary powers of the National Assembly

138. The Secretary of State told us that the Bill would make provision for an Order in Council mechanism to go before Parliament at the request of the National Assembly to trigger a referendum. That Order in Council would determine the question for the referendum.²²⁵ In the event of a successful referendum, the White Paper stated “like the Scottish Parliament, [the National Assembly] would be able to make law on all the matters within its devolved fields”. This would exclude those subjects which remain the responsibility of Whitehall Departments for Wales as well as for England”.²²⁶ It goes on to say that unlike in Scotland, “civil and criminal law, the administration of justice, police and the prison service,” will remain reserved.²²⁷

223 Ev 14

224 Q27

225 Q223

226 Cm 6582 para 3,26

227 Cm 6582 para 3.26

139. Whilst the White Paper does not include any detail about the way in which the limits of the National Assembly's powers are to be defined,²²⁸ the Government's written evidence outlined two potential options:

- to specify the subjects on which the National Assembly could legislate (this was the model adopted in relation to Scotland in the Scotland Act 1978, which never came into force); or
- to provide that the National Assembly could legislate on anything unless it was specifically reserved to the UK Parliament and then to specify those reserved matters (which was the model adopted in relation to Scotland by the Scotland Act 1998).²²⁹

140. The Government has opted for the first option. It coming to its decision it cited four main reasons. First, that Wales unlike Scotland does not have its own legal system and institutions. Second, that Wales shared a common legal jurisdiction with England, so a definition along the Scotland 1998 lines would be more complicated in Wales, and could have far reaching consequences in terms of the common legal jurisdiction. Third, that the list of reserved powers would be substantially longer and more complex in Wales compared to Scotland. Fourth, that the Scotland 1978 model built on the executive function already devolved to the National Assembly, and therefore could develop out of the existing pattern of Welsh devolution.²³⁰

141. In his evidence to us, Professor Rawlings, highlighted the problems with the Scotland 1978 model. He argued that, "the Assembly only having power to legislate where it is expressly authorised to do so carries strong potential for time-consuming and complicated problems of legal competence, and, in turn, for intergovernmental wrangling and even substantial forms of litigation".²³¹ Furthermore he reminded us that the 1978 model was rejected for Scotland in 1998 on grounds of "complexity from the need to spell out the devolved areas in considerable detail".²³² He concluded that "Lord Richard was well aware of the England and Wales jurisdiction point, so his response was to take out the most obvious things relating to the England and Wales jurisdiction... Lord Richard took the view that this was a manageable position".²³³

142. We note the Government's preference for the 1978 model for the definition of any future transfer of primary legislative powers for the National Assembly.

228 Ev 11 and 12

229 Ev 61

230 Ev61

231 Hastening Slowly: the next phase of Welsh devolution, Public Law [2005] (Winter).

232 Ev 11

233 Q44

The Role of the Secretary of State

143. In paragraph 133 we noted that the White Paper proposed that “if the Secretary of State was minded to table an Order in Parliament, he would first be obliged to undertake such consultation as he considered appropriate”.²³⁴ That role was questioned by our witnesses. In their written evidence Professors Miers and Rawlings did not agree that the Secretary of State for Wales should be able to decline to table a National Assembly decision or to consult further before putting such a decision to Parliament. They strongly believed that: “the settled will of the democratically elected representatives in the Assembly should be put to Parliament for its decision without the possibility of Government intervention”.²³⁵

144. The Secretary of State disputed the charge that this role encompassed a power of veto over a referendum that the ‘Government intervention’ implied. Rather, he believed that a Secretary of State would want to be sure that the broad consensus in the National Assembly was reflected throughout Wales: “I would not see this provision as being a veto in power, it would be a bit of a reality check on being confident that the people of Wales will back you in a vote”. However, he acknowledged that “a two-thirds majority gives you that kind of confidence”.²³⁶ That a two-thirds majority in the National Assembly is necessary is not disputed. However, the Secretary of State left us no clearer about what further evidence was necessary, over and above a two-thirds majority that would allow him to take a judgement on whether or not to lay the Order for a referendum.²³⁷

145. A two-thirds majority in the National Assembly in favour of a referendum would represent a clear broad consensus that there was general support for a referendum. In the absence of any further opinion poll “evidence”, it would rightly be the basis for submitting an Order in Council to trigger that referendum. Therefore, we remain unconvinced that the Secretary of State could draw upon any other demonstration of support or otherwise that would give him a clearer insight into whether the trigger should be pulled or not. For that reason we do not consider it appropriate for that Office to have the power to refuse a request for a referendum. Rather it would be for Parliament to decide on the fate of that request. We recommend that the power of refusal by the Secretary of State be excluded from the Bill.

234 Cm6582, para 3.24

235 Ev 11

236 Q223

237 Q223-5

5 Electoral Reform

146. There has been general welcome for the Government’s proposals in relation to the separation of the executive and the legislature and some support for the proposals for enhanced legislative powers. That general welcome has not been extended to the UK Government’s proposals for reform of the National Assembly’s electoral system. In the White Paper, the Government proposes to “change the provisions currently in the Government of Wales Act to prevent individuals from simultaneously being candidates in constituency elections and being eligible for election from party lists”.²³⁸ The rationale of the Government is that such a proposal, if enacted, would counter what has been termed the “Clwyd West problem”. In that constituency, five candidates stood for election in the 2003 National Assembly elections. One candidate was successful in becoming the constituency Member, while another three became Assembly Members as additional candidates elected from their respective parties’ regional lists.²³⁹ It is the Government’s view that such an outcome “devalues the integrity of the electoral system in the eyes of the public and acts as a disincentive to vote in constituency elections”.²⁴⁰

147. During the course of our inquiry, we heard evidence of some concerns about the Additional Member System and the way in which it was working in Wales. Lord Richard said “there is something wrong in a situation in which [four out of the] five people can stand in Clwyd, none of them can be elected, and then they all get into the Assembly. On the face of it that does not make sense”.²⁴¹ The Secretary of State quoted Lord Steel, the former Presiding Officer of the Scottish Parliament, as saying of the Scottish experience that the “system had led to a confusing and expensive proliferation of parliamentary offices throughout the country”.²⁴² Dr Jonathan Bradbury suggested therefore that “abolishing dual candidacy is an option worthy of consideration for solving perceived problems of electoral representation in Britain’s mixed member electoral systems”.²⁴³

148. The First Minister cited the independent Province of New Brunswick Commission on Legislative Democracy, which had considered the option of dual candidacy for the new MMP (multi-member proportional) system to be introduced in that Province. It was argued that “the Commission is of the view that if a candidate chooses to run in a single member constituency the voters in that constituency should determine whether that candidate is elected and that there should be no back door to the legislature”.²⁴⁴

149. However Dr Roger Scully, Senior Lecturer in European Politics at the University of Wales Aberystwyth commented that the ‘back door’ was completely foreseeable in the context of the AMS system in Wales. He said “frankly, if the Government did not realise

238 Cm 6582, para 4.4

239 Cm6582, para 4.5

240 Cm6582, para4.5

241 Q96

242 Q253

243 Ev89

244 Q244

when it brought in this White Paper that that would happen, they should have done, they were negligent in not realising that”.²⁴⁵ Furthermore, the Electoral Commission cautioned against “introducing a change to the electoral process that is as yet untested over a period of time”.²⁴⁶

150. The Committee found little support for the Government’s proposed solution to this problem, i.e. to ban dual candidacy. Both Lord Richard and Lord Steel’s solutions to the problems they identified would be to introduce the Single Transferable Vote in both Wales and Scotland.²⁴⁷ While Lord Richard acknowledged that there “was a basic logic in asking people to choose where they want to stand and how they want to stand”,²⁴⁸ Dr Richard Wyn Jones, Director of the Institute of Welsh Politics claimed that the proposed ban would “give Wales an internationally anomalous system”.²⁴⁹ That point was disputed by the Secretary of State.²⁵⁰

151. Glyn Mathias, the Electoral Commissioner for Wales, acknowledged that tension existed between list and constituency members in the National Assembly, and stated that “Clwyd West is not perhaps the best example of how the AMS system works”.²⁵¹ Despite this, the Electoral Commission have found no evidence in their research that it posed a problem to the electorate. Kay Jenkins said that despite extensive public opinion research, including in the Clwyd West constituency: “[dual candidacy] is not an issue we could say that has ever been raised with us or that voters are clamouring to have resolved”.²⁵² Jonathan Bradbury stated that the argument that there is public disquiet over what the Secretary of State for Wales described as “losers become winners”,²⁵³ “is the weakest part of the case given the lack of clear evidence to prove that there is a problem”.²⁵⁴

152. Dr Roger Scully, Director of the Jean Monnet Centre for European Studies supported this. He described the Government’s claim in the White Paper as “a very bold, unqualified statement about public opinion,”²⁵⁵ but argued that it was “not backed up with any reference to evidence at all”.²⁵⁶ He added that based on detailed public opinion research in Wales, that in North Wales and in Clwyd West “opinion towards the electoral system was just as favourable as it was elsewhere in Wales”.²⁵⁷ In evaluating the Government’s claims, Glyn Mathias, the Electoral Commissioner for Wales told us, “there is no evidence at all to

245 Q49

246 Ev 39

247 Report from the Richard Commission, p259, and the National Library of Scotland, Donald Dewar Lecture 2003. Also see Ev 95

248 Q107

249 Q60

250 Q239

251 Q114

252 Q116

253 Q250

254 Ev 90

255 Q50

256 Q45

257 Q45

back up this proposal and therefore we came to the conclusion that we do not think the case for change has been made”.²⁵⁸

153. The First Minister dismissed the view of the Electoral Commission, describing it as presenting “poor unsupported claims”.²⁵⁹ The Secretary of State added that they had “got this wrong”, and that some of their evidence was “politically unworldly”.²⁶⁰ Mr Mathias told us that the Government has no statutory obligation to consult with the Electoral Commission. Its powers rest under Section 6 of the Political Parties, Elections and Referendums Act 2000, which provide for the Electoral Commission to comment on electoral issues where it thinks it is appropriate.²⁶¹

154. Dr Wyn Jones aired his concerns that the proposed change would reduce the quality of Assembly members. He said, “any step which – and this is from a general perspective of the functioning of Welsh democracy – makes it more difficult for the opposition parties to get their “best members” in a 60 Member Assembly is I think problematic”.²⁶² Given that the majority of Labour members are constituency members and the majority of opposition members are list members,²⁶³ this would cause more problems for opposition parties in Wales than it would to the Labour Party in Wales. For that reason Drs Wyn Jones and Scully concluded that it was “difficult to rule out the hypothesis of partisan motivation”.²⁶⁴ While they were clear that they had no evidence that pointed in that direction, Dr Scully argued that “even if this is not intended it is unfortunate because it is going to look deeply partisan”.²⁶⁵ Glyn Matthias added: “it is perceived, rightly or wrongly across the political spectrum as partisan, and there is a danger that if it is perceived as partisan it might undermine public confidence in the process.”²⁶⁶ The Electoral Commission concluded that, “in light of the need to encourage voter participation at the Assembly election in 2007, we would caution against any change that is perceived to be partisan and could add to a prevailing distrust of politicians”.²⁶⁷

155. Dr Bradbury described any reform to the electoral system as “inherently difficult, given the distinctive nature of the system, the variety of reform options available, and likely perceptions of partisanship”.²⁶⁸ However he suggested that the reform proposed in the White Paper is “at least a plausible basis for incrementally developing the current system to solved perceived problems without necessarily causing new ones”.²⁶⁹

258 Q114

259 Q252

260 Q257

261 Q114

262 Q61

263 Ev 253

264 Q61

265 Q51

266 Q51

267 Ev 39

268 Ev 93

269 Ev 93

156. Taking into consideration evidence to the Committee, informal feedback from the public and written evidence submitted to the Committee, we support the proposals for electoral reform as laid down in the White Paper.

Conclusions and recommendations

Government White Paper

1. The reconstitution of our Committee and the Parliamentary timetable meant that our inquiry concluded outside of the consultation period set out for the White Paper. However, we trust that the Government and Members of the House will wish to draw upon our Report and its findings during the Second Reading debate and the debate in Committee on the Bill during its passage through Parliament. (Paragraph 16)
2. We welcome the intention of the Wales Office to introduce a coherent and freestanding Bill and hope that it will bring a greater level of clarity to the devolution settlement for Wales. (Paragraph 23)
3. Whilst we welcome the publication of the White Paper, it is short on the detail necessary for proper pre-legislative scrutiny. A draft Bill would have been more appropriate. We are not convinced that the deadline of the 2007 National Assembly elections would have debarred the Government from publishing a draft Bill and still completing the Parliamentary process for the Bill in this very long session. Given that it is a constitutional Bill, we are disappointed that the Government have shied away from its commitment to publish draft legislation on this occasion. (Paragraph 29)

Welsh Statute Book

4. We agree that a “Welsh statute book” would be highly beneficial and reiterate our predecessor’s view that a clear and comprehensive register of Welsh legislation should be a requirement of the devolution settlement. Furthermore, we add our voice to that of the National Assembly Committee in recommending that the Governments in both London and Cardiff agree on the means by which a “Welsh statute book” can best be made available. (Paragraph 30)

Separation of the Legislature and the Executive

5. We welcome the proposals to make formal the separation of the Legislature and the Executive of the National Assembly for Wales. (Paragraph 35)

Assembly Ministers

6. We conclude that the approval of Ministers by Plenary of the National Assembly is an attractive proposition and therefore we recommend that provisions to that effect be included in the Bill. (Paragraph 36)

Dissolution of the National Assembly

7. We conclude that a mechanism to dissolve the National Assembly in the event of a stalemate between the political parties is a sensible and pragmatic suggestion. Therefore we recommend that the Bill include provision for the National Assembly

to dissolve itself in the event of being unable to appoint a Welsh Assembly Government. (Paragraph 40)

Deputy Ministers

8. We agree with the proposal to put Deputy Ministers on a statutory footing. That statutory footing will need to include a clear definition of the roles and responsibilities of the Deputy Ministers. The Government must be alive to the fact an increase in the payroll vote of the National Assembly will have an impact on the size of the backbench body and the potential to cause strains on the scrutiny functions (Paragraph 41)

Numbers of Ministers and Deputy Ministers

9. We believe that a statutory upper limit for the number of Ministers including Deputy Ministers is a sensible approach to the composition of the National Assembly, and we welcome the decision of the Wales Office to include provisions to that effect on the face of the Bill. (Paragraph 42)

Title of the Welsh Assembly Government

10. Concerns remain that the current title of the Welsh Assembly Government may have the potential to continue the confusion over the status of the Executive and the Legislature. In respect of the Bill, we believe that Welsh Executive would be a more appropriate term to use in Statute. (Paragraph 49)

Size of the National Assembly

11. The Government has taken a strong line against the possibility of increasing the number of Assembly Members from 60 to 80. However, a 60 Member Assembly may not prove sufficient to carry out its scrutiny and legislative roles. In that event, the National Assembly for Wales and Parliament may at some date in the future wish to reassess the size of the National Assembly, at which time the electoral process will also need to be considered. (Paragraph 57)
12. With respect to Committees, we reiterate the concerns raised with us that the 60 member limit on the National Assembly and the size of the National Assembly payroll vote has the potential to place serious strains on the National Assembly Committees' ability to carry out its scrutiny of the new Welsh Executive. The Government will need to be alive to this potential danger when it introduces its Bill. (Paragraph 60)

Committees of the National Assembly

13. The structure of the Committee System in a reformed National Assembly will be a matter for that institution to decide. However, as Members of Parliament for Welsh constituencies, we recognise the important role that the regional committees have played in taking the National Assembly out of Cardiff to other parts of Wales. We recommend that this important part of the Regional Committees' work is retained in

any new Committee structure. We further recommend the retention of the statutory provision for a North Wales Regional Committee. (Paragraph 62)

14. We agree with the Government's proposals to remove Ministers from being members of scrutiny Committees of the National Assembly. However, we note the recommendation of the National Assembly Committee that flexibility on this issue is necessary with respect to legislation and other specific Committees. We look to the Government to ensure that the necessary flexibility is contained within the Bill. (Paragraph 66)
15. We recommend that provisions equivalent to Sections 23 to 26 of the Scotland Act be enacted in respect of the powers of Committees of the National Assembly for Wales. (Paragraph 68)
16. We agree with the National Assembly Committee that the Welsh Assembly Government should send either a Minister or an official when a National Assembly committee insists on attendance by Government witnesses. (Paragraph 70)
17. The use of co-opted members is a matter for the National Assembly. However, we agree that, should the National Assembly wish to continue with that practice, the protection of those Members needs to be made explicit. We look to the Government to ensure that co-opted Members of National Assembly Committees are protected from defamation to the same level as Members of the National Assembly, when serving on Committees. (Paragraph 73)

Standing Orders of the National Assembly

18. We understand the legal requirement for the Secretary of State for Wales to give statutory effect to the Standing Orders for the National Assembly for Wales. We are less convinced with the need for that Office to be the final arbiter of any disagreement over those Orders. We believe that the Presiding Officer of the National Assembly, not a Government Minister of another institution, is a more appropriate location for that role. Therefore we recommend that the Government include in the Bill, provisions to ensure that the Presiding Officer, subject to the approval of the Secretary of State for Wales, be the arbiter on Standing Orders for the National Assembly. (Paragraph 81)

Human Resources

19. It would be undesirable to include in the Bill provisions for specific increases in staff for the National Assembly as they have yet to be identified in detail. Furthermore, future demand will best dictate the level of necessary resources. However, it is clear, that in moving from the Corporate Body model to a "free-standing" legislature, enhancements will be necessary to support Assembly Members in their new tasks. We look to the Government to provide those resources where they are clearly necessary. (Paragraph 85)
20. In its Report the National Assembly Committee welcomed the separation of Government and National Assembly Staff but recommended that the Bill include "a

Statutory ‘broadly in line’ provision” with respect to the salaries of National Assembly staff. We agree with the recommendation of the National Assembly Committee. (Paragraph 87)

National Assembly Committee Recommendations

21. We note the recommendations of the National Assembly Committee in relation to the statutory duties of the National Assembly, the special provision for the Welsh language and the examination of the Resource Budget. We look forward to hearing the response of the Government on those recommendations. (Paragraph 93)

Legislative Proposals: Stage 1

22. Should Wales-only Bills continue to be introduced to Parliament, we would expect the Government to maintain its policy of publishing them first in draft form so that they could be subjected to pre-legislative scrutiny by this Committee in conjunction with the appropriate Committee of the National Assembly. (Paragraph 96)
23. We look to the Wales Office to play an active and visible role in the education of Government Departments in this respect. We recommend that the Wales Office, in its response to this Report, set out clearly, the precise procedures that are in place to ensure that those roles are carried out effectively. (Paragraph 100)
24. We recommend that the Wales Office supply the Committee with quarterly memoranda setting out those Bills which contain significant Welsh clauses. (Paragraph 101)
25. We recommend that the Wales Office include under the heading Territorial Extent in the Explanatory Notes to Bills, a statement listing the clauses in Bills that relate to Wales; and explaining how the Government’s new commitment to more permissive legislation for Wales has been enacted in relation to those clauses. (Paragraph 103)

Legislative Proposals: Stage 2

26. We recommend that when submitting a proposal for a draft Order in Council for pre-legislative scrutiny the Wales Office also provide a detailed explanatory note which would make clear the scope of the proposal, the practical effects of the proposal on Wales, and the legislative authority that would pass to the National Assembly. (Paragraph 108)
27. We recommend that any proposal for a draft Order in Council be laid before the Parliament. Once it is laid, we recommend that it must lie before Parliament for a period of 60 days, not including any time during which parliament is dissolved or prorogued, or either House is adjourned for more than four days. We recommend that a draft Order consequent on the proposal may not be laid before Parliament until the end of that period. (Paragraph 110)
28. Therefore we recommend that provisions similar to those for the Scottish Grand Committee under Standing Order 115 should be made for the Welsh Grand Committee. (Paragraph 118)

29. We believe that, in principle, all draft Orders in Council should be debated on the floor of the House. Therefore we recommend that Standing Orders be amended to disapply Standing Order No.118 in respect of draft Orders in Council made under the proposed new Act. Should there be a general agreement that a draft Order be referred to the Welsh Grand Committee the Minister could, on such an occasion, table a motion to refer it to that Committee. (Paragraph 120)
30. The Secretary of State has an important role to play in facilitating the progress and passage of Orders in Council. In particular, he will provide advice and support to ensure that Orders in Council are drafted correctly, and conform to Parliamentary rules. We are not convinced that it is necessary for him to act as a filter, and use those powers to refuse to lay an Order in Council based on its policy aspirations. A request from the National Assembly, if it is in order, should be submitted for the approval of Parliament, not for the approval of the Secretary of State. Therefore we recommend that the Secretary of State's powers be limited to refusing Orders in Council on the basis of procedure, and not on the merits of the policy aspiration. (Paragraph 131)
31. Orders in Council may be instigated not only by the Welsh Assembly Government, but also by individual Assembly Members or National Assembly Committees. Should a Welsh Assembly Government request be refused we can see some logic in the Secretary of State responding to the First Minister. However, that logic does not apply to Orders in Council that have been instigated through the non-Government route. The procedure for a refusal needs to be consistent. In light of the fact that the National Assembly, as the legislature will approve all Orders in Council, we consider it more appropriate for the response be sent to the Presiding Officer and not the First Minister. (Paragraph 132)

Legislative Proposals: Stage 3

32. We note the proposal for a post-legislative referendum, and its approval by Parliament using the Order in Council procedure. That approach would avoid the need for further primary legislation, and the inevitable delays that such a route would cause. However, the Order in Council mechanism would not allow the question to be put in the referendum to be amended, nor would it allow for the possibility of a number of questions to be put. Therefore, the new Bill that will be presented to Parliament will represent the only opportunity for all Members of Parliament to consider that wording in detail. The wording of that question should be straight forward and therefore one that should survive any length of time between the enactment of the Bill and a possible future referendum. Therefore we recommend that the wording of the question for the referendum be included on the face of the Bill (Paragraph 136)
33. In the event of a referendum returning a majority "No" vote, we agree that a long period of reflection would be necessary. It would be wrong for a series of referenda to be held solely to attempt to force a particular decision. The Bill will need to contain explicit provision to stop repeated referenda in the event of a "No" vote. The period between a "No" vote and a second referendum is open to debate, but we consider two National Assembly terms as an appropriate time-gap before a referendum is called for a second time. (Paragraph 137)

34. We note the Government's preference for the 1978 model for the definition of any future transfer of primary legislative powers for the National Assembly. (Paragraph 142)
35. A two-thirds majority in the National Assembly in favour of a referendum would represent a clear broad consensus that there was general support for a referendum. In the absence of any further opinion poll "evidence", it would rightly be the basis for submitting an Order in Council to trigger that referendum. Therefore, we remain unconvinced that the Secretary of State could draw upon any other demonstration of support or otherwise that would give him a clearer insight into whether the trigger should be pulled or not. For that reason we do not consider it appropriate for that Office to have the power to refuse a request for a referendum. Rather it would be for Parliament to decide on the fate of that request. We recommend that the power of refusal by the Secretary of State be excluded from the Bill. (Paragraph 145)

Electoral Reform

36. Taking into consideration evidence to the Committee, informal feedback from the public and written evidence submitted to the Committee, we support the proposals for electoral reform as laid down in the White Paper. (Paragraph 156)

Formal minutes

Tuesday 29 November 2005

Members present:

Dr Hywel Francis, in the Chair

Mr Stephen Crabb
Nia Griffith
Mrs Siân James
Mr David Jones
Mr Martyn Jones

Mrs Madeleine Moon
Jessica Morden
Hywel Williams
Mark Williams

Draft Report (Government White Paper: Better Governance for Wales), proposed by the Chairman, brought up and read.

Ordered, That the Chairman’s draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 104, read and agreed to.

Paragraphs—(*Mr David Jones*)— brought up and read, as follows:

In evidence to us the Secretary of State argued that the Order in Council procedure did not represent a significant change in the constitutional settlement for Wales as set out in the 1998 Act. When asked about the constitutional impact of Orders in Council he asserted that:

“the UK Parliament, in respect of the powers that go to the Assembly under this new procedure, makes the decision. That is exactly what the 1998 Act provided for and was endorsed by the people of Wales in 1997”.²⁷⁰

Some of our witnesses took a different view. Lord Richard argued that the proposals for Orders in Council had the potential to be a “concealed grant of almost a direct legislative competence down to Cardiff”.²⁷¹ In their written evidence Professors Rawlings and Miers also saw the potential for “the further invasion of executive activity into the legislative processes”.²⁷²

Professor Rawlings, in an article in the *Public Law* journal has also argued that “the UK Government has been sold on the idea of affording Wales forms of secondary law-making power which effectively blur the traditional dichotomy between executive devolution and legislative devolution, such that Cardiff can make the kind of policy rules commonly expressed in, but without the formal status of, statutes. An approach

270 Q194

271 Q78

272 Ev 7

that sits comfortably with the empowerment model, one might even call this a form of quasi-legislative devolution”.²⁷³

In our opinion the views set out above do not support the proposition that the Order in Council procedure is nothing more than what was agreed to by the Welsh people in 1997.

We believe that the Orders in Council procedure represents a step-change in the transfer of powers from Parliament to the National Assembly. We conclude that it is inappropriate for such a change to take place without the explicit support of the people of Wales. Therefore we recommend that the proposals for Orders in Council be put to the people of Wales in a referendum before they are considered in Parliament.

Notwithstanding our view that Orders in Council should not be used prior to a referendum of the Welsh people, we now highlight some practical and procedural issues that the Government will need to address in relation to the Orders in Council process, were it to be implemented.

Question put, That the paragraphs be read a second time.

The Committee divided.

Ayes, 2

Mr Stephen Crabb
Mr David Jones

Noes, 7

Nia Griffith
Mrs Siân James
Mr Martyn Jones
Mrs Madeleine Moon
Jessica Morden
Hywel Williams
Mark Williams

Paragraphs 105 to 130 read and agreed to.

Paragraphs 131 and 132 read as follows:

The Secretary of State has an important role to play in facilitating the progress and passage of Orders in Council. In particular, he will provide advice and support to ensure that Orders in Council are drafted correctly, and conform to Parliamentary rules. We are not convinced that it is necessary for him to act as a filter, and use those powers to refuse to lay an Order in Council based on its policy aspirations. A request from the National Assembly, if it is in order, should be submitted for the approval of Parliament, not for the approval of the Secretary of State. Therefore we recommend that the Secretary of State’s powers be limited to refusing Orders in Council on the basis of procedure, and not on the merits of the policy aspiration.

273 Hastening Slowly: The Next Phase of Welsh Devolution, [2005] Public Law, (Winter).

Orders in Council may be instigated not only by the Welsh Assembly Government, but also by individual Assembly Members or National Assembly Committees. Should a Welsh Assembly Government request be refused we can see some logic in the Secretary of State responding to the First Minister. However, that logic does not apply to Orders in Council that have been instigated through the non-Government route. The procedure for a refusal needs to be consistent. In light of the fact that the National Assembly, as the legislature will approve all Orders in Council, we consider it more appropriate for the response be sent to the Presiding Officer and not the First Minister.

Motion made, to leave out paragraphs 131 and 132 and insert the following new paragraph:

We reiterate our view that we do not accept the White Paper's proposals for Orders in Council. We acknowledge and approve of the role of the Secretary of State for Wales and Welsh Members of Parliament in promoting and safeguarding the interests of the people of Wales in Parliament. – *(Mr David Jones)*

Motion made, and Question put, That the paragraph be read a second time.

The Committee divided.

Ayes, 2

Mr Stephen Crabb
Mr David Jones

Noes, 7

Nia Griffith
Mrs Siân James
Mr Martyn Jones
Mrs Madeleine Moon
Jessica Morden
Hywel Williams
Mark Williams

Paragraphs 131 and 132 agreed to.

Paragraph 133 to 137 read and agreed to.

A Paragraph – (Mr David Jones) – brought up and read, as follows:

We further recommend that the wording of the question include the option for the abolition of the National Assembly for Wales.

Question put, That the paragraph be read a second time.

The Committee divided.

Ayes, 4

Mr Stephen Crabb
Mr David Jones
Mr Martyn Jones
Mrs Madeleine Moon

Noes, 5

Nia Griffith
Mrs Siân James
Jessica Morden
Hywel Williams
Mark Williams

Paragraphs 138 to 144 read and agreed to.

Paragraph 145 read as follows:

A two-thirds majority in the National Assembly in favour of a referendum would represent a clear broad consensus that there was general support for a referendum. In the absence of any further opinion poll “evidence”, it would rightly be the basis for submitting an Order in Council to trigger that referendum. Therefore, we remain unconvinced that the Secretary of State could draw upon any other demonstration of support or otherwise that would give him a clearer insight into whether the trigger should be pulled or not. For that reason we do not consider it appropriate for that Office to have the power to refuse a request for a referendum. Rather it would be for Parliament to decide on the fate of that request. We recommend that the power of refusal by the Secretary of State be excluded from the Bill.

Motion made to leave out paragraph 145 and insert the following new paragraph:

Whilst a two-thirds majority in the National Assembly is an indication of consensus within that body, it would not amount to an indication of any wider consensus within Wales. We therefore agree that the Secretary of State should have the power to refuse the request for a referendum. – (Mr David Jones)

The Committee divided.

Ayes, 2

Mr Stephen Crabb
Mr David Jones

Noes, 7

Nia Griffith
Mrs Siân James
Mr Martyn Jones
Mrs Madeleine Moon
Jessica Morden
Hywel Williams
Mark Williams

Paragraph 145 agreed to.

Paragraph 146 to 155 read and agreed to.

Paragraph 156 read as follows:

Regardless of the merits or reasons for the proposed changes to the electoral system in Wales, we are concerned that party political feelings on this issue, from all sides, will draw the focus of the Bill away from the many welcome proposals that will be contained within it. We therefore recommend that the Government redouble its efforts to gain a cross-party consensus on electoral reform before the Bill passes into legislation.

Motion made to leave out paragraph 156 and insert the following new paragraph:

We are wholly unconvinced by the arguments put by the Secretary of State and the First Minister in favour of electoral reform and prefer the evidence of the Electoral Commission and our academic witnesses. We conclude that there is no good reason to change the current arrangements for the election of regional Assembly Members.
– (Mr David Jones)

The Committee divided.

Ayes, 4

Mr Stephen Crabb
Mr David Jones
Hywel Williams
Mark Williams

Noes, 5

Nia Griffith
Mrs Siân James
Mr Martyn Jones
Mrs Madeleine Moon
Jessica Morden

Another Motion made to leave out paragraph 156 and insert the following new paragraph:

Taking into consideration evidence to the Committee, informal feedback from the public and written evidence submitted to the Committee, we support the proposals for electoral reform as laid down in the White Paper – (Nia Griffith)

The Committee divided.

Ayes, 4

Nia Griffith
Mrs Siân James
Mr Martyn Jones
Mrs Madeleine Moon
Jessica Morden

Noes, 5

Mr Stephen Crabb
Mr David Jones
Hywel Williams
Mark Williams

Paragraph 156, as amended, agreed to.

Resolved, That the Report, as amended, be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No.134 (Select committees (reports)) be applied to the Report

Several Papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 6 December at Ten O'clock.

List of witnesses

Tuesday 18 October 2005

Alan Cogbill, Cedric Longville and Ms Zenny Saunders, Wales Office Officials, **Hugh Rawlings, Mrs Kate Cassidy and Keith Bush**, Welsh Assembly Government Officials Ev 1

Professor Richard Rawlings, London School of Economics, **Professor David Miers**, Cardiff Law School, **Dr Roger Scully** and **Dr Richard Wyn Jones**, University of Wales, Aberystwyth Ev 16

Tuesday 25 October 2005

Rt Hon the Lord Richard QC, Ev 28

Glyn Mathias, and **Mrs Kay Jenkins**, The Electoral Commission Ev 41

Monday 31 October 2005

Rt Hon the Lord Elis-Thomas AM, Presiding Officer, National Assembly for Wales and **Paul Silk**, Clerk to the National Assembly for Wales Ev 47

Thursday 10 November 2005

Rt Hon Peter Hain MP, Secretary of State for Wales and **Rt Hon Rhodri Morgan AM**, First Minister for Wales Ev 63

List of written evidence

1	Professors David Miers, Keith Patchett and Richard Rawlings	Ev 7
2	Dr Richard Wyn Jones and Dr Roger Scully	Ev 14
3	Rt Hon the Lord Richard QC	Ev 27
4	The Electoral Commission	Ev 37
5	Supplementary Memorandum submitted by the Rt Hon the Lord Elis Thomas AM, Presiding Officer	Ev 57
6	Rt Hon Peter Hain MP, Secretary of State for Wales and Rt. Hon. Rhodri Morgan AM, First Minister, Welsh Assembly Government	Ev 57
7	Supplementary Memorandum submitted by Rt Hon Peter Hain MP, Secretary of State for Wales, Wales Office	Ev 80
8	Wales Council for Voluntary Action (WCVA)	Ev 82
9	Electoral Reform Society	Ev 84
10	Barry K Winetrobe, Reader in Law, Napier University	Ev 86
11	Dr Jonathan Bradbury and Dr Meg Russell	Ev 89
12	Citizens Advice Cymru	Ev 93
13	Chris Ruane MP	Ev 95

Reports from the Welsh Affairs Committee since 2005

The following reports have been produced by the Committee in the 2005 Parliament:

Session 2005-06

First Special Report	Manufacturing and Trade in Wales and The Public Services Ombudsman in Wales Bill [HL]: Government Responses to the Second and Third Reports of Session 2004-05	HC 433
Second Special Report	Police Service, Crime and Anti-Social Behaviour in Wales: Government Response to the Committee's Fourth Report of Session 2004-05	HC 514

Oral evidence

Taken before the Welsh Affairs Committee on Tuesday 18 October 2005

Members present:

Dr Hywel Francis, Chairman

Mr Stephen Crabb
Nia Griffith
Mrs Siân C James

Mr David Jones
Hywel Williams
Mark Williams

Witnesses: **Mr Alan Cogbill**, Director, **Mr Cedric Longville**, Legal Adviser, and **Ms Zenny Saunders**, Head of Legislation and Strategic Policy Branch, the Wales Office; **Mr Hugh Rawlings**, Director, Local Government, Public Service and Culture Department, **Ms Kate Cassidy**, Head of Policy, Constitutional Affairs Unit, and **Mr Keith Bush**, Legislative Counsel, the Directorate of Legal Services, Welsh Assembly Government.

Q1 Chairman: Good morning. May I welcome you to the Welsh Affairs Committee and ask you to introduce yourselves, please.

Mr Cogbill: Certainly. I am Alan Cogbill, Director of the Wales Office—a role I have held since the middle of last month, so I fear members of the Committee will prove to be much better versed in what we discuss today than I am. On my right is Hugh Rawlings, who is a director in the National Assembly for Wales. I can say a little more later about how the Wales Office and National Assembly are working together on this. Beyond him is Kate Cassidy, who, as head of the Constitutional Affairs Unit within the National Assembly is, in effect, the manager for the project for the new Government of Wales Bill, following the White Paper, and Keith Bush, who is from the Assembly's legal services. On my left is Cedric Longville, who is legal advisor in the Wales Office, and Zenny Saunders, who is the head of the policy legislation team responsible for the Bill and, before that, the White Paper.

Q2 Chairman: Could I begin with a question on the interrelationship between the White Paper and the proposed Bill. Which one of you will be the team leader when the Bill is published? Will it be run from the Wales Office or from the Welsh Assembly Government?

Mr Cogbill: The team leader will be Kate Cassidy. We have in place an arrangement under section 41 of the last Government of Wales Act which enables the Assembly's officials to act for other public bodies, and they will be supporting the Secretary of State for Wales and the Wales Office. So it will be the Secretary of State for Wales' Bill, and the Wales Office will provide support, accountable to me, but we shall enjoy the help, advice and a substantial amount of the major work of supporting the Secretary of State and ministers here from colleagues in the National Assembly.

Q3 Chairman: The White Paper sets out the Government's proposals for a new devolution settlement for Wales. Why was it not possible to produce a draft Bill, which would allow for greater

pre-legislative scrutiny and for a more collaborative approach to refining the devolution settlement for Wales?

Mr Cogbill: There is one strong reason why it was necessary to proceed in this way, and there is something I would like to say as to why I think that will not disable parliamentary scrutiny. The compelling reason was that the intention is to give effect to the proposals in time for the new Assembly to be elected in 2007 and to come into existence on a reformed basis. That entails having Royal Assent legislation during 2006. The White Paper was published early in the present Parliament, so the total interval available would not have allowed time for a draft Bill. The reason why I think that will not disable parliamentary scrutiny is that it is worth remembering that the Bill is essentially enabling and empowering, and for the most part, to the extent that they do not restate with modifications parts of the former Government of Wales Act, will have provisions for Orders in Council to confer greater legislative competence on the Assembly, and, ultimately, possibly after an affirmative vote in the referendum, to confer primary legislative competence. But those are subsequent stages and there would be ample opportunity for parliamentary scrutiny at each of those successive stages.

Q4 Chairman: When the Bill is introduced, will it be a brand new Bill that draws together the Government of Wales Act 1998 and the proposals in the White Paper, or will it be in the form of an Amendment Bill?

Mr Cogbill: It will be offered as a coherent and freestanding Bill which restates, with necessary qualifications, things from the previous Government of Wales Act, so that you will be able to go to the new Act and find everything there in a self-sufficient way. That is the intention.

Q5 Chairman: The 1998 Act is generally considered to be a complicated Act and sometimes confusing to digest. If the Government introduces an Amendment Bill, how will you be able to ensure that it will represent clear legislation that is accessible to the lay reader?

18 October 2005 Mr Alan Cogbill, Mr Cedric Longville, Ms Zenny Saunders,
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Mr Cogbill: That is the primary motivation behind our intention that I have just mentioned to produce a coherent and freestanding Bill. That will repeat, in some measure, with very slight modifications, material from the previous Government of Wales Act. But we would not want to make small textual amendments, so that only by looking at the 1998 Act could you understand the effect of the new Act. It will be intended to be a cornerstone piece of legislation which will be accessible to everyone.

Q6 Mr Jones: Mr Cogbill, the White Paper says that the terms First Minister and Assembly Ministers will be enshrined in the statute. Will the terms National Assembly for Wales and Welsh Assembly Government also be similarly enshrined or will there be some other expressions used? Will there be powers for the Assembly to change their names if they seek it at some later stage?

Mr Cogbill: I envisage that the Bill will start rather as the present Government of Wales Act does, saying that there shall be an Assembly for Wales to be known as the National Assembly for Wales. To the extent that that reappears in the next Bill, it will establish the name of the National Assembly. One of the things which the National Assembly plainly will not have power to do is to modify the new Bill once enacted, because that will be a foundation document for it and its role and powers and so on. To that extent, that will be set in statute.

Q7 Mr Jones: The First Minister, I see from the Bill, will be appointed by the Crown on the nomination of the Assembly. Will the Assembly feel they have the power to dismiss the First Minister; for example, on a vote of confidence or in some other way?

Ms Cassidy: We envisage that if there were a vote of no confidence in the Welsh ministers (ie, the whole collective Cabinet) that would trigger a process where the ministers would resign. But clearly there has to be provision for one minister to carry on in office, because the officials who are acting derive their authority from the minister. We therefore envisage that the First Minister would remain in office until he was replaced but the very act of a vote of no confidence would have triggered the resignation of the rest and would trigger the process for identifying a new First Minister.

Q8 Mr Jones: The White Paper appears to be giving the Assembly a greater role in conducting its own affairs in relation to its Committees. Would there be sufficient flexibility built into the system to allow for the Assembly to choose for itself how best to scrutinise the Executive in Wales?

Ms Cassidy: Yes.

Mr Cogbill: One of the criticisms made of the present Act, I think rightly, is that it is somewhat too prescriptive and rather inflexible about matters which ought really to be in the competence of the Assembly to adjust. So that is its intention.

Mr Rawlings: Of course one of the criticisms of the 1998 Act is the requirement that the relevant minister should be a member of the subject

committee and the intention is that that requirement will be deleted. So committees will be able to take evidence or call ministers before them, but those ministers will not be members of the committee.

Q9 Nia Griffith: I would like to talk about the implications for staffing. You talked about a formal split between the staff who service the Welsh Assembly Government and those who service the Assembly. How will the Bill reflect the potential for increased staffing resources? Linked to that is the whole enhancement of the role of parliamentary scrutiny. Again, there are going to be implications for parliamentary service, and, again, how is the Bill going to address these issues of the increased need for resources in staff?

Mr Cogbill: In part this is about defining the roles separately of people who will be supporting separately the Government in the Assembly and the Assembly itself. It is a fair point that any increase in the volume of work through the Assembly—and if it is legislating in new areas, that would be new work—will require some modest staff addition.

Mr Rawlings: I think to some extent this is a question of staff training for members of AGS, because, just as the Assembly will become more clearly and overtly a legislative body than it has been hitherto, so the staff support for Assembly members will need to reflect that. As I say, that may require some additional training provision for them.

Q10 Mark Williams: I am turning now to the Standing Orders. The White Paper talks about the Secretary of State taking power to make a new set of Standing Orders for the Assembly. What is the rationale behind the Secretary of State presiding over that process? Why is that the case? Of particular importance, what is the role of the National Assembly in those discussions and in that process? What would be the role of the Welsh Assembly Government in that process. If they are to have a role, does that not raise the spectacle possibly of a clash of interests?

Mr Cogbill: I think your last question illustrates the reason ultimately why we felt it right that the Secretary of State should have the power to make the Standing Orders, that ultimately there needs to be the possibility of someone away from the proceedings themselves deciding. There has to be a capacity to press to decision on what Standing Orders should be. That is the reason why the Secretary of State is there, to make the Orders. The Secretary of State would be advised what Orders he or she might make. Our expectation is that certainly the present Secretary of State would rely heavily on advice from the Assembly, and, if there were agreement within the Assembly, I think it extraordinarily unlikely that he would want in any way to modify what was coming forward from the Assembly. I think that probably deals with the clash of interest point as well, that we would look, first of all, for the dispute to be resolved within the

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Assembly and then the Secretary of State would be there to be able to decide if it was for some reason not reconcilable.

Ms Cassidy: Clearly, it is the Secretary of State's Bill and he would want to see it through. He would want to see that the final bit of the jigsaw there is put in place properly, because an Assembly cannot function properly without Standing Orders that reflect the content of the Bill. But if the Assembly itself is able to agree what sort of Standing Orders it should have, then, from statements that have been made in the Assembly reflecting discussions with the Secretary of State, I do not think the Secretary of State would have any objections to taking the view of the Assembly and taking what the Assembly wanted. If the Assembly was agreed on what it wanted, then I think the Secretary of State would want to accept that. It has to have substantial support clearly from the Assembly. That is one of the points in response to the consultation, is it not, that representations were obviously made that the Assembly should have a say in the shaping of the Standing Orders after 2007?

Mr Rawlings: I think it might help the Committee if they were to distinguish between the drafting or the preparation of the Standing Orders and the formal making of them. The Secretary of State I think would be expected to make them but the extent to which he would be involved in the drafting or the preparation would be, I suppose, in inverse relationship to the degree of agreement in the Assembly. If there was a full degree of agreement, then the Secretary of State's job would be very easy.

Mark Williams: Thank you. That clarifies the situation, particularly that last comment.

Q11 Chairman: If there is a difference of view, at the end of the day the Secretary of State will respect the will of the Assembly.

Mr Rawlings: If there is agreement in the Assembly, then the Secretary of State, we anticipate, would want to make the Standing Orders very much in line with that agreement. The overriding concern is that there must be a set of Standing orders available to the Assembly from the beginning of the new regime.

Q12 Mrs James: In my question I would like to concentrate on the memoranda of understanding. Currently Government departments have a series of memoranda of understanding between themselves and the National Assembly. Would a new set of memoranda be needed to reflect the new settlement? Would there be a need to have separate ones between government departments and the Assembly as well as the new Welsh Assembly Government? Would those memoranda of understanding be put on a statutory basis?

Mr Cogbill: I will answer the last question first, if I may. No. These are essentially administrative arrangements between departments and the devolved Government. Perhaps I could ask Keith to elaborate.

Mr Bush: It is undoubtedly the case that new memoranda of understanding or concordat (however you choose to call them) will be required. For example, one of the things that the present memorandum of understanding deals with is consultation on the part of the UK Government with the Assembly Government in relation to legislative proposals that will affect Wales. If the Assembly acquires enhanced legislative powers, clearly that will become a two-way street instead of a one-way street, as it were, so there undoubtedly will be the need to revisit the memoranda and to revise them. They will continue as they are at the moment to be essentially memoranda as between the two executives; in other words, between the Assembly Government and the UK Government, dealing with the day-to-day running of government in relation to Wales and the UK respectively. They are not legal documents (in the sense that they explicitly say they are not binding in law), and for that reason it will neither be necessary or appropriate that they should be referred to on the face of the legislation.

Q13 Hywel Williams: I would like to ask you some questions about Orders in Council. The White Paper provides that Orders in Council relate to "specific matters or within defined areas of policy within the fields in which the Assembly *currently* exercises functions." Does this phrase describe the current scope of the devolved fields (with the possibility that others may be added) or to prescribe that they shall not extend beyond those set out in schedule 2 of the Government of Wales Act 1998?

Mr Cogbill: The White Paper had an architecture of three stages. Stage 1 was possible now, under current law, which was the proposition in new Bills of framework provisions, which would give the Assembly greater legislative discretion in the application, whatever the main Bill said. There is an example of what we have in mind there, published last week in the NHS Redress Bill: in clause 17 there is a provision which is a framework provision, and that I think begins to set out how we see enhanced competence for the Assembly coming into being and the kind of broad restrictions that would apply: for example, no tax raising power; no new criminal offences. That is stage 1 of the architecture. Stage 2 is to enable Orders in Council to be made, subject to affirmative resolutions in both Houses of Parliament, which would confer a legislative competence on the Assembly to make measures in areas where now there exists an executive competence which has been conferred on the Assembly corporately by transfer of functions Orders to date and other pieces of legislation. The intention behind the second phase, which applies from 2007, is that we will take that whole range of single executive powers and try to build upon them a categorisation, if I may put it that way, of areas where as of now, there is specific statutory reference and that power has gone to the Assembly as an executive power. Within the fields you mention, we should construct some general headings within

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which the Assembly, subject to the Order in Council, would be able to legislate, so to make a more coherent legislating power, if you like, by Assembly measure. Then there would be the third stage, which would be after an affirmative referendum, which would be for primary competence. But the answer to what you are driving at is that we will take the present executive powers, and any others that may be added over the next couple of years, and construct upon them a series of categories within which the Assembly would be given power. In each case, that extension would be by Order of Council and that would be subject to affirmative resolutions in both Houses.

Q14 Hywel Williams: Will it be possible for individual Assembly members (with the agreement of the National Assembly) to initiate requests for Orders in Council? Will Assembly committees also be able to do so?

Mr Cogbill: Yes. The fate of any such request will no doubt depend on the degree of Assembly support, the degree of Assembly Government support and the view of the Secretary of State. But, yes, we do not see any need to restrict it.

Q15 Hywel Williams: Paragraph 3.33 of the White Paper states that the Government believes that “Parliament will continue for at least some years into the future to enact ‘Wales-only Bills’ at the request of the Assembly.” Can you explain the differences in legislation that would need both Orders in Council and Wales-only Bill for the next few years?

Mr Cogbill: I find that quite hard to explain, because, as Nick Ainger was reflecting last night on the Transport Bill, that is the kind of thing which certainly potentially could be dealt with under the proposed Order in Council procedure and by way of Assembly measure hereafter. I think the point we are making here is simply that it will be some time before the new regime established under Orders in Council will come into place, and obviously we cannot have an interruption in the flow of necessary Wales-only measures. So there will be a mix of the two, but there will not be any fine distinction between the two kinds of legislative process.

Mr Longville: I think there may be occasions when a Wales-only Bill will be needed because it will cover non-devolved matters as well as devolved matters.

Mr Cogbill: Indeed.

Mr Rawlings: I think too that the White Paper is at pains to make the point that what is being done here is a rebalancing of the legislative contribution made respectively by Parliament and the Assembly to the law in Wales. Simply because there is a proposal for enhanced legislative competence for the Assembly should not be allowed to blind one to the fact that Parliament will continue to make law for Wales. In a sense, paragraph 3.33 is just reiterating that point.

Q16 Chairman: Stage 1 of the new legislative proposals, as I understand, will give Wales greater legislative discretion, but how is this going to be monitored by UK government departments? There

is a feeling today that there is some degree of inconsistency of understanding—and that is putting it at its most generous, I suppose—by UK government departments of what the nature of devolution settlement currently is.

Ms Saunders: I will outline some of the processes we are going to put in place to pass the message on about the new legislative process. We are putting together what we call a Devolution Guidance Note which goes out to all Whitehall departments. The Secretary of State is currently seeking clearance on that and it will then go out. That will be like the bible or the first pages to which any government department will turn in looking at how to engage Wales in any legislation that they are bringing forward. Kate gave a presentation to a Whitehall contacts group to pass over the message initially. We are also engaging with the devolution unit based in the Department of Constitutional Affairs, and they will help to spread that message as well. On top of that, we have set up a legislation branch within the Wales Office as a focal point for any government department, so that they know they have one unit to contact if they need any advice, and there is a similar unit established within the Assembly that can give advice internally and also externally to government departments.

Ms Cassidy: That is right. The Constitutional Affairs Unit in the Assembly Government is also liaising with departments in the Assembly that have an interest in England and Wales legislation, to discuss with them what they would be looking for in the Welsh clauses of those Bills.

Q17 Chairman: There is a lot of information there that is very helpful. Could that be summarised into a statement ensuring that the approach would be included in the explanatory memorandum to the Bill?

Ms Saunders: It is rather an internal working practice. This is what we are going to set up at the moment, but you may find in time that we develop different ways of engaging with Whitehall departments. We could put a general note out as to the set up that we have at the moment, but that may develop in time.

Ms Cassidy: Of course, that is a stage that will not be included in the Government of Wales Bill because the Government of Wales Bill will be dealing with separating the Assembly, giving it enhanced legislative competence and setting the framework for a referendum on primary powers and primary competence. But the business of giving framework clauses in individual bills is something which is already in train. As Alan has mentioned, the NHS Redress Bill is a recent example.

Q18 Chairman: I think I understand everything you have said, but it sounds to me as if we are talking to lawyers. You made the point at the very beginning that it is important for all this to be clearly understood by the public. An internal memorandum

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is one thing but how this is perceived and understood by the people of Wales is something altogether different. Do you get the drift of my question?

Mr Cogbill: Yes, indeed. I smile, only because this is a bit of an issue for England and Wales' legislation. I used to have some dealings with the Law Commission who had exactly that set of concerns about how the people were supposed to understand what the statute book was at any point. We cannot get over the fact that if you have different bodies passing legislation applicable to different parts of the United Kingdom there may be a difference of approach, there may be an inconsistency, if you like, but that is inherent in the idea of devolution. If you are asking, "Is there any one place you can go to?" then, presently, if you try to work out what executive powers the Assembly has, you can start with the transfer of functions Order (which runs to about 30 pages and is quite hard to follow) and that is not even a comprehensive statement of law. I think I am saying that you are on a point which is, if I may say so, a very good point about the body of law in any part of the kingdom; I do not think it is one which we could offer to solve by simple memorandum. I think it is something where we expect legislation, as far as possible, to be created by those responsible in a way which allows you to see the cumulative impact. To take one example: our thoughts about Orders in Council for enhanced legislative competence of the Assembly are that those should work in a way which steadily assembles a schedule to the Bill, so that you do have a code, if you like, of what has been conferred on the Assembly. I think there are a number of things we can do which make small steps in the direction you mention.

Ms Saunders: The measures that I was outlining just now are for internal use in engaging other departments. When the Bill goes through we will look at how much information we can put out to the public on our websites, both the Wales Office website and the Assembly website. We will look at what guidance can be issued at that time.

Q19 Mr Crabb: Returning to the theme of Orders in Council, could you provide a bit more detail on the Orders in Council procedure and particularly on how those Orders will be scrutinised here at Westminster. Will it be a simple yes/no approach or will there be opportunities for Orders to be amended before they are approved?

Mr Cogbill: Ultimately there will be an Order which is not amendable, but plainly it is our intention that there should be full scrutiny of the draft of that Order in every case. How Parliament chooses to scrutinise such drafts is a matter for you as parliamentarians, and I do not want to presume to lay down any principles around that. The Secretary of State is quite clear that in every case there will be a draft. I would imagine that this Committee, for instance, would have a substantial interest and would play potentially quite a key role for Parliament as a whole in examining in some depth what was in that draft Order.

Mr Longville: The only constraint is that if amendments to a draft Order were agreed, then they would have to be approved by both the Assembly and by Parliament. For instance, if the draft started its life at a meeting of the Assembly and was approved at the Assembly, and then as a result of pre-legislative scrutiny it was thought appropriate to amend that draft, the draft would need to go back to the Assembly for approval—as well as parliamentary approval of course.

Q20 Mr Crabb: Envisaging a case where the Secretary of State were to refuse an Order in Council, the Secretary of State would then write to the Welsh Assembly Government informing them of that fact. Would it not be more appropriate if he or she were to write to the Presiding Officer?

Ms Cassidy: It is government to government communications. That seems to be the appropriate way of maintaining it. The Secretary of State would normally write to the First Minister on anything.

Mr Bush: I think the thinking would be that it would be a duty on the First Minister then to lay the Secretary of State's reasons before the Assembly. The First Minister would be conveyed the information from the Secretary of State but it would be going pretty directly to the Assembly so that they could consider the reasons given by the Secretary of State.

Mr Rawlings: I hope the First Minister and the Secretary of State would not regard this as disparaging, but it is a sort of post-box operation: the Assembly makes a decision; the First Minister will convey that message to the Secretary of State; the Secretary of State responds to the First Minister, who then informs the Assembly.

Q21 Mr Crabb: Has anyone in Government undertaken an assessment of how many Orders in Council there might be in the course of a year?

Mr Cogbill: We have tried, but it is a matter of speculation. You could look at the number of Wales-only Bills which might have been suitable for treatment under an Order in Council. You might think that would end up at perhaps three or four a year—more initially, I suspect. The effect of Orders in Council would be cumulative. I think we would expect more in 2007 and then eventually we would go over a peak and have a diminishing number. But it is very difficult to go much beyond that.

Mr Rawlings: I think the working assumption is that an administration coming in after an Assembly election would come in on the basis of a manifesto or an agreed programme for government and that might generate early requests for Orders in Council in the first half of the Assembly and then the second half of the Assembly will be delivering the measures authorised by the Orders in Council.

Q22 Mark Williams: Just returning to the point you made about notifying the Presiding Officer or the Government, could we reflect on the answer you gave to an earlier question from Mr Williams about individual members initiating Orders in Council.

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You talked about post-box mechanisms, and perhaps it is worth reconsidering that aspect, in view of where the Orders in Council have emanated.

Mr Rawlings: Obviously, we can give thought to that. But I think the point is this: we took Mr Williams's question to mean who would be able to initiate the process for creating an Order in Council. He was probing on: Are you going to limit it to the Welsh Assembly Government?—to which the answer was no. But, whether it comes from the Welsh Assembly Government or from a committee or from an individual member, at the end of the day it would only go forward to the Secretary of State if the Assembly had endorsed it by resolution, and at that point someone has to act on behalf of the Assembly. The fact that the process was initiated by an individual member is, in a sense, neither here nor there, because, once the Assembly endorses it by resolution, the Assembly owns it and the First Minister is acting on the Assembly's behalf in then handling the correspondence.

Q23 Chairman: Could I turn to proposals to change the electoral process. Is there a statutory responsibility to consult with the Electoral Commission before the Government undertakes any electoral change at all?

Mr Cogbill: Not, I think, in the terms in which you put it. The Government proposed the legislation only about five years ago which established the Electoral Commission in this form. Obviously the Secretary of State wants to hear the views of the Electoral Commission on any change in electoral arrangements and also of course in the quality of the elections and on measures that might improve turnout and public interest and support in elections. I think the answer, strictly speaking, is no, but it does not matter whether he has a duty or not if he wants to hear their views—and, yes, of course he wants to hear their views and consider them.

Q24 Chairman: If I could turn to the number of Assembly members. There has been a good deal of debate and discussion about increasing the size of the Assembly in the light of increased responsibilities and powers. Ignoring the merits or otherwise of such an increase, would there be provision in the Bill to allow for such an expansion in membership?

Mr Cogbill: We are not proposing that. I believe the First Minister at the time of the White Paper said he did not think there was any necessity to increase the number. Guided by that, the Secretary of State, I think, is not looking to put in a provision which would allow that.

Q25 Chairman: Following the consultation, do you have more details about the procedure for triggering a stage 3 referendum?

Mr Cogbill: I do not think so. I am not sure what you had in mind procedurally.

Ms Saunders: There have been various recommendations made in the process of consultation. I think we had about 82 responses. From that, the Secretary of State will be considering

any recommendations he may want to take on. The White Paper is essentially based on a number of manifesto commitments. We do not envisage those changing, but obviously the Secretary of State will be able to update you if he is going to take on any further recommendations.

Q26 Chairman: How much detail will the Bill include, given that this will be a post-legislative referendum?

Ms Cassidy: Obviously the Bill will translate the commitment in the White Paper, so the White Paper does give a fair bit of detail about the triggers for a referendum and that will be replicated in the Bill. There is also the Political Parties and Referendums Act 2000 which lays down enduring rules about the conduct of referenda, and so the provisions of the Bill will be largely referring to that Act and saying it will be done like that.

Q27 Chairman: Some of us are old enough to remember the trauma after the “No” vote in 1979. How will the Bill provide for a possible “No” vote in such a referendum?

Ms Cassidy: Clearly the objective of having various triggers for a referendum is that people should be fairly confident that if there was a referendum there would be a “Yes” vote. But if there were a “No” vote, then it would leave the Assembly with its enhanced legislative competence, and we envisage that the Bill would be drafted so as not to rule out a referendum at some point in the future. So there will be no timescale or limits set. The effect of a “No” vote would be simply that the Assembly carried on as it was.

Q28 Mr Jones: Does that mean there is the potential for a succession of referenda built into the Bill?

Ms Cassidy: In reality, remembering that it is not only the Assembly that would have to vote overwhelmingly for a referendum but also the Secretary of State would have to decide that he wanted to put forward a referendum Order, the chances of people wanting to do that again in short order, if ever there were a referendum vote and it failed, we think would be limited by political reality.

Q29 Mr Jones: The point I was making is that it is not just one bite of the cherry. The Bill would comprehend the possibility of a further referendum even after a “No” vote.

Mr Cogbill: Unless the Bill said: “You are allowed only one referendum on this,” that would be the position. But, exactly as Kate says, I think people will reach a judgment, going through the preceding steps to launch a referendum, whether there is any point. The Bill would not seek to prohibit any referendum, after a first one, for all times.

Q30 Chairman: Do you feel confident enough to say that the administrative arrangements of the Bill are sufficiently strong and robust to survive a period of political cohabitation? Or are you relying too much on goodwill between Cardiff and Whitehall?

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Mr Cogbill: The Bill will set out the new powers and procedures and so on and allow the Assembly to gain competencies, subject to Parliament's agreement, and those will then subsist whatever the change of political party that might happen. There is experience of different administrations, different public bodies of different political complexion, working together. If one thinks around England and central and local government, that may not be the happiest parallel, but usually ways are found of doing that. Your question was about administrative arrangements and the robustness of those and the answer to that is, "Yes, we are confident of that." Of course, we cannot remove the possibility of political disagreement; nor would we seek to do so.

Mr Rawlings: If one is focusing on the administrative arrangements, the staff supporting the UK Government will be civil servants, as, indeed, will Welsh Assembly Government staff remain civil servants. That may assist maintaining the dialogue, regardless of the political complexion of the respective governments of the day.

Mr Longville: In terms of the Order in Council process, the Secretary of State will have to give his reasons if he decides not to proceed with an Order in Council, and it might be rather difficult for him to do that if as a result of pre-legislative scrutiny it was clear that the consultation pointed towards the terms of the Order in Council.

Chairman: Thank you very much for your evidence.

Written evidence from Professors David Miers, Keith Patchett and Richard Rawlings²

**WHITE PAPER "BETTER GOVERNANCE FOR WALES": SUBMISSION TO
WELSH AFFAIRS COMMITTEE**

INTRODUCTION

1. This joint submission comments principally upon issues in the White Paper that we consider to be controversial or may require clarification in the Bill that gives effect to its proposals or to have relevance for the work of Parliament. Our principal focus (Part 1) is on the proposals to enhance the law making powers of the National Assembly for Wales. However, in Part 2 we discuss a number of other concerns to which, in our view, the White Paper gives rise.

PART 1: LAW MAKING POWERS

2. We look in turn at each of the proposed changes designed to enhance the Assembly's legislative powers.³ Although the general thrust of these proposals is to be welcomed, at a number of points further clarification is needed as to intended practice in order to determine the extent to which they will achieve the desired enhancement.

A. *Developing the current settlement: granting wider legislative powers*⁴

3. The White Paper anticipates that future legislation will grant to the Assembly more permissive legislative powers in a more consistent way, for example by the use of framework provisions. While this will advantageously enable the Assembly and Welsh Ministers to develop the regulations necessary for more integrated policy-making and more suitable administrative arrangements, the nature and extent of delegated powers will remain the subject of negotiation with the line departments in Whitehall. The reluctance of some Ministries in the past⁵ to transfer extensive legislative powers may be less evident in the future at least with respect to powers to make rules to further the objectives of the Act or as to how the statutory scheme is to be implemented. However, it may well continue with respect to proposals from Cardiff for powers to enact divergent policies or substantive law for Wales, especially where Whitehall considers that the requirements of a unitary jurisdiction call for uniform legislation, which remains a central government responsibility.

4. A new and potentially contentious issue, presumably to be settled in each Bill, will be whether the fresh powers are to be conferred on Welsh Ministers or on the Assembly itself. The White Paper contemplates that the "important" law-making powers will be given to the Assembly, while the more conventional regulations of an executive character will go to the Welsh Ministers.⁶ This prompts two linked questions. The first is how to formulate criteria that will satisfy Parliament that the scope of the powers transferred

² Respectively of Cardiff University, the University of Wales and the London School of Economics.

³ White Paper ("WP"), paragraphs 1.19–1.26 and c 3.

⁴ WP, paragraphs 3.9–3.13.

⁵ See, eg Keith Patchett, "Pragmatism or principle", in R Hazell & R Rawlings (eds), *Devolution, Law making and the Constitution*, (Imprint Academic, 2005), c 4. Parliamentary committees have commented forcefully on this matter; see House of Lords Select Committee on the Constitution, *Devolution: Inter-Institutional Relations in the United Kingdom* (HL 28 of 2002–03); and Welsh Affairs Select Committee, *The Primary Legislative Process as it Affects Wales* (HC 79 of 2002–03).

⁶ WP, paragraph 2.12.

either to those Ministers or to the Assembly is appropriate. The second is how to ensure that there is some equivalence in that scope across different subject areas. This will be of immediate relevance on the enactment of the Bill creating the new institutional configuration, as the existing legislative functions will need to be reallocated as between the Assembly and the Welsh Ministers. We comment further on this second point in section 15.5.

5. If greater consistency in allocating law-making powers is to be achieved as is the stated intention,⁷ the following questions must be addressed:

- what criteria should be applied to determine whether the new powers are “important” and thus conferred on the Assembly rather than the Welsh Ministers?
- where powers are considered to be sufficiently important to be conferred on the Assembly, will provision be needed to prohibit further delegation by the Assembly to the Welsh Ministers?
- where powers are conferred on those Ministers, should Parliament include provision for affirmative and negative resolution procedures to be applied by the Assembly to Ministerial instruments (or at least the former), depending on their potential impact, leaving it open in other cases for the Assembly to determine whether such requirements are appropriate?
- what new procedures are needed to ensure consistency in the way Bills treat the conferment of powers?

6. On the question of criteria for importance and for the inclusion of scrutiny requirements, there is a case for these to be formally articulated. Obvious possibilities include Devolution Guidance Notes or the Cabinet Office’s *Guide to Legislative Procedure*, drawing on the criteria and experience of the House of Commons Regulatory Reform Committee⁸ and the House of Lords Delegated Powers and Regulatory Reform Committee (DPRR).⁹ So for example, the criteria, under a general test of “appropriateness”, could be based on such considerations as the following:

- the potential ambit and impact of the ensuing instruments;
- the possibility of significant conflict between personal freedoms and securing the policy objectives;
- the extent to which individuals are likely to be prevented from continuing to exercise a right or freedom that they might reasonably be expected to continue to exercise;
- the likelihood that significant charges would be imposed under the power;
- the possibility that ensuing instruments could be given retrospective effect;
- the extent to which the power authorises the repeal or amendment of existing statutory provisions (ie Henry VIII powers); and
- where the Henry VIII powers are to have prospective effect, the kinds of matters or cases for which their future use that could now reasonably be expected.

7. As to new procedures to secure consistency, there is a case for a more systematic “devolution audit”¹⁰ both during the development and the Parliamentary stages. The Cabinet’s Legislative Programme Committee should take responsibility for monitoring the way permissive powers are conferred. In particular this should require, by stipulations in the Devolution Chapter in the *Guide to Legislative Procedure*, that the sponsoring department show how the criteria have been applied and that appropriate consultations on this specific part of the Bill have taken place. At the Parliamentary level, scrutiny of the way this matter is being treated might be made the responsibility of the House of Lords DPRR Committee that has the most relevant experience for this purpose. However, the Welsh Affairs Committee and the House of Lords Constitution Committee could undertake periodic enquiries into how successfully consistency has been achieved.

B. *Transfer of powers by Orders in Council*¹¹

8. The proposal to transfer legislative powers by Order in Council is both ingenious and innovative.¹² However, some reservations may be expressed about the further invasion of executive activity into the legislative processes and the added complexity that will be brought both to law making as it affects Wales and generally to parliamentary procedures.¹³ As might be expected from a new device, its successful implementation will depend in part on matters that have yet to be fleshed out and upon continued good will

⁷ WP, paragraph 3.12.

⁸ See http://www.parliament.uk/parliamentary_committee/regulatory_reform_committee/regulatory_reform_criteria.cfm.

⁹ See http://www.parliament.uk/parliamentary_committees/dpr.cfm and Eighteenth Report, *Special Report on the Work of the Committee*, (2004–05, HL Paper 110). See D Miers, “The Deregulation Procedure: an Expanding Role” [1999] *Public Law* 477–503.

¹⁰ See Alan Trench, *Better Governance for Wales; An Analysis of the White Paper on Devolution for Wales*, ERSC Devolution Policy Paper No 13 (2005), paragraphs 2.10–2.12.

¹¹ WP, paragraphs 3.14–3.21.

¹² See further, Richard Rawlings, “Law Making in a Virtual Parliament: The Welsh Experience” in R Rawlings and R Hazell (eds), note 4 above.

¹³ White Paper gives no indication that alternative solutions were considered, eg an annual Wales-only Miscellaneous Legislative Powers Bill that could have been processed through pre-legislative scrutiny and the usual legislative procedures in much the same time as it appears the Order in Council procedures will require.

between the administrations in Cardiff and London.¹⁴ It may be asked whether the proposed scheme will be sufficiently robust to operate effectively in a period of cohabitation between administrations of different political colours.

8.1 Uncertainty of scope

The forthcoming Bill must specify the precise fields that are to be within the scheme. The White Paper provides that Orders in Council are to relate to “specific matters or within defined areas of policy within the fields in which the Assembly *currently* exercises functions”¹⁵. It is unclear whether this phrase is intended merely to *describe* the current scope of the devolved fields (with the possibility that others may in future be added) or to *prescribe* that they shall not extend beyond those set out in Schedule 2 to the Government of Wales Act 1998.¹⁶

If this phrase is intended only to describe the present list of fields, some mechanism (eg Order in Council with appropriate consultation arrangements) for adding to it will be necessary if Orders in Council are to authorise legislation for a policy area that is outside that list. We may note that under the Fire and Rescue Services Act 2004, functions were transferred¹⁷ that do not fall within any of the currently devolved fields, suggesting that an additional field is currently operative, though what that field comprises is unclear. This transfer raises a particular question as to the exact field that embraces fire services and a more general, and substantial question, whether further fields are to be created. Such questions go to heart of the settlement and have not been ventilated in the present debate.¹⁸

If, on the other hand, it is the Government’s intention to fix the Order in Council scheme to the fields at present listed in Schedule 2, will transfers of legislative functions outside those fields continue to be possible under the “developed” settlement? The use of Acts of Parliament or Transfer of Functions Orders for that purpose will simply perpetuate the existing complexities by which powers are transferred to the Assembly, and which have been the subject of frequent and adverse comment.

The formulation of the powers conferred in these Orders in Council will need to be carefully drafted to ensure that they satisfy the criteria and restrictions relating to “specific matters” and “policy areas”.¹⁹ In particular, we foresee difficulties in defining them so that they do not authorise legislation that encroaches upon the powers that are the responsibility of the UK Government or that contains provisions belonging to non-devolved field.

8.2 The form of the request and of the Order in Council

Conflicting views have been expressed as to the nature of the information to be contained in Assembly requests and the Orders in Council. Given likely Parliamentary expectations, as evidenced by the approach of the House of Lords DRR Committee, clear indication will be required of the reasons, purpose and intended use for which the particular powers are being sought. Such information could be provided in explanatory documents. Equally, it could be contained in the instruments themselves, thereby introducing legal limitations upon the powers granted, which could be enforced by judicial review. Unlike powers conferred in a Bill, which are construed in the context of its overall purpose and its text (possibly, subject to a *Pepper v Hart* statement), powers conferred by an Order in Council will not necessarily be constrained by the content of a particular Act.²⁰ For that reason the draft Order may present a greater parliamentary challenge.

It may be questioned whether it will be enough merely to state the topics on which legislation can be made and to refer to the statutes that may be modified by the Assembly. It is more probable that the relevant Whitehall department will insist upon restrictions to confine the legislative activity to the permitted scope and an itemised list of the statutory provisions that can be modified. The more elaborate the instrument, the greater the possibility of legal challenge on vires.

8.3 Henry VIII powers

Orders in Council will include powers for the Assembly to amend, repeal and add to existing legislation where necessary to enable it to deal comprehensively with the policy area in question. Such powers are intended to be “general and continuing”²¹ and could extend to the power to modify legislation enacted subsequent to the Order. Given reservations about the grant of these Henry VIII powers, notably expressed

¹⁴ As signalled by House of Lords Select Committee on the Constitution, *Devolution: Inter-institutional Relations in the United Kingdom* (HL 28, session 2002–03).

¹⁵ WP, paragraph 1.25, italics supplied.

¹⁶ Government of Wales Act 1998 (“GWA”), s 22(2) and Schedule 2.

¹⁷ As authorised by GWA, s 21(b).

¹⁸ The Richard Commission declined to make recommendations for new fields principally because significant extension of functions carries major resource and policy implications: *Report of the Richard Commission on the Powers and Electoral Arrangement of the National Assembly for Wales* (“Richard Report”), chapter 9, paragraph 62.

¹⁹ WP, paragraphs 2.25 and 3.17–3.18.

²⁰ See examples in WP, paragraph 3.18.

²¹ WP, paragraph 3.21.

by the House of Lords DRR Committee, it may be expected that such provisions will require strong justification and may well be closely circumscribed. This will be particularly so if line departments are concerned lest future use of the powers intrudes into areas of substantive law that are thought to be properly a matter for central government Ministers.

8.4 Restrictions

Further restrictions seem desirable in two respects. First, powers granted to the Assembly should not be capable of further delegation by the Assembly to the Welsh Ministers. This level of law making properly belongs to elected representatives. Secondly, powers in Council, once granted, should not be withdrawn or further modified by Parliament without the consent of the Assembly, as is the procedure at present for varying or revoking Orders transferring powers under GWA.²²

8.5 Right of initiative

The White Paper speaks of the Assembly's request to the Secretary of State, but is silent as to where the right to initiate proposals for Orders in Council will lie. It seems unlikely that this will rest principally with the Assembly itself, though no doubt the Standing Orders will provide opportunities for AMs to bring proposals forward.²³ Rather, it seems likely that they will be part of the Welsh Ministers' annual legislative programme²⁴ and, following plenary debate and possible amendment by the Assembly, will be incorporated into the formal request. Such a structured process seems more probable rather than one that allows proposals to be made irregularly throughout the Assembly session. It allows more efficient timetabling of the Assembly's work and, possibly too, of the subsequent parliamentary consideration.²⁵ This suggests that if the powers with respect to more than one policy area are sought, a composite Order in Council, rather than a series of individual instruments, may be prepared. The issue as to how many Orders in Council there may be annually and how substantial they may be has important implications for the work of Parliament.

8.6 Parliamentary consideration

The White Paper acknowledges that it is for Parliament to determine how draft Orders in Council will be considered there, though the Government favours examination in committee before the matters reach the floor of each House.²⁶ Such prior consideration will be vital if the Assembly's proposals are to be thoroughly scrutinised. The Affirmative Resolution procedure (and the absence of amendment) will not allow adequate opportunity to look as closely as will be appropriate, especially if the Order is composite or contains expansive detail.

Pre-legislative scrutiny by a Joint Committee of both Houses appears to offer the most satisfactory mechanism. Any suggestion of joint activity with the Assembly makes no sense as it is the Assembly's proposals that are under consideration. However, the composition of a joint parliamentary committee is problematical as there are several interests that should be reflected there which cannot be accommodated readily by authorising the joint working of the existing committees that have relevant expertise. It may be necessary to establish a committee that comprises members selected from eg the Lords DRR and Constitution Committees, and from the membership of the Commons Regulatory Reform and Welsh Affairs Committees.

Presumably such a committee will need to be authorised to take evidence and hear witnesses concerning the proposals, the purposes for which they are sought and the justification for their proposed extent. This raises the nice question as to who are the proper persons to give evidence on behalf of the draft. The White Paper clearly states that the "Assembly" will make the request,²⁷ though in most instances it is likely to have been initiated by the Welsh Ministers. It may be necessary to seek evidence from both the executive branch and from AMs authorised by the Assembly to speak on its behalf. This in turn raises the unexplored question, what follows if, as has been the common experience with both Houses regulatory reform committees, the parliamentary committee wishes to hear further evidence, or requires amendments to be made.

²² GWA, s 22(4)(b).

²³ *Assembly Standing Orders*, SO 31 provides for AM proposals for subordinate legislation following a ballot for the right to table a motion.

²⁴ Such a programme is likely to indicate also the Measures that will be put to the Assembly under Order in Council powers already granted.

²⁵ Cf the arrangements under which the Scottish Executive is given two slots annually when Parliament will consider any further transfers of functions to Scotland.

²⁶ WP, paragraph 3.21.

²⁷ WP, paragraph 1.25.

8.7 Role of the Secretary of State for Wales

Since the Orders in Council will transfer responsibility for preparing legislation from Whitehall, negotiations with the affected Whitehall departments will be a necessary precursor to the preparation of the drafts. It is hardly conceivable that a forthcoming request and the contents of the draft Order will not involve the Secretary of State prior to the formal laying. Presumably the Wales Office will continue to play a similar facilitating role to its role with respect to Wales-only Bills, though the preparation of the instruments will be undertaken in Cardiff. This reduces the likelihood that the Secretary of State will refuse to lay the draft instrument. The sticking points will surely be addressed well before that arises. The difficulties that the Assembly has sometimes experienced in negotiating Wales-only provisions in Bills may well be met again in this context, not least if what are seen as open-ended powers are being sought.

Indeed, the sticking points will need to be addressed *before* the proposal is debated and agreed by the Assembly. Unlike a Wales-only Bill, where negotiation between Cardiff and Whitehall can resolve such points before and during its parliamentary stages, no amendments can be made once the Assembly has made its request. There is nothing in the White Paper that addresses the case where the Secretary of State, following his routine formal consultation with the affected Whitehall department and Parliamentary Counsel, wants the request amended. This certainly cannot be done simply by exchanges with the Welsh Ministers. If the amendments are minor, it is possible that the Assembly might have given the Presiding Officer authority to agree them; but if they are substantive, they would surely require the Assembly's consent. That in turn will delay (possibly fatally) the laying of the Order.

In a period of cohabitation it is conceivable that the Secretary of State may find political reasons for declining to advance an instrument that is thought to go too far in transferring legislative responsibility. The White Paper suggests that if the Secretary of State does reject the request, he will be required to explain his reasons in a letter to the "Assembly Government".²⁸ In our view, this is constitutionally unacceptable. As the Assembly made the request, the Secretary of State should justify his refusal to lay the draft Order to the Assembly via its Presiding Officer. His explanation should also be tabled in Parliament. Further, the Secretary of State's case for any such rejection should be the subject of scrutiny by the Welsh Affairs Committee.

C. Full primary powers²⁹

9. We acknowledge the political arguments for a referendum to be held before primary powers are conferred on the Assembly. However, we question the proposal that the Secretary of State for Wales should be able to decline to table an Assembly decision or to consult further before putting such a decision to Parliament.³⁰ The settled will of the democratically elected representatives in the Assembly should be put to Parliament for its decision without the possibility of Government intervention.

10. The White Paper fails to deal with what happens if a referendum rejects this fundamental change to the settlement. In such circumstances, there is a case for a moratorium on further referendum initiatives for a specified period, eg for two Assembly terms. In our view provision to that effect should be included in the new Bill.³¹

11. The proposal to include in that Bill provisions that will enable the post-legislative referendum³² to be held at some future date is attractive, but not without its problems. If a further Government of Wales Act is to be avoided³³, the Bill must provide for the necessary changes in sufficient detail to allow voters to know what is intended. However, if the Bill were to contain full treatment of all the matters that will need to be settled, debate would inevitably focus on controversial issues that are hypothetical in the present circumstances and may not be wholly appropriate when a referendum is actually called. It is hard to conceive that Government will wish to enter upon the resolution of such issues in the abstract. On the other hand, to leave significant details to be dealt with eg by a subsequent Order in Council is to vest Government with authority to legislate constitutional reforms, a matter that should be for Parliament to settle. Further, it would mean that the forthcoming Bill would not be the comprehensive constitutional document that a major institution of the State merits. It may well be that circumstances closer to the time of a referendum will require further legislation to be enacted by Parliament.

12. An important matter that will have to be resolved relates to the way in which the limits to the Assembly's powers are to be defined. The Scotland Act 1998 gives general authority to legislate subject to express exceptions, principally in the form of "reserved matters" that remain with Parliament.³⁴ The alternative, whereby powers are granted with respect to defined areas of competence³⁵, was deliberately rejected on grounds of complexity from the need to spell out the devolved areas in considerable detail. If,

²⁸ WP, paragraph 3.20.

²⁹ WP, paragraphs 3.22–3.29.

³⁰ WP, paragraph 3.24.

³¹ Cp Northern Ireland Act 1998, Schedule 1(3) re border polls.

³² WP, paragraph 1.26.

³³ WP, paragraph 3.23.

³⁴ Scotland Act 1998 ("SA"), s 29 and Schedule 5.

³⁵ As in the Scotland Act 1978.

as seems probable, the future Assembly scheme builds upon specified fields as they are likely to be used for the purposes of the Order in Council scheme,³⁶ it will be necessary to ensure that every aspect of the Assembly's legislative output is covered by the terms of those fields as interpreted by the courts. Not only does this mode of transfer increase substantially the possibilities of legal challenge, but it will lead to time-consuming negotiations over competence issues between the administrations in Cardiff and London. If the Scottish approach was adopted in 1998 because it offered the maximum clarity and stability, the same objectives are surely just as desirable for Wales especially as these virtues have been lacking in the devolution arrangements to this time.

D. *Consequences of enhancing the Assembly's powers*

13. The White Paper concentrates upon processes and mechanisms with little said about the values that should inform the reforms. In particular, considerations such as effective democratic scrutiny, transparency, accountability, the importance of principle and of the absence of complexity, as well as clarity and stability, should inform any constitutional renovations. The promised arrangements, which will operate for some years, build on rather than replace a number of the unique features of the Assembly and do little to displace the complicated nature of the law as it specifically affects Wales. Despite concerns that have been regularly expressed by legal practitioners as to access and certainty,³⁷ the new scheme adds new modes by which the Assembly and the Welsh Ministers will acquire legislative powers and several additional forms of instruments that will contain the law applicable to Wales.³⁸

14. The history of Welsh devolution to date has been one largely influenced by pragmatism.³⁹ The admirable desire for the people of Wales to be able to determine how best to deal with their own domestic concerns has had to compete with entrenched attitudes about political representation. The compromises that have ensued have taken place with insufficient regard for the longer term. Since the Assembly acquired its devolved functions, both the scope and the application of otherwise common bodies of law have slowly come to assume different forms as between Wales and England. This is marked, for example, in the timing of Commencement Orders. But now, a distinctive body of substantive Welsh law is emerging, which in due time will differ in important ways from the law that has effect in England. Yet little attention has been given to the implications of two primary law-making institutions and two potentially conflicting bodies of law *within the same unitary legal jurisdiction*.⁴⁰

PART 2: OTHER ISSUES

Restructuring the Assembly

15. We welcome the proposals for the restructuring of the Assembly, in particular the formal separation of the legislative and executive arms and the greater freedom of the Assembly to establish committees as it sees fit.⁴¹ However, further consideration should be given to the following:

15.1 Naming the executive

Continued use of "Welsh Assembly Government" would fail to mark out sufficiently distinctively the proposed separation of legislature and executive. An appropriate title is "Welsh Executive".⁴²

15.2 Provision for an Assembly corporate body

The Assembly will no longer be a body corporate; it presumably will be an unincorporated association. It will be necessary therefore to establish a body with legal powers to acquire and hold property, make contracts and appoint Assembly staff, handle money relating to Assembly expenditure and bring or defend proceedings that may be brought against the Assembly. The implementing Bill should therefore make provision for an "Assembly Corporate Body" with these powers, comprising the Presiding Officer and a small number of Assembly Members.⁴³ It will also be necessary to make provision for the division of existing Assembly assets and liabilities between this corporate body and the executive branch.

³⁶ WP, paragraph 3.23 refers to "all devolved fields".

³⁷ As discussed in Welsh Affairs Select Committee, *The Primary Legislative Process as it Affects Wales* (HC 79, session 2002–03). See also David Miers and David Lambert, "Law making in Wales: Wales Legislation on-line" [2002] Public Law 663.

³⁸ See John Osmond & Keith Patchett, *Virtual Parliament*, IWA, July 2005, 7–9.

³⁹ Richard Rawlings, *Delineating Wales. Constitutional, Legal and Administrative Aspects of National Devolution* (Cardiff: University of Wales Press, 2003).

⁴⁰ See Timothy Jones and Jane Williams, "Wales as a Jurisdiction" [2003] *Public Law* 78.

⁴¹ WP, paragraphs 1.7–1.18 and c 2.

⁴² Cp SA, s 44.

⁴³ Cp SA, s 21 and Schedule 2.

15.3 Provision for the Assembly Parliamentary Service

It is to be expected that the new Bill will provide for the offices of Presiding Officer and Clerk to the Assembly, as well as the clerks and staff of the Assembly, who will no longer be members of the Civil Service. Although the Assembly Parliamentary Service need not necessarily be formally named in the legislation, the provisions relating to the Assembly Corporate Body must make provision for that body to determine the terms and conditions of service and for recruitment, and for the formal transfer of civil servants to the Service.⁴⁴

15.4 Preparation of Standing Orders

While there may be circumstances that require the Secretary of State for Wales to have the formal power to make the new Standing Orders,⁴⁵ the committee preparing them should consist of Assembly Members under the chairmanship of the Presiding Officer and should have powers to co-opt outside experts. The Assembly and the Assembly Parliamentary Service has the required experience and competence to devise Standing Orders appropriate to its future work.

15.5 Allocation of existing legislative functions

Legislative functions are currently vested in the Assembly. The White Paper proposes that the powers to make subordinate legislation traditionally exercised in Whitehall by Government Ministers should in future be exercised in Wales by the Welsh Ministers.⁴⁶ As in the case of conferment of new powers, the White Paper envisages that the Assembly will retain “important” legislative functions. These arrangements require a procedure and criteria for allocating the many existing legislative functions between the Ministers and the Assembly. This is a potentially exacting task as it must be completed by the time the new Act comes into force and as it must be applied not only to “Assembly general subordinate legislation”,⁴⁷ but also to all “relevant Welsh subordinate legislation”⁴⁸ that has been made by the Assembly to date. What is important is that the criteria for retention of legislative functions by the Assembly must bear some equivalence to those likely to be applied when decisions are taken as to the allocation of new legislative powers (see paragraph 4, above). Although the task will no doubt fall largely upon the Civil Service, in our view the Assembly itself must be concerned in the decision as to the kinds of existing legislative functions that it should retain.

Electoral arrangements

16. We have reservations concerning the proposal to prevent individuals from standing in constituency elections and at the same time being entered upon the regional party lists.⁴⁹ This is likely to affect minority parties disproportionately. They will, for example, be obliged to choose whether to run their better candidates in constituencies (eg to boost the party’s share of the vote, though they may not be elected) or to keep them back for the party list (when they may have a better chance of success). In our view such a policy could well deprive the Assembly of those who can best represent minority parties. The arguments in favour of the White Paper proposal would lose some of their force if the five regional lists were to be replaced by a single national list.

Numbers of AMs

17. The White Paper contains no proposals for an increase in the size of the Assembly. However, its additional responsibilities when considering legislation and scrutinising executive instruments and expenditure⁵⁰ are certain to make significantly extra demands upon the AMs and, if the numbers are not increased, could well impair its capacity to carry out all its functions effectively (as some already claim). In particular, given the size of the executive payroll (some 15), it is a matter of concern whether the remaining Government AMs (currently 14) will be sufficient to undertake the range of plenary and committee activities that will fall upon backbenchers of the largest party. The minority parties will experience similar problems of full participation in committee scrutiny work and developing the knowledge base for debating legislative issues. As the Richard Report highlighted,⁵¹ there is a strong case (more especially in the case of primary powers) for an increase to, say, 80 AMs.

18. The Secretary of State has floated the idea⁵² that the forthcoming Bill could authorise a number increase by Order in Council. Such an increase requires alteration of the present distribution between constituency and list seats and almost certainly the linking of constituency seats with existing parliamentary

⁴⁴ Cp SA, ss 19 and 20 and Schedule 2, paragraph 3.

⁴⁵ WP, paragraph 3.31.

⁴⁶ WP, paragraph 2.12.

⁴⁷ GWA, s 58(6), ie essentially statutory instruments.

⁴⁸ GWA, s 58(2).

⁴⁹ WP, paragraph 4.5. See for an excellent discussion, Richard Wyn Jones and Roger Scully, *Electoral Arrangements and Electoral Politics after the White Paper* (Institute of Welsh Politics, Aberystwyth: 2005).

⁵⁰ WP, paragraphs 2.14–2.19.

⁵¹ Richard Report, chapters 4 and 14.

⁵² Speech to ESRC devolution conference, Cardiff, 11 July 2005.

constituencies.⁵³ It is unlikely that the Bill will make such important and potentially controversial changes to electoral arrangements in abstract and it is questionable whether they should be made by Order in Council rather than by Parliament directly. The earliest such a change could take place is for the Assembly elections in 2011. The nettle should be grasped and full provision made in the Bill for an increase that will take effect at that time.

15 September 2005

Written evidence from Dr Richard Wyn Jones and Dr Roger Scully

ELECTORAL ARRANGEMENTS AND ELECTORAL POLITICS AFTER THE WHITE PAPER

1. BACKGROUND—THE PECULIARITIES OF WELSH DEMOCRACY

The most important and obvious feature of Welsh electoral politics in the second half of the 20th century was the dominant position of the Labour party. Labour's dominance is more than simply a reflection of the class composition of Welsh society: in other words, Labour has consistently performed better in Wales than we would have expected if the relationship between class and voting behaviour were the same here as it has been in England in the same elections.

This dominance has been practically unchallenged with swathes of the country now having remained steadfastly loyal to Labour for three or even four generations. Occasional challenges may have arisen, but all proved transient.

Among explanations offered for Labour's dominance have been:

- The weakness of the Conservative Party in Wales (ever since the dawn of the democratic age; an issue which we have written about elsewhere).
- The much-vaunted “Welsh radical tradition” to which Labour claimed inheritance from the previous hegemonic Liberals.

But another important factor has received much less attention: the lop-sided nature of electoral preferences in Wales since 1945 has been greatly magnified by the first-past-the-post electoral system. Wales has consistently produced some of the least proportional electoral results anywhere in the world. In the post-Second World War period this disproportionality has always worked to the benefit of Labour.

2. THE DEVOLUTION SETTLEMENT: AN ELEMENT OF PROPORTIONALITY

In this historical context of disproportionality and one-party dominance, is significant that a more proportional electoral system was made an integral part of the Devolution package developed by Labour party. This development was seen as important and valuable by some (see, for instance, the discussion in *Redesigning Democracy*, where Kevin Morgan and Geoff Mungham bravely took issue with the “monist” political culture arising from one-party dominance); and by others in the Labour party as a necessity to secure Liberal Democrat and Plaid Cymru support for the referendum.

A more proportional electoral system was clearly integral to the package that Welsh voters approved in the 1997 referendum. And it would thus appear safeguarded by the affirmative vote in the referendum: in other words, the proportional element in the electoral system could only be removed if approved by another referendum.

We must note that our current system is *not* PR; with only $\frac{1}{3}$ list seats, an accurate description of the system is *semi*-proportional representation. Two National Assembly for Wales (NAW) elections in Wales have produced much more proportional outcomes than Westminster elections; but they have still been notably less proportional than in Scotland, and still, by international comparison, among the most disproportional democratic elections going.

Evidence of public opinion in the most recent detailed academic survey (2003) is of strong public approval for elements of PR. A clear majority (58.5%) said that the NAW should be elected by PR, and less than 15% were definitely against PR; a plurality actually agree that the NAW voting system should be used for House of Commons elections (with only 27% against the idea); and a clear majority supported the view that there is “more point in voting” for NAW elections because “every vote counts”.

⁵³ GWA, s 2 and Schedule 1.

3. THE WHITE PAPER PROPOSALS, AND THEIR JUSTIFICATION

The Electoral Arrangements section of the White Paper is noticeably short (less than two full pages!). One suggestion made is a proposal for a similar mechanism as exists in Scotland for (in exceptional circumstances) an extra election between those held at four year fixed terms. This seems unproblematic and uncontroversial, and we shall not therefore discuss it further.

More controversially, the White Paper rejects the Richard Commission proposals of an 80-seat NAW, elected by the Single Transferable Vote (STV) system. Instead, it proposes retaining a 60-seat Assembly, but disbarring individuals from standing as candidates in both constituency and list contests (to overcome what one might term the “Clwyd West Problem”).⁵⁴

This latter proposal is justified in the White Paper by the statement that for losing candidates to 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 (*Better Governance for Wales*, pp 28–29).

Rather strikingly, however, this bold assertion is made without any supporting evidence being offered—nor are any sources for such evidence referred to.

In a similar manner, a Labour Party Policy Document of September 2004 (coincidentally also entitled *Better Governance for Wales*) had suggested that defeated constituency candidates winning list seats was “confusing and frustrating for the electorate who wish to see their votes as determining who gets into the Assembly and who does not” (p 5). But while this document cited views from two Labour CLPs and one affiliated organisation in support of this view, it again offered no evidence about public views themselves to support this assertion.

4. THE PROPOSALS EVALUATED

On the day of publication of the White Paper, one elected representative from Wales referred to the electoral system proposals as the “Mugabe-isation” of Welsh politics. This is unreasonable and unfortunate: the proposals do not involve gerrymandering, or intimidation or anything approaching that, and to discuss them in such intemperate language demeans not only those who say such things but also political discourse in Wales.

Nonetheless, there are serious questions about the proposals that can, and should, be raised.

4.1 *There is no evidence of public disquiet about the current system or public demand for such a change*

No such evidence has been offered at all by the Government. And, as discussed earlier, there is significant evidence of general public support for the AMS electoral system. The considerable amount of academic and other research, drawing on surveys and focus group evidence on public attitudes, that has been conducted on the 1999 and 2003 NAW elections, has not seen the “Clwyd West problem” emerge as a salient reason for non-voting or voter dissatisfaction. Indeed, examination of data from the 2003 post-election shows that the particular experience of having three Clwyd West losers becoming list AMs did not reduce the confidence of voters of North Wales in the electoral system: they were just as favourable as those elsewhere in Wales to the use of PR, to the idea that the system used for NAW elections should be used for Westminster elections, and to the statement that there is “more point voting for NAW because every vote counts”. And evidence from the small number of voters from Clwyd West in the sample indicates they are actually more favourable to the electoral system than the average across Wales.

4.2 *The proposed change is internationally anomalous*

Mixed electoral systems like AMS are increasingly widely used; according to the authoritative work of Prof David Farrell (*Electoral Systems: a Comparative Introduction*, Palgrave 2001) mixed systems are used in 29 countries, representing one-fifth of the world’s population. Many of these countries adopted such systems in the 1990s.

Candidates have been permitted to run for both constituency and lists in Germany since the AMS system was inaugurated there in 1949. (Indeed, in 1998, Helmut Kohl famously lost his constituency seat, retaining his place in the Bundestag via the list). In New Zealand, Italy, Japan, Hungary and Russia (all of whom introduced a mixed electoral system in the 1990s), candidates are permitted to stand for both constituency and list. And the change proposed in Wales is not on the agenda currently in Scotland.

⁵⁴ So named after the events of 2003, when three defeated candidates from this constituency were subsequently elected as regional list AMs for North Wales.

After extensive consultations with the expert academic community, we have only been able to discover one place where the change proposed in Wales has been implemented. This was in Ukraine, prior to the 2002 parliamentary elections. (This change was introduced by the same party who, more recently, attempted to fix the result of the Presidential election and poison the main opposition candidate). The only other instance we have been able to find where this has even been seriously proposed is very recently for New Brunswick in Canada. Therefore, suggested change does, frankly, make Wales look odd.

The proposed change would also be likely to create particular difficulties for the major opposition parties in Wales, who would have to make some difficult choices as to whether many of their major figures should be deployed as constituency or list candidates. While there is no particular reason why electoral arrangements should actively seek to make life easy for opposition parties, there are two associated problems that arise here.

4.3 *The proposed change diminishes the chances for opposition parties to get their “best” people into the NAW*

In the context of an Assembly that, in the view of the Richard Commission, is almost certainly too small (and hence to function well one really can’t afford to have sub-standard representatives) this is problematic for the *quality* of representation.

4.4 *Even if it is not intended, the proposed change looks deeply partisan*

We take it to be axiomatic—something that should win universal support—that electoral systems and arrangements in a representative democracy should be, as far as possible, neutral, and not matters of partisan dispute. The widespread acceptance of this principle is the reason why practices like gerrymandering, when they do occur, are widely condemned and seen as a perversion of democracy (and why Britain has an independent Boundary Commission to avoid such problems). Any changes that create the perception of partisanship—of being done to serve interests of some parties against others—are therefore highly problematic by definition, and may well undermine public confidence. At the very least, such changes should have other compelling, overwhelming advantages if they are to be justifiable.

4.5 *If the “Clwyd West problem” really is a major problem, there are other ways to address it*

It was notable that ministerial speeches in the Lords and Commons (on 15 June 2005) justifying the electoral system changes relied heavily for support for their case from the Electoral Reform Society. This is curious because the Society have criticised the current arrangements on the basis of their strong support for STV. The Richard Commission, after their extensive investigations, recommended STV—an electoral system that would provide a similar level of proportionality to the current one, while also ensuring that there is no distinction between list and constituency members. The White Paper and its preceding Labour policy document state that ruling party rejects this proposal, but the documents do not give any convincing reason why. Indeed, as stated before, the Labour policy document asserts that “the electorate” wish to see their votes as determining who gets into the Assembly and who does not—yet scholars of electoral systems would almost unanimously agree that the electoral system that maximises voter choice is STV.

5. CONCLUSION

The White Paper as a whole is a very interesting and in many places impressive document. The Electoral System proposals are, by some considerable distance, the weakest part of the White Paper. The document makes no convincing case for the proposals at all. And those proposals manage to create the image of being deeply partisan. Our conclusion is therefore that they are highly problematic.

3 October 2005

Witnesses: **Professor Richard Rawlings**, Chair in Law, London School of Economics, **Professor David Miers**, Cardiff Law School, Cardiff University, **Dr Roger Scully**, Senior Lecturer in European Politics and Director of the Jean Monnet Centre for European Studies, University of Wales, Aberystwyth, **Dr Richard Wyn Jones**, Director of the Institute of Welsh Politics, University of Wales, Aberystwyth, examined.

Q31 Chairman: Good morning to you all, welcome to the Welsh Affairs Committee. Could you begin by introducing yourselves, please?

Professor Rawlings: Professor Richard Rawlings, London School of Economics.

Professor Miers: Professor David Miers from Cardiff Law School, Cardiff University.

Dr Scully: Dr Roger Scully from the University of Wales, Aberystwyth.

Dr Wyn Jones: Dr Richard Wyn Jones from the University of Wales, Aberystwyth.

Q32 Chairman: Could I begin by asking some questions about developing the current settlement through granting wider legislative powers? In paragraph 3 of your paper—and thank you very much for your paper, it is very useful for the

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Committee—you express fears that government departments will adopt varying approaches towards the nature and extent of delegated powers to the Assembly. What further provision could be included in the Bill, in your views, to ensure consistency in the way Whitehall departments approach the conferment of powers to the National Assembly for Wales?

Professor Rawlings: Thank you, chair. Obviously, I heard the comments from officials about the great work that has been going on behind the scenes to try to foster relationships between Assembly officials and Whitehall departments; in answer to your question I do not think it is so much a matter of having something on the face of the Bill, I think it would be very difficult to conceive of having separate provisions on the new Government for Wales Act setting out some kind of principles—that immediately gets you into problems with judicial reviews and so on and so forth. What I think one would be looking at here would be trying to have some more public documentation on how this process is proceeding and, if I may do so, perhaps I could pick up on the chairman’s comment which was along the lines of this was all very well but it did seem to be a set of insider arrangements and what about the people of Wales, how would the people of Wales be able to find out what was going on? Picking up on your own suggestion, chairman, I took you to be suggesting that there might be an explanatory memorandum attached to Bills dealing with Wales—perhaps if we have the Sewel convention in Scotland, should we have the Francis memorandum in the case of Wales? If indeed, as I am sure it is, the UK Government and the Welsh Assembly Government are serious about this enterprise, presumably the Committee could press for explanatory memoranda to be attached to each Bill, which would first of all list the relevant clauses relating to Wales and then, secondly, explain how the government’s new commitment to consistently permissive legislation has been played out in relation to those clauses. I think that would be a very fine idea, if I may say so, picking up on your own suggestion, chairman. I think it might well concentrate Whitehall minds at an early stage and of course it would help parliamentary scrutiny—for example, this Committee would immediately have a document on which it could seize in terms of scrutiny.

Professor Miers: I am very happy to align myself with the observations that Professor Rawlings has made. Our comments in our written submission were in the main prompted by history and the evidence to date that some departments have been less willing to concede to allocate functions to the National Assembly than others. I entirely agree with Professor Rawlings that you would not want to see a statement on the face of the Bill about, let us say, a presumption that departments should, when looking at the functions generally that are exercised by Ministers of the Crown here and new Ministers in Cardiff, always ensure that powers are transferred to the Assembly. In other words, you might want that in the guidance note, you might want that as part of

the apparatus, part of the understandings between London and Cardiff, but Richard is right, you do not want that on the face of the Bill. The point on the White Paper that the Government has produced makes it clear that it is its intention to transfer wider powers, and if I might make one observation, I manage a service called Wales Legislation On-Line which is run from Cardiff Law school, with which you may be familiar—I might say in passing that it is co-funded by the Assembly Parliamentary Service and the Welsh Assembly Government. The researchers who work on that service for me have identified, they think, a greater transparency in the way in which Acts now allocate functions to the National Assembly, and I think that is another important feature of transfer. It is not simply transfer of scope—breadth and depth—but also transparency in terms of accessibility on the part of users, broadly speaking, in Wales. There is a marked improvement in that respect.

Q33 Chairman: Can we just take the argument a step further? The proposals in the White Paper will necessitate the re-negotiation of the Memoranda of Understanding between Wales and Whitehall. Would it be desirable to use this opportunity to establish them on a proper statutory footing?

Professor Miers: The view I have expressed is not provided that it is a public document.

Professor Rawlings: Not provided it is a public document and there is a way for this Committee and for other parliamentarians, and of course civil society and Assembly Members, to make sense of what is going on. I think colleagues around the room would share the view that it is one thing for insiders, the officials, to know, but there is a further issue about transparency for the public at large whom you represent, and that is the idea that I was trying to get over with reference to the explanatory memorandum and so forth.

Chairman: Thank you. Mrs James.

Q34 Mrs James: am going to continue with this theme for a while and I am going to quote from the White Paper to you the statement that “important law-making powers will be given to the Assembly, while the more conventional regulations of an executive character will go to the Welsh Ministers.” What provisions do you think need to be included in the Bill to ensure clarity and consistency over which powers will be conferred on Welsh Assembly Ministers, and which to the Assembly itself?

Professor Miers: That is a difficult question to answer.

Professor Rawlings: You can have some very basic provisions in the Bill and you can have channels and procedures for passing powers to what, after 2007—I think this is crucial for everyone to keep in mind—will not be one body but two; we will be talking about the National Assembly and we will be talking about the Welsh Assembly Government, the Welsh Administration, howsoever it is designated, whereas of course at the moment we are talking about a single corporate body. One starts there and clearly one can then set up different procedures for allocating in

different ways. It seems to me that once again the judgment about which way things should be allocated—and the White Paper here I think talks about “important functions” going to the Assembly as against the Welsh Assembly Government or the Welsh Administration—will be a key issue of scrutiny, both in Cardiff and in London on a continuing basis. It seems to me that it is less a question of what we put in the new Government of Wales Act, it is more the dynamic work that will be done in committees like this to make sure that parliamentarians and elected representatives in Cardiff think that the on-going provisions are appropriate. Let me give you a simple example. We may all have different views about whether smoking should be banned in public places. Question: the Government says that this decision will be devolved to Cardiff; do we think it is appropriate that Welsh Assembly Government Ministers take that decision, or do we think it is appropriate that all the elected representatives of the people of Wales in the Assembly take that decision? It seems to me clear that it is the latter rather than the former; irrespective of what we think about the substance of the policy, as a constitutional issue it seems to me to be important that it should not be simply a matter for Ministers in Cardiff, it should be for all the representatives in the Assembly.

Q35 Mrs James: Thank you. In paragraph 7 of your report you mention the need for a more systematic “devolution audit”. Could you elaborate a little further on this, and explain what role you foresee this Committee playing in that process.

Professor Miers: That could flow from the observations that have already been made, as I understand what Professor Rawlings has said, earlier this morning. Let us suppose that you have a clear public statement on the relationship between London and Cardiff in respect of how and by what criteria importance will be determined—that will be a difficult matter, but let us assume that you have some criteria, some public statement. It is that kind of statement that provides you with the basis for an audit and, clearly, the greater the degree of elaboration in that statement the more criteria you have upon which to review legislation post the Bill being enacted. If I might add a postscript to Professor Rawlings’ last observations on what counts as ‘important’, if you look at the history, if you look at what has been transferred to date, it varies enormously from the very, very specific where you might say as a committee that these things are not very important, they are matters that could quite properly be done by Welsh Ministers, to others—and the example that the White Paper itself uses and it has been used often before is the Education Act 2002 which provides the Assembly with a very wide power to make secondary legislation as it thinks fit to give effect to the purpose of that Act. You might think that that scope, that breadth, of potential legislative activity is important, so importance might lie, at least in one dimension, in terms of the scope that is left, the discretion that is left to the Assembly to act.

Chairman: Mr Hywel Williams.

Q36 Hywel Williams: I want to ask you about the robustness of goodwill between Cardiff and London. Professors Miers and Rawlings, in your paper you express the concern that the success of the proposed transfer of powers by Order in Council will depend on continued goodwill and that might not be sufficiently robust to operate effectively during a period of cohabitation, and there are several variations that I was thinking of earlier on about the differences between the administration in Cardiff and the Government here. What provision could be included on the face of the Bill in order to strengthen the proposed scheme during that sort of period?

Professor Rawlings: Again, it is somewhat difficult because one is dealing with different political and administrative conditions, and clearly a major concern must be in relation to so-called Step 2, enhanced legislative competence orders, because whatever the current Secretary of State says about his approach to the drafting of the Orders in Council, nothing that the Secretary of State can say can prevent a future Secretary of State, perhaps a Conservative Secretary of State, taking a rather different view of how those Orders might be drafted, and clearly, as we are saying, you can construct various possible conditions of cohabitation, I have just chosen one obvious one. There is one thing that one could do to protect the Assembly—and I think we mention this in our paper—one could read across the idea of a constitutional lock. Let me explain that. At the moment, if powers are transferred to the Assembly by a Transfer of Functions Order, they may come back, but only if the Assembly consents. That, of course, does not prevent Parliament—the doctrine of parliamentary sovereignty—taking the powers back, we all understand that, but it gives the Assembly a measure of protection. Likewise, one could incorporate in the Bill a provision that an Order in Council granting continuing power to legislate in the Assembly would not be repealed without the consent of the Assembly. That would be a constitutional lock protecting the Assembly, but once again that of course would not prevent Parliament at the end of the day from legislating to take powers back.

Chairman: Dr Scully and Dr Wyn Jones, please feel free to make any observations that you wish as well, although of course you will be becoming involved in a later part of this session.

Q37 Hywel Williams: You may have been present earlier on when I asked the officials about something that you mention in paragraph 8 of your paper, and I asked the officials whether paragraph 1.25 of the White Paper—that Orders in Council are to relate to “specific matters or within defined areas of policy within the fields in which the Assembly currently exercises its function”—describes the current scope of the devolved fields or prescribes that they shall not extend beyond those in Schedule 2 of the Government of Wales Act 1998. If I understood rightly—and I am not sure if I did—the officials seemed to say that this was descriptive and also there

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would be a constricted list of categories. Is that your understanding, and what are the implications of this for the use and scope of Orders in Council?

Professor Rawlings: I have to confess I found it a little difficult to follow the answer; perhaps that was because I was sitting behind the officials concerned. I am a little wary of commenting on this because I did not quite follow. If the answer that was given was that it is the current fields under the 1998 Act, there seemed to be a suggestion that it might also be fields that have been added since the 1998 Act. If that is right, then presumably it covers something like fire and rescue services. It is important to remember one of the answers that the officials gave you, which was that when we talk about Step 2 we must not forget Step 1, that over time one would expect Step 2 to move increasingly centre stage but there will clearly be a transition period in which things need to be built up, the new technique needs to be developed and elaborated. Were there to be matters falling outside those fields, it would of course always be possible to proceed down the more traditional route and back into Step 1.

Hywel Williams: Thank you.

Chairman: Mr Stephen Crabb.

Q38 Mr Crabb: What in your view would be the most effective procedure for parliamentary scrutiny of draft Orders in Council?

Professor Miers: That is always a good question. This might be a slightly long answer so I apologise at the beginning; the analogy that might readily come to mind is the procedures adopted by the Regulatory Reform Committee and the Delegated Powers and Regulatory Reform Committee in the House of Lords, but there are some clear differences between particularly Regulatory Reform Orders and the requests that will come from the Assembly. They will not be the same kind of trigger for action, and I might come back to that. If you think in terms of stages, it seems to me that the stages go in this kind of sequence, that the Assembly will have gone through some kind of deliberative process, which undoubtedly will involve some consultation, there will have been a democratic vote, whether initiated by the Welsh Assembly Government or Welsh Ministers or by AMs or by the public bill procedure, but at any rate it will come as a request from the Assembly. Questions arise as to what should accompany that request and you might wish to explore that with the Secretary of State, but it will come here and the question is what parliamentary scrutiny will be exercised here? It could be exercised by this committee, for example, and it would need a set of tests which, again, would not be dissimilar to those that the Lords and the Commons committees already apply, so some kind of test of appropriateness—is it appropriate that secondary legislative powers of this extent and scope be transferred? No doubt another criterion would be whether or not the proposed request is *intra vires*. There are a number of points in the White Paper which speak of non-encroachment by the Assembly on policy matters that are the responsibility of UK Ministers, and others about not having a transfer

that is coterminous—the White Paper says that should not happen. Those sorts of propositions which are in the White Paper, if they are in turn translated into some conditions for the Assembly—what will ultimately be Orders for the Assembly—will give this committee or whatever committee is undertaking the scrutiny some levers against which to judge the justification, let us put it that way, that the Assembly in its request has put forward. I would envisage some kind of scrutiny process using tests similar to, but not all of them, those that are used by your own and the Lords committee.

Q39 Mr Crabb: You stated in paragraph 8.6 of your report that there is no indication in the White Paper that the Bill will include a procedure by which the Secretary of State could request amendments to the Order in Council. What do you think are the practical implications of this for the success or otherwise of the proposals?

Professor Miers: This is rather like a question what do we mean by a field, what is the extent of the transfer, but this is a very difficult point. One needs to bear in mind the point we make in 8.6 that requests for Orders in Council are not like Wales-only Bills, they are not amendable in the standard parliamentary procedure which accompanies them, the request comes from the Assembly and if the Secretary of State or indeed the Parliamentary Scrutiny Committee formally reaches a conclusion that there is something in the proposed request that it cannot accept, it is an inappropriate allocation, or that it does indeed encroach upon a policy area that is a matter for a UK Minister, then I cannot see—at least not in the White Paper—how you resolve that, because it cannot be resolved here, it can only be resolved with the consent of the Assembly. Unlike Regulatory Reform Orders, where it just goes back to the Minister, back to the department concerned, at Stage 2 and at Stage 2 the committee looks to see whether or not the Minister has had regard to the comments made at Stage 1 as to possible changes, that is not possible, it seems to me, for Assembly requests, except as we say in the paper, maybe with some minor matters, but not if the committee or indeed the Secretary of State took the view that one aspect of the request—maybe not the whole of it—was a wholly inappropriate transfer. I do not know the answer to your question, but it is a serious question.

Q40 Mr Crabb: You also said in the paper that plans to allow the Secretary of State to decline to lay an order, and to explain his reasons in a letter to the Assembly Government are “constitutionally unacceptable”. Perhaps you could explain what you mean by this and what steps you think should be taken to remedy this on the face of the Bill?

Professor Rawlings: I will deal with that one because it came up earlier on. The point that we were making there goes back to the comment about the post-box. Let us not labour this point, but it refers back, does it not, to the fact that after 2007 we will not be dealing with one devolved body in Cardiff, we will be dealing with two institutions: we will be dealing with

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the Assembly and we will be dealing with, let us call it, the Welsh Administration. The White Paper states explicitly that the request will come from the Assembly. The point we are making here is that it seems peculiar, to put it mildly, that the answer does not go back to the Assembly, it goes back to what by then will be a statutorily different body, the Welsh Assembly Government. In Parliament we do not regard the Prime Minister as the titular head of Parliament, the Speaker is the titular head of Parliament to the extent that we have one. The point that we are making is that if this is a request from the Assembly, surely the answer would go back to the titular head of the Assembly who is the Presiding Officer. I suppose it may be, as officials have indicated, that the Assembly will in some way have delegated the First Minister to send and receive letters on its behalf; I merely comment that it is not for me or for officials to say how the elected Assembly in Wales decides to order its own affairs, and if elected Assembly Members decide to so delegate that task to the First Minister, that is entirely a matter for them. On the other hand, should they decide that the Presiding Officer undertakes this task, that, it seems to me, is a matter for them and it is not something officials or the White Paper should prescribe.

Professor Miers: Chairman, may I add a postscript to illustrate the point in one particular respect? The proposal in the White Paper proceeds, I think, from the unstated assumption that requests will in effect have been Welsh administration initiated requests, but what if there is, as presumably there will be, some provision within Standing Orders to allow for the equivalent of Private Members' Bills—there is already, so why should that not continue? To use the equivalent here, if an Assembly Member were to promote what in effect is a Private Member's Bill or a Private Member's request, no doubt the Assembly Government or its successor will want to look at it and will conduct the usual sort of review of it to ensure that it is not incompatible with its own policy, but that request having been initiated by someone who is a member of the Assembly and approved by the Assembly, through what deliberative processes it agrees, it is surely wholly improper that that refusal to lay by the Secretary of State goes back to the First Minister. It seems quite improper to me.

Chairman: Mr Mark Williams.

Q41 Mark Williams: Thank you, Mr Chairman. Turning now to the consequences of enhancing the Assembly's legislative powers, in your report in clause 11 you raised some of the concerns surrounding the post-legislative referendum with regard to stage 3 and you talked in terms of, firstly, the Bill requiring sufficient detail, the concerns about a debate about something that was going to happen in the future, that it would be hypothetical in nature, and also concerns about matters of great importance, of constitutional reform, being dealt with in Orders in Council rather than being settled in Parliament. How do you propose to address some of those problems that you identified and how best could those problems be addressed at this stage?

Professor Rawlings: I would make two comments in relation to that question. The first one, of course, is that it is so difficult to say at this stage because we were obviously having to write here ahead of the Bill, and in a sense what we were arguing for here was for significant detail to appear on the face of the Bill, because it seems to us how could colleagues sitting around this table properly assess stage 3 were that detail not to exist? At the same time one has to be sensible and reasonable about this; we are dealing with a situation that I call "legislative devolution in waiting". This could be 10, 20, 30 years away and, clearly, it would be absurd to think that parliamentary counsel writing in 2005 could possibly anticipate all the possibilities that may or may not happen at some indeterminate point in the future. What one is talking about is a fair amount of detail in the Bill to explain the kinds of things that are in issue here, but of course an Order in Council set of powers would be such that more precise detail of the exceptions can be added in at a later stage. The second point that I want to make relates to the next paragraph in our paper, paragraph 12, because it follows, Mr Williams, directly from your question. It does seem to me that there is one great oddity in this whole process. One of the officials talked earlier about the expectation that this process would lead to full legislative powers for Wales. If we jump forward 15 years, let us just pretend that this happened; what will people say was the most important decision that was taken at this stage? It seems to me that clearly the substance of the powers will be one but, secondly, the very basic constitutional decision about how those powers are expressed. Are they, in other words, expressed as they are expressed in the Scotland Act of 1998, whereby the Assembly is given legislative powers and powers are then reserved to Westminster, or will it be the model of the Scotland Act that failed in the 1970s whereby the Scottish Parliament would have had a prescribed list of powers, a defined functions model? That is a very important matter, it seems to me, which goes to the flexibility of the powers that the devolved Assembly would have, a capacity for judicial review, lawyers all over the place and so on and so forth, yet the White Paper skips over this entirely. It seems to me—if I may be so bold as to suggest this—that it would be entirely appropriate for this Committee to ask for a detailed memorandum from the Wales Office on the advantages and disadvantages of these models and what the current thinking is about the choice of these models, prior of course to your conversation with the First Minister and the Secretary of State. It seems to me at the moment that arguably the most important question in this whole process is being glossed over.

Q42 Mark Williams: My second question is a question posed in the earlier session by the Chairman, but we would welcome your comments too, in the event of a referendum rejecting the stage 3 proposals, what provisions should the Bill make?

Professor Rawlings: Again, I was struck by the fact that the White Paper had nothing to say about this and I was struck by the answer from one of the

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officials along the lines of “the expectation was that it would not be a problem”. I do think we need to have a little bit more respect, if I may say so, for the democratic process than that, and we have to proceed on the basis that the good people of Wales may decide at the end of the day that they do not wish to go down this route. What would one then do? In our paper, clearly in the back of our minds, was a “Denmark” situation—the allusion being to asking the people of Denmark to vote again when they produced a result in the referendum on Maastricht that the powers-that-be in Brussels did not want them to produce, and they were immediately asked again to vote in the “correct” fashion. That seems to me to be a profoundly undemocratic approach that one would not wish to see visited on the people of Wales. It seems to me that a reasonable balance would be to read across the kinds of provisions that one finds in the Northern Ireland Act, whereby one says that if you have a so-called border poll and the good people of Northern Ireland say no, we would rather stick in the United Kingdom, you accept that result and you say that for a period of years we will not revisit this question. It seems to me that it would be entirely appropriate to have in the upcoming Bill this kind of moratorium clause.

Chairman: David Jones.

Q43 Mr Jones: Professor Rawlings, can we revert to the point we touched upon a few moments ago concerning the model that we are going to have for devolution maybe, and you contrasted what we have in Wales at the moment with what Scotland has got at the moment, the question of reservation of powers or converging powers, and you suggested that we should ask for a memorandum from the Wales Office as to the advantages or disadvantages of the two models. Perhaps you could assist us as to the extent of your opinions on the advantages and disadvantages of the two models.

Professor Rawlings: I would like to answer that in two ways. First of all, coming to the situation afresh, it seems to me that there are obvious advantages in the model of the Scotland Act 1998, and I take this to be the view of Her Majesty’s Government in abstract terms in the sense that otherwise why would they have chosen the 1998 Scotland Act model? If one revisits the debate on Scottish devolution it is put very much in terms of avoidance of legal technicality and, picking up on the Chairman’s comments earlier on, intelligibility. You may wish to visit the House of Commons Library and to ask the librarians there to take out for you the original Scotland Act back in the 1970s where they attempted to use the opposite model. I cannot remember which schedule it is, but they will point you in the right direction—it would charitably be characterised as voluminous. That said, this is not as clear in the case of Wales as it is in Scotland, for this reason: we are manoeuvring here within a unified jurisdiction of England and Wales and there clearly is an argument that in the context of the England and Wales jurisdiction it is particularly difficult to achieve a Scotland 1998 type model. I would like to see that argument played out

in a detailed memorandum from the Wales Office because I do think that there are genuine competing views here that the Committee should consider. In short, the answer to my question is: in the abstract I would clearly like the Scotland Act 1998 type model, in particular because from the point of view of the citizen it is clearer, but, question mark, is it achievable inside the England and Wales jurisdiction? Parliamentary counsel would no doubt have a view on that.

Q44 Mr Jones: If we were to adopt the Scottish model, could we therefore be looking at the very drastic constitutional step of separating the jurisdictions of England and Wales?

Professor Rawlings: I do not think so. This goes back to the Richard Commission and no doubt you will want to take this issue further with Lord Richard when he comes to give evidence to the Committee. It is interesting to see that the Richard Commission went for what I call ‘Scotland minus,’ by which I mean the Scotland 1998 model minus, of course, things like criminal justice, civil law and so on and so forth. In other words, the Richard Commission chose the Scotland model 1998, but of course Lord Richard was well aware of the England and Wales jurisdiction point, so his response was to take out the most obvious things relating to the England and Wales jurisdiction. Clearly, therefore, Lord Richard took the view that this was a manageable proposition and in the light of that in particular, again, I would put the case for a memorandum from the Wales Office actually discussing what I think is a fundamental issue that is being glossed over.

Chairman: Nia Griffiths.

Q45 Nia Griffith: Addressing in particular Drs Scully and Jones and speaking about some of the things that you have written here on the electoral issues, in particular about dual candidacy and the ability to stand for the constituency and the Regional List. You said that there is no evidence of public disquiet about the current system or public demand for such a change. Can you provide some more detailed data to support this claim?

Dr Scully: We are saying two things there. First of all, in the White Paper there is a very bold, unqualified statement about public opinion, which is not backed up with any reference to evidence at all. Secondly, we say that when we go back and look at what evidence does exist that is relevant to it, it does not appear to support the statement that is made in the White Paper. I must say that in the detailed post-election study that was done in 2003 there was no specific question on the issue of should people be allowed to stand on both their constituency and list, so we do not have the nicest piece of evidence, but we do see that there is generally a fairly good degree of satisfaction with the electoral system. As we mention, we see that in North Wales—where you had the particular problem of the three losers in the Clwyd West constituency coming in through the regional list—opinion towards the electoral system was just as favourable as it is elsewhere in Wales. One thing that we omitted to put in the written

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evidence was that we directly asked people did you vote, did you not, and for those people who said they did not vote in 2003 we asked why did you not vote? It was an open-ended question and it gave people the opportunity to say anything they liked and we recorded as many responses as people gave. The total number of people who mentioned anything to do with the electoral system at all as a reason for not voting in 2003 in our sample was two; that is out of more than 500 who said that they did not vote. That would suggest that the electoral system was not an important factor, as the White Paper puts it, "acting as a disincentive to vote".

Q46 Nia Griffith: You also mentioned a range of different countries where constituency and list members are used. What evidence is there in those countries about public attitudes to those electoral systems, what data have you actually got in that respect?

Dr Scully: I do not have in front of me detailed evidence on particular public opinion polls; however, there is quite voluminous literature in heavyweight tomes, like the one I have here, about the application of various forms of mixed-member electoral systems. Generally speaking, in most countries it is reasonably popular, and the very interesting thing to note, I think, is the fact that this system has come to be adopted, or variations of this system have come to be adopted, in quite a large number of countries in relatively recent years. I think it is self-evident that if these sorts of systems were seen as malfunctioning, as dysfunctional, then they would not have become so popular and have been adopted in so many countries as they have been in recent times.

Dr Wyn Jones: I have a slightly broader point that I would like to put before you. Part of the problem with the whole candidacy issue is that the debate is about the symptom rather than the problem, and the fundamental problem is that we have not quite worked out what the role of the regional list of AMs is. In particular, because the lists are based on the regions, it implies clearly a degree of territorial representation, that these people are representing a territory and, therefore, that means dealing with particular cases, because how else are you going to represent an issue without doing so through the prism of particular difficulties and problems. On the other hand, the fact that there is a degree of territorial representation then leads to resentment because people see it as stealing constituency work and so on and so forth; I should say I do not think that the public mind, they have more choice in terms of representation, but in terms of politicians this is clearly a difficult issue. I think a lot of these problems arise because these are regional lists, which implies a degree of territorial representation, and many of these issues I suggest would be removed from play if we moved to a national list system which would clarify the representation issue.

Dr Scully: May I just mention one more thing, Chairman, about that? The particular regions we have originated and were used for the European Parliament constituencies, but we have not actually

used those in Wales for the European Parliament elections since 1994, so in a sense one could argue what particular purpose are these regions serving? One could well argue and might wish to argue that there is perhaps a sense of North Wales identity, but it would be very difficult for instance to say that there is a South Wales centralist identity, so it is rather difficult to see that these regions have any particular logic behind them. If the purpose, as I think it originally was in the Government of Wales Act, is to have an element of proportionality in the voting system, if the main purpose of the list AMs is to be the people who introduce this element of proportionality in the voting system, that is an all Wales consideration so why not have an all Wales list?

Q47 Nia Griffith: There is just one further point on that. Obviously, you will be aware that the Electoral Reform Society gave evidence to the Richard Commission and one of the things that they said obviously was that "A system in which candidates can lose elections but nevertheless win seats undermines respect for the electoral process." I do take on board your idea on the national list, but how do you respond to that actual feeling that people have now, the gut reaction that they have?

Dr Scully: To be fair to the Electoral Reform Society we should be clear about their view. If I may quote directly from their own publication, the Electoral Bulletin, for June and July, page 4, where Ken Ritchie the chief executive was quoted: "We raised the Clwyd West question as an anomaly of the Additional Member system. But it is wrong to change just a single aspect of the voting system when there is so much wrong with it", and they go on then to endorse the Single Transferable Vote. The Electoral Reform Society are and have been for a very long period extremely strong, vociferous supporters of the introduction of the Single Transferable Vote system across the UK as well as for Scotland and Wales; they have criticised many aspects of the current voting system in Wales and indeed in Scotland, in line with their long-standing support for STV. To be fair to them, therefore, they are not just criticising this aspect of the system, as far as they are concerned the whole thing should be done away with and we should have STV, as the Richard Commission recommends.

Chairman: Mr David Jones, I am sure you wish to ask the next question.

Q48 Mr Jones: I certainly do. Drs Jones and Scully, you did issue a mild rebuke in your paper to a colleague of mine who referred to the White Paper as "the Mugabe-isation of Welsh politics". I think what my colleague had in mind was what might be described as the Clwyd West question and the Government's response to that. Having criticised him you seem to spend the next four or five paragraphs actually supporting what he said, albeit in colourful terms, but I am sure you would allow any politician a degree of hyperbole, because that is part of the trade, but would you not agree with me that the Clwyd West result was something that was

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entirely foreseeable in the original devolution settlement and the way that the list building was structured? You say that if it really is a problem there are other ways to address it, but how would you suggest it be addressed, if it needs addressing at all?

Dr Wyn Jones: If it needs addressing at all, STV is an obvious way of going about it, but that seems to have been ruled out of court, so if we are staying within the broad outlines of the system that we have at the moment, then a national list with a 5% threshold, plus guidelines or conventions on the roles of list versus constituency members would seem to be a sensible way forward. The fundamental problem is that the role of list AMs has never been properly worked out, in particular the territorial representation role has never been thought-through. If they are going to have the role representing a territory then it is natural to open offices and they do all these things which other constituency-based Members seem to object to, so moving to a national list would seem to be a sensible way of avoiding many of those issues and clarifying what people are there to do.

Dr Scully: You asked was this foreseeable, absolutely it was foreseeable and this weighty tome here, the study of mixed-member systems around the world, indicates that it has long been a tradition in countries that have mixed-member systems that people who are going on the list do some element of some shadowing of certain constituencies. Frankly, if the Government did not realise when it brought in this White Paper that that would happen, they should have done, they were negligent in not realising that.

Q49 Mr Jones: To that extent would you agree that to call it Mugabe-isation slightly went over the top, but nevertheless this has actually been brought forward for purely party political reasons?

Dr Scully: My scholarly competence or expertise, such as it is, is in certain matters to do with politics, not in reading the mind of the Secretary of State and I would not wish to presume to do so.

Q50 Mr Jones: Would you hazard a guess?

Dr Scully: We certainly objected to the label Mugabe-isation, I think that is really unfortunate, that sort of level of intemperate comment. Given that the reasons offered in the White Paper for doing this do not stack up, frankly, are not supported by the evidence, given also that Labour currently do not have any members coming through the list so if it is going to create problems for any parties it is going to create problems for the other parties, it is difficult to rule out the hypothesis of partisan motivation. I have no particular private evidence on that matter but, as we say, even if this is not intended it is unfortunate because it is going to look deeply partisan. Whether or not that was the original intention it is going to look that way and if there is one thing that people dislike almost as much as paedophiles living nearby and bent coppers, it is politicians who seem to be stitching things up for themselves. I think that although this is not going anywhere remotely close to what Mugabe does and

what other people do, it appears to be trying to adjust the electoral system in favour of one party against the interests of other parties, and it is not being done on an inter-partisan, cross-party basis. Therefore, to the extent that the public know and care about it, it is likely to be unpopular.

Q51 Mr Jones: Is that what Mr Mugabe is doing in Zimbabwe?

Dr Scully: He is doing a lot more than that.

Q52 Mr Jones: Indeed. If I can just mention the question of the national list, you did acknowledge that there is an identifiable North Wales element, both in reality and within the body of the Act, because of course there is exclusively provision for a North Wales Regional Committee. To that extent would you not acknowledge that a North Wales area regional member might have, maybe, more justification generally and therefore ought to be preserved, because of the identity of North Wales?

Dr Wyn Jones: As an Anglesey boy I have a particular view on it. The problem is that if one is going to have list members identified with a region, then one has to accept all the things that go with that in terms of opening offices, perhaps in the constituencies which are represented by a member of another party, you are going to have to accept that constituents are going to be “stolen”—I think that is the phrase often used—so all those things go with it. It is a judgment call, whether you think that the case of more members for North Wales in addition to those elected for North Wales constituencies is such that you are willing to accept all those other things and all the tension that is clearly caused. That is a judgment call, but I think that is how I would suggest that people weigh it up in terms of the balance between those two interests or issues.

Dr Scully: Maybe you yourself, Mr Jones, have suggested that part of the resolution of the problem is that it is specifically through having committees in the Assembly that are concerned with particular regional issues and that rather than the electoral system is the way to deal with particular regional issues and concerns.

Mr Jones: May I ask one more question on the number of Members, Chairman?

Chairman: So long as it is not on Mr Mugabe.

Q53 Mr Jones: I will not touch on Mr Mugabe at all, I promise. Professors Rawlings and Miers, in paragraph 17 of your report you suggest that the Bill should provide for an increase in the number of Assembly Members to 80. Could you possibly explain that further and why that should be included on the face of the Bill rather than addressed at a later stage?

Professor Miers: The reason for that, Mr Jones, is our sense that under the proposed new settlement Assembly Members are going to have a very great deal of work to do. They will have a much more pronounced scrutiny function and it remains to be seen how the standing orders will be constructed and how the Assembly will go about its deliberative and scrutiny functions. They will have scrutiny

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functions, they will have legislative and deliberative functions and, on the evidence to date, the amount of time—if one takes, for example, the scrutiny of secondary legislation—that the Assembly has actually been able to devote to the scrutiny of measures has been very, very small. If important matters are to be transferred to the Assembly, matters which are broader and which are, in effect as primary legislation would be in its breadth and depth, then it seems to us that the Assembly will need to have the kind of procedures in place that will give proper and due consideration to those measures. If it is going to produce requests for Orders in Council—if I can come back to some observations that were made earlier on—the parliamentary consideration of those requests will need to be assured that they were given proper consideration in Cardiff. It seems to us, therefore, that in the creation of and transfer of a much more extensive set of powers to the Assembly, there will simply be more work to be done, and that more work requires, apart from AMs' time, time from current Assembly Parliamentary Services—if you like an officers' office—so there are consequential manpower issues that flow from the proposals in the White Paper which include (a) how many AMs have you got to do the job, and (b) how many officials have you got to do the job? We share some concerns about the capacity of the Assembly to do the job that it will be enabled to do.

Chairman: Mr Hywel Williams.

Q54 Hywel Williams: Going back to the national list question, I do not know if I am being naïve but would it not compound or magnify the problem of constituency AMs complaining about list AMs—as if you gave them a national shooting licence rather than just a local one?

Dr Scully: I suppose there is the possibility of people trying to cherry pick certain topics around various places, but I would have thought that is quite difficult to do across the whole of Wales. The point Richard was making earlier was that within a more defined geographical location there is the tendency to be a more defined geographical representative; yes, it is a possibility, but I would have thought that having some people who are clearly identified as being list members for the whole of Wales would probably diminish the sorts of problems that we are seeing at the moment.

Dr Wyn Jones: Just as an additional thought, I did suggest that one needs connections, one needs proper understandings which are formalised in terms of working out the role of the various forms of representatives. I think that would be much simpler in that context, for reasons which Roger suggested.

Q55 Hywel Williams: Do you have any thoughts at all about the national list compounding what I see as a south-east problem in Wales in that list AMs would be more likely to congregate around Cardiff rather than, say, Caernarfon?

Dr Wyn Jones: I think that is unlikely, given that the parties would look very closely at who is on the list and where they are in terms of place on the list and

how it will maximise votes. Parties will have a very real interest in trying to spread from their geographical base in other directions for that precise reason, so I think political calculus will develop. Caernarfon is pretty safe.

Dr Scully: That is something you see in other countries which use national lists or very large regional lists, and there are obvious, patent attempts not only to balance by issues like gender, race and age to a degree but also by communities.

Q56 Chairman: Could you share with us your thoughts on one vote rather than two? There has been some speculation about reducing the number of votes.

Dr Scully: Are there any particular aspects of it you want us to talk about? Whether we agree with it?

Q57 Chairman: Yes.

Dr Scully: Personally, I feel mildly negative against it, but less so than I do with the current proposals in the White Paper. It does somewhat diminish voter choice. At the moment under the two vote system voters have, if they wish to, the opportunity to vote for one party in the constituency and another one on the list; getting rid of the second vote does diminish some scope for voter choice. However, most people vote on fairly straight party lines. Our evidence suggests that in cases where people do split their tickets they seem to use the list vote rather as an expression of second preference. So to the extent one would be somewhat reducing voter choice, I can see a certain negative aspect to it. One further factor I should say is that getting rid of the second vote, particularly if you have a national list, would have some clear electoral implications. If you had a national list and two votes, you might well start to see the sort of thing you see in Scotland where several seats go to minor parties unless you have a 5% threshold or something, so one could well see UKIP or the Greens or whatever getting seats on the list. Getting rid of the second vote is another means of stopping the fractionalisation of the Assembly into more and more parties. It is likely most people would vote for one of the big four on the constituency vote and if those are aggregated to do the list calculations that would probably mean the existing big four parties would still retain an overwhelming dominance in terms of seats in the Assembly. That is just a factual point.

Q58 Chairman: Following on that, have you done any research on the proposition, which I have not heard discussed very much, of uncoupling the two systems? If the one did not depend on the other, would there be different results?

Dr Scully: Yes, massively so. I presume you mean there basically the list seats are calculated in a way which does not take account of the constituency results, and that would basically mean you would not have a semi-proportional voting system.

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Q59 Chairman: Even with a national list?

Dr Scully: Even with a national list, you would still have a pretty small dose of proportionality introduced into the system. That would be what these sorts of tomes call “mixed member majoritarian”. If you had that in the last Assembly elections, the Labour Party on less than 40% of the vote would have had a clear majority in the Assembly rather than exactly 50% of the seats. The system we have at the moment for the Assembly is not that wildly proportional by international standards, it is, as we term it, semi-PR. If you decoupled the list from the constituency in terms of denominators and so on and so forth then you would have hardly any proportionality at all. Given that was the basic principle of the White Paper, approved in the referendum, I think that would be very difficult politically to sell, but I think that is somewhere where you people have more expertise than I do.

Q60 Chairman: You may have answered this question but I pose it to you at the end in a very broad, general way. Based on your research, what are the implications of the White Paper’s proposals for reform to the electoral system in Wales?

Dr Wyn Jones: It would give Wales an internationally anomalous system. The only country which we have been able to find which has done something similar to banning dual candidacy is the Ukraine, which is not an example to follow. It will introduce a system which, whatever the rationale is, we fear will look partisan because it impacts the opposition parties far more than the governing party. There is a real danger as well it will reduce the quality of AMs in particular, which is worrying in the context of a 60-member assembly, because one of the things which has emerged from this morning’s discussions is that there is going to be nothing in the Bill about the possibility of increasing to 80. Back in July at the conference in Cardiff, the Secretary of State suggested at that stage the thinking was there might be something in the Bill which would allow that. So we are certainly looking at 60. Therefore in the context of 60, the quality of members is something which is really very important indeed, and any step which—and this is from a general perspective of the functioning of Welsh democracy—makes it more difficult for the opposition parties to get their “best members” in a 60-member assembly is I think problematic.

Dr Scully: I would agree wholeheartedly with Richard and merely add, if this issue is really a problem, I think the Government has come up with probably the worst of the available solutions.

Q61 Chairman: Can I end with one question. The title of the National Assembly for Wales is in the 1998 Act. The Welsh Assembly Government is here under that name in the Act. Does this Bill afford us the opportunity of providing new names and what do you think about that?

Dr Scully: On the whole, I would accept the Welsh Assembly Government; my colleagues on the right may not. I prefer not to mess around with names unnecessarily; unless you have a particularly strong reason to, leave names as they are.

Professor Rawlings: Chairman, I think it was to your question, the answer which was given by the officials this morning relating to one of the two bodies that will be in operation in 2007 but not the second. I think you were told that the Bill would refer, presumably in Clause 1, to the National Assembly for Wales and personally I can perfectly well understand that. It shows the strong sense of continuity that we see here and, in a sense, I think it goes very well with the evolutionary theme in the White Paper. When it comes to the other body, the White Paper does refer to the Welsh Assembly Government. I note that the officials this morning did not say that the term Welsh Assembly Government would be in the Bill. We wait to see. My own approach is to try and stand back from this. It does seem to me all colleagues around this table should actually be able to agree on what I think is a fairly simple point, and it is very well made in the report from the Assembly Committee on the White Paper. That report says that we do not refer to the UK Parliament Government, we do not refer to the Scottish Parliament Government. We have a clear differentiation in terms of the labels so that on the one hand we can all have a general sense of a legislature or a parliament comprising all parties, and on the other hand we have a clear label referring to the activity of government which is carried on by a party or parties in coalition. It really does seem to me that it should not be very difficult for all colleagues around the table to agree on the label of either the Welsh Executive or the Welsh Administration. Looking at Conservative colleagues over there, I do not see why Conservative colleagues should, in some sense, be implicated, as they can be in the public mind, with the policies of “the Welsh Assembly Government”. That seems to me to offend basic understandings in our British democratic system. So I would be very strongly of the view, rather than have the Welsh Assembly Government, this kind of combination of government and legislative functions in one name, that one should have either the Welsh Executive or the Welsh Administration. A note to colleagues: I have not suggested the Government of Wales because I do understand that some colleagues would find that difficult to accept given this is an issue of devolution rather than another constitutional reform.

Q62 Chairman: Dr Wyn Jones?

Dr Wyn Jones: I would endorse what Professor Rawlings has said, and I would add a further thought. I think one of the most important things that has been said this morning was in your opening comments, Chairman, on complexity. We have been talking about the electoral system but if one is talking about democratic participation more generally, one of the big, big problems with the settlement we have is its Byzantine complexity. One

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of the cardinal virtues of the Richard Commission Report was it gave a clear sense of constitutional principle, which was about making things intelligible. I am afraid the White Paper, for reasons I understand, is going to add yet further layers of complexity to the governmental system in Wales.

This does not help and anything which clarifies matters is to be welcomed, and I would endorse what Professor Rawlings has said.

Chairman: Thank you very much. If, in light of the evidence this morning, you would like to submit a further paper, please do so.

Tuesday 25 October 2005

Members present:

Dr Hywel Francis, in the Chair

Mr Stephen Crabb
David T C Davies
Mrs Siân C James
Mr David Jones

Mr Martyn Jones
Mrs Madeline Moon
Hywel Williams
Mark Williams

Written evidence from the Rt Hon Lord Richard QC

**WELSH AFFAIRS COMMITTEE INQUIRY
GOVERNMENT WHITE PAPER: BETTER GOVERNANCE FOR WALES**

When the statement on the White Paper was made on 15 June, I gave it a qualified welcome. It seemed to me to recognise the principle that the National Assembly needs greater legislative competence than it has at present. I am grateful that the Government has recognised this and has provided proposals to put it into effect.

The White Paper's proposal to change the status of the Assembly from a single corporate body with its own legal personality to a structure which recognises the division of functions between the Assembly Government and the Assembly is very much in line with the suggestions in the Richard Commission Report, and I am sure it is right.

I likewise agree that Ministers in the Welsh Assembly should no longer sit automatically on the Subject Committees. It seems to me that the scrutiny function of the Committees is lessened considerably if a Minister is actually a member of the Committee itself. There is of course a strong case for allowing Ministers to appear before Committees as and when this might be considered necessary.

I think too that it is sensible to clarify the number of Ministers and Deputy Ministers who can form the Assembly Government. If the number of Ministers is eight and the number of Deputies is four, then it would follow that when Ministers are withdrawn from the Subject Committees, manning them adequately will become a problem. This was one reason why we concluded in the Richard Commission that with the growth in the legislative capacity in the Assembly the present membership of 60 would not be sufficient. I regret that the White Paper has rejected this recommendation.

But the meat of the White Paper is in its suggestions for enhancing the Assembly's legislative powers.

The proposals in the Richard Commission Report were for an interim stage between the present situation and the devolution of primary legislative powers during which framework legislation would give the Assembly greater delegated powers than it has at present. If this can be categorised as the starting point, then the addition of the Government's proposal to legislate by Orders in Council is an interesting device which will give the Assembly greater legislative competence without formally devolving primary legislative powers.

Much of course will depend on how the Orders in Council will work in practice. As the recent Devolution Policy Paper produced by the Economic and Social Research Council and written by Mr Alan Trench observes: "When and how exactly Orders in Council would be made is far from clear. One suggestion is that they would be made as and when the Assembly seeks them. That would imply varying frequency, but with the possibility of much Parliamentary (and Assembly) time being spent on them". Another suggestion is that there would normally be only one Order in Council a year, the result of a bid by the Assembly and a bargaining process between Cardiff and Whitehall. Mr Trench suggests that this process would be replaced by an Order in Council authorising the Assembly to pass the legislation itself instead.

There is very considerable lack of clarity in the way in which this interim stage would be managed and effected. It is by no means clear how the Assembly would formulate its requests, and to what extent this will be purely a function for the Assembly Government, who presumably will negotiate with the Secretary of State on what it considers appropriate. Indeed, this illustrates one of the dangers still inherent in the White Paper proposals. The scope the Secretary of State would have to reject a request by the Assembly is as yet unspecified. Parliamentary procedure in relation to Orders in Council is fluid to say the least, and it could well be that the Secretary of State would take the view that it would not be appropriate for the Assembly to be given the powers that it is asking for, particularly if political affiliations of the Cardiff and Westminster Governments were different. Furthermore, it is equally unclear what role the Westminster Parliament would play in considering the requests from Cardiff. The scope for debate on Orders in Council is limited. They are not capable of amendment, and it is difficult to see quite how the Westminster legislative process could be adapted to meet the requirements of this new procedure.

The provision in the White Paper is that if the Secretary of State rejects a request by the Assembly for Order in Council powers, he should do so in a public and transparent way. This would seem to indicate that the function of the Secretary of State in normal circumstances will be merely to present the Assembly's request to the Westminster Parliament. On the one hand, the proposal is one which seems to limit the role of Westminster and the Secretary of State to the presentation of the Assembly's request, but on the other retains residual power to the Secretary of State to reject a request if he thinks it appropriate. This approach seems to me to be somewhat paternalistic. It is in effect saying to the Assembly "normally we can trust you to make reasonable requests, but there may well be circumstances in which we in London think that you in Cardiff have overreached yourselves, in which case we will intervene to prevent it".

Nor is it at all clear what the Orders in Council will actually contain. It is envisaged that the powers transferred to Cardiff will include the right to amend existing primary legislation, and even the right to amend primary legislation which has not yet been passed. As the Committee will know, Henry VIII Clauses are not exactly smiled upon by Parliament, particularly in the House of Lords, and especially by the Delegated Powers Scrutiny Committee. I do not think that the proposal will necessarily get an easy ride through Parliament.

Moreover, the result of proceeding by way of Order in Council will be an increase in the legislative work of the Assembly itself. Indeed, the Report on the Better Governance for Wales White Paper produced in September 2005 specifically recommends that there should be three minimum stages for Measures: a debate on the principle, consideration of detail, with the possibility of hearing witnesses, and a vote on the final Measure. Given the relatively little time the Assembly at present spends on the actual legislative process, the introduction of Standing Orders enshrining this procedure is bound to mean that the workload on individual AMs will increase. The extent to which 60 AMs, 12 of whom will be Ministers, will be able to cope with this is at this stage unknown. I really do feel that this issue of the size of the Assembly is one that will inevitably have to be resolved. If, in fact, the Assembly can be run successfully with 60 members, then so be it. But if, as we all at the Richard Commission suspected, the workload will prove too heavy, then consideration will have to be given at some stage to increasing the numbers.

In turn that means, as the Commission Report recommended, that there will have to be some consideration given to the electoral system by which AMs are elected. The White Paper is very clear in rejecting the proposal that the Assembly should be elected through the STV system. The present system of having directly elected and list AMs is already causing strain, and this would, we on the Commission believed, intensify if the numbers were to be increased to 80. Again, this is an issue which will at some stage have to be revisited. The present system may be appropriate for a Chamber of 60, but it is difficult to argue that it will remain appropriate at all levels in the future.

So I return to the qualified approval that I gave to the White Paper when it first appeared. I would repeat that modified approval today. The Order in Council device is an ingenious way of packaging the situation in which the Assembly gets considerable additional powers by the back door. But the proof of the pudding will be how it works in practice, and my fears of unacceptable strains between the Assembly and Westminster in the event of there being different Administrations in each capital has by no means been dispelled.

It is disappointing that the Government have not gone as far as we in the Richard Commission recommended. The White Paper is a step in that general direction. I still believe that the logic of the situation is that Wales should be treated broadly in the same way as Scotland and that the momentum of events will in due course produce the devolution of primary legislative powers. The White Paper proposes a mechanism which is perhaps over-complicated. One has to ask the question—if the object of the exercise is to give the Assembly quasi-legislative powers, would it not be simpler to give it those powers directly?

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Witness: **Rt Hon Lord Richard QC**, a Member of the House of Lords, Chair of the Richard Commission, examined.

Q63 Chairman: Good morning. Welcome to the Welsh Affairs Committee. Lord Richard, could you formally introduce yourself to the Committee?

Lord Richard: My name is Ivor Richard. I was the Chairman of the Richard Commission on the powers and electoral system of the Assembly.

Q64 Chairman: Could I begin by asking you to explain briefly the remit of that Commission, the scope and the timeframe of that inquiry and the Report's key recommendations?

Lord Richard: We were set up by the Assembly, I think as a result of an agreement between the Labour Party and the Liberal Party in Wales that between the Assembly elections there should be a review of the powers of the Assembly, how it was working, the electoral system under which it was elected, and that is really what we were set up to do. Five members of the Commission came through the Nolan procedure where we had a set of hearings. Three of us did this, Sir John Shortridge, a Professor from Cardiff University and myself. We got a large number of

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applications, we whittled them down to a shortlist and picked (I was picked already) four, and then we had nominations from the major political parties in Wales, and that made up the whole of the Commission; we were ten in number. What was interesting was the extent and the amount of the evidence we actually took in public and in private. We held a number of evidence sessions in various parts of Wales. I think that one of the important aspects of the Richard Commission Report is that it actually pulls together the evidence which really had not been pulled together at all before. We did not have a Convention in Wales in the way they did in Scotland therefore it was terribly important, I thought, that somebody gathered in the evidence, which we did. I think almost every organisation in Wales (the one notable exception being the WDA which for some reason, I am not quite sure why, declined to give evidence) submitted written evidence to us. I think we saw 115, if my memory serves me correctly. We had sessions at which we took evidence. We held 115 evidence sessions in front of us, so we had a spread of views. Now, the way in which we approached this—and again I have to be frank about this—the idea that in advance somebody could have persuaded me that the Plaid and the Conservative Party would both sign a common document on the future evolution of the Assembly I would have found a little fanciful. In fact, we got a unanimous report, as you know. What was interesting about it, I think, was that although some of us, including myself, had started off very sceptical about the whole approach, thinking that perhaps the Assembly had not had enough time to settle down properly and really it was a bit early to be looking at this yet again, I am bound to say that as time went on and we took the evidence, the logic of the situation pushed us all in the one direction which was—and let me use a neutral phrase at this stage at least—the Assembly needed greater legislative competence than it had got at present. It also needed some changes to the Government of Wales Act to put it constitutionally on a more sensible basis than it was. We also felt—and this was quite strongly felt on the part of the Commission—that you could not run the Assembly with 60 Members if you (i) gave it greater legislative competence and (ii) if you had a clear division between the executive side of the Assembly and the legislative side of the Assembly, you would not have enough people to run the committees and therefore there would have to be an increase in the number of AMs. If there was going to be an increase in the number of AMs then you could not do it on the basis of the existing electoral system because the strains that already existed between the elected AMs and the list AMs were there—and we all reckoned that it would be intensified very considerably if in fact you merely doubled the number of list Members from 20 to 40. So we had a look at alternative electoral systems and we came up with STV after we had looked at just about every one we could think of. It is not wholly satisfactory and although it is pretty revolutionary in a sense as far as Wales is concerned,

the whole logic of the situation had been pushing us in that direction and that is really how we had approached it.

Q65 Chairman: Perhaps you have anticipated some of the questions but if I could finish the opening part in relation to your role. In your own personal response to the White Paper which we are discussing, Lord Richard, you gave it a B, verging on a B+, I gather. What more do you think that White Paper could have said and done to merit an A or an A-?

Lord Richard: Obviously if it had implemented the conclusions of the Richard Report I would have undoubtedly given it an A, verging on an A+, I should think!

Q66 Chairman: Now you are being fanciful!

Lord Richard: Yes. Can I just make two or three general points first on how I approached this White Paper. First of all, it is now trite to say that devolution is a process and not an act in itself, and that is clearly true. If that is so, then you have got to have some idea of what you want at the end of the process. As far as I am concerned, I have a very simple view on this which is that seems to me that the Scottish pattern of devolution is one which, frankly, should be applied in Wales. For the life of me I do not understand (well, I do understand actually) why we have got the system that we have got, but it does seem to me rather basic that a nation in the UK like Wales should, broadly speaking, have the same devolutionary powers as the Scots have got, and we do not have them. I think the third point I would make is if that is the end result that you want to see, which is in effect primary legislative powers in Cardiff, you have then got to go on and ask yourselves does this White Paper move in that general direction or does it not? And the answer is it does and although it does not go as quickly or as far as I would like at this stage, nevertheless, because of its move in that general direction, my view is that it should be modestly welcomed. I have got some major qualifications about it, particularly on the Orders in Council procedure where I think, frankly, the idea that that is going to get an easy ride going through Parliament in principle to start off with is doubtful. Certainly in my House the desire of the House of Lords is continually not to have Henry VIII powers. Henry VIII powers in relation to this White Paper apply not only to existing legislation but the idea behind it is that Henry VIII powers will be given to the Assembly in respect of future legislation which has not yet been passed by this Parliament. I think that is going to take a bit of swallowing by the House of Lords and I think there are going to be problems getting it through. Secondly, on the Order in Council procedure nobody is absolutely certain how it is going to work. If what is proposed is that the Assembly will ask for powers to do X, Y or Z and the Government here say, "Fine, we agree," then they have got a purely presentational role in the sense that the Government's function here is really to present the Assembly's request to Parliament and expect

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Parliament then to pass the Order in Council. The extent to which consultation would take place before I do not know. One thing about Orders in Council is that they are not amendable, and so the scope for Westminster intervention in the procedure is going to be limited. Thirdly, we know that parliamentary procedure at the moment is that you have an hour and a half's debate in each House on the affirmative procedure, which again is broadly what is being proposed here, so in a sense it did strike me that the more one looked at it and scratched the surface and got underneath it, it is in fact using a device to give primary legislative powers to Cardiff but it is extraordinarily complicated and it is basically only a device. It does seem to my rather naive political mind that if that is the object of the exercise why do it in such a complicated way when we could do it in a simple way?

Chairman: Could we pause at that point because you have given us a great deal of information and to an extent you have anticipated some of our questions. First of all, could I ask Mr Davies and then Mr Jones to put their questions.

Q67 David Davies: Lord Richard, you said earlier on that Wales should have the same settlement in terms of devolution as Scotland. Why have you come to that conclusion? Why should it not have the same as England, which is the largest constituent part of the United Kingdom? Obviously we are all agreed that the current constitutional settlement is illogical because it is giving one system of government to Scotland, another to Wales and something else to England, or rather nothing else to England. Why do you think you can iron out that inconsistency by giving yet more to Wales without addressing the problem in England?

Lord Richard: First of all, I have a rather basic problem which is that I was charged with looking at the position in Wales, and not with looking at the position in England.

Q68 David Davies: You cannot separate the two.

Lord Richard: It is a serious point actually.

Q69 David Davies: I know.

Lord Richard: If I had been asked to look at the constitutional position of England within a federal structure obviously I would have done it and been delighted to do it. Why do I think you have got to treat Wales on the same basis as Scotland? First of all, because there is a deep sense of unfairness in Wales at the present situation. We held a number of meetings in different part of Wales. We held one in Newport. Were you there at the Newport one?

Q70 David Davies: Yes.

Lord Richard: I thought so. What was very interesting there is the Assembly came in for a lot of criticism and right at the end I said, "May I ask a question?" and everybody nodded and said, "Yes, of course" and I said, "How many here think that Wales should have the same powers as Scotland?" and two-thirds of the audience put their hands up. That attitude was not confined to Newport. We

found really in all part of Wales that there was a feeling that somehow or other Wales had been not exactly cheated but done out of their rights because one constituent part of the UK, Scotland, had been treated in a different and more generous way than the Welsh. The other point I felt strongly then and still feel strongly now is that we are not a county council of England. Wales is, after all, a nation with a history and a language and a tradition, as the Scots have got a history, if not so much of a language, and a tradition, and if that can be recognised in one part of the United Kingdom why on earth can it not be recognised in another part of the United Kingdom? I expect the Irish would feel the same.

Chairman: If we could pause there.

Q71 David Davies: On the point about the meetings, I accept what you are saying as probably correct but what you may not be aware of is that most of the people who turned up at those meetings were all in favour of more powers to the Assembly. The great mass of people living in Wales who did not even bother to turn out and vote did not bother turning up at meetings about the Welsh Assembly.

Lord Richard: I am sorry, if I could answer that, all we could do is hold the meetings and advertise the meetings. If people turned up to them, that was splendid; if they did not turn up, that was up to them. Secondly, there is some polling evidence which is very interesting. As you know the Aberystwyth School has done a poll and I have seen it; 64% of the people who voted in Wales are in favour of greater powers to the Assembly. That is a body of evidence I think you ignore to your peril.

Q72 Mr David Jones: Lord Richard, as you may know, we took evidence last week from academics and I would like to return to your suggestion that the Scottish pattern of devolution should be applied in Wales. One of the impediments that the academics saw, and one that I see, is that we have the constitutional position of Wales and England being part of the same jurisdiction, having a unified legal system and a unified judiciary, which of course is not what prevails in Scotland. Is that not a major constitutional impediment to what you propose in terms of adopting the Scottish pattern?

Lord Richard: First of all, there are signs—and I put it no higher than that at the moment—that the Welsh judiciary is beginning to exert a degree of independence from the rest of the UK. There are now more courts sitting in Cardiff—there is a commercial court sitting there, a court of appeal sits in Cardiff, and there is a court of criminal appeal in Wales—and they are beginning to develop a corpus of specifically Welsh law which is going to, I think, in the future differ, and may differ radically, from England. Secondly, the fact that you have got common judicial systems does not seem to me to be a great impediment to legislative competence. After all, other parts of the world—take Germany for example—they have a common judicial system, they have virtually a common set of laws, but they have a much more federal system of government in which the länder have greater legislative competence and

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each of them has virtually the same legislative competence. While it is true that the affairs of Wales and England are more mingled, and the border is not so clearly defined between Wales and England as it is between Scotland and England, that is nevertheless the development of what has been called the Sewel procedure, which is an interesting device. What happened here is that in the House of Lords Lord Sewel, who was a junior minister at the Scottish Office when the Scottish Bill was going through, in an almost give-away line said, in effect of course, if the Scottish Parliament were to request it, Westminster could legislate in the devolved areas by consent. Nobody thought that this would happen very often but it is happening quite a great deal and now deals, in effect, with a large number of the border problems which we would have in Wales just as they have in Scotland. So I do not think that the absence of separate judicial systems is sufficient to justify the non-separation of the political systems. I do think that we have got more cement in a sense than the Scots do in that while they have got separate laws we have got a separate language.

Q73 Mrs James: To take you back to your written submission, Lord Richard, you state that it would be sensible to clarify the number of ministers and deputy ministers who can form the government, and to include this on the face of the Bill. Could you give us a little more detail on that please?

Lord Richard: It just seems to me that if you are going to talk about how big the Assembly is going to be, you have to have some idea how many ministers you want. I think the suggestion is there should be eight ministers and four deputies. 12 from 60 leaves you only 48, does it not? 48 to man the committees of the Assembly is going to be tight. I do not say they cannot do it but it will be distinctly tight. I do not think you could run an Assembly Government on less than 12 ministers and deputies because of the different portfolios that they have got. If they are going to look at specific issues like health and education and what have you, then you do have to have ministers in charge. I think the present system is very much a hangover from the existing structure in the Government of Wales Act, the corporate body idea which we did not approve of on my Commission and which the White Paper does not approve of.

Q74 Mark Williams: I think you have touched on this in that answer and in the earlier one. There is a growing consensus, I think, that ministers should no longer sit in the Assembly subject committees in order to ensure ministerial accountability. You agreed with that. One of the fundamentals behind that was that manning of committees would remain a problem. I think you have answered that in answer to Mrs James's question. Can I ask why have you settled on the suggestion of 80 Members? Is that sufficient to alleviate the scrutinising role that we envisage for these committees?

Lord Richard: We did a bit of rather basic and imprecise arithmetic and came to the conclusion that you needed more AMs. We could have said 75 or we

could have said 85. Frankly, it was a compromise figure. We did not want to be too ambitious but we did not, on the other hand, want to leave the Assembly with insufficient backbenchers. That is the problem. If you are going to have an Assembly doing a proper scrutiny role you have got to have people who are prepared to do it. At the moment they are sitting on two or three, and some are even sitting on four committees. It is too much, they cannot do it. If you go and look at the committees operating with ministers sitting there as members of the committee, the relationship is much too cosy. The chairman of the committee and the minister, so to speak, are getting along well and therefore the amount of scrutiny is pretty small and pretty limited. Certainly that was the case in the committees I looked in on and that was the general feeling of other members of the Commission that went down and looked at it.

Q75 David Davies: I think, Lord Richard, that last point is very accurate actually, from my own experience. If you increase the numbers and you increase the powers, as you have a bi-cameral system in Parliament, and if you are going to have full legislative powers or something approaching that in Wales, as you do in Scotland, would you not also need some sort of scrutinising body, a panel of wise men and women, or some equivalent to the House of Lords to look at what they are doing as well? What do you think of that?

Lord Richard: I have been trying to reform the House of Lords for the last decade! It is a morass I do not think I would visit upon Wales at this stage. Yes, one of the functions of the second chamber is that it can do precisely what it is you want it to do. How you get that second chamber and whether it is appropriate for a country with three million people as opposed to one with 50 or 60 million, I do not know. It is interesting that New Zealand, for example, had a second chamber and it has got about three million people and they abolished it. Whether they are right or wrong no doubt will be seen. Certainly I do not think it is a prerequisite for the Assembly to get greater powers that you should have a second chamber.

Q76 Mrs Moon: In your inquiry did you look at any other legislative bodies around the world to reach this conclusion about having an upper house? You have mentioned New Zealand and I am just wondering if you looked anywhere else?

Lord Richard: No, we did not do a detailed comparison of other countries. Some of my colleagues went to Northern Ireland and had a look at that system, which again is different from the Welsh and Scottish systems—that is when the Northern Ireland Assembly is sitting—and their powers are again different. I have to say that from my point of view it seems much more sensible that if you are going to have devolution to the different parts of the United Kingdom, on the whole it should be the same sort of devolution. To have three or four different types is bound to cause confusion and has caused confusion. However, did we spend a lot of time looking at other countries? No, not a great deal.

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I think we all had a bit of basic knowledge about the German system, we knew a bit about Australia and a bit about New Zealand, but we did not set out to have a full international comparison.

Q77 Hywel Williams: I would like to take you back to the question of Orders in Council. We did have some officials here last week from the Welsh Office and also some academics and we asked them about this. I have to confess I am not a great deal wiser, to be honest, but perhaps that is a deficiency on my part. You have concerns about Orders in Council in your submission and you note the lack of clarity about Orders in Council, how they could be managed and effected. Would you like to tell us more of your concerns and what is problematic? You may have already have touched on this earlier.

Lord Richard: Sorry, I did not catch the end of that.

Q78 Hywel Williams: You have already touched on this earlier but perhaps you could expand on your earlier answer.

Lord Richard: I think we are in uncharted waters, frankly. Until this White Paper I do not think anybody envisaged the idea of using an Order in Council procedure to grant legislative competence to a devolved Assembly. You would not do it to county councils and they never did do it, as I recall, to council councils in this way. Let's be frank about it, it is a device to avoid having to come to Westminster and ask for primary powers to be formally devolved. It is quite an interesting device. It is quite a good device in that sense because what you end up with is a situation in which Cardiff ends up with greater powers, Westminster can say they have not devolved primary legislative powers, but depending on the way in which the Order in Council procedure is used, it could in effect be a concealed grant of almost a direct legislative competence down to Cardiff. All I am saying is that we do not know how it would be done, and we do not know who would be responsible for introducing it. We do not know whether there would be one Order in Council, for example, per year which would set out the Assembly's wish-list, or whether there would have to be an Order in Council in respect of each individual piece of legislation that the Assembly wanted. I do not know. Nor am I quite so sure, frankly, how you could have pre-Order in Council scrutiny, how that can work until you have got an Order in Council which you can scrutinise. Secondly, you cannot amend it and therefore it is a "take it or leave it" thing which even on the affirmative procedure is subject only to rudimentary parliamentary scrutiny up here. And finally you have got the Henry VIII point. I am not a purist about Henry VIII provisions but it does seem to me basic that on the whole an Act of Parliament ought to be amended by an Act of Parliament. Although there may be reasons why you give Henry VIII powers to ministers, I still do not see the purpose of doing it via this rather tortuous route of Orders in Council when if you want to give them more legislative competence you could do it in a more open and obvious fashion.

Q79 Hywel Williams: Can I take you on to the Secretary of State's function in this. In your paper you say that the Secretary of State's power to reject a request from the Assembly is somewhat paternalistic. How do you propose that the procedure should be best managed as far as the Secretary of State is concerned? Should there be just the Commons and Lords rather than secretaries of state, Commons and Lords?

Lord Richard: I do not know how you would manage it. With respect, you cannot ask me to say how you ought to manage it because I would not have gone down this route anyway! All I can do is look at what is said in the White Paper and ask the questions, and I do not know how he is going to do it. Lurking at the back of everybody's mind, certainly at the back of my mind is what was called in the Commission, somewhat irreverently, the "Redwood factor". If you had a Secretary of State in London who was against the whole concept of devolution and did not want any powers to go down to Cardiff and had the Assembly demanding greater legislative competence in a particular area, then the Secretary of State in London would be in a position to stop it. Quite apart from the fact that this is a somewhat paternalistic view, it does seem to me that it is wrong. If you have got an Assembly elected in Cardiff to do certain things then, *prima facie* at any rate, the legislature in London should be enabling them to do it, not putting up barriers in their way. If it is an enabling function that the Secretary of State has up here, again I come back to the point I made earlier, why go this route? However, I do not know how it is going to work out because nobody knows how it is going to work out.

Q80 Mrs Moon: You have touched a little bit on what I wanted to ask you about which was your comment about the unacceptable strains that could develop if you had a different government in Westminster to that in Wales. I wondered could you be a bit more detailed and specific about what you see some of those strains being and what you feel could be done to alleviate them? I appreciate I am asking you to project into the future, but it would be helpful if from your experience you could outline what you see as the particular problems.

Lord Richard: There are two arguments actually. One is that the sort of fears that I am expressing are illusory and the alternative is that you do not need to worry about it because the system is now so bedded in that it would be very difficult for any Secretary of State or any government up here to reverse the process. I am not as optimistic as that. It does seem to me that if you had an administration up here of a different political complexion to Cardiff then, to put it at its lowest, the Westminster administration could act as a brake upon the Assembly's doing what it is they want to do. Take smoking, which is a very good example actually, the Assembly want to ban smoking in public places in Wales; they cannot. Scotland just did it and the Secretary of State for Wales actually did it in Northern Ireland in his other capacity. It seems to me that is a bit crazy that you have got a situation in

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which the Assembly wants to do something, everybody knows they want to do something, everybody agrees that it should be able to do something in Wales, but it cannot and in order to get it done they have to depend upon, in effect, the goodwill of the Westminster Parliament, and Westminster inevitably will look at it on an England and Wales basis not just on a Wales basis. I think the danger is the brake point, that it could act as a brake upon the legitimate aspirations of a properly elected Assembly in Wales. I do think that if you start down this devolution route you have got to recognise the fact that as a nation Wales has got certain rights. If you want to treat it as if it were a glorified county council, okay, that is another matter, then you treat it like a glorified county council. If you want to treat it as a nation you have to treat it as a nation and if you treat it as a nation it has certain rights, and one of those rights seems to be basic, that on the whole it ought to be able to pass the legislation that it thinks right.

Q81 David Davies: Lord Richard, you talk about an administration, presumably you mean in London, acting as a brake on the Welsh Assembly. Is it not the case, though, that at the moment Welsh Members of Parliament can act as a brake potentially on an administration which has a different view. You talk about rights but you do not mention the responsibilities. Surely the point here is if Wales is to be given the power to go off and do its own thing, then it cannot be right that Welsh Members of Parliament can go along to Westminster and vote on matters that affect only England—because at the moment that is what is happening and they are the ones who are potentially putting the brake on English aspirations?

Lord Richard: I am not going to deal with the West Monmouth question any more than I can deal with the West Lothian question.

Q82 David Davies: It is intrinsically a part of this, is it not?

Lord Richard: It is an issue that at some stage will no doubt have to be resolved by discussion between the constituent parts of the United Kingdom. That is the point. At the moment if you talk to Welsh MPs (and I expect this is true sitting around this table here) you would take the view that in relation to Welsh affairs you play a valuable role at Westminster in helping to govern Wales properly. You obviously take the view that in relation to English matters you play a responsible part in helping to govern England.

Q83 David Davies: These are not English matters per se, are they, they are Welsh matters because it is Welsh MPs who are going over to England. The problem is whenever the West Lothian question is put to you, you say, “I am only interested in Wales.” I am putting to you that Welsh MPs can act as a brake on England and you are saying that is nothing to do with me, however you are highlighting the fact that a potentially different administration could act as a brake on Wales. Surely you cannot separate the two issues; they are one and the same issue?

Lord Richard: Except there is this distinction, is there not: I am talking about an administration in Westminster; you are talking about Members of Parliament in Westminster. I am saying if you have got a government in Westminster that can be a pretty effective brake. If you have got a group of MPs in Westminster, I do not think that has the effect of a brake because there is no secretary of state and administration here saying no to the administration in Cardiff. That is a slightly constitutional-type answer to a question. At the moment I am bound to say I think your question is unanswerable. I have always taken that view over the West Lothian question and I think it applies just as much to Wales as it does to Scotland.

Q84 Mr Crabb: Given what you said earlier about your view on the state of public opinion in Wales with regard to devolution, would you therefore disagree with the Government who said that they do not believe there is a consensus within Wales about giving full legislative powers to the Assembly?

Lord Richard: That is an interesting question. I would like to see more evidence but I do not accept the fact that there is none. In other words, it does seem to me that there is some evidence which shows that the people of Wales would like greater legislative competence. Whether that is sufficient at this stage to fight a referendum campaign I am not entirely convinced but I do think the evidence is capable of being gathered.

Q85 Mr Crabb: How do you view that stream of public opinion in Wales, and it is a significant stream, that would either keep the status quo as regards the Assembly or even favour abolition? In your enquiries did you just ignore that stream of opinion?

Lord Richard: We did not ignore it. We looked very hard to find people who wanted to abolish the Assembly and go back to the old status. There were some but there were not very many. Most people in Wales now accept devolution and the Assembly as part of the fabric of the way in which Wales is run.

Q86 Mr Crabb: Maybe we are peculiar in Pembrokeshire but there is a significant strain of opinion—

Lord Richard: Well, it did not surface in Haverfordwest and we had a good meeting in Haverfordwest.

Q87 Mr Crabb: At what point do you feel it would be useful to test public opinion in Wales with a referendum?

Lord Richard: When the Government has decided what they want to do in Wales. If the Government decide that they are going to grant legislative powers to Wales, there ought to be a referendum, but I do not think you could have a referendum on a referendum. I do not think you could go and ask the people of Wales, “Do you want a referendum on primary powers?” I do think there is evidence that can be gathered which would indicate what the state of opinion in Wales was and at the moment the latest

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poll I have seen is the one which Aberystwyth did which was 64%. I would like to see a more recent one.

Q88 David Davies: Lord Richard, what aspect of these proposals to enhance the Assembly legislative powers, if any, would be most contentious in the House of Lords?

Lord Richard: On the White Paper questions?

Q89 David Davies: Yes?

Lord Richard: I think the Order in Council procedure. Their Lordships will not like that. They will find it odd. First of all, they do not like being disturbed too much and this I think will disturb them quite a lot and, secondly, they really have a feeling, particularly in the Delegated Powers Scrutiny Committee, which is a powerful committee in the House of Lords, that Henry VIII powers on the whole are not acceptable, that you can perhaps use them in exceptional circumstances but to found a constitutional settlement on that basis, I think their Lordship will have problems with that. The other thing one must say about the White Paper proposals is if you see them as a transition then you can approach them in one light, which is the light that on the whole I think I have. If you see them as an end in themselves you approach them I suppose with a much more critical view and you ask yourself, "Is this going to be the final constitutional settlement?" Does that make sense?

Q90 David Davies: Yes, it does. Have you had any indication whether the changes to the voting system, which we are probably going to ask you about in a minute, are going to be contentious in the House of Lords?

Lord Richard: Yes I think it probably will be, but...

Q91 David Davies: I do not know whether the Chairman wishes to come in.

Lord Richard: Not violently I would have thought because it is the second stage in the process.

Q92 David Davies: That begs the question is it not the case that it is going to be contentious because it is such an illogical thing to do?

Lord Richard: Illogical?

Q93 David Davies: I think so, to change the voting system. You were making the case earlier on that we need a bit of consistency in the devolution system, and we need the same powers in Wales as we have in Scotland (although not in England of course), but surely what we are now doing is to change the voting system once again and it is a system that the public currently do not understand that well. They are going to understand it even less well and it is going to be a completely different system to the one that is being used in Scotland or in Northern Ireland or of course in England. I will tell you straight, I think the only reason it is being done is because the current voting system favours parties other than the Labour

Party and the only reason it is being changed is that it will cause a certain amount of inconvenience to the minority parties particularly the Conservative Party.

Lord Richard: Let's be clear what you are asking about. Are you asking me how did we come to the conclusion on STV, do I think that is going to be contentious, or are you asking me about the abolition of the right to stand?

Q94 David Davies: The abolition of the right to stand on both. The STV effectively is not going to go through the House of Lords, is it, because it has not been accepted?

Lord Richard: Let me go back a bit. The basis of our argument on the electoral system was the size of the Assembly. In other words, we said—and I have said it quite often since—that if the Assembly can run itself on 60 then problems with the electoral system tend to be lessened, tend to be slightly subsumed. If, on the other hand, you have got to put the number of AMs up because you cannot run the Assembly on 60, given that 12 are ministers and therefore you have not got enough people to do the job, if it goes up to 80 people, how are you going to elect the 80. Your arithmetic then does not work if you want to keep the existing constituency boundaries.

Q95 David Davies: But it is not at present going to go up to 80, is it? The only change that we are going to see in the electoral system is the change to prevent people from standing both for the lists and for the constituencies.

Lord Richard: I will not avoid that, I promise you, but I thought you wanted me to justify the STV proposal first.

Q96 David Davies: I think that is a very interesting point and I would love to have that debate with you some time but that was the not question, the question was more about the changes that are being proposed. Perhaps you could tell us what your view is on the changes being proposed. Do you think it is constitutionally right, given your view that we should have more consistency, that we are going to make these systems more inconsistent?

Lord Richard: There is something wrong in a situation in which five people can stand in Clwyd, none of them can be elected, and then they all get into the Assembly. On the face of it that does not make sense. I think a lot of people in Wales find that it does not.

Q97 David Davies: That is a good argument for first past the post rather than STV.

Lord Richard: First past the post is what?

Q98 David Davies: I said that is a good argument for the first past the post system rather than the STV one which you actually propose in your report?

Lord Richard: Not if you are going up to 80, it is not.
Chairman: Could we pause a moment there and ask Hywel Williams to come in.

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Q99 Hywel Williams: As you said earlier, stage three full powers is the end point and if stage two is so complicated and difficult, for me at least to understand, what possibly could be the argument in favour of having a stage two at all?

Lord Richard: I think you must ask the Secretary of State that. I suspect one of the arguments is sitting in this room actually. It avoids difficulties over the number of Welsh MPs, over the size of constituencies in Wales, it avoids all those difficulties, but it is actually an interesting and complicated device. I am not against devices if they work, but I am against devices if they look as if they are going to be difficult to run and if the end result is as yet unclear, and it is to me.

Q100 Hywel Williams: I think I have concerns about the understandability of it all for the public in Wales and therefore the difficulty of recruiting them as supporters eventually, from my stand point in particular.

Lord Richard: I think there is something in that. One of the objects of our report was to try to simplify matters, not to complicate them. That was why we were very much in favour of severing the Assembly Government away from the rest of it, in other words moving away from this concept of the Assembly being a corporate body because people did not understand what that meant. As you know, there was confusion as to whether the Assembly was doing something or whether the Assembly Government was doing it. I think to move into a situation in which, if it is being done by Orders in Council, people will not be sure (i) whether the Assembly have asked for power and (ii) whether the refusal of power is because they have not got through to Westminster or for some other reason, and (iii) whether what is being operated is basically a Westminster power in Wales or a Welsh power in Wales. I think that is going to be a source of some confusion. I do not think it is insuperable but it is an additional hurdle.

Q101 Mark Williams: Can we turn to the electoral system and STV. You have explained the logic which led you to reach the conclusion of STV. Why would you have ruled out an extension, if you like, of the additional Members system?

Lord Richard: It is very difficult to do, 40 list and 40 constituencies. The existing strains that there are with 40/20 we have heard about and to double the number of list Members, which is what you would do, you increase those strains.

Q102 Mark Williams: Did you look in terms of the boundaries that would operate of the regions within the STV? We heard from some of the academics last week that it was time to update the boundaries under which the system is undertaken, given that we are working on boundaries that were European election boundaries some years ago?

Lord Richard: Yes, we looked at that.

Q103 Mark Williams: What did you find?

Lord Richard: Can I make the point again that I have just been making because if you can run it on 60, you do not need to do anything with the electoral system; if you cannot run it on 60 and it goes up to 80, you do need to do something with the electoral system. You have then got to decide what it is you want to do with it. You cannot have first past the post clearly. You cannot have a list which is equal to the number of the constituencies, so you have got to have another one. We looked at the different types of electoral systems that were on offer.

I have to tell you I am not an expert on the details of proportional representation systems so you must forgive me if you are. It did seem to us that the most logical one was STV.

Q104 Mark Williams: What consideration did you give to replacing the system with a single national list?

Lord Richard: We looked at that. The problem with the single national list is that you do not have any relationship then between the individual and a recognised geographical entity. We did think that it was important to try and preserve as much of a geographical link as you reasonably could. So how do you do it? I suppose in theory you could double up on everything but I do not think that is particularly fair politically nor would it be particularly efficient. The other thing you can do is that you can enlarge the number of constituencies but have more Members per constituency. If you do that, what new constituency boundaries do you have? You cannot just double up on the parliamentary ones. On the other hand, if you take the European ones, then you can probably have a sufficient number in each of those constituencies to make STV reasonably workable, because we did hear quite strong evidence that you have got to have about four or five Members as a minimum for STV to work properly and then is STV too complicated? There are certain parts of Western Europe however where it has not proved too complicated. The Irish seem to get along well with STV. It takes a bit longer to announce the results of their elections but people seem to be able to grade candidates in the order in which they wish them to be graded, first, second, third and fourth, so we came to the conclusion that although STV is a considerable mouthful to gulp down to start off with (and I understand the politics of this) nevertheless, once you have actually got the meal down, on the whole, it might be fairly palatable. At least, it would not prove unpalatable, let's put it that way.

Q105 Mr David Jones: Continuing with this discussion, last week, as I said earlier, we had evidence from a panel of academics who told us that the White Paper's proposals for reform of the electoral system, particularly with regard to list Members, look deeply partisan (whether or not that was the intention behind it) and this may have a negative impact upon public confidence in the

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system. In fact, one of the academics said words to the effect of—and I paraphrase—if there is one thing that the public dislike almost as much as a bent copper or a paedophile living down the street, it is a politician who seems to be stitching up the electoral system to his own advantage. What are your views on that?

Lord Richard: I certainly agree with every syllable of that remark.

Q106 Mr David Jones: Is that the way it looks to you?

Lord Richard: No, I do not think it does. Do you mean the abolition of the right to stand on the list and the right to stand in the constituency?

Q107 Mr David Jones: The motives behind the proposals?

Lord Richard: I do not know what the motives are because I am not in the government, but I think there is a basic logic in asking people to choose where they want to stand and how they want to stand. If you just let people double up you get this absurd situation, as I said before, of people being rejected by the electorate but nevertheless ending up sitting in the Assembly. If at the beginning of the process they say, “We are not going to stand for the constituency, we are going to stand for the list,” okay, I accept that.

Q108 Mr David Jones: You mentioned earlier the Clwyd West result. Was not the Clwyd West result always foreseeable having regard to the form of devolution settlement that we had?

Lord Richard: The electoral system as then present?

Q109 Mr David Jones: Yes?

Lord Richard: Yes, it probably was. I do not know the details of Clwyd West but, yes, I think it probably was.

Q110 Mrs Moon: Sorry to interrupt you. An interesting comment about stitching up the electoral system. I think part of the problem that we have at the moment is that the regional AMs refer to themselves—and it is a linguistic issue—as the Member for a constituency rather than a Member for a constituency. I do think that that is part of the problem that we have and certainly one that the public finds difficult when they have people representing themselves as the Member when in fact they are a Member. I just wondered what your comments on that would be?

Lord Richard: I can see that it could be a problem. I have to tell you when we probed a bit talking to AMs about this particular issue we did not find that the AMs themselves were particularly worried by this. We found Members of Parliament rather more worried than AMs seemed to be. Everybody said if you are an AM you are an AM and therefore you

should be treated in exactly the same way, and the jurisdictional fights, if I can put it that way, between the individuals did not seem to be all that great. That was certainly my impression. I may be wrong about that but, on the other hand, it is a relationship—this comes back to a point I was making earlier about the strains—it is a relationship which has strains built into it and it does require a certain amount—a considerable amount—of tact, to put it politely, on both sides for the thing to work properly. In most cases I think it probably has; in some cases it has not.

Q111 Mrs Moon: Finally, you said the Government’s proposals are over-complicated. I think you have said that several times today and we are quite clear that you are not happy with that. You have outlined some of your preferences but just as your final submission could you tell us what you feel would be the simple and effective means, very briefly, for giving that?

Lord Richard: Along the lines of something similar to the Scottish settlement, that everything is devolved except that which is reserved, and where Cardiff would have a power to pass legislation in the way the Scottish Parliament does. For the life of me, doing the best I can with the arguments, I do not see the argument against that. It seems to me basic, quite honestly, that if you are going to have a devolved Assembly then it ought to have powers. At the moment it does not have powers to do what it wants to do and it ought to have the powers to do what it wants to do, broadly speaking, within sensible limits and all the rest of it. To leave it in semi limbo, in which it is, dependent upon whether or not it can get time at Westminster to get the bills in the legislative programme there is a good example of what is wrong. When it comes to competition for parliamentary time at the moment, what happens? Wales is treated in exactly the same way as any other government department so it has got to compete against the Home Office, the Department of Health, the Department of Trade and Industry, and all the rest of it, for legislative time to introduce a measure. First of all, it should not be treated as if it were a government department because it is rather more than a government department or a county council. It is basically a nation, one of the nations of the United Kingdom, so it deserves to be treated differently from that point of view. Secondly, so long as legislation remains confined to Westminster, you are bound to have these strains on parliamentary time. Having sat on these committees at one stage to decide what bills go in and what bills do not go in, the horse-trading is extraordinary. It is inevitable, but I do think that Wales is a bit different and deserves to be treated a bit differently than an ordinary horse caper.

Chairman: Lord Richard, thank you very much for your evidence.

Written evidence from The Electoral Commission

WELSH AFFAIRS COMMITTEE INQUIRY: BETTER GOVERNANCE FOR WALES

INTRODUCTION

1. The Electoral Commission welcomes the opportunity to submit evidence to the Welsh Affairs Committee's inquiry on *Better Governance for Wales*. The Commission's representatives will be happy to expand upon or supplement any of the points made below in oral evidence to the Committee.

2. The Commission's representatives giving oral evidence to the Committee will be Glyn Mathias, Electoral Commissioner, who has particular responsibility in the Commission for Welsh affairs, and Kay Jenkins, Head of the Commission's Wales Office.

3. The Commission's evidence to the Welsh Affairs Committee is based on matters within the Commission's statutory remit, that is, electoral issues. The Commission submits no evidence to the Committee on the question of a new Executive structure for the National Assembly for Wales or on enhancing the Assembly's powers, as these are not matters in relation to which the Commission has any statutory role.

4. The Commission's evidence mirrors its submission to the Secretary of State for Wales made in response to the White Paper *Better Governance for Wales*, September 2005, available on www.electoralcommission.org.uk.

ABOUT THE ELECTORAL COMMISSION

5. The Electoral Commission is an independent body established by the Political Parties, Elections and Referendums Act (PPERA) in 2000. The Commission is headed by a Chairman and four other Commissioners. The Chairman and Commissioners do not have connections to any political party, nor is the Commission accountable to Government. It is funded by and responsible to Parliament through a committee chaired by the Speaker of the House of Commons. We aim to foster public confidence and participation in elections by promoting integrity, involvement and effectiveness in the democratic process.

6. Under Section 6 of the PERA, the Commission is required to keep under review, and from time to time submit reports to the Secretary of State, on such matters relating to elections as the Commission may determine. The elections for which the Commission has statutory responsibilities include elections to the National Assembly for Wales. The Commission is also required, by section 5 of PERA, to prepare and publish reports on the administration of elections to the National Assembly for Wales. The Commission is required to promote public awareness of current and pending electoral systems in the UK, under section 13 of PERA.

7. We have, to date, published the following reports on elections in Wales:

- (a) *The National Assembly for Wales elections 2003: the official report and results* (November 2003).
- (b) *Local elections in Wales 2004: the official report* (December 2004) (Undertaken at the request of the Welsh Assembly Government).

8. Prior to the National Assembly election in May 2003, we published in December 2002 the research report *Wales Votes?* This focused on public attitudes towards Assembly elections.

9. We have also published the following relevant reports on UK-wide elections, including Wales:

- (a) *Election 2001: The official results*.
- (b) *The 2004 European Parliamentary elections in the United Kingdom* (December 2004).
- (c) *Securing the vote* (May 2005). Further reporting on the UK Parliamentary election 2005 will be published by the Commission in autumn 2005.

10. In all of the reports cited, we have commissioned and published the findings of expert research on attitudes towards voting and the electoral process, including quantitative and qualitative public opinion polling. Our reports also include the findings of expert election results analysis including, for example, on the two votes currently used in the National Assembly electoral process.

PROMOTING PARTICIPATION AT ASSEMBLY ELECTIONS

11. The Commission very much welcomes the intention signalled in the White Paper to implement a key recommendation made in our statutory report on the National Assembly elections 2003, that is, to provide for powers for the Assembly to arrange for public information campaigns to promote participation in its elections. We believe this will be beneficial to voters and look forward to working alongside the Assembly in fulfilling our own duty to promote public awareness of the 2007 Assembly elections. Promoting participation at elections is, of course, the collective responsibility of all involved in the electoral process.

ELECTORAL ISSUES

12. The White Paper outlines the Government's proposal to change the provisions currently in the Government of Wales Act such that individuals would be prevented simultaneously from being candidates in constituency elections and being eligible for election from party lists. The Commission's comments on this proposal are set out below.

Some context and criteria

13. The Electoral Commission's statutory remit requires us to promote public awareness of all current and pending electoral systems in the UK and the Commission has not to date taken a view on the merits of any particular electoral system.

14. The White Paper is not concerned with the merits of particular electoral systems and proposes an amendment to an element of the existing additional member system that the White Paper argues causes voter confusion and concern.

15. In formulating our own proposals for changes to electoral law and practice, we place the interests of the voter at the centre of our considerations. Our priority is that electoral arrangements should create the best possible conditions for political parties and candidates to engage with the electorate. Furthermore, we aim to ensure that electoral practitioners can effectively and efficiently administer electoral arrangements.

16. At the National Assembly elections in 2003, the main story, alongside the actual election results themselves, was the low levels of voter turnout, at only 38%. We commented in our statutory report⁵⁵ that all concerned with elections and electoral processes were left with a serious challenge. We stated that all those with an interest in promoting democratic involvement had, and continue to have, a responsibility to examine how they could more effectively engage with and gain the confidence of the electorate.

17. In our audit of political engagement⁵⁶ we pointed out that what is incontrovertible is that turnout is on a downward trend in the UK and that much research has found the public to have low opinions of politicians and of politics. Turnout at the UK Parliamentary election in 2005 showed only a marginal improvement on 2001.

18. We believe it important that any amendment to the current electoral process is considered in the context of a continuing distrust of politicians and against the interplay of factors that resulted in low turnout at the last National Assembly election. Any change should be considered in the context of how it might impact on public perceptions and voter participation at the next Assembly election.

19. Any change should also be considered for its impact in a UK-wide context, as well as within Wales. In particular, the same electoral arrangements apply to the Scottish Parliament and were introduced at the same time as those of the National Assembly. Wales would have an electoral process unique to itself if the proposal in the White Paper were implemented.

20. In light of these points, we believe the following criteria are important in considering a change to the existing electoral arrangements for the National Assembly:

- (i) the change and the reasons for modifications should be comprehensible to voters;
- (ii) the change should be "fair" and be seen to be fair in the eyes of voters;
- (iii) there is a need to avoid accusations of partisanship, which could impact adversely on participation; and
- (iv) there is a need to consider broader context, including the potential impact of any change on other electoral systems in the UK.

International comparisons: dual candidacy

21. There are around 30 countries that have mixed or additional member electoral systems (AMS⁵⁷). Compensatory systems with lists, like that used for the National Assembly elections, normally explicitly or implicitly permit dual candidacy. They normally require that in the event of double success, the successful candidate must sit as a member for the constituency.

22. Candidates have been permitted to run for both constituency and lists in Germany since the AMS system was inaugurated there in 1949. New Zealand, Japan, Hungary and Russia, all of which introduced mixed member systems in the 1990s, permit dual candidacy. In Italy, Denmark and some regions of Germany, dual candidacy is expressly required.

⁵⁵ *The National Assembly for Wales elections 2003*, November 2003.

⁵⁶ Research reports, jointly with Hansard Society, March 2004.

⁵⁷ In drawing international comparisons, we have been assisted by Prof D Farrell of Manchester University, Dr R Scully of Aberystwyth University and Mr A Ellis of the IDEA in Sweden.

23. Prevention of dual candidacy to our knowledge has until now only been tried in the Ukraine, prior to the 2002 Parliamentary elections there.

24. Preventing dual candidacy was considered when the electoral system for Quebec (Canada) was reviewed in 2003. Although the review acknowledged concerns that defeated constituency candidates were being “recycled” as regional AMs, the review board concluded that dual candidacy should be required. It was proposed to make mandatory what was likely to happen in any event, namely that the most advantageous places on each party’s list should go to the party’s constituency candidates in the region. The conclusion was that each regional AM must therefore have contested a constituency seat.

25. In light of international norms, we would caution that there should be compelling reasons for introducing a change to an electoral process that is as yet untested over a period of time. Whilst the effects of change can to an extent be predicted, unexpected trends might emerge that have not been possible to assess or analyse from experience in other countries.

Voter perspective: dual candidacy

26. In the time available to respond to the White Paper, it was not feasible for us to commission public opinion research on the issue of dual candidacy. Drawing on our quantitative and qualitative research on public attitudes to the National Assembly election in 2003, however, we note that the “Clwyd West problem” as described in the White Paper did not emerge in any of our attitudinal research about voting in the election. As our research included unprompted questions to the public about their reasons for voting or not voting, this may suggest that there was in fact low public salience of the issue at the time.

27. In the absence of any research findings on voter attitudes on dual candidacy in the public domain, we believe it is necessary for the Government to provide more information regarding the justifications underpinning the statement in the White Paper that voters are confused and concerned about the issue and that it is a disincentive for voters. It would be helpful for any evidence base to be made publicly available, to throw further light on this matter.

28. It is possible that some of those members of the public said to be critical of dual candidacy may in fact be criticising an outcome of proportional representation, compared with the majoritarian “first past the post” system to which voters in Britain have been traditionally accustomed. The Additional Member System used at the National Assembly elections is specifically aimed at an outcome whereby the party list system “corrects” the advantage gained in the constituency election under first past the post.

Impact on political parties and candidates: prevention of dual candidacy

29. There would be no impact on the proportionality of the result; it would remain as at present.

30. At present, some high profile candidates stand for election in constituencies, with the fall back of election through the regional list. A party may be unlikely, under this proposal, to risk a high quality candidate to challenge in a constituency election; opposition parties may be obliged to run their major players in regional lists to ensure election. This may impact adversely on the quality of some constituency contests, where opposition candidates may be perceived to be “second string”. This in turn is likely to favour sitting candidates.

31. In preparing its response to the White Paper, the Commission contacted all political parties registered to contest elections in Wales. From those that responded giving us their views, the majority were strongly opposed to the change. Some parties advocate more fundamental change to the Assembly’s electoral process or indeed to the Assembly itself. But there is a perception that the change proposed favours incumbency and the current party of Assembly Government that holds the large majority of constituency seats.

CONCLUSION: PREVENTING DUAL CANDIDACY

32. Our main consideration is the voter’s perspective. In light of the need to encourage voter participation at the Assembly election in 2007, we would caution against any change that is perceived to be partisan and could add to a prevailing distrust of politicians.⁵⁸

33. On the evidence available to the Commission, which we have reviewed above, we do not believe that the case for change has been made out.

⁵⁸ For example, see *Audit of Political Engagement*, The Electoral Commission, March 2004.

AN ALTERNATIVE APPROACH—A SINGLE VOTE

34. In the course of discussions about the White Paper's proposals, an alternative option to preventing dual candidacy has been mooted; that alternative was referred to, for example, by Secretary of State Peter Hain at a seminar held to discuss the White Paper in Cardiff. The option is that the current AMS system could operate with one vote.

35. A compensatory mixed system such as AMS may operate with one vote; the vote is cast for a constituency candidate but is also considered to be cast for the candidate's party, thereby electing regional candidates from a party list. The current d'Hondt formula of calculating vote shares could operate with the one vote; the total of the constituency votes across the region could be used to calculate the allocation of list seats, rather than the total of the regional vote currently used. The calculation could take into account the number of constituency seats won when calculating the list allocations, similar to the present system. However, without seeing this option set out in written proposals detailing how it would work, comments are to an extent speculative.

36. It is notable that, in the context of National Assembly elections, implementing this option would mean that a voter would cast one vote in an election for five candidates—to elect a constituency Assembly member and four regional members.

International comparisons

37. The overwhelming majority of existing compensatory systems have two votes. Changes over time indicate a clear trend towards two votes. The exceptions to the two vote system are the two largest Lander of Germany: Northern Rhine-Westphalia and Baden Württemberg.

38. The option has also been raised in Scotland during deliberations of the Arbuthnott Committee, which is considering the consequences of having four different systems of voting in Scotland, and different boundaries for Westminster and Scottish Parliament constituencies. However, there is little evidence that the option has been widely debated in Scottish civic society or is one which has attracted significant media or public comment.

Voter perspective

39. One vote could be said to be simple and straightforward; voters would have only one choice to make. The corollary is that voter choice would be reduced. Personal and political choices would be merged; voters would no longer be able to vote for a preferred individual local candidate with their constituency vote and a preferred party, which might be different, with their second vote. Neither would any other type of differential or "tactical" voting be possible.

Impact on political parties and candidates

40. Of those political parties in Wales who gave us their comments on this issue, opposition is strongest from smaller parties and from those who advocate more fundamental change to the Assembly electoral process.

41. The main disadvantage of this option is that small parties would have significant hurdles to mount in order to attract votes. Under the single vote proposal, a party or individual effectively has to stand in a constituency election in order to gain votes and would have to stand 40 candidates, one in each constituency, in order to claim to be contesting the election across Wales. Even within one region, a party would have to contest every constituency to be said to be covering the whole region. This would be a significant cost and resource issue for small parties.

42. In National Assembly elections, it is already comparatively difficult for small parties or independent candidates to be successful in the regional vote. This is because, in practice, the threshold to be elected in the regions is already high, at about 12% of the vote. This contrasts with elections to the Scottish Parliament, where the ratio of regional to constituency seats is lower. The proposal would therefore to the disadvantages faced by small parties or independent candidates.

Conclusion: a single vote

43. Our conclusions on this issue are similar to those on the proposal set out in the White Paper; we would caution against any change to the current electoral process without strong evidence to back the case. If this proposal were to be considered actively, it would need more flesh on the proposed process and should therefore be the subject of full consultation.

1 September 2005

Witnesses: **Mr Glyn Mathias**, Electoral Commissioner for Wales, and **Ms Kay Jenkins**, Head of Office, Wales, the Electoral Commission, examined.

Q112 Chairman: Good morning and welcome to the Welsh Affairs Committee. Could you begin by introducing yourselves please?

Mr Mathias: My name is Glyn Mathias, and I am Electoral Commissioner for Wales.

Ms Jenkins: I am Kay Jenkins, Head of the Wales Office in the Electoral Commission.

Q113 Chairman: Could we begin by examining the role of the Electoral Commission. Could you tell us whether the Government has a statutory duty to consult with you with regard to the proposed changes to the electoral system?

Mr Mathias: No, there is no statutory obligation on the part of the Government to consult us. The powers which are given to us under Section 6 of the Political Parties, Elections and Referendums Act do give us the power to comment on electoral issues where we think it is appropriate. Perhaps it is useful to describe our role in the electoral process in Wales. We did produce a statutory report on the December 2003 Assembly elections which included widespread research into public attitudes, which is particularly relevant to this discussion. In addition, the Welsh Assembly Government asked us to report on the combined elections of 2004, and one of the recommendations we have made and is now being implemented is the establishment of an Elections Planning group to co-ordinate the planning of elections across Wales, in which we are actively involved and my colleague Kay is represented on that group. So we are actively involved on a continuous basis in the electoral process in Wales. That is perhaps more relevant than the statutory basis which you are asking about in commenting on this particular situation.

Q114 Chairman: Can I thank you for the evidence that you have provided us with. In particular in paragraph 16 you stated: "Our priority is that electoral arrangements should create the best possible conditions for political parties and candidates to engage with the electorate." Based on this point of your criteria is there a case for reform to the electoral arrangements for elections to the National Assembly for Wales?

Mr Mathias: We have looked at the particular proposal in the White Paper for a ban on dual candidacy really from the point of view of the voter and public confidence in the electoral process. I entirely understand the tensions that exist between list Members and constituency Members of the Assembly and I entirely understand that Clwyd West is not perhaps the best example of how the AMS system works. However, there is a serious danger that an attempt to resolve one particular anomaly or injustice will actually serve to create other anomalies and injustices and that is the basis really of the conclusion we have come to. There are about 30 other countries around the world which have additional Member systems as their electoral system. No other country currently bans dual candidacy on the lines of the proposal in the White Paper. We therefore feel that reasons for going down

this road have to be more compelling than if there were those other examples. If you are going to operate outside international democratic norms then you have to have particularly compelling reasons to do so. We carried out extensive public research, as I described, for our statutory report for the 2003 elections. This issue did not figure in that research. We asked a whole series of questions and sought unprompted replies and this issue did not arise. I think also, as you heard partly in the last discussion, that the ban is perceived widely as disadvantageous to opposition parties in its effect if not its intention. It is likely to favour incumbents in constituencies because opposition parties basically have to choose where to put some of their best candidates, whether in constituencies or on the list, and therefore they may have to put weaker candidates in constituencies and that is likely to favour incumbents. It is perceived, rightly or wrongly across the political spectrum, as partisan and there is a danger that if it is perceived as partisan it might undermine public confidence in the process. Above all, what concerns us is that there is no evidence whatever in the White Paper to back up this proposal. There is no evidence at all to back up this proposal and therefore we came to the conclusion that we do not think the case for change has been made.

Chairman: Stephen Crabb?

Mr Crabb: I think Mr Mathias has just covered the question I was going to ask, thank you.

David Davies: Yes, I was going to ask you about the advantages and disadvantages but you seem to have outlined them very well. I can only echo what you say that it is seen as partisan. Certainly as somebody who is stepping down from the Welsh Assembly (and therefore I have no further interest in it personally) I think it is completely partisan and I think it is an absolute disgrace, and many other people feel the same way, and that it is being done purely for political reasons.

Chairman: Is that a question?

Q115 David Davies: What do you think, Glyn?

Mr Mathias: That is clearly not a comment I am going to make. I am sure the intentions are to resolve a particular problem. What we are pointing out is if you think it through as to what the net effects will be, other anomalies in the system will be created. If you look at Scotland in comparison with Wales and the Scottish Parliament in comparison with the Welsh Assembly, to take this particular example, in Scotland there are four Labour Assembly Members who are list Members including one of them a Minister in the Scottish Executive. This particular proposal for a ban on dual candidacy has therefore not arisen in Scotland. It has arisen in Wales partly because the divide between the constituency Members and the list Members runs straight along party lines. All Labour Members are constituency Members and the list Members are other political parties. It is that party political divide between constituency Members and list Members which has

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exacerbated the problem in Wales. It does not mean the additional Member system is inherently defective.

Q116 Mrs James: I wanted to take you back to your comment about extensive public research. Could you give us some background on that, the demographic breakdown, who undertook it for you?

Ms Jenkins: Yes, I can fill you in on that. We have conducted quite a lot of research across Wales. Before the National Assembly election in late 2002/early 2003 we published *Wales Votes*, which was looking at the likelihood of people voting at the Assembly election and probing voter attitudes towards the National Assembly, and that was based on focus groups conducted across Wales and, in fact, one of those was in the Clwyd West constituency. What we found from that research was the most compelling issue emerging was the public information deficit about public understanding about what the Assembly's powers and responsibilities were. Immediately following the election we conducted public opinion research, a sample of thousand adults across Wales which is the recognised statistically valid sample. We had another series of focus groups across Wales probing voter attitudes to try and get under the skin of what people felt about voting. As Glyn mentioned earlier, we had unprompted questions during that research so that if we were not asking the right question about what made people vote or not vote they had the opportunity to raise issues, so if dual candidacy was an issue for voters it could have emerged during any of that research. In addition to that, we had constituency observations in about ten constituencies at the National Assembly elections where we had commissioners and our own staff on the ground in constituencies talking to party activists, voters and so on. Again, we actually had somebody in Clwyd West by coincidence and it was not something that came up there. We had a post election seminar where we had people from across the political spectrum. Anybody who has anything to do with elections in Wales was at that seminar—political commentators, media, academics and so on. It was not an issue that emerged around election time at all. We also have a huge amount of public correspondence and public inquiries with our office. As you can imagine, people write to us on any electoral subject they care to raise, and it is not something that has emerged during that research. Again, we reported on the 2004 elections in Wales, the local elections and European Parliament election. We have had audits of political engagement across Great Britain in between elections, where again we probe voter attitudes. So we have got a very extensive body of research on what makes people vote and not vote across Britain and particularly specifically in Wales, and it is on that basis that we say it is not an issue we could say that has ever been raised with us or that voters are clamouring to have resolved.

Q117 Mrs James: I have never met anybody who has taken part in this research. Certainly there has not been huge interest in coming to ask the people of Swansea East. I am really concerned that you are getting to a variety of places.

Ms Jenkins: Absolutely.

Q118 Mrs James: I have been involved in focus research and believe you me the same people pop up every time.

Ms Jenkins: Definitely because we make sure that we have our focus groups in a spread across Wales to reflect the geographical and political spectrum and also each time we have had focus groups we have had them in different places.

Q119 Mrs James: Do you pay people for attending focus groups?

Ms Jenkins: No, we do not. Our focus groups are done following a competitive tendering exercise. We use MORI or NOP or those types of people and the volunteers do not know they are coming to a focus group with the Electoral Commission. They know it is going to be a focus group about elections and they are not paid.

Q120 Mr Martyn Jones: Did the Commission's research not pick up any indication of voter confusion about what additional Members are?

Ms Jenkins: It certainly picked up voter confusion about the electoral system, that is undoubtedly the case.

Q121 Mr Martyn Jones: I thought it might be.

Ms Jenkins: People do not understand the electoral system and how people are elected. As you know, many people working in elections do not understand it either. There is undoubtedly a level of voter confusion about the electoral system, but that does not impact on whether or not they vote, interestingly. The issue is getting people into the polling station. Once they are in the polling station they will vote whether or not they understand the electoral process.

Q122 Mr Martyn Jones: That I am sure is correct but in this modified de Hondt system that we have in Wales there is an additional vote. Did any confusion come out about what the additional vote was for? Did they think they might have to vote for some other party? Did that not come out?

Mr Mathias: I think it is true to say that the research revealed an element of ignorance that there were going to be two votes and indeed what they were supposed to do with the second vote, that is certainly the case. We were also asked specifically by the First Minister Rhodri Morgan to look at the issue of changing to one vote rather than two because people were so confused about it, if you like, and that was the rationale for us to look at it, that there was an element of confusion in the public mind. Indeed, if you went to one vote rather than two you would remove that element of confusion. On the other hand, the disadvantage would be that there was already a second vote, and a percentage of voters (we

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do not know how many) take advantage of that second vote and use the second vote tactically or consciously to vote for the same party or a different party, and to take it away from them would be depriving them of that vote which they have already got. Also it is arguable that one vote rather than two would further disadvantage minor parties and independent candidates, which is certainly a consideration to bear in mind. However, the arguments for and against one vote rather than two are less clear-cut, I think, in our minds anyway, than the other issue.

Q123 Mr Crabb: Just so I am clear, are you saying therefore that the proposed changes in the White Paper, particularly relating to electoral arrangements, could lead to voter turnout falling below the 38% which we saw in 2003?

Mr Mathias: What we are saying is currently, as you have heard, there is a degree of ignorance and lack of awareness about the voting process, which is probably why this particular issue amongst others has not come to the fore in the public consciousness. If however there is a great political battle about this particular proposal and it does come to the fore in the public mind then I think it could serve to undermine public confidence and could serve to foster distrust of politicians, which we know already exists out there to a considerable degree, so that is the danger.

Q124 Hywel Williams: Can I just confirm with you, however, that in terms of any confusion that you might have discovered in the research that confusion does not concern what is called the Clwyd West problem? It is about a number of other things but not about that particular issue?

Mr Mathias: Yes, that is correct.

Q125 Mrs Moon: I wonder if I could just take you back to your focus groups. It is very striking in relation to this 38% and the impact on turnout. Turnout for an election involves commitment to the democratic process, as in some respects does turning out for a focus group. Did you look at how many people who came to your focus group failed to turn up to elections? Have you carried out any research into the majority of people who are not turning out for elections as to whether or not the electoral system has an impact on why they are not turning out? Have you looked at that issue?

Ms Jenkins: Yes we have because the focus groups are not randomly selected. We particularly looked at people in different groups so for example we selected voters and we selected non-voters and we selected what the researchers describe as “differential” voters, that is, people who vote, for example, at the general election but not at the Assembly elections, so that we could probe why they are voting in one election, why they are not voting in another, why they have never voted. So we look at those different aspects to try and get a full view. Can you remind me of the second part of your question?

Q126 Mrs Moon: It was whether or not the electoral system impacted on whether or not people turned out. There was the complicated issue of people voting for a list but that was not impacting?

Ms Jenkins: It has no impact at all. We particularly looked at whether or not the electoral system impacts on turnout and our view is that it does not have any impact. I think there has been quite an extensive body of research done on that. The Independent Commission on PR was looking at that because there is an argument that proportional representation encourages people to vote, but in Wales and Scotland so far the experience has been that it has not impacted on voter turnout either way.

Q127 Mrs Moon: Can you tell us why they were not turning out? What were you being told was the reason people do not turn out for Assembly elections?

Mr Mathias: A whole host of reasons. It is easier for us to ask the question why is the turnout in Wales lower than the turnout say for parliamentary elections to Westminster. One of the prime reasons there is lack of knowledge about what the Assembly is doing, which is at least in part down to the media structure in Wales, but an ignorance about the Assembly and ignorance about the electoral process supporting the Assembly, which is one of the reasons why we recommended (and we are very pleased to see our recommendation included in the White Paper) that the Assembly should be given powers to publicise its own elections. There is legal doubt about this at the moment and we are very grateful that is going to be in the White Paper because this could be a means of helping to address that particular problem.

Q128 Hywel Williams: Some of the thinking about the Assembly sees it that Assembly elections are second-order elections. Does the voting system mark it out as being a second-order election and would first past the post impact it differently and increase the perceived importance?

Mr Mathias: I do not think so. As Kay has been saying, we do not believe from our research that the method of election has any particular impact on turnout. It is far wider issues about engagement with the political process and engagement with the political process in the Welsh Assembly as distinct from Parliament. Those are much more important issues in terms of the turnout than the method of election.

Q129 Mrs Moon: We heard from Lord Richard prior to your submissions and, as you know, the Richard Commission recommended an increase of Members from 60 to 80. If that had been followed what impact would that have had on your preferred system of Assembly elections, if we were looking at 80 Members?

Mr Mathias: We felt it was not within our remit to look at the structure or the powers of the Assembly. We are here to comment on specifically electoral

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issues. So the straightforward answer to your question is this is not something we have considered and not something we have a view on.

Q130 Mrs Moon: The Richard Commission also recommended a different electoral process, however. Did you not look at that?

Mr Mathias: No, we have not looked at that and there is a very good reason for that. There are currently five different electoral systems in operation across the United Kingdom. It is the role of the Electoral Commission to give guidance on and in some sense regulate aspects of all those elections. It is therefore not appropriate for us, we feel, to state a preferred system of election one against another because we have a responsible role in connection with all of them. So we do not state a preference and we have not considered whether one system is better than another.

Q131 Mrs Moon: But you are saying that the system that is being recommended in the White Paper is not one that you would see as being positive so you are making a comment on one system.

Mr Mathias: We are making a comment on a change to an existing process, not whether one whole electoral system should be changed to another. We feel that is a different issue because the additional Member system operates, as I have said, around the world and the proposal here is moving outside how any other country operates, and we felt that was a legitimate question to comment on, quite distinct from suggesting that STV is better than AMS or vice versa.

Ms Jenkins: I think as well one reason why we considered it important to comment was that the White Paper justifies the proposed change in the electoral system as being reported voter confusion and concern and indeed refers to reports of the Electoral Commission on the 2003 elections, and so we felt it was important to look at the issue from the point of view of voter participation and how we thought it would impact potentially on voter participation at the 2007 election.

Q132 Mrs Moon: Thank you. Just very briefly, are you able to comment on the change potentially to the turnout and to the result of the 2003 election if we had had the 80 Members?

Mr Mathias: Obviously that is not something we have looked at it. We have not looked at the issue of the structure of the Assembly or any consequences that flow from it. It is our job to comment on any proposals that specifically are made by the Government and we look at it from the voters' point of view. We did not feel that was within our remit to do.

Q133 Mark Williams: In your written submission in paragraph 20 you set out four points which were your criteria for evaluating any potential changes in the electoral arrangements. You talked in terms of the reasons for change should be comprehensible to voters, changes should be fair and seen to be fair, the need to avoid accusations of partisanship which

could affect participation (which we have talked about) and the need to consider the broader context. In your view, do the Government's proposals meet those criteria?

Ms Jenkins: We have already partly gone to that question in that we are talking about low public understanding of the whole issue. What we have looked at particularly is how it would impact on voter participation, and our concern is that voter understanding of the whole issue of electoral arrangements is very low. We were worried that in the runup to the elections if there are accusations about partisanship, which we think is very likely, that that could have an adverse impact on voter participation at the next election. Also one of the criteria is that we have said in terms of arrangements for political parties then they should be the best possible arrangements for political parties and candidates to participate, and obviously if there are strong views by some parties about those electoral arrangements those, in our view, could not be the best idea of arrangements. I think there is another issue about the proposed changes and how they might be understood by voters. If it is said that the concerns about the Clwyd West problem are about the issue of dual candidacy. We would really like to know more about the basis for that confusion and concern because we do think there is a possibility that voters are confused and concerned about the additional Member system as such rather than dual candidacy per se in that if you prevent dual candidacy you will still have the situation that parties which have lost in the constituency election will be seen to have won in the regional election. The additional Member system is a compensatory system. It is specifically designed to correct the advantage in the constituency election through the regional list so it may be that what is said to be confusion and concern about dual candidacy might in fact be about the additional Member system as such, which we feel has not been probed sufficiently in the White Paper.

Q134 Hywel Williams: I seem to remember reading in the paper that in some countries list candidates are also required to stand in constituencies. Is that not an equally elegant answer to the Clwyd West problem as the one proposed?

Mr Mathias: You are referring to the situation in Quebec which has recently reviewed its electoral system and come to the conclusion that in the additional Member system they would wish to require all candidates to have stood in constituencies. You cannot be elected on a list unless you have stood in a constituency which is precisely the reverse of what is proposed in the White Paper. Here I think what the rationale is if you have a two-tier system of Members, constituency and list, the conclusion they came to was it is better to integrate the two tiers as much as you can by requiring all list Members to have fought a constituency battle, whereas the net effect of the proposal in the White Paper is that it further distances list Members from constituency Members and makes them even more second tier than they are at the moment and that is

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one of the risks, but it is a contrast, you are right, between the conclusion in Quebec where they did a thorough review of all the international systems before they came to their conclusions and what is in the White Paper, for which there is no evidence at all.

Q135 Mr David Jones: In paragraph 25 of your submission you caution that “there should be compelling reasons for introducing a change to an electoral process that is as yet untested over a period of time.” Would you say that the Government has actually shown any such compelling reasons? I have particularly in mind the comments you make in paragraph 19 of your submission where you observe that the same electoral arrangements apply to the Scottish Parliament. Do you not think it anomalous that the Government should perceive this to be a problem in Wales but apparently not a problem in Scotland?

Mr Mathias: As I mentioned earlier, the situation is slightly different in Scotland because there are four Scottish MSPs on the list who are Labour MSPs and where there are tensions between list and constituency Members it tends to be more cross-party than one party against the others. So the situation is slightly different. The point we are making there is the fact that Wales might be different in its process than Scotland is not an absolute reason why it should not go that way but that regard should be had to the situation in Scotland and consultations should be had with the Scottish Parliament to ensure that no unnecessary differences and anomalies are created.

Q136 Mr David Jones: I would like to touch on what everybody keeps describing as the Clwyd West problem. I must say I take it rather amiss that my constituency is described as a “problem”! In your view has what happened in Clwyd West had any impact on voter turnout and participation? Also perhaps could you comment on the fact that, as I seem to recall, in Clwyd West, the Conservative Party which came second in the first past the post election secured a bigger share of the vote in the regional list. Does not that show a degree of sophistication on the part of the electorate rather than it being a problem?

Ms Jenkins: There is no evidence that the Clwyd West so-called problem has had any impact on voter participation. We do not believe it has. I can only refer back to the research we have already talked about about what makes people vote or not vote in any election (but in an Assembly election particularly) and we have not got any evidence that that has been the case.

Q137 Mrs James: I am very interested in the Arbuthnott Commission and it has been quoted quite widely by you in a number of places. While the final report says the current voting system has “potential to add to existing cynicism (about politics and politicians) current engagement was not the result of voting systems.” How do you interpret this research?

Mr Mathias: It largely backs up what we have said.

Ms Jenkins: I was just going to say it is very similar findings to that which we have found out ourselves. There are a whole host of reasons as to why people vote or do no vote and they relate generally to disengagement with the political process. People feel very strongly about issues but they do not necessarily translate those into party political issues or as to why they should vote in any election. All those background issues are going on but also going on are issues related to particular election short-term factors, to do with the election campaign and whatever the issue is at the moment which then affects people as to whether or not they turn out. However, in all of that the voting process has not emerged as something that makes people vote or not. In that context we would agree with the findings of the Arbuthnott Commission research.

Q138 Hywel Williams: Just to sum up—and this is a statement rather than a question perhaps—it seems to me that you are saying it is possibly unwise to base a change in the long term electoral system on the outcome of one election, as it were. Indeed, a geographical or party split might be different in the future.

Mr Mathias: Yes.

Q139 Hywel Williams: Can I just turn to the question of the national list. Is a single national list a viable alternative to the present regional list?

Mr Mathias: This is not an issue which we have looked at because it is not an issue that has been presented to us to look at. In principle, there is nothing wrong with a national list but, as I understand it, it could operate in a number of different ways and we would have to look at exactly what the proposal is before making any comment. I would say this: if the Government wished to develop that or any of these proposals we would be happy to co-operate with research and development of such a proposal if it was appropriate, but we have not looked in detail at the issue of a national list.

Q140 Hywel Williams: Given what you know at present without doing any further research, would the national list address any of the concerns the Government seems to have over the regional list and the Clwyd West question, et cetera? Perhaps you are not in a position to answer that?

Mr Mathias: I am not in a position to answer that question. I would be speculating and making it up on the hoof and I do not think that is advisable.

Hywel Williams: Thank you.

Q141 Chairman: Could I ask the last question and it is about postal voting. Is there any evidence in your research about a falling away in the returns, so to speak, where if you apply for postal votes, when the forms arrive they appear to be so complex—the voting system and also how to vote—that there is a disproportionate number of people not returning their votes?

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Mr Mathias: In the Assembly elections.

Ms Jenkins: No, actually the contrary is true because postal voting in Wales has been taken up at a higher level since its introduction as postal voting on demand. In 2001 we had a higher number of postal voters in Wales compared with England and Scotland and that has continued to rise. The rise has just about bottomed out at this year's election in that now in Wales there are only about 1% more postal voters compared with England and Scotland, but in 2003 it was still very much on the rise. We had about 11% of the electorate who asked for a postal vote compared with an average across Britain of about 7% and there was a high rate of return at the 2003 election. So although people did find the forms complicated to fill in, that is undoubtedly true, they did return them.

Q142 Chairman: Is there a great deal of variation across Wales then?

Mr Mathias: The levels of postal voting certainly vary across Wales and perhaps quite surprisingly in that some of the lowest areas of postal voting are some of the rural areas and some of the highest are in the conurbations. I do not think that is particularly relevant to the issue that we are discussing.

Q143 David Davies: I may be going off track here but one of the huge concerns that I had over postal voting was that I could never get a clear answer from the returning officer as to whether it was acceptable to go around with forms to people and then to collect them back again. The returning officer's advice was

that this was inadvisable and she at the time would recommend against it, but she was not able to give a clear set of rules. It came to my attention—and I do not want to talk about particular constituencies—that in a constituency one candidate for one party was doing that whilst another candidate from another party was being advised that it was not a good idea but because there was not a clear ruling on it that candidate could not be certain whether to follow the recommendation and be completely safe or to do what the other candidate was doing. There need to be clear rules that we can all follow, surely, on that?

Mr Mathias: In advance of the last general election the Electoral Commission did draw up a code of conduct in conjunction with all the main political parties and they all signed up to it. That code of conduct, with which I am sure some Members are familiar, did specify that it was inadvisable for candidates or agents or party workers to handle postal ballots, and that was quite clear. I got the impression that, by and large, this code of conduct was abided by during the election.

Mrs James: Certainly I was given that advice and I circulated that to every one of our party workers. Our advice was you do not touch a postal vote.

David Davies: I was not talking about Bridgend when I was talking about that constituency, I can assure you. Sorry, you are not Bridgend.

Mrs James: Swansea East.

David Davies: Not that one either, nor Bridgend!

Chairman: Can I thank you both for your evidence and for the clarity of your evidence. It was very helpful.

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Members present:

Dr Hywel Francis, in the Chair

Mr Stephen Crabb
David T.C. Davies
Nia Griffith
Mrs Siân C. James
Mr David Jones

Mr Martyn Jones
Mrs Madeleine Moon
Hywel Williams
Mark Williams

Witnesses: **Rt Hon Lord Elis-Thomas AM**, Member of the House of Lords, Presiding Officer, and **Mr Paul Silk**, Clerk, National Assembly for Wales, examined.

Q144 Chairman: Good afternoon. May I extend a warm welcome from the Welsh Affairs Select Committee and ask you to introduce yourselves.

Lord Elis-Thomas: My name is Dafydd Elis-Thomas; I am Presiding Officer of the Assembly, and I am very pleased to be able to welcome you here. May I wish you well, Mr Chairman, in your new role? I am pleased to see your predecessor; we worked very closely together in a previous session. This is the Assembly Clerk, Mr Paul Silk: a number of you will know him and will have worked with him in the past.

Q145 Chairman: Can I begin by asking you some questions on the Assembly Committee Review. In September you published your report on the Government White Paper, which we have before us. I understand that that report was agreed unanimously. Does that reflect a wider consensus on the White Paper from the point of view of the whole of the National Assembly?

Lord Elis-Thomas: I am not certain whether I could claim that there was a consensus. There was a vote on some issues, and those have been noted in the record. There were a number of issues that the committee did not discuss within its remit. We did not, for example, discuss questions surrounding changes in election rules, or preventing Members from standing for election. We did not discuss those issues within the committee. However, it is fair to note that within the report and in the debate held on 21 September this year—and I think you received a copy of that debate as evidence—you will see that there was agreement on most issues. Your colleague, Gwenda Thomas, and myself had a minor disagreement regarding specific committees to deal with issues of equality of opportunity, and she participated in the debate; but we did not disagree on what we should be doing, only on how we organise committees. I would say that there was relatively widespread unanimity amongst all parties in their responses to those sections of the White Paper that we discussed in our committee.

Q146 Chairman: The Welsh Assembly Government has had a very strong input into the drafting of this Bill that will follow the White Paper. What role have you played in this process in respect of the development of the National Assembly?

Lord Elis-Thomas: Not much, is the honest answer to that question. We have not been consulted with, nor has the Assembly Parliamentary Service. There has been no consultation save for discussions, which I am not party to, between party leaders. It would not be appropriate for me to discuss those here, but I believe that the First Minister has been discussing these issues with party leaders. As I understand it, there has been very little consultation with officials working with us, and with colleagues who are committee clerks and part of the parliamentary service. I am disappointed about that because, unlike a situation where a body is to be abolished—and perhaps you would not expect consultation in that situation—you would expect political leaders of any project, be they Ministers in the Wales Office or Ministers in Cardiff and UK Ministers, to consult with the body that is to be changed and which would be most directly affected by those developments. I understand that there was a politically sensitive situation before the Westminster elections, when there were discussions on preparing the White Paper. However, I would have thought that in the period between the election of a new government and the publication of the White Paper and the bill, that it would have been most appropriate for there to have been consultation. It is also a cause for concern for me that the bill has not come to us as a draft bill. I believe that every parliamentary bill of any substance should be published as a draft bill so that detailed work can be done in gathering full evidence before it is finally published. You could say that that is what we are doing here; we are preparing for that process. However, it is not the same thing as discussing the bill as a draft bill. As it was not published as a draft bill, that is an even stronger argument for having wide consultation, including consultation with officials who work for the Assembly Parliamentary Service, apart from those of us who are political leaders. As I say, I am disappointed that that did not occur. It places us in a particularly difficult situation because it is possible that I will have to express an opinion on the bill as a Member of the House of Lords, and I would have much preferred to have expressed that opinion privately beforehand, and that would have made it easier for the Government. That is a matter for them.

Q147 Chairman: Does Mr Silk have anything to add on this?

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Mr Silk: No, Chairman, I do not think I have anything to add to what the Presiding Officer has said.

Q148 Chairman: You recommended that the bill should contain provisions for the Welsh Assembly Government to change its title, should a consensus be reached. Would you welcome a similar provision for the National Assembly, to change its title should a similar consensus be achieved?

Lord Elis-Thomas: I think that it is constitutionally incumbent upon us to change the name of the government of Wales or the administration of Wales because the name that was announced was chosen by the Government itself. It was decided just as we were concluding the process of inter-party consultation in 2001. We were in the process of looking at the procedures of the Assembly, and the Government decided to launch the new image and the new name. That name, in my view and in the view of the majority of people who gave evidence to us on the White Paper—and possibly they said the same to you—has just perpetuated the confusion. I do not believe that you can couple the name of an administrative body with a parliamentary body, because to me the Assembly Government is confusing constitutionally, which reduces the possibility of rational parliamentary democracy in Wales. That is a complex issue. People are continuing in the media—I have to be careful because a few are sitting behind me—they might be stabbing me in the back! Countryside Council people are immediately behind me, so I think I am safe with them! There has been a practice of the media referring to the Assembly, when they actually mean the Government. The ordinary people of the country say, “that Assembly is not doing anything for us”. With due respect, we are meeting as elected members in the Assembly in order to debate and discuss, but it is the Government that takes the action. The Government is the administration. Although the White Paper will use this term “WAG” once again, I do hope that that will change. In saying that, it is appropriate for the Assembly to have the right—or not be stopped from changing its name, if that were to occur; although I cannot see any reason for changing the name of the National Assembly, because a national assembly has the same meaning worldwide as “Senedd”. If you have been to our exhibition at the Pierhead building, we have adopted the name “Senedd” for the new building in both languages. I think that it would facilitate matters if we could continue with the name “National Assembly”. Having said that, I would not wish to see anything on the face of the bill that would stop our successors in this place from changing the name to whatever they believed to be appropriate; but, naturally, we would have a view on what is constitutionally reasonable, and I do not believe that we have that at present in the name of the Government.

Q149 David Davies: In section 140 apparently there is a reference to support from the Conservative Party for the name to be changed to “The Parliament of

Wales”. That is not something that I would recognise, and I think that many Conservatives would think that the parliament of Wales is still based in London. Section 20 states that the term “Welsh Assembly” was deliberately avoided in 1998 because of the somewhat exclusive sense in the adjective “Welsh”. I would have thought that “Welsh Assembly” was a pretty reasonable start for an assembly that is based in Wales. Do you agree with that point that it is the problem with the use of the word “Welsh” in describing the Welsh Assembly?

Lord Elis-Thomas: I have always thought that there has been a problem with the use of the word “Welsh” because people can interpret it in various ways. That is why organisations use the word “Cymru” rather than the adjective “Cymrei” or “Cymrei/Welsh”, which can also be used. I do think that the phrase “Cymrei” does not actually raise the same problem in the use of the Welsh. We do not have to use the adjective. We could discuss these problems of grammar in the Welsh language for hours, because you have learnt the Welsh language to a very high level, and I congratulate you for that. You have learnt the language, of course, with the resources available to Assembly Members—I will just drop that in, in passing! In response to your question, I would say that there is a question in regard to the way the word “Welsh” is understood in English. Therefore, calling an organisation “Wales” Tourist Board is more understandable than is the use of the term “Welsh”; so we should be using the word “Wales” rather than “Welsh”. This was a point of argument before the inception of the Assembly; and that point was accepted by the Secretary of State and officials at that time. I would not want to see that changed.

Q150 Mr Martyn Jones: It is nice to be here again, Presiding Officer and Mr Silk, in a slightly different position but nonetheless enjoyable. In paragraph 16 of the report you suggest that the number of Ministers and deputy Ministers be regulated by the bill. Can you explain why you believe this to be important?

Lord Elis-Thomas: Numbers of Ministers in Whitehall are regulated by statutory instrument. I think there is an issue in a relatively small Assembly of the payroll vote of the numbers that would be part of government—not just the payroll vote, but there are others of us who, obviously, not being on the Government’s payroll, are on the payroll of the body, whether as chairs of committees or as deputies or presiding officers. I think there is a need to have regard to how many Members out of the 60 should be involved in government or in being involved in political, democratic or constitutional roles within the body. That is the reason for that concern. There is an issue of what should be on the face of the bill and what should be in standing orders. I would say that a broad limit on the face of the bill would enable flexibility in terms of Ministers, deputy Ministers or secretaries, as it is in the original powers, if you want to use that term—Ministers or deputy Ministers or whatever. The Government, or any administration,

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would be able to choose the flexibility of its total complement of Ministers, the numbers in cabinet and all of that. The detail of it should be a matter for the First Minister and for the code of conduct of Ministers in the cabinet; and if any further light touch is required, it should be for standing orders.

Q151 Mr Martyn Jones: That relates to my next question, which is about the relationship between standing orders and the face of the bill. In your report you recommend that provisions be included in the bill for the Assembly to dismiss the Government on a vote of “no confidence” or to have the power of approval for Ministers. Could that not be handled by standing orders?

Lord Elis-Thomas: On an issue of dissolution, it needs to be tackled by legislation. We cannot dissolve ourselves now, and it does limit the possibilities in certain times, when there are minority governments. The Scotland Act has a provision for dissolution, and I think I am right in saying that we are recommending the equivalent of what is in the Scotland Act. Therefore, I think that that matter should be on the face of the bill. The rest of it, in relation to the relationship between parliament/government—part of that needs to be on the face of the bill. We are moving from a situation in which the body corporate, whose early demise I have long desired and whose final death I warmly greet, did provide us with its version of the traditional government and parliament. In other words, it was about delegating powers of the First Minister and reverse delegation was the weapon, as it were, that the parliamentarians had. We assume in our report what is not clear in the White Paper; that there will be a Welsh consolidated fund. We had some very useful evidence from the Auditor General for Wales, Jeremy Colman, on this very issue. Ian Summers, as Deputy Auditor, and Jeremy Colman both gave evidence to us. During the course of that evidence there emerged a very useful discussion about how the practicalities would develop for the Auditor General in his Comptroller role, signing off funds approved by the Assembly to Government and so on. That voting of supply is a clear necessity to be specified, because that is the way in which the Parliament can make the Government accountable. That perhaps is the most important issue. Conventions would establish the situation where, once a First Minister or any Minister had suffered a vote of “no confidence” or a motion of censure, that those Ministers would then understand that the message was that they no longer had the confidence of the House. That is not something you put on the face of the bill; but it is something that is established by convention. The other systems, the voting of supply, should be part of legislation. As a result of that, we might establish a finance committee, which we do not have now in our standing orders, which could oversee some of those issues and scrutinise them.

Q152 Mrs James: I would like to concentrate on the Assembly committees. Little mention is made of Assembly committees in the White Paper outside of

the removal of the Ministers as Members. How do you envisage the committee structure working post 2007?

Lord Elis-Thomas: You are tempting me now! It is not that I do not welcome the temptation, because I volunteered to discuss this exact matter. In addition to being Presiding Officer, I also chair the panel of the Assembly Member chairs of all of our committees. We will be discussing this issue tomorrow night. The problem we have is that we have an Assembly of 60 people; 15 of them are either in cabinet or are party leaders or are chairs of committees. That is more than 20 out of that number to begin with. Naturally, if they are committee chairs, they are to be counted amongst committee members; but, as you all know, the role of a chair is slightly different to the role of a committee member as far as being part of a committee is concerned. In order to be an ordinary committee member, that only leaves us practically 30 plus members who would be free to carry out committee work. Assuming that we have to accept the criticism that we do not do very much legislation or law-making work, and that these new Measures are being pledged or promised to us, all the orders-in-council and all those questions, I imagine that we will need a minimum of two committees to be involved in legislation. I am not talking about subordinate or secondary legislation at present, because somebody will have to look at that, but looking at primary legislation in the new system, looking at Measures and draft orders-in-council. If two of those committees sit each week, then that would take quite a bit of people’s time. If you then come to the essential committees, from the point of view of scrutiny of the Government’s work the Audit Committee is obviously a strong, independent and important committee that looks not just at the Government but also audits the House Committee—or commission, as it may be in the new system. That is another separate committee, which then leaves only time or space for perhaps three select committees such as your Committee, to use a Westminster term, to scrutinise the legislation and look at measures but at the way in which the Government is trying to make policy by creating measures; and also looking at the outcomes. In any parliamentary system we do not look enough at the outcomes of what we do. Looking at all of that, I do not anticipate that we could have more than three or perhaps four committees of that nature. We then have the whole question of how we discuss non-devolved legislation, legislation that is UK legislation and in addition European Union legislation; so you will need a committee to do that as well. I believe that we will have to focus our work in much greater detail, and we will have to be willing to have smaller committees meeting more frequently and during the day whilst the Assembly is in session. That may not be unusual for yourselves, but it is for us here.

Q153 Mrs James: I am very happy on that because you have anticipated my next question. Do you believe that there will be sufficient opportunity for

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you and sufficient hours in the week for you to do this? How do you see the workload being shared during the week? You have spoken a little about this, but could you go into greater detail?

Lord Elis-Thomas: I am not going to be popular here, but I do think that we have to start at half past ten on Tuesday morning, which will mean that it is in time for the North Wales train; and then we will have to sit through to lunchtime, and then half past two until half past six, I would have thought. The same will be true of Wednesdays, and we will need to sit on Thursday mornings and perhaps Thursday afternoons. I would assume that the “travelling circus”, if I can use that term to describe the regional committees, would be abolished. I would not have thought that they would be necessary in the future. In place of that, I would like the committees looking at the measures, and the select committees scrutinising the administration to travel regularly, as you do. I do accept the criticism that we do not meet frequently enough here—or over there, as the case will be when the Senedd building opens.

Q154 David Davies: The simple question to the Presiding Officer is this: do we have to cut the number of committees and the number of Ministers?

Lord Elis-Thomas: As I understand the White Paper, the Ministers will no longer be committee members, with the exception of those occasions when they are called to committee, according to your own procedures. Then I would believe that since the Ministers will cease to be members of committee, those committees will then be free to set their own agendas, not just to have to always respond to Ministers’ agendas. They could set their own scrutiny agenda, which would be far more effective, hopefully. I am not a member of committees so I am in no position to make those statements; but that is my opinion, as one looking from the outside. You may have your own opinion as having been a member of a committee.

David Davies: This is not the time or place, perhaps, to give my opinion on that, but it appears to me that it is difficult to ensure that the agenda is relevant always. It depends very much on the committee chair.

Q155 Nia Griffith: Can I ask about your current arrangements for co-opting non-Assembly members to committees, and how you would like to see that continue with the new arrangements.

Lord Elis-Thomas: We have currently on our standing committees—and I refer particularly to the Equality Committee, which has done this very effectively—organisations like Stonewall Cymru, with which I am associated, and various other bodies. They have been part of our partnership on that committee work, and we do want to see that continue. However, I would not necessarily want to see the co-option of people who are not Assembly members on the committees for the whole of an Assembly session, although that would be possible in the way that we have couched our recommendations in our report on the White Paper, but we should be enabled to draw in expertise, as

members of the committees, for periods of inquiry. That has, in the way we have been able to operate through our standing orders, both in Westminster and here, included yourselves. We have sat together on committees, Assembly Members and Members of Parliament, in particular when scrutinising pieces of legislation. The value of doing that is borne out by the fact that we all want to keep on doing it. All the voluntary bodies that have been the statutory consultees or that have been involved by being members of committees on a process, can see the value of that; and we would want that to continue. I would want it to happen in a flexible way, and I would not want anything on the face of a bill to prevent that happening. I would not want too much specification in standing orders as to how it should be done, but there should be the flexibility for us to do it. If we have fewer committees that are more concentrated in terms of the field of study, then that would work very well along with that kind of process.

Mr Silk: Chairman, may I add one small point about this, which is quite an important point that was reflected in the White Paper committee report? I understand there has been some problem in Scotland in relation to co-optees to committees in relation to their status and protection in terms of defamation and so on. The White Paper committee report mentioned the need to protect the position of these co-optees in the future, so that it was absolutely clear that they were participating in proceedings of the Assembly, and therefore covered in the protection we have from defamation for Members of the Assembly and proceedings in the Assembly.

Q156 David Davies: I apologise because I think I may have referred to you as First Minister; and if I did—

Lord Elis-Thomas: A number of people refer to me as First Minister, and they are all wrong!

Q157 David Davies: Mr Presiding Officer, you have recommended that sections 23 to 26 of the Scottish Act be implemented by the Welsh Assembly. What impact would this have on the workings of Assembly committees?

Lord Elis-Thomas: The intention of this is to ensure that we are able to call witnesses in the same way as a parliamentary committee does.

Q158 David Davies: Will this not effectively mean that a Welsh Assembly committee will have the power to call any witness from anywhere in the United Kingdom; and is there not an argument for saying that whilst this may be the Welsh Assembly, responsible for all things in Wales, that we may be exceeding our remit if we have the legal right to drag before a committee somebody who has possibly never set foot in Wales, just because an Assembly committee has taken a dislike to them or decided that they want to interview them about something?

Lord Elis-Thomas: I am advised, as I always am, by Paul on this matter, that the relevant sections you quote in the Scotland Act apply to Ministers of the

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Scottish Executive, and we would expect a similar provision to apply to us. We are very keen, and have done so in the past, to have UK Ministers and European Commissioners and others appearing before our committees. I can understand of course that UK Ministers would not want to be subject to twice the grilling, as it were, in a devolved body as well; and therefore the important issue is for us to act as proper scrutineers of the powers of the Ministers who are accountable to us.

Q159 David Davies: Sections 23 to 26—and this is wearing my Assembly Member hat—would give the Assembly the powers to call up any witness that they wanted from the United Kingdom—or would they? That is my understanding, and so therefore even a private citizen living in the UK could be subject to an invitation, which they could not refuse, from a Welsh Assembly committee.

Lord Elis-Thomas: I am not certain how these powers are working in Scotland, but I am willing to look at that and provide a note for the Committee if there is an issue here. It is not our intention to be sending our equivalent of the Serjeant-at-Arms up to Scotland to drag people down and haul them before us—although I can think of a few Scottish people I would not mind doing that to!

Q160 Mrs Moon: I would like to ask a few questions on the issue of the breakdown of parties on committees and how they would be able to work on that basis. If the ruling party has 15 Members committed to Government or presiding officer roles, how many government backbenchers would need to double-hat on committees to make them workable? Do you have a view on that?

Lord Elis-Thomas: Yes. First, we are not very familiar with having ruling parties here—we do not have them very often! We had a ruling coalition at one time—or a partnership coalition. Therefore, we have always had to deal with these issues of flexibility of members of committees. I am not part of the process, but these are all negotiated between the parties. A motion is put down by the Minister as a result of those negotiations. We are now seeking a situation, through our report, whereby it would be possible to look for party balance over the whole of the committee system rather than on individual committees, which always creates difficulties. On the other hand, I think it is important to recognise that there can be pressure on the Assembly Members who represent, shall we say, the biggest party, in a situation where half of that party's membership is taken out, or a third of it is taken out for activities involving the administration of government, as opposed to parliamentary scrutiny. That is where I look for—and it is beginning to happen here, after six and a half years—the development of a committee culture; in other words, of Assembly Members, as indeed Members of Parliament in my experience have always done, taking a particular pride in being the people that scrutinise and take on government, as it were, of whatever party, because they are committed to a particular subject area. We are beginning to get that here; members are

beginning to get a name as champions of, say, mental health issues, which is a terribly important issue for us here, or equality issues, so that those members then are seen to be active members of committees pursuing those issues and pursuing the government Ministers of their own party as well as pursuing anyone else, any outside witnesses or officials who come to them, on the basis of their commitment as parliamentarians. That is something that we need to be looking for here. We have already recognised, in a small way, through remuneration, the role of chairs of committees. I am not suggesting that we would want to recognise members of committees in the same way, but we need to recognise that that is an extremely important contribution to the work of a democratic body; and therefore Members would seek to excel as committee members and not just say, “if I turn up for this committee and not ask too difficult questions, I might be made a deputy minister” or something like that!

Q161 Mrs Moon: Do you take the view that provisions in the bill will allow for greater flexibility in party representation? Will that ease potential difficulties in appointing members to committees?

Lord Elis-Thomas: We have to look at the numbers of committees that are realistic for us. That is the sort of thing that I set out earlier. Hopefully, it will not be for us in the present Assembly, but it will be for the new Assembly, the third Assembly, within a framework of legislation which is broad and flexible enough to allow it to do that within its then agreed standing orders to establish which committees it wishes to have. Mention is made of audit in the White Paper, and I understand how important it is that audit has a committee on the face of the bill; but I would not want any other committee specified. I would want that to be a matter for standing orders and a matter for us to work out in this Assembly for our successors to hopefully agree early in the third Assembly. If that is to be done, more easily rather than with difficulty, the less stipulation on the face of the bill the better. That is a general principle: do not put anything on the face of the bill that can be worked through in standing orders. That is my view.

Q162 Mr David Jones: The report recommends the introduction of a code of ministerial parliamentary accountability along Westminster lines. Would that be sufficient, in your view, or would you want to build on that or deviate from that?

Lord Elis-Thomas: I have in practice, as the holder of my office currently, not become involved directly in any standards issue, in particular any issues involving the conduct of Ministers. That has worked through the relevant code of conduct for cabinet members. We have of course a standards regime in our independent Commission on Standards, which deals with general issues in regard to standards of Members. The issue of Members acting as Ministers is very much a matter for the First Minister within the framework of cabinet responsibility.

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Q163 Mr David Jones: In the case of a committee summoning a government witness, would you want the power to summon a Government Minister?

Lord Elis-Thomas: I think that follows. There are issues here about the relationship between Ministers and officials, which I would not want to get too closely involved in, in my present position. I think the argument is that if Ministers are accountable to the National Assembly, then those Ministers can be summoned to committee; and those Ministers would be accompanied by officials. I think it can be quite useful for committees to be able to examine witnesses independently of Ministers, or serially, as it were—not necessarily together. That has been the subject of much discussion, I understand, in Scotland, and there is an understanding in the Scottish Parliament, but I am not sure whether Parliament and the cabinet are fully signed up to this. Clearly, we were going to look for further information on that ourselves, and I am quite happy to provide you with further views that we have established from Scotland.

Mr Silk: It is hardly for me to remind you that it is an issue for Parliament as well. The Osmotherly rules have been asserted by Government, but I understand that they have never been agreed by the House of Commons; so there is still a dispute between the House of Commons and the Government about that.

Q164 Mr David Jones: Lord Elis-Thomas, the White Paper envisages that disputes over standing orders should be subject to the arbitration of the Secretary of State. What are your views about that? Do you think that the Secretary of State is the appropriate arbiter; or would you think that you would be the most appropriate arbiter? Have you had any discussions with the Secretary of State about this?

Lord Elis-Thomas: I do not believe that it is appropriate for anyone except the Members of the National Assembly for Wales to write their own standing orders. The same is true of the Maesteg Golf Club or whatever—a free association. We would like to select within the law, clearly, and within the tradition of parliamentary procedure; but I think it is part of the maturity of any institution that it is in charge of its own rules. I have expressed views on this before, and I do not want to repeat myself too often, but I am hoping that we can come to an understanding on these matters, and that your Committee may well be able to help us! We have now come to a position where we have produced this report; we have clearly indicated that we wish to be responsible for our own standing orders, which has cross-party support in this report; and our wish is to go ahead and begin drafting our standing orders as soon as practical. If there are difficulties about agreement in any committee which may consider the standing orders there are two ways of dealing with them. We normally do standing orders using our Business Committee sitting as a procedure committee; or we can establish, as we did in the case of this White Paper examination, a start-and-finish committee to do the standing orders. There are arguments for and against both sides. If that process

comes to disagreement, then there are further ways of internal arbitration here. For example, party leaders—as we did with the Assembly procedure—could discuss and try and resolve any disagreements. There could be an argument, although I would not advance it myself, that where there is no agreement, then a presiding officer is in a more appropriate position to impose a rational solution upon the Members and elected Assembly, than is a secretary of state of another government.

Q165 Mr David Jones: Do you anticipate some resistance from the Secretary of State?

Lord Elis-Thomas: Well, it is a matter for the Secretary of State.

Q166 Mr David Jones: Do you anticipate it, though?

Lord Elis-Thomas: I do not think it is appropriate for me to go into the mind of the Secretary of State.

Q167 Mr Crabb: My question concerns the memoranda of understanding that exist between the UK Government departments and the National Assembly. Given that these memoranda will need to be amended in the light of the separation of the executive from the legislature, what new arrangements would you like to see introduced between the Assembly, the Welsh Assembly Government and Whitehall departments?

Lord Elis-Thomas: I would encourage the Wales administration, as I prefer to call it—the WAG—to have as much intergovernmental relations with Whitehall, the European Commission, the Scottish Executive or Northern Ireland Executive, when it is back, as it needs to carry out its work effectively. Some memoranda of understanding have worked better than others, I understand, between UK Government departments and the Assembly Ministers. As regards the National Assembly for Wales as a constitutional body, then our relations would not be with government; they would be with Parliament and indeed with other parliaments with other similar regional assemblies, with the European Parliament and so on. In that area, we have already developed ways of working together, including ways of working with yourselves, of which we are very proud so far—and I am sure that they work equally well in this new Parliament as they worked in the last one. We are proud of those arrangements and I would want to see us build on those for the simple reason that I was always aware that when there were two elected bodies in the queue, as it were, for the taking of evidence on different subjects, it was not really fair on the witnesses. The way that we have operated in the last couple of years is much better all round. I am also very proud that this has given our Assembly Members a mode of operating alongside Westminster Members in the public domain and different fields, in a way that I did not imagine would be possible. It has worked very well.

Q168 Mr Crabb: Can we move to legislation specifically. Under Stage 1 of the White Paper, Government departments are expected to draft Welsh clauses with the maximum level of

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appropriate permissiveness. In a previous evidence session I suggested that departments include in the explanatory notes to bills a statement verifying accordance with the aims of the White Paper. Even if it were only for the purposes of clarity, would you welcome such a statement?

Lord Elis-Thomas: I would welcome it indeed. I am still waiting for these framework clauses to appear. I do not think I have seen any yet, although I am told in the White Paper that it is already happening. It is of great interest to me, and I did look with particular interest at *Hansard* and the questions asked by Peter Law, MP, to various Government departments. The answers are fascinating. Some of them do correspond to each other! The Home Office does not say that it intends to implement the Government's policy; it only says that it is in discussion with the Welsh Assembly Government; so we will see what emerges.

Q169 Mark Williams: Turning to orders in council, are you satisfied that the National Assembly will be given sufficiently flexible powers to adequately scrutinise orders in council? How do you envisage orders in council being scrutinised by the National Assembly?

Lord Elis-Thomas: We had some very arcane discussions in our committee about orders in council and what they can be used for, and I must say it is a particularly distinctive procedure of the United Kingdom constitution where these things operate. I am sure that there are views in Westminster about the adequacy or not of the time devoted to debating orders in council. As far as we are concerned here, there are three issues. First, there are the orders in council, which I assume will be the form of request from the Wales administration to the Secretary of State for permission for the Secretary of State to present an order in council to enable the administration here to produce a Measure. That is one procedure. We assume that that is the way it will work, and not the other way. How many of those are going to be made each year? Are there likely to be delays in that process? Are we going to go through the whole rigmarole of the smoking policy? Five years down the road, we are still unable to carry out the resolution for the National Assembly for Wales. I can speak about this with a little bit of passion because I was out with the Chair and voting for that particular issue; and we are still unable to do it. I think we need a way of progressing our legislative desires in the Assembly in a way that is better than what there has been so far. I referred to legislation emanating from the administration here, but that is not the only way a legislature legislates. There is a possibility of committees looking for orders in council in order to have legislation, and clearly there has to be in any proper parliamentary body the opportunity for private members' legislation. There has to be a way in which we can pass through the Assembly a request for an order in council on the proposition of an individual member in private members' time; and that then will go to the Secretary of State, and then it appears potentially in the form of an order in council, which Parliament approves.

Then I come to the final interesting point, which is the letter of refusal. This is potentially a very fascinating invent in the UK constitution, and this is the reason why we emphasise in our report on the *Better Governance* White Paper that that letter should be addressed to the holder of my office and not to the First Minister, because it is a letter which has, as it were, constitutional import. My understanding is that the word "trivial" is used in the White Paper. Since I do not know what is in the bill, I do not know whether that word is included, but I do say to parliamentary draftspersons that if the word "trivial" is in the bill that is trivial reasons for refusal of a request from the Assembly, it will keep those involved in judicial review busy for many years to come, I would have thought. The way I see it is that the letter would come to the holder of my office; then that would be a public document; and then there would be an Assembly debate upon the reasons for the refusal and whether they are adequate. Some of you might want debates in Parliament as to whether the reasons for refusal were adequate. I am highlighting this because the order in council route is fraught with all sorts of constitutional difficulties potentially for all concerned. If the order in council is drawn very broadly, just like the long title of a bill, then that is much easier; but if the order in council has to be preceded by some kind of submission of ten pages, saying, "please can we have an order in council?" including a draft measure and costings, then it could be very complicated.

Q170 Mark Williams: On a practical note, the White Paper envisages the possibility of individual Members and committees instigating the orders in council. Do you feel that the National Assembly has the capacity to provide the legal support that those Members and committees would require?

Lord Elis-Thomas: We have to do that. We do not currently have it and would not pretend to have it. I was about to say that we have very sharp lawyers, but that could be misread! We have constitutional lawyers and committee clerks obviously that have the required skill, and we would have to make sure that we had that resource, because without them we are not serving our members properly.

Q171 Mr David Jones: Listening to you answering those questions, Lord Elis-Thomas, would it be fair for me to conclude that you regard the whole order in council proposal as a Byzantine fiction, which is, frankly, put there for a purpose other than to deliver effective government to the people of Wales?

Lord Elis-Thomas: No, I do not think it is a fiction because I have seen it operating, obviously, in my various guises. I have seen it, for example, in the procedure of legislation now to prevent the people in Northern Ireland from killing themselves with tobacco smoke. I was very pleased that the Secretary of State for Northern Ireland was able to do that recently. The order in council procedure as set out here is an ingenious addition to our armoury of devolution possibilities. As I am a pragmatist, I will try to work at any system that I am required to by the legislation; but I will make damn sure that I work

it to the bone or, to use another phrase, I will push the door until it creaks on these matters. It is part of my job to do that because I have to make sure that the Assembly Members have all the opportunities open to them.

Q172 Mr David Jones: I get the impression that you would rather move from Stage 1 straight to Stage 3, without the distraction of Stage 2 and all the additional legal processes that would be involved.

Lord Elis-Thomas: Not necessarily. If I can be a little indiscreet, I quite like the idea that Stage 3 is constructed around the question of whether or not there should be the demise of the office of the Secretary of State. There is a present irony about that, considering where we came in, in 1964.

Q173 David Davies: I do not think it is going off the subject at all, but given the extra work that orders in council might entail, has there ever been any official consideration given to a second chamber?

Lord Elis-Thomas: Have we considered a second chamber, Accounting Officer?

Mr Silk: Not that I am aware of, no.

Lord Elis-Thomas: You will know, as a close follower of the architecture of the Senate building, that there is what we call the Richard Corridor. That is not a second chamber; that is desks for twenty Members with seats.

Q174 Hywel Williams: Good afternoon. Is there a real need then for a secretary of state to sift these orders in council, or is it sufficient that the applications are deemed to be correct and could go directly to the Westminster Parliament, rather than going through that filter?

Lord Elis-Thomas: What I hope will happen is that the Secretary of State will interpret the act, if and when it is passed, as a constitution for action. Therefore, it will be the practice for an application for legislation to be processed and accepted. The only argument that I can see for the function of the Secretary of State or the Wales Office in this case is to ensure that any issues regarding the drafting are appropriate to come before the House of Commons and House of Lords in Westminster; and that that should happen appropriately. That is a matter for another step. I do hope that that is how it will be interpreted. I would be exceptionally angry if we came to any position where the Secretary of State rejected an application for policy reasons, because that would be completely contrary to the whole argument in favour of devolution; namely, if a legislative or parliamentary body in Wales asks for legislation and if that is in order constitutionally, then it is appropriate for that legislation to be considered. It would be another matter if the Westminster Parliament decided to vote it down or revise it—you could not revise an order in council anyway, but to vote it down; that would become a political issue between the two bodies. I believe it would be inappropriate for a secretary of state to reject tabling an application for an order in council because there was something regarding a difference in policy. For example, if we wanted to do

something, as we wanted to do with smoking, such as planning issues, and do something that would not be completely acceptable to the Westminster Government because of their policy, then that would take us into very difficult territory indeed.

Q175 Hywel Williams: Following on from that, do you believe that the present arrangements, with the detail included at present, are robust and strong enough to withstand the situation of a government of a different hue here in Cardiff to London, when there might be a temptation to look at policy discrepancies rather than the validity of any application?

Lord Elis-Thomas: That depends on how serious the current Government is regarding setting up a working constitution for the people of Wales, speaking quite frankly. I would imagine that there is no point in reforming devolution arrangements unless they work as parliamentary arrangements and constitutional arrangements, whoever governs. I have never understood the argument that the only way that devolution works is if the same parties are in London and Cardiff. That is a rather strange way of looking at it. Politics changes government, but democracy should be something that is here to stay. You can reform it, of course, but from the procedural point of view everybody can use it, and I do not think that that argument is taking us anywhere.

Q176 Hywel Williams: Would you anticipate the act of parliament being used if the House of Lords were to disagree, for example? Secondly, would you anticipate the House of Lords honouring the convention if there was a matter that was part of the manifesto of the governing party here—that they would not reject that on the basis that it was in the manifesto?

Lord Elis-Thomas: I have attempted to answer questions as Presiding Officer, not as a Member of the second chamber, but I do not know exactly how the second chamber would respond. Since I understand that there are intentions to reform, the whole question of legislation on the reform of a second chamber is something that is likely to become more prominent very soon. I would not like to predict exactly what that situation would entail. All I would say is that crossbench Members and other Members of the House, including Lord Richard, who I know has given evidence to your Committee, have very strong opinions on this constitutional issue. They would certainly want to be given a full opportunity to discuss the bill when it is published. They will do that very critical, and I could not imagine them doing anything else—whether it be in the manifesto, because constitutional correctness is just important a principle as is a party manifesto. In terms of the use of the Parliament Act, I do not think I will go down that particular route because the last time the Parliament Act was used we saw an exceptional mess, did we not, and I would not want to see that happen again?

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Q177 Nia Griffith: Turning to staffing, supposing that the current level of staff were to remain after separation of the legislature and the executive, what proportion of staff would you see as coming under the Welsh Assembly Government, and what proportion would remain in the Parliamentary Service?

Lord Elis-Thomas: Can I ask Paul Silk, the Accounting Officer, to deal with all staffing issues.

Mr Silk: We have moved towards a form of administrative separation between the Welsh Assembly Government and the rest of the staff of the Assembly at present. We have about 285 staff working for the Assembly Parliamentary Service, and about 4,200 staff working for the Welsh Assembly Government, who will shortly be joined by about 1,300 people who work currently for the Assembly-sponsored public bodies, the ASPBs. I anticipate that those staffing levels will remain in those sorts of proportions in future. I ought to draw to your attention that currently, as far as senior staff are concerned, there is a much greater predominance of senior staff working for the Welsh Assembly Government than for the Assembly Parliamentary Service; so if you take people in the higher grades, from Senior Executive Officer, as it used to be described, upwards, it is about 18% of our staff who work at that level, and about 22% in the Welsh Assembly Government, about 28% in the Scottish Parliament, and something over 40% in the House of Commons.

Q178 Mrs Moon: I assume, Mr Silk, you will want to answer this question as well. With an enhanced role and an increased workload, the report states that there would need to be an expansion of the Parliamentary Service. Who sets the limit, and who sets the budget from which this will be funded?

Mr Silk: The Presiding Officer has already referred to the probability that we would have something similar to the Consolidated Fund Procedure. We do not know yet of course because we have not seen the bill. I assume that if it is akin to the procedure you have under the Consolidated Fund Procedure in London, as they have in Scotland, then it will be for the Assembly Commission to make a bid for staffing, as for the other parts of its budget, and for that budget to be subject to the approval of Plenary as a whole. I imagine that a similar sort of process as the process we presently have will continue in the future.

Q179 Mrs Moon: Do you have any idea of the increased number of staff that would be needed?

Mr Silk: When the Assembly started, for perfectly understandable reasons some of the functions that were done here in the corporate body, people did not anticipate the need for staff at the right sort of levels, as we would perhaps anticipate if we are going to have proper legislative functions in the future. Areas therefore like research services, committee services and the Table Office, are areas where I would like to see some enhancement to staff as well as legal advice to committees and to members generally. We would probably need some enhancement of all those

services. I would not see a great growth in the numbers of staff, but perhaps having more expert staff is something we could aspire to.

Q180 Mrs Moon: You do not have a figure.

Mr Silk: Not at present. We do not yet know exactly what the functions of this part of the Assembly will be in the future. We do not know whether we will have any functions, how many Measures we will have, or the obligations in respect of those Measures; so it is very difficult to make any speculative judgments now. The White Paper report stated that it would be less than honest to say that what we will have to do in the future will necessarily be done without any increase in staff numbers, and I think that is true.

Q181 Mark Williams: With that answer very much in mind, would you welcome the need for provisions in the bill to protect the National Assembly from restrictions on the legitimate increase of resources that you have implied may well come along?

Mr Silk: Obviously, the total resource for Wales—the block grant will still come from the Secretary of State. I do not imagine you are anticipating a restriction on what the Secretary of State should give as a block grant; it is about the apportionment inside the block grant. I would see that as being what happens at present; that it is a matter for Plenary as a whole. If a majority does not support the estimates that have been put before it by the Assembly Commission, then it will be for the majority to turn those down. In normal circumstances, as happens with the House of Commons budget, which is set by the House as a whole, I would expect that to be done by agreement between the parties inside the Assembly, and that it would not therefore be a matter for political dispute on the floor of the Assembly. We would certainly hope to avoid that.

Q182 Mr David Jones: Lord Elis-Thomas, the White Paper envisages that the bill will make provision at some indeterminate future time for a referendum on the granting of primary legislative powers to the Assembly. Would you wish there also to be provision for increasing the size of the Assembly from 60 to 80 members, as recommended by Richard; and can you see any impediment as to why that should not take place?

Lord Elis-Thomas: I am afraid my life is lived perpetually at stage 1 and struggling towards stage 2; I have not even thought about stage 3. I do not think that really has a direct impact on my current work as Presiding Officer. There are obviously constitutional principles here as to when and whether a referendum should be held and what should be put to the people in that referendum. I favour the principle of referendum for any substantial constitutional change, but I have tried to limit my horizons to trying to preside over an Assembly to which the people of Wales can look for proper representation. I do not think I have managed to do that yet.

Q183 Mr David Jones: So you would not feel it appropriate to express an opinion as to what sort of questions should be asked in the referendum.

Lord Elis-Thomas: If there were a referendum, I do not think at this stage—and I do not think the bill envisages—the form of a question being part of the bill, as far as I gather. Certainly we have had no discussion of that in the work of our committee. We have confined ourselves to stages 1 and 2; and that is more than enough for the moment. I think that the development of devolution depends on clear and intelligible procedures, but I would say that, would I not? My immediate concern is to make sure that we can get that through from stage 1 into stage 2. The issue of a referendum and the issue of a two-thirds majority for a referendum request for the Assembly and all these issues, I have not formed an opinion on at this stage. To mix metaphors again, I have got other fish to fry.

Q184 Hywel Williams: Returning to the subject of orders in council, do you have any view regarding the nature of those individual orders? Would that be what is termed a jumbo order, with perhaps a series with just a very long title; or are we looking at a series of them on individual issues?

Lord Elis-Thomas: There are some strange and inexplicable things in this White Paper to me regarding the distinction between areas and fields of policy. Once again, I have not been able to understand where the distinction lies. As you know, an order in council can do almost anything. It could be an administrative issue or a policy issue or it could be a change of a Minister from one portfolio or place to another, or all sorts of things. We need to attempt to look for an intelligible consistency in the process, and it should be clear to the people of Wales that what is expected in an order in council, very simply, is a permission for the Assembly to make a measure. It is a question of where you start the work. If you are seeking permission and then preparing a draft measure—for example in the mental health field, where, obviously, serious legislation will be required soon to deal with services and entitlements and rights. We do not know what is happening, but there has been sufficient talk in the media that the proposed legislation will not appear in the way originally intended. If that is true, I am very glad of that. If you are going to make laws in that field, then you do not want to set about making the first mental health bill for Wales, although I would love to see that—but you will not do that without ensuring that you are going to get permission through an order in council under this system for it to be enacted. There is a question of where the process works. I would assume that the logical process is to say that some kind of rough application will be submitted, where we say it is an area where we feel we need legislation. If it comes from an individual member, then I imagine that the draft Measure will have to come from here as well, before it becomes an application for the order in council. It could also come from a committee and it could come as an application from the committee for an order in council, and that could be returned with a tick in the box, or not, as it were.

If that is the process, then what is important is that people understand that that is the system. It is permission given by the two Houses of Parliament for the Assembly of Wales to make measures. That is the most logical system, I believe. That is what I would like to see, and that permission should be given conditional on the full accuracy and detailed accuracy—what would appear at the outcome of the process—that is the Secretary of State, not as somebody intervening in the process but validating the process.

Q185 Hywel Williams: There has been some confusion in general in regard to the areas, fields or domains, as some people describe them. We asked some of the experts in our first hearing but we did not receive much enlightenment on this issue. I see that your Committee has recommended that responsibility for the Welsh language should be transferred wholly to the Assembly. Would you like to outline some of the reasons for that, for the record here?

Lord Elis-Thomas: We received a letter from Elin Jones, Assembly Member, asking to give evidence on this; and some of us had been considering this, having read the White Paper. There was an opportunity for us in committee to discuss it in some detail. It does not make any sense to me in an area which impacts only on Wales—that is the legislation on the Welsh language, that there should be some restriction on the Assembly in drafting a Measure that would be broad enough to encompass anything that should be done in that area. That was the crux of that debate. You could have two orders in council, one after the other, to ensure that the two areas would be covered, but that would be a protracted process and very strange. It would be more reasonable to say, “this is an appropriate issue”, if we can avoid those two terms, areas and fields. We should say that it is an appropriate topic to ask for that to be devolved. There is an argument for including the term “measure”. I am very fond of the term “measure” because it is an old term used in the Church in Wales. We should of course not forget that the Church in Wales was the first organisation in Wales to be given legislative powers, way before the Assembly; but I would like to see the term “measure” used in Wales for bills. In future, we will have Measures in the Assembly and bills in Westminster, but I would like to see the words “Assembly measure” appearing in the orders in council so that there is a clear link. In reality, the order in council is the long title of a bill in the Westminster tradition. That would then refer to the Measure which would emanate from that; and of course the glory of that would be that once the order in council is made, then that whole policy area is devolved. Then there is democratic clarity as to where power resides. The greatest problem with the current settlement, which was not drawn up as a reasonable constitution—we will not go into that now, but its main deficiency was that the electorate

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in Wales did not know that if they voted someone to the Assembly what those people could actually achieve. That is a terrible deficiency, and it is anti-democratic. It prevents political parties and certainly prevents the electorate from thinking of the outcome of the process that they are part of. That is why I do not want to see this process making things even more murky; I want to see this process opening

the door to people. They know that an order in council will lead to a Measure that will achieve something.

Chairman: May I thank you both for your exceptionally clear responses, and congratulate your committee in its success in reaching a consensus. I hope that we will also be able to have the same kind of consensus in this Committee.

Supplementary memorandum submitted by the Rt Hon the Lord Elis-Thomas PC AM

When I answered David Davies' question 160, I promised that I would provide further information on my understanding of the powers of the Scottish Parliament in respect of witnesses.

I am advised that the Scotland Act only makes provision for witnesses and documents to be called if the subject is one for which a member of the Scottish Executive has general responsibility. The Parliament may only impose this requirement on a person outside Scotland when it directly relates to discharge of functions of the Scottish Administration or those of a Scottish public authority or cross-border public authority.

In detail:

1. Power to call for witnesses and documents is covered in Sections 23-26 of the Scotland Act 1998. Standing Orders make provision for committees to use these sections.
2. The Act provides for the Parliament (which includes committees and sub-committees) to require any person to attend its proceedings for the purpose of giving evidence or to produce documents in that person's custody or control which relate to any matters concerning:

any subject for which any member of the Scottish Executive has general responsibility:
[Subsection (1)]

3. The Parliament may only impose this requirement (under subsection (1)) on a person outside Scotland in connection with

the discharge by him of—(a) functions of the Scottish Administration or, (b) functions of a Scottish public authority or a cross-border public authority, which concern a subject for which any Member of the Scottish Executive has general responsibility [Subsection (2)]

The functions referred to would concern a subject for which a member of the Scottish Executive has general policy responsibility, even though that member of the Scottish Executive does not have general policy responsibility for the public authority itself.

4. Subsections (3), (4) & (5) make provision for UK Ministers to be summoned in certain circumstances. In general terms they allow for them to be called where the exercise concerns a subject for which a member of the Scottish Executive has general responsibility, but protect against the Scottish Parliament being able to call UK Ministers on matters that are reserved or where there are shared functions.

I understand that, to date, the Scottish Parliament has not made formal use of Sections 23-26 to call either witnesses or papers. Similarly, in Wales, we have not used our formal powers under sections 74 and 75 of the Government of Wales Act 1998. Nevertheless, I believe that such formal powers are an important weapon in the armoury of any legislature. The fact that they exist can persuade witnesses who might otherwise be recalcitrant to co-operate with a committee.

**Written evidence from the Rt Hon Peter Hain MP, Secretary of State for Wales,
and Rt Rhodri Morgan AM, First Minister for Wales**

INTRODUCTION

1. We welcome the Welsh Affairs Committee's inquiry into the Better Governance for Wales White Paper. The following paragraphs provide some additional information about the main proposals contained in the White Paper.

Separation of the Executive and the Legislature

2. There is a strong consensus in favour of the proposal for a legal separation of the legislative and executive elements of the existing National Assembly for Wales. Under these proposals:

- The Welsh Assembly Government—comprising the First Minister, other Welsh Ministers and Deputy Welsh Ministers, the Counsel General to the Welsh Assembly Government and staff (who will remain civil servants)—will be given separate legal identity
- the National Assembly for Wales will continue in being and will be responsible for legislative scrutiny, for voting resources to the Welsh Assembly Government, and for holding Ministers to account;
- an Assembly Commission, a corporate body comprising the Presiding Officer and four other Assembly Members, will be created to be responsible for ensuring that the Assembly, as a legislature, is provided with the staff and services it requires. As with the staff of the House of Commons and the Scottish Parliament, those future staff of the Assembly would not be civil servants but they would be entitled to be members of the Principal Civil Service Pension Scheme.

3. Many of the provisions of the new Government of Wales Bill amend the Government of Wales Act 1998, so as to take account of the setting up of these three entities. Around 120 clauses in the Bill reproduce provisions already in the Government of Wales Act (but modified to take account of the separation of the executive and legislative elements), compared with about 40 concerned with the new provisions required, relating to the Assembly's enhanced (and, subject to a referendum, primary) legislative powers.

The Assembly's Legislative Powers

Stage I—Westminster Bills affecting Wales

4. The White Paper sets out the UK Government's commitment, in drafting primary legislation affecting Wales, to grant the National Assembly wider and more permissive powers with maximum discretion to determine the detail of how a policy proposal should be enacted. This approach is generally referred to as incorporating "framework provisions" in Government Bills.

5. The White Paper noted that this stage would not need to await the new Government of Wales Bill and indeed it is already being implemented. Revised guidance to bring this to the attention of Government Departments has been provided. The Committee will be aware that the NHS Redress Bill, which was published in October, contains a framework provision in relation to Wales using this model.

6. The National Assembly for Wales is an elected legislative body with extensive scrutiny procedures for dealing with subordinate legislation made under framework provisions. We will ensure that this position is maintained in the future in relation to any broad law-making powers conferred on the Assembly under framework provisions. The intention is that any such powers contained in Acts of Parliament enacted before the Government of Wales Bill itself becomes an Act would transfer to the Assembly, rather than to the Welsh Ministers in May 2007. This would be achieved by converting them, by means of an Order, into Assembly Measure-making powers. Other powers previously conferred on the Assembly by Acts of Parliament—ie the usual powers which Whitehall Ministers have to make statutory instruments, orders, regulations, directions etc—will generally be transferred to Welsh Ministers for future exercise.

Stage 2—Enhanced Legislative Competence for the National Assembly (Orders in Council and Assembly Measures)

7. The White Paper envisages that enhanced legislative competence will be conferred on the Assembly by way of Orders in Council. Each Order will authorise the Assembly to make legislation (to be known as Assembly Measures) on matters set out in the Order. It will not be possible for Orders to give the Assembly legislative competence in fields where Welsh Ministers do not have executive powers. The Bill will include a list of devolved fields; this list will broadly follow that in Schedule 2 to the Government of Wales Act 1998, with additions reflecting further functions allocated to the Assembly since 1999. Orders in Council will then specify the matters relating to these fields where the National Assembly may opt to make Assembly Measures.

8. It is envisaged that Orders in Council will be short, describing the scope of the enhanced legislative competence to be conferred on the Assembly, and any specific reservations. General reservations will be included in the Bill itself, and will not need to be repeated in individual Orders in Council.

Orders in Council—Procedures

9. The Committee may find it helpful to have more detail than was contained in the White Paper on the process of developing, scrutinising and making Orders in Council and Assembly Measures.

10. In circumstances where the Assembly Government has initiated the proposal, the main stages will normally include:

- Preparation of a draft Order in Council following discussion between the Welsh Assembly Government, relevant Whitehall Departments, and the Wales Office. This will focus on ensuring there is clarity about the vires/scope of the Order in Council and confidence that it will give the necessary legislative competence to enable the Assembly Government's policy objective to be achieved.
- Pre-legislative (non-statutory) scrutiny of a preliminary draft Order by the National Assembly and Parliament. The precise nature of pre-legislative scrutiny undertaken by the National Assembly and Parliament will be a matter for those two institutions to determine. The processes will not be prescribed in the Government of Wales Bill. This stage will enable modifications to be made to the draft, if necessary, in the light of comments made.
- The formal (statutory) processes for the National Assembly and both Houses of Parliament to give their approval to the final draft Order in Council, modified as appropriate following the pre-legislative scrutiny processes. At this stage the Order in Council will not be amendable as both the National Assembly and Parliament will need to approve identical text.

11. The normal procedure for arranging for National Assembly and Parliamentary approval of the draft Order in Council is expected to be that a draft Order is laid before both the National Assembly and Parliament for approval, more or less simultaneously. This will follow prior discussion and agreement between the Welsh Assembly Government, the Assembly and the Secretary of State, so that a co-ordinated process can be delivered.

12. There will be a fallback procedure whereby a draft Order in Council can be laid before, and approved by, the National Assembly, without a draft having been laid before Parliament. The First Minister will then notify the Secretary of State, who will then have 60 days in which either to lay before Parliament the draft Order approved by the Assembly or to give notice to the First Minister of his refusal to do so and his reasons. It will be open to the Assembly to use this procedure in instances where prior discussion and agreement between Cardiff and London has not been possible.

13. The Bill will not place any restriction on individual AMs or Assembly Committees proposing Orders in Council.

14. A flowchart illustrating the stages in the Order in Council process is attached at Annex 1.

15. The Committee will no doubt have a particular interest in considering and setting out its views on the pre-legislative scrutiny arrangements which should operate in Westminster. The Committee has undertaken some useful work examining draft bills affecting Wales. The House may decide it wishes the Committee to continue this approach in relation to Orders in Council. The Commons could also take the view that it should do so where possible in parallel with the relevant National Assembly committee, as it has done on draft bills. Further, all Members (and not just those on the Welsh Affairs Committee) might be encouraged to contribute to the Committee's consideration. It would be helpful if the Committee could deliberate on these matters and set out its views in its report.

Assembly Measures

16. Once an Order in Council has conferred enhanced legislative powers in relation to a particular matter, a draft Measure can be brought forward in the Assembly. The National Assembly's arrangements for scrutinising and approving Assembly Measures will be a matter for the Assembly itself. However the Government of Wales Bill will contain minimum requirements relating to consideration of Measures as with legislation considered by Parliament, these minimum requirements will include consideration of the principle, the detail and the final text of the proposed Measure.

Stage 3—Primary Powers

17. The proposals set out in Stages I and II for the National Assembly to have enhanced legislative competence will significantly enhance the Welsh Assembly Government's ability to deliver the right policies for Wales, within the traditional parliamentary model of scrutiny by the relevant legislature ie the Assembly. Both Stages I and II enable Westminster to determine that the National Assembly is the appropriate body to make law in relation to a particular policy area in Wales.

18. The Government does not believe it would be appropriate to ask Parliament to legislate again in the future on the fundamentals of the constitutional settlement for Wales. Accordingly the Bill will also make provision for conferring primary legislative powers on the National Assembly, if and when this is approved by people in Wales in a referendum.

19. Such a referendum ought only be triggered on the basis of a broad political consensus in Wales in favour of primary powers. There is no suggestion that there is such a consensus at this time, nor is there likely to be one for many years to come. A referendum would therefore only take place if there was a two-thirds vote in favour in the Assembly, as well as the agreement of the Secretary of State, and both Houses of Parliament.

20. The White Paper states that conferring primary legislative powers on the Assembly would mean that “it would be able to make law on all subjects within its devolved fields”. That is, the Assembly’s primary legislative powers would extend to those subjects where it already has executive competence, and would preserve exceptions in particular areas where they exist now. The Bill will identify those subjects and exceptions, in a schedule. The Bill will also allow for this to be updated to take account of any Measure making powers granted or transfers of functions agreed by Parliament between now and the time when any referendum might be in prospect.

21. Annex 2 explains why it has been necessary to take this approach to defining the primary legislative competence of the Assembly.

22. It is important to note that the Bill will not in itself transfer any UK Government functions to the Welsh Ministers or confer legislative powers on the Assembly, beyond a limited power for the Assembly to regulate its own internal arrangements.

Electoral Arrangements

23. The White Paper proposes that all candidates wishing to stand for election as an Assembly Member should have to choose whether to stand in a constituency or on a regional list. As with the proposals to legislate for an Assembly with enhanced legislative powers and end the confusing corporate status of the Assembly, this forms part of the Government’s manifesto commitments.

24. The current system allows a candidate who fails to win a constituency seat to become elected via the regional list. For example, in the Clwyd West constituency in the 2003 Assembly elections, three of the four defeated candidates were nevertheless elected as regional members.

25. This problem is compounded when defeated candidates set up a “local” office in the constituencies where they were defeated and purport to be the “local” member. The Government believes this devalues the integrity and transparency of the electoral system; is not understood by the electorate who expect to see their votes collectively elect a candidate thereby defeating the other candidates. If that does not happen, as in Clwyd West, it contributes to voter apathy.

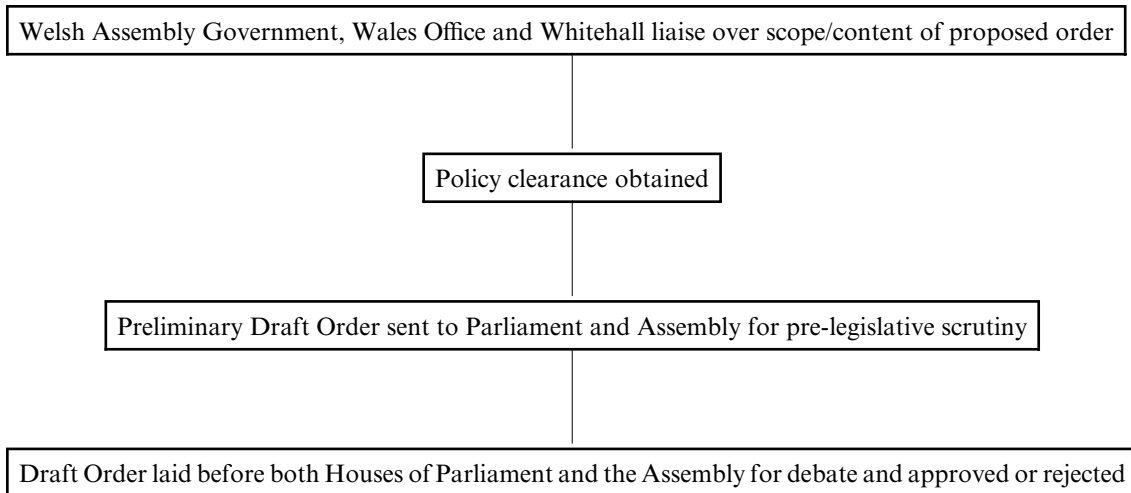
26. This issue arose during the Richard Commission’s consultation process.

27. Requiring candidates to choose whether to stand for election in a constituency or on a regional list is the most effective and straightforward means of ensuring that candidates who are rejected by the electorate in one area do not enter the Assembly via another means. In the Government’s view moving to a national, rather than a regional, list would not address this problem and would remove the legitimate link between a regional member and regional issues.

28. In addition, regional and constituency Assembly Members will be required to describe themselves accurately so that the basis on which they were elected remains clear. These requirements will have to be covered by the Assembly’s Standing Orders and elaborated in a protocol which the Assembly will be asked to develop, to provide the necessary guidance. A template for such a protocol already exists in the Scottish Parliament.

7 November 2005

Annex 1—Flowchart

GOVERNMENT OF WALES BILL: ENHANCED LEGISLATIVE COMPETENCE PROCEDURE
FOR ORDERS IN COUNCIL*Notes*

The timescale will vary according to the scope and nature of the Order.

The Bill will not set any fixed timescale for Parliamentary or Assembly scrutiny. This will be for the relevant committees to agree, again taking account of the scope and nature of the order.

Annex 2

PRIMARY LEGISLATIVE COMPETENCE OF THE ASSEMBLY—COMMENTARY

1. When defining the subjects on which the Assembly will be able, subject to a “yes” vote in a referendum, to exercise primary legislative powers there are two broad options:

- (a) to specify the subjects on which the Assembly may legislate (this is the model adopted in relation to Scotland in the Scotland Act 1978, which never came into force);
- (b) to provide that the Assembly may legislate on anything unless it is specifically reserved to the UK Parliament and then to specify those reserved matters (which is the model adopted in relation to Scotland by the Scotland Act 1998)

2. Whichever of the two approaches is adopted, the aim would be exactly the same, namely to define as clearly as possible what the Assembly could and could not do, in accordance with Parliament’s wishes as to what should be devolved and what should not be devolved.

3. Under the approach of the Scotland Act 1998 changes to the law which are made by the Scottish Parliament are not limited to specific subjects. They can include changes to basic principles of law. For example, the Scottish Parliament has made changes in land law in Scotland, beginning with the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

4. Scotland has its own distinct legal jurisdiction, with its own system of courts, judges, legal profession and provision for legal education. An ability on the part of its legislature to change basic principles of law and specific rules relating to subjects such as land law which have a general impact across almost all day-to-day activities is consistent with this situation.

5. Wales is different. It forms part of a single unified England and Wales jurisdiction with a common courts system, judges who can act throughout the two countries and lawyers who are educated and who practice in a way which does not distinguish between England and Wales. There is no intention to change this. The Assembly is to be able to make laws which apply in relation to activities in Wales but these will be part of the general law of the jurisdiction of England and Wales.

6. Lawyers who practice in Wales and judges who normally sit in Wales would inevitably be more familiar with laws which applied only to Wales than their colleagues in England but they would still be working within a single unified jurisdiction and if, in the course of a case being heard in England, it were relevant to consider something done in Wales to which an Assembly Act applied then the court would apply that Act in exactly the same way as it would apply an Act of Parliament.

7. If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

8. In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects. (The fact that this model was adopted in the 1978 Act reflects the fact that either model would work in relation to Scotland. Group 24 of Schedule 10 to the Scotland Act 1978—“Civil law matters” was intended to ensure that the proposed Scottish Assembly would be able to legislate on at least some of these fundamental legal principles and rules of common application.)

9. The other approach having, in principle, the same effect would be to transfer general law-making powers to the Assembly but then to reserve fundamental legal principles and basic legal rules to the UK Parliament. The view of Parliamentary Counsel is that such a reservation would be so complex and its effect so uncertain that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach.

10. There are further, subsidiary, reasons for adopting the Scotland Act 1978 approach in relation to Wales. Firstly, the list of reserved subjects which would apply in relation to Wales would be substantially longer and more complex than that in the Scotland Act 1998, in that it would need to include subjects such as criminal justice and the courts which are generally devolved in relation to Scotland but not in relation to Wales. Secondly, the task of formulating a list of devolved subjects in relation to Wales, which builds on the executive functions already devolved to the Assembly, is one which can develop out of the existing pattern of Welsh devolution and is therefore much easier to accomplish accurately and effectively than would be that of compiling an exhaustive list of subjects in relation to which the Assembly does not exercise executive functions.

Thursday 10 November 2005

Members present

Dr Hywel Francis, in the Chair

Mr Stephen Crabb
David T C Davies
Nia Griffith
Mrs Siân C James

Mr David Jones
Mrs Madeleine Moon
Hywel Williams
Mark Williams

Witnesses: **Rt Hon Peter Hain MP**, Member of the House of Commons, Secretary of State for Wales, Wales Office, and **Rt Hon Rhodri Morgan AM**, Member of the Welsh Assembly, First Minister for Wales, the National Assembly for Wales, examined.

Q186 Chairman: Good afternoon. Welcome to the Welsh Affairs Committee. I wonder if our two witnesses could introduce themselves.

Mr Hain: Peter Hain, Secretary of State for Wales.

Rhodri Morgan: Rhodri Morgan, First Minister for Wales.

Q187 Chairman: That is just for the record—we do know you! Secretary of State, we will be submitting some written questions to you. Hopefully you will be able to reply in the next few days. That will give us more time to ask some of the more substantial questions today.

Mr Hain: I would be very happy to do so.

Q188 Chairman: Could I begin at the beginning, so to speak, with the devolution settlement. It was once suggested by Nye Bevan that the constitution of the Welsh Rugby Union was Byzantine but the devolution settlement has been similarly described in more recent times as Byzantine and the White Paper proposals add to the complexity. Why was a draft Bill not published in order to give an opportunity to the public to have a better understanding of what the proposals are being submitted to us?

Mr Hain: First of all, we published a White Paper in June. Secondly, the clock is ticking on this. These arrangements need to be in place in advance of the Assembly elections in May 2007. The new structure, particularly for abolishing the single corporate status of the Assembly and replacing it with a proper executive and legislature arrangement—a policy, incidentally, supported right across all the parties, a matter of consensus—needs to be in place from early May 2007. The Assembly needs to have time to put those arrangements in place, which involves a pretty substantial and radical restructuring of the whole way it goes about its work.

Q189 Mr Crabb: In response to our concerns about the complexity of the proposals, Alan Cogbill assured us that the Bill will be “coherent and free standing”. What do you understand that phrase to mean?

Mr Hain: I think he meant there would be one single Government of Wales Act. There is an existing Government of Wales Act 1998 but, as my memorandum makes clear, around 120 of the clauses in the new Bill—to become an Act, we

hope—will be transposing and modifying the existing legislation. There will be around 40 new clauses, mainly dealing with the enhanced powers and the reforms there. Rather than cross-referencing the whole time, the Parliamentary Council advised us it is better to have a single piece of legislation which would be, as it were, the Bible for devolution.

Q190 Mr Crabb: A lay person would be able to understand the devolution statement just by reference to the new Act without referring back to the 1998 Act.

Mr Hain: Indeed, with perhaps the help of the explanatory memorandum that goes alongside it.

Rhodri Morgan: Could I endorse that. From the point of view of lawyers in Wales, political scientists in Wales, anybody interested in their rights or the political process, if you have an act which requires reference back to the 1998 Act then basically you have to have two books in front of you all the time. It is much better if you have just the one and you can get your nose on to that statute, and—provided you are reasonably good at interpreting statutes—you are at the races; whereas, if you are dodging back and forth all the time, I just think it leads to confusion. So it does make for a longer Bill this time, but I think it is a much better output even though you have that greater length. You should not measure it by how many clauses you have but how many clauses you have terminated in the old Bill in order to give you the coherent single viewpoint.

Q191 Mrs James: My question is to the First Minister. The Presiding Officer told us when he gave evidence last week that the National Assembly for Wales had very little input into the drafting of the Bill. Can you outline in detail what role you and the Welsh Assembly Government have had in drafting the Bill?

Rhodri Morgan: Perhaps the remarks of the Presiding Officer will be accurate for his perspective. By that he will mean that the members of the Assembly, the corporate body of the Assembly, the 60 members of the Assembly, will have had little role because it is a UK Government Bill and is part of the manifesto commitment. But that also implies that there has been a degree of tremendous teamwork between both our lawyers and Wales Office lawyers, our civil servants and Wales Office civil servants, and

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myself politically and the Cabinet more generally, in supporting the Wales Office's prime responsibility as part of the collective UK Government responsibility for bringing the Bill forward. We have been there as part of the team that has helped to create the set of instructions to the Parliamentary Council, but it is a UK Government Bill. There are no two ways about that.

Mr Hain: As Rhodri says, there is a single Bill team, staffed by a majority of Rhodri's staff, drawn from the Assembly, with Wales Office staff to complement that. Obviously the Presiding Officer is being kept closely in the picture. I saw him on Monday and I think satisfactorily resolved all the queries that he had. I suppose it is also similar in this sense—apart from the UK Parliament being in the lead on this, because it is a UK Parliament bit of legislation—that the speaker does not draft government bills in our Parliament.

Q192 Mark Williams: A large consultative exercise was undertaken by Lord Richard and he has produced a highly acclaimed report. How are the Government's recommendations in *Better Governance for Wales* superior to the conclusions Lord Richard reached?

Rhodri Morgan: What Richard does not have but this Bill does have is an intermediate stage—which could in theory become the final stage: it all depends on politics long after I have retired and put my feet up. The Richard first stage has already been implemented—by Peter when he was Leader of the House—and that has been continued; namely, the principle of framework legislation. On all England and Wales Bills the normal practice of this Government and this House will be to put the Wales measures into the hands of the Assembly for filling in all the details. Then Richard goes straight to a third stage, with all the complexities of a shift in the electoral system to STV, a referendum and so forth, and a reduction probably in the number of members of Parliament and so forth following the Scottish precedent. What this Bill has but Richard did not have is the intermediate stage; namely, the Orders in Council stage, or, if you like, the parliamentary release catch, where the Assembly can apply and then the Secretary of State takes a view, and then it comes through into Parliament to request Parliament to release the powers to the Assembly to pass an Order in Council. That is not in Richard. We think that is a good thing to have added to Richard. I do not think there is anything in Richard which is not in this Bill; but there is something in this Bill of key importance which is not in Richard.

Mr Hain: I do not want to contradict Rhodri at the start of our joint evidence, but what was not in Richard was a commitment to a referendum, I think I am right in saying. On the question of primary powers, this Bill will put on the statute book for the very first time primary powers for Wales. I think that is a very important part of it and one that I am proud of. But it has made it clear that this is a radically different settlement from the 1997/98 settlement—which itself was authorised by a referendum—that you would require a referendum to get primary

powers for the Assembly, whereas you could get on with the job in the meantime and give substantial powers, as Rhodri said, to the Assembly through Orders in Council between 2007 and 2011, and of course Richard did not envisage primary powers coming in until at least 2011. So we think we have a more practically deliverable package of enhanced powers for the Assembly than the Richard Commission proposed. Of course the other similarity with the Richard Commission was the split between the executive and the legislature. We just took that blueprint that he recommended and are taking that forward.

Q193 Chairman: Could I pursue this for a moment. Could you put on the record the reasons why you think it is so important? I assume it is in the context of what has happened in the past and the need to get the full support of the people of the Wales to move forward.

Mr Hain: It is that. I think you have to be on the high ground here. If you are proposing a democratic extension of powers for the Assembly that is completely different from the 1998 Act, completely different from the policies put to the people of Wales in 1997, you need to get the people of Wales's endorsement for it. That is the reason. I think that has strengthened the case, and, I suspect, Chairman, if we had not as Welsh Labour and as the Labour Party have it put in our manifesto and as a government decided on this policy, the Bill would doubtless have been amended during its passage in Parliament to have included a referendum. I think we are in a very strong position of saying, "Here are the powers sitting and waiting on the statute book. When there is a consensus in Wales, beginning with a consensus in the Assembly to go for those primary powers, then we can trigger a referendum by the Order in Council mechanism we propose."

Q194 Mr Jones: Secretary of State, does the Order in Council process itself not amount to a radical extension of the powers of the Assembly way beyond what was envisaged at the time of the 1997 referendum? Should that not also be the subject of a referendum now?

Mr Hain: No, because the UK Parliament is in charge. The UK Parliament in respect of the powers that go to the Assembly under this new procedure makes the decision. That is exactly what the 1998 Act provided for and was endorsed by the people of Wales in 1997. Yes, it is true that we do not have the full stages of primary legislation, the whole process in both Houses—that is true: there is an accelerated procedure—but Westminster remains sovereign. Therefore, there is no case for any referendum which would authorise the delivery of primary powers to the Assembly—which I have long supported—in which Westminster would no longer make decisions to the powers that the Assembly have.

Q195 Mr Jones: Have the people of Wales ever been consulted over the Order in Council procedure?

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Mr Hain: There was a widespread process of consultation following the Richard Commission, in which both Rhodri and I were in exactly the same position, that we wanted to see the Assembly get on with its task of having greater powers following 2007 and did not want to wait another four years, as Richard proposed—particularly bearing in mind we needed to get a referendum to get further on. Fundamentally, we are suggesting here that once the decision in principle is taken by our Parliament, by this House and by the House of Lords, to grant the Assembly the enhanced legislative competence orders that it requires to make Assembly measures—that is a decision of Westminster, and once that decision is taken—the Assembly is able to tailor its own policies much more effectively and in fact with less complexity than is the case now.

Rhodri Morgan: If I might add to that. I do not think one should abuse or overuse the referendum mechanism. You should confine it to the major constitutional issues about who runs your country. The degree to which Parliament and the Assembly run the country is not a suitable question for a referendum. In other words, if you are introducing something new, like the Assembly, then: referendum. If you are joining the European Union and you have never been run by the European Union before, then: referendum. The degree to which Parliament runs Wales and the Assembly runs Wales, that, it seems to me, would be an abuse of the referendum mechanism.

Q196 Mr Jones: But this was never envisaged in 1997.

Rhodri Morgan: I do not agree with you. I believe that this implements exactly what was intended by the 1997 referendum—not the technicalities of it, but the way in which Parliament could release powers over a legislative area was envisaged and this makes the Assembly-Parliament bargain over who does what very much in line with what was envisaged throughout that time.

Mr Jones: And you are content—

Chairman: Could I ask members of the Committee, if they want to ask a supplementary, to do it through the Chair, please.

Q197 Mr Jones: Forgive me Chair. You are quite content, therefore, that the people of Wales should have no say on this particular—

Mr Hain: Hang on, David. Have no say? I mean, this is a difference between an Order in Council granting the Assembly more powers and more scope to tailor policies in the way that it ought to, and a bit of primary legislation. Are you seriously suggesting a referendum on the people of Wales on giving powers to the Assembly to choose between primary legislation and Order in Council? I do not think the people of Wales would thank you for that referendum, quite frankly, and it does not alter the fundamental relationship and the fundamental settlement endorsed in 1997.

Chairman: We will return to the Order in Council later on in the session.

Q198 Hywel Williams: Good afternoon. The Presiding Officer, when he was before us a little while ago, said that it would be inappropriate for the Bill to prevent either the Welsh Assembly Government or the National Assembly for Wales to change their names if they so desired. Is there a provision in the Bill to allow them to change their names? Would you think that is appropriate?

Rhodri Morgan: No, there is no provision for any change of the name. It is a curious thing about names. I seem to remember that in the opening clause of the Government of Wales Act 1998 there are three different ways of formulating the phrase: “National Assembly for Wales” or “an Assembly for Wales” or whatever, right in the opening clause. We are not proposing any change of name, therefore there would not be legal authority for changing the name. Welsh Assembly Government was not in that Act, but clearly now you do need some name, because what you are doing is having a legal personality for the Assembly Government which is not in the original Act. But, beyond using the name that has become custom and practice over the past four or five years, there is no provision for doing that and no provision for changing the original provision of the National Assembly for Wales from the 1998 Act. I think we all accept that in the end the people rule this issue and what becomes the convention is the convention. You will all be aware here that the words “Prime Minister” had no force in law for 150 years or more. It was always “First Lord of the Treasury” and then suddenly they decided they had better regularise this and had the words “Prime Minister” enshrined in law. Likewise, I heard a very good plug for us by the managing director of BT this morning. He referred to us as “the Welsh Government” having worked well with BT on bringing broadband to Wales. I do not know what people will be saying in 10 or 15 years. None of us can predicate that. In the end, the people will rule because it is the people’s convention. They decide whether to call the Prime Minister the Prime Minister or the First Lord of the Treasury, and they will decide which name to give to the Welsh Assembly Government, or the National Assembly for that matter, in 10 and 20 years and there is nothing any of us in this room, neither me nor Peter nor any of you, can do about it if that is what the people decide.

Q199 Hywel Williams: Where did the term Welsh Assembly Government come from? What were the procedures for adopting that?

Rhodri Morgan: It was agreed across the four parties in the Assembly that we needed to stretch the elastic—not break the elastic, but stretch the elastic—of the Government of Wales Bill of 1998, so as to make as clear as possible the distinction between the executive branch and the legislative branch, and we have to have a title, therefore. There was a bit of argument about it. People pointed out, “Welsh Assembly Government sounds quite funny if you just use the three initials: WAG.” Fine. Okay. Take that on the chin. People said: “The equivalent if you applied it here would be the United Kingdom

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Parliament Government as distinct from Her Majesty's Government." Not many people outside this Place use "Her Majesty's Government" but that is the official title. In the end, you have to decide upon the title with the fewest disadvantages, and that was done. Because you have used it then for four or five years, the best thing is to proceed with it. What the public will use in 25 years time, I have no idea.

Q200 Hywel Williams: Forgive me for pursuing what might be a minor point. Should there be agreement between the four parties and the other two members in the Assembly that the name change was required if, according to this Bill, there is no way for them to do that.

Rhodri Morgan: No, that is true, but neither was there for using Welsh Assembly Government either—but it came into being. The formal legal titles are set out here: "Welsh Assembly Government" and "National Assembly for Wales" and their Welsh equivalents (which fit rather better). Informal titles, of the Prime Minister type before that became a legal title, can emerge from nowhere. You do not know really what the public get used to and what the public choose to like and what they choose not to like and what they choose to use, which has to be short and snappy—that can be used on a building site, supermarket checkout or whatever. Sometimes formal titles do not suit. Informal titles which emerge up here and in Cardiff there is no control over what the public in the end decide to call a particular body in their constitution.

Q201 Hywel Williams: The Bill does not appear to give the National Assembly for Wales the powers of dissolution. Will that be provided? I am thinking now in terms of possible confusion in the public's mind if there are discussions between the parties and the Assembly and it is unclear what is happening down there. Will there be powers of dissolution?

Mr Hain: There will be procedures in the Bill for these circumstances. Of course it is a fixed term Assembly but if there were some kind of impasse and the Welsh Assembly Government could not be formed, then there would be procedures specified in the Bill.

Q202 Mr Jones: Secretary of State, who is best placed to be final arbiter of negotiations over the National Assembly's Standing Orders, the Presiding Officer or the Secretary of State for Wales?

Mr Hain: Let me start by saying I have no inclination, let alone any enthusiasm, for drawing up the Assembly Standing Orders. I do not think that is my job. I think that is the job of the appropriate mechanism in the Assembly—and Rhodri could perhaps advise us of his thoughts on that. I made that clear to the Presiding Officer on Monday. However, we have used the same provision as in the 1998 Act, that, if there were some kind of impasse over either the total package of Assembly Standing Orders or perhaps a narrower part, the fallback would be an order for the Assembly to start afresh with Standing Orders—as we would clearly need

to—and it would fall to me to resolve that matter. I hope that will not be the case. I hope there will be a consensus on it because I do not to exercise that power. It is simply, as it were, a statutory fallback in the case of an impasse.

Q203 Mr Jones: Would that be a continuous process?

Mr Hain: No, once the Standing Orders are agreed they can then be amended by, I think, two-third's majority in the future. That is not a matter that the Secretary of State will want to hear about, let alone be involved in.

Rhodri Morgan: You have to start from somewhere, because you have a new Bill; you cannot use the old Standing Orders. I think the formal legal point is that in all circumstances the Secretary of State makes the Standing Orders but if there is a two-third's majority in favour of a set of Standing Orders, the Standing Orders that he makes are the ones that Assembly have already determined. If, however, the Assembly simply cannot agree on a set of Standing Orders, we are in difficulty and then you have this fallback power for the Secretary of State to do more than make them, but legally have to make them (in other words, write them), because the Assembly cannot do it itself. I am sure it will not come to that, but you have to have a fallback, otherwise you could finish with an Assembly with enhanced legislative powers but no *modus operandi*.

Mr Hain: It is a powerful incentive, as I see it, Chairman, on the Assembly to agree, so that I am not troubled by this! I have enough to do.

Q204 Mark Williams: Without wishing to add to the Secretary of State's workload, you responded to Mr Roger Williams in a written answer last week that the Devolution Guidance Note 9 has been revised to take account of the White Paper. I think Mr Williams described them in Welsh questions as a "Bluffer's Guide to Devolution" but we will not go into that now. What steps has your office taken to ensure that there is a more consistent and accurate approach in giving the Assembly "wider and more permissive powers"?

Mr Hain: Exactly that. We have a manifesto commitment to doing this. Very soon after the election, having got agreement before it to this approach from the Government, I initiated the procedure whereby the Department for Constitutional Affairs subsequently issued a devolution guidance note—of which there are many—Devolution Guidance Note 9, which specified that in drafting primary legislation of an England and Wales character, if there were to be clauses devolving power in it—such as the NHS Redress Bill on banning smoking in enclosed public places, which is the first example of this—then, instead of a series of, as it were, clauses which specify in some detail what the Assembly could or could not do, it simply said the Assembly will have the power to do as it wishes in detail on this policy. That guidance is now to be followed by a new Whitehall Department on drafting primary legislation and drafting bills affecting Wales as well as England.

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Q205 Mark Williams: Are there any monitoring arrangements in place to ensure that guidance is being, in the first place, looked at and then followed?

Mr Hain: I guess your Committee might want to take an interest in that! The procedure is that all legislation affecting Wales is monitored extremely closely. Indeed, we helped draft it by the Wales Office, and, as often as not, working in partnership with the Assembly. It is often Assembly officials who provide the expertise, because they are the lead officials, and Wales Office officials and ministers if needs be will be involved in some brokering and extra assistance at the Whitehall end of things, so that process will occur. If there were any attempt, as it were, to depart from it, then we have the Devolution Guidance Note to assist us in making sure that the new regime is kept to.

Q206 Mrs Moon: I wonder if I could ask you a different question, about aiding communication between Whitehall civil servants and Assembly civil servants, if I could put it that way. It has been suggested that to assist understanding and to aid scrutiny an explanatory memorandum be attached to Bills explaining which clauses were relevant to Wales and which clause were going to be enacted differently in Wales. Would you find this a useful proposal? Do you think it would aid both scrutiny and understanding?

Mr Hain: I think there is an explanatory memorandum attached to all clauses at the present time. That would make it clear where there were Welsh-only clauses. We could perhaps look at making that even clearer, given the new framework powers that are being granted. We also envisage—although I realise we are not discussing this yet—that when an Order in Council comes before the House of Commons and the House of Lords there will be an explanatory memorandum attached to that, explaining exactly what its purpose is and exactly how it will operate.

Rhodri Morgan: In relation to this Bill itself, whereas it would be a huge burden of time to get it translated into Welsh around the time of publication, we do think it might be practical to have the explanatory memorandum (which would be 20 pages, say) translated into Welsh at a pretty early stage—maybe not before second reading but possibly well before your committee stage starts here.

Mr Hain: Perhaps I may make one other point that I perhaps overlooked in answering the question. My experience has been—and I am sure Rhodri will agree—that our officials in the Wales Office and the Assembly work very closely together. There is a common purpose. Sometimes issues have to be resolved in the nature of the situation but they have a common purpose.

Q207 Mrs Moon: I do not think the suggestion was that there is a problem in the Wales Office. I think the suggestion was that some other government department is perhaps not aware of issues in the Wales Office.

Mr Hain: Our job in the Wales Office is to make them aware—as we do when we need to.

Rhodri Morgan: And I have suddenly lost the power of speech!

Mrs Moon: Indeed.

Q208 Chairman: Should you ensure that there is some sort of statement by those departments that they would do that? There is the recent example of DCMS not undertaking certain things in relation to the Welsh language. Is there any request that you should explore that?

Mr Hain: The Parliamentary Under-Secretary of State made it clear that that had been a less than desirable procedure. Sometimes there are slip ups, but we usually put them right or spot them coming and make sure that things are done in the way that was intended.

Q209 Chairman: Would it be in order—and this is not a flippant remark—that the officials might visit Wales on some staff development programme to get some understanding of how devolution is unfolding?

Mr Hain: My experience—and certainly of Wales Office officials who have been there since the beginning, following 1999 and the establishment of the Assembly—is that whereas Whitehall was on a very steep learning curve at the beginning at official level, and, dare I say it, occasionally at ministerial level as well, that has largely receded. So I am not sure there is a problem here, but you are free to make any observations, Chairman, and your Committee, on this as you see fit.

Q210 Mr Crabb: Going back to the Orders in Council procedure, you kindly submitted a memorandum which outlined in detail how the procedure would work. It is clear from reading the document that you both get on well and agree on the big issues. Do you envisage any potential problems for the Order in Council procedure, should we perhaps have a Secretary of State and First Minister who do not have the same kind of goodwill that you both enjoy?

Mr Hain: What a suggestion! It is an important question that I think we would both be pleased to address. If you are envisaging a situation which is quite conceivable in the future—of a different colour government in London from a Welsh Assembly Government in Cardiff, that kind of cohabitation is no different—as I think Rhodri has described it—in respect of primary legislation. Let us be clear, if there are going to be difficulties of cohabitation, then they are even more difficult under primary legislation, the existing settlement, than they would be under Orders in Council, because a hostile London government could refuse to put a request for primary legislation in the business programme, pleading no time/pressure/no opportunity in the Queen's Speech. That may be, as it were, an excuse because there was an objection in principle. Parliament is sovereign and that is the case now as it will be in the future. But I think the Order in Council procedure allows for a better accommodation and an easier accommodation between difficulties of politics, simply because you do not have this roadblock in the way of having to

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squeeze in Welsh Bills, as we have had to fight for space over recent years. We have been very successful, by the way, very successful indeed, but you have to fight for space in the Queen's Speech in the legislative programme. An Order in Council is not really going to trouble the legislative programme to a great extent. It is an hour-and-a-half debate on the floor of the House compared with going through all the stages of a bit of primary legislation.

Rhodri Morgan: Obviously I have a completely split personality over this. In the end, the true test of devolution is how it has coped with cohabitation. With any settlement at all, it is how it has coped with different political parties in power. Because it is, in a way, too easy when the same party is in power. Although you have the odd bit of argy-bargy from time to time, naturally, it is, by and large, the same party, the same manifesto, the same set of values. It would be nice in theory to be there. On the other hand, in partisan terms, you do not want that to happen. You want to be winning elections in Wales and you want to be winning elections at the UK-wide level. Robustness, therefore, of the settlement, in readiness for the time or the moment at which this cohabitation of different parties in control has to be put to the test, is very important in any settlement. I believe that what is proposed here is as robust as you can make it. Until it happens, you will not really know that, but I think it is devised so that you can establish a set of conventions, possibly with the same party in control, and then with whatever happens at Assembly elections in 2007 or 2009 or whatever. At general elections we cannot really predict what will happen, but the key thing is this: Is the convention and the understanding of how the Orders in Council procedure will work when there are different parties in control going to work on the basis that the Secretary of State, initially, and then Parliament will decide what you call the "appropriateness of releasing this bit of legislative power" not on the merits of the case—that is, do we like it or not?—but on whether it is appropriate? If we can get that convention working and up and running, then it is, I think, robust. There is not a devolution settlement anywhere in the world that has not had cohabitation. We are unusual here. Australia had the absolute opposite, where the Federal Government has been Conservative for years now—12 years or something—and all the States and the Northern Territories are mainly Labour. There you have this complete clash of political parties, but because they have had devolution for 100 years or so, it does not matter—they still blame each other for who has left the other short of resources for doing this, that or the other. Of course you will always get that. On the other hand, it does not put the devolution settlement to the test. Because devolution has only been around for six years here, not 100 years, there will be some fairly testing times, but it is very important that this settlement is seen to be robust. It is up to everybody from all different political parties that might be in power in Cardiff or in London to be able to work—and to work on how it would work. The point Peter has made is very important, that the present settlement lacks a certain

element of robustness, because when the Assembly now makes a Bill bid for primary legislation here, you will never know whether the Secretary of State was being sincere in saying, "Sorry, you chaps down there. Very fine Bill, but we do not have time to put it in. You always know the struggle we have. The Home Office have six Bills this year, so there is no time for yours," You will always be wondering, "Was he having us on? Was he using the time factor—not enough time in the legislative programme—as an excuse for the fact that he does not like the Bill?"

Mr Hain: I never have Rhodri, of course. It is my view that, in the future, any government in Westminster of a party hostile to the Government in Wales, if it consistently defied the Assembly, would find itself run out of Wales in subsequent elections, as happened on the previous occasion this occurred—I do not make a partisan point, I am stating a historical fact—when the conservatives lost all their MPs in 1997. I think this will be a learning process for everybody. I would have thought any sensible United Kingdom Government, acting in its own party's interests as well as the interests of the nation, would want to work in partnership with the Assembly, as we have done, because otherwise there are political consequences for that particular party in Wales.

Q211 Hywel Williams: If the party or parties in the Assembly have a manifesto commitment to a particular course, and that is endorsed by the National Assembly but is refused by the minister here, even if the major parts of expertise might reside in Wales—and I am thinking of the Welsh Language Bill, for example—how would you foresee that being dealt with?

Rhodri Morgan: This is all part of the predictive process of what then happens when you have to face up to cohabitation. Partially, we can draw on the long history of the relationship between Labour governments elected with majorities in the House of Commons, but with adverse voting majorities in the House of Lords. The Salisbury Convention—not in the written constitution, because we do not have one in this country—has lasted a long time, 100 years—and it is still lasting, so far as I know—whereby the House of Lords with a Conservative majority, let us say, or an anti-Labour vast majority, does not block a measure of a Labour majority coming in if it is a manifesto commitment. You then say, "Okay, if the Assembly winning party has a manifesto commitment, then that is a pretty strong argument." The only slight difficulty one can see is if you do not have a single-party majority and you have a rainbow coalition of several smaller parties, one of them has a manifesto commitment but the others do not. Are we in Salisbury Convention territory there? To be honest, I do not know, but I do not think so. If all three opposition parties form a rainbow coalition, all have the same manifesto commitment, well then it has the same effect as if one party wins a majority with a manifesto commitment in the Assembly—which does have the same moral force. But we are talking about moral force here, as we are with the

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Salisbury Convention, because none of this is written down, and because the British Constitution depends on not writing things down but on custom, practice and convention.

Q212 Hywel Williams: You would assume that something like the Salisbury Convention would apply in one case but there might be a second case where one party in a group of three might only have a manifesto commitment.

Rhodri Morgan: Absolutely.

Q213 Hywel Williams: But there would be a different class of commitment from the others, even if they happened to agree with the lead party.

Rhodri Morgan: But did not put it in their manifesto. No, if you did not put it in your manifesto, it does not have the same force really. Everything in relation to quoting the Salisbury Convention is based on something being in a manifesto. It has to be in a manifesto to have any ability to read across from the Salisbury Convention, as it operates between the two Houses here.

Q214 Hywel Williams: So, even though we are in new territory, the convention as it applies in this Place is the one you foresee coming into force.

Rhodri Morgan: There is nothing else to go on. We do not have written constitutions, we do not have referenda to change written constitutions, because we have not had one in the first place. We have conventions. We want conventions which work. They work very well and have done since 1688.

Q215 David Davies: This discussion is getting pretty hypothetical at the moment. I firstly have to welcome the recognition that there may well be a situation where we have different government in Westminster from one in the Welsh Assembly. I suspect it would be in no party's interest to undermine the relationship between those two bodies, although I am not sure it will be quite as good as it is at the moment. It is in the interests of both organisations to work together and I am sure everyone would recognise that. My first question is almost superfluous, given the way the conversation has developed, and it may sound a little pedantic, but, as the Secretary of State for Wales said earlier on, giving full legislative powers would create further problems or the potential for further problems. I am bound to throw back to him the obvious rejoinder, that not giving Orders in Council and keeping things as they were would create less potential problems if we arrive at a situation where there are two different parties running the two different legislative bodies.

Mr Hain: I am not sure I understood the question as you interpreted my answer. My point earlier was that under primary legislation there tends to be more problems.

Q216 David Davies: Yes, so under no Orders in Council potentially less problems.

Mr Hain: Yes, I think so. Let me give you an example, as it might be helpful for the Committee, of the sort of problem that might need to be resolved. It is not an issue of principle but an issue of detail, in a sense. Suppose you took nursery education and the Assembly requested an Order in Council enabling it to make provision in relation to nursery education to ensure maximum flexibility and the request was broadly framed, and the Secretary of State would be concerned that the request might be too broad and might allow future Assembly administrations, for example a grand opposition coalition involving the Conservatives, to re-introduce nursery vouchers. In those circumstances, the Secretary of State would ask the Assembly to narrow the scope of the Order to prevent a potential clash there. You might have those kinds of discussions but the process would encourage you towards a consensus in the partnership. As I think you well put it, the organisations would want to: it would be in both Parliament and the Assembly's interests to work closely together. If, however, you got a series of log-jams as a result of political confrontation, if you did do this in future years then I think the case for triggering a referendum and going to primary powers would become unassailable. Any party in Westminster which was seeking to consistently thwart the Assembly would be inviting it to trigger the process for a referendum, to get the primary power which would not allow any blockage or log-jams or roadblocks to be put in the way.

Q217 Mark Williams: Returning to Lord Richard's views on these matters, he described the White Paper's proposal to give the Secretary of State the power to reject a request from the Assembly for Order in Council as "somewhat paternalistic". Can you explain the rationale for proposing this role for the Secretary of State rather than letting Parliament decide on the merits of the Order? And, following on from that, would you not consider a limitation of your proposed power, whereby your role would be limited to checking whether the Order in Council is in order?

Mr Hain: I am happy to go into the process where, by the time it came to that decision, you would know it was in order because both sets of officials would have been involved in checking that and clearing it, including with other Whitehall departments. I think there are two points here. First of all, it is not Parliament that, as it were, lays its own Orders; it is the Secretary of State. That is the way our system operates. Secondly, I do not think it is a question of a paternalistic role; I think it is the necessary intermediary between Welsh Assembly Government making a request ultimately to Parliament and a secretary of state transmitting that request to the floor of both Houses—as would be the end result after a process of pre-scrutiny, which you may, Mr Chairman, want to look at. I do not think it is a patronising role, a paternalistic role at all—except in the sense that, given that you do not have a separate parliament for Wales able to make its own primary legislation, you could argue that everything that Westminster does is in one sense patronising

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towards the Assembly. But that clearly is nonsensical, and I do not see it as any different really from the present situation. I put down primary legislation as the current Secretary of State, just as I would do to Orders in Council if I still hold that post when this new dispensation is in place.

Q218 Nia Griffith: If, Secretary of State, you see that role as a transactional role, as you transmitting something from the Assembly to Parliament, why did you say you should have the right to refuse an Order in Council and therefore pre-empt a decision by Parliament?

Mr Hain: I do not see it as a purely transactional role. I think it is a question of getting the Order in Council in the sort of shape that Parliament is likely to want to endorse. I gave an example on education and I will give another one on tax and benefits. If the Assembly, say, requested an Order in Council within its existing devolved competence, for example, social justice, but the Secretary of State was concerned that the proposed policy would have serious implications for the tax and benefits system, which is not a devolved competence, and it would not be possible to draw up a measure without encroaching into reserved matters, then you would perhaps want to tweak the Order in Council and you would want to enter into discussion. I would envisage this taking place at a very early stage, when the First Minister first came to the Secretary of State and said, "Look, we want to do this. Our officials need to get together to work out a satisfactory and suitable mechanism in the form of an appropriate Order in Council in order to effect this," and you would immediately be working in partnership on it.

Rhodri Morgan: It is something more than *vires* but something less than merit. In other words, if I ring Peter up and say, "We are thinking of bringing in the slaughter of the first-born miscellaneous provisions Bill, Order in Council 2006"—or 2007 or 2008 or whatever, and Peter's first reaction is, "I think that is a fairly challenging proposal to do in an Order in Council, Rhodri," you can see that there is an exercise of judgment going on, not merely on the *vires*, because the lawyers you hope will have sorted that out, but it is something less than the merits of the case. It is an in-between stage.

Q219 Hywel Williams: Would you be in favour of some kind of "constitutional lock" to offer the National Assembly for Wales some protection if a government of a different stripe appeared in respect of existing Order in Council powers?

Mr Hain: Constitutional lock?

Rhodri Morgan: What constitutional lock?

Q220 Hywel Williams: If there were disagreement between governments here in Westminster and in Cardiff, would you be in favour of some kind of constitutional lock that would offer the National Assembly for Wales a level of protection over existing Order in Council powers?

Mr Hain: First of all, I think it is simply a statement of constitutional fact that Parliament is sovereign. You could not, even if you wanted to, bind

Parliament. The Assembly could not bind Parliament in its decision and, therefore, it would always be a matter of the House of Commons and the House of Lords making the decision that the Assembly requested of it—or not, as the case may be. But that is no different from the existing settlement. So I do not think you can put a Bill down as saying whatever the Assembly asks Parliament has to do it in advance. Parliament would not carry a bill saying that. I would certainly not introduce one saying that. I would come back to the point I made earlier: I do not envisage that arising, and if it consistently did arise, the case for triggering a referendum for primary powers would become unanswerable.

Q221 Nia Griffith: Supposing something is turned down and there is a refusal, why in particular should that refusal come to you rather than to the Presiding Officer of the National Assembly for Wales?

Rhodri Morgan: These are proposals which come from the elected Government majority of the Assembly, the administration, and therefore the refusal goes back. But there is not an abridgment here of the ability of backbenchers in the Assembly to use what is now Standing Order 31. As in a ballot procedure, as you have up here, for private members' bills, we have Standing Order 31 for private members' initiatives then of a legislative character. They would have the same ability to come forward, but they would be treated differently. They would not go back to the Government side of the Assembly, because they have not come from the Government side of the Assembly, but they have been voted through on a free vote through a private members' bill equivalent procedure that we have.

Mr Hain: From my vantage point you cannot have a secretary of state with a position where he is dealing with the whole of the Assembly, especially under the new dispensation, unanimously supported across the parties, where there is a clear division between the legislature (that is the Assembly) and the executive (that is the Welsh Assembly Government). We would deal with the Assembly on a government-to-government basis. We would deal with the issue on a government-to-government basis, although ultimately the Welsh Assembly Government is answerable and accountable to the Assembly just as we are to Parliament.

Q222 Hywel Williams: Lord Richard told us that the House of Lords would not be happy at all in respect of the use of Henry VIII powers and the Orders in Council procedure. Would you use the Parliament Act in the face of opposition to the Bill in the Lords?

Mr Hain: First of all, this is a manifesto commitment, so the Salisbury Convention applies. It is a manifesto commitment in all the key principles in the Bill. I do not agree with Lord Richards and my initial inquiries suggest that assessment is not the case. I think there is a lot of support amongst peers of all parties for this process. For the reasons that the Richard Commission explained, the Welsh Assembly and the Welsh Assembly Government do need to move on from where we are now and before

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a referendum triggered primary powers, if and when you got to that point. I do not think these are Henry VIII powers because in the end Parliament decides to give the Assembly the measure-making capacity. Secondly—and this is a crucial point where I do not agree with Lord Richard—the Assembly will itself have a full scrutinising legislative role of a much larger kind than it has now. The concern about Henry VIII powers is giving secretaries of state Henry VIII powers to do pretty well what they like. Here you are giving the Assembly the ability to determine its own policies and exercise its own powers of duties as it sees fit. That is a legislative body, accountable ultimately to the people of Wales.

Rhodri Morgan: I endorse that very strongly. I think it is fair to say that the scrutiny procedures in the Assembly and the degree of democratic *Sturm und Drang* by which their weaknesses are teased out. The teasing out of weaknesses in a government proposal is extremely strong in the Assembly and I would say compares well—if “well” is the right word here—in the way it tests the validity of a government proposal with the amount of scrutiny of a Henry VIII type of procedure in this place. That is not a criticism, of course, of the mother of parliaments, but I think it is fair to say the Assembly would put things through the ringer more closely as a democratically elected body, whereas Henry VIII powers are exercised in committee and with less real scrutiny than you would get on the floor of the House.

Q223 Mrs James: I would like to ask some questions on Stage 3 of the process. This question is specifically targeted to the Secretary of State. What further evidence of consensus would be required to trigger a “stage 3” power referendum in addition to a two-third’s majority in favour in the National Assembly for Wales? Why should the Secretary of State have the power of veto over a decision by the National Assembly to hold a referendum?

Mr Hain: I would not see the Secretary of State role as having a power of veto. I think any sensible secretary of state would want—and that is why this provision is going into the Bill on my watch as Secretary of State—to be sure there was a consensus in Wales, reflected in as broad a consensus in the Welsh Assembly as possible, hence the requirement for a two-third’s vote. Some people have interpreted this, as it were, as a hostile act, a veto. I do not. As a passionate devolutionist and a believer in primary powers in principle, I would want to be clear that there was a majority for this. For example, let us say in the current situation, in the balance of representation in the Assembly, and the balance of power therefore, suppose that the Opposition, almost gratuitously and for embarrassment purposes, sprung by one vote—as it is capable of doing under the current arithmetic—a request for a referendum. That request in the current party configuration would be without the support of Welsh Labour. It is a leap of faith to imagine the Conservatives supporting this, but they might want to support it to abolish the Assembly—who knows?

Q224 David Davies: Do not worry on my account.

Mr Hain: But you would need to be sure that there was a broad consensus of at least the kind that existed in the 1997 referendum. Even then—as many of us around this table found to our cost, including you, Chairman—when we thought we had cross-party support excluding the Conservatives, it was a very narrow victory. When you call this referendum to trigger the primary powers you have got to have reasonable confidence that you are going to win it and, therefore, I would not see this provision as being a veto in power, it would be a bit of a reality check on being confident that the people of Wales will back you in a vote. I think that a two-thirds majority gives you that kind of confidence that is the case.

Q225 Mrs James: Leading on from that, how do you think the Bill could make adequate and sensible provision for a Stage 3 post-legislative referendum, which we know may not happen for several years? What plans are you putting in place for that process?

Mr Hain: The Bill will make provision for an Order in Council mechanism to go before Parliament at the request of the Assembly to trigger a referendum. That Order in Council will determine the question to be framed—that is not an issue addressed in the Bill—what the question is, quite properly so, because that would have to await a further decision at the appropriate time. It would make provision for that mechanism to operate, and I think that is quite right. There would also be provision for a period of consultation in line with the White Paper following the request from the Welsh Assembly Government and in turn following a vote in the Assembly for this referendum to be triggered. There would be a period of consultation by the Secretary of State just to assess the situation and then the referendum decision for Parliament would follow.

Rhodri Morgan: A referendum is not a public opinion poll. In other words you can have a public opinion poll three times a year, you cannot possibly envisage having three referendum a year on whether to have primary powers and a different government would come in, then you would have a referendum to take them away again, and then another referendum. That is what we call an “neverendum” not a referendum! You want there to be a consensus that the time has come and you want broad agreement even to trigger the process: “Look, time to make this a big shift”. To put it to the people to test it in the hope that unless something horrendous happens that settles that issue for the next 50 years. You do not want this to be treated in a public opinion poll sense, it is not taking the temperature. Quebec has had this problem for years of every couple of years they see whether they can get a referendum on Quebec’s independence through the year. If they cannot get it through this year, they try it again next year. If they try it again after the Canadian Government has put taxes up, then maybe they will get it, but they do it all the time. We do not want that. We want them to determine a big constitutional issue for preference to settle matters for at least half a century until an entire generation

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of politicians and voters have lived, died and gone and different people are around in politics and at the voting stage as well, not as a test of opinion just for this year.

Mr Hain: I very much endorse that and I want to add one other brief point. If we lost a referendum—

Q226 Mrs James: My next question.

Mr Hain:—it would be disastrous for the case for primary powers which is why I am being sensibly cautious about this. We are imposing a constitutional reality check so that those of us, who favour primary powers in line with Welsh Labour's policies and other parties who have favoured primary powers, are as confident as we can be in anticipation of the people's verdict that there is wide support for it because if we lose it, it would be off the agenda for a very long time.

Rhodri Morgan: A generation.

Q227 Mrs James: You touched on repeated referenda; do you think the Bill may need provision in the event of a no vote and a repeat referendum too soon, a set amount of time or a limit to that?

Mr Hain: No, I do not think so. That is a matter for politics. It would make provision for a referendum to be triggered. According to the procedure two-thirds Assembly votes, request to the Secretary of State, and the Secretary of State passporting that request on to the floor of Parliament via an Order in Council. If the result turns out "no", everybody will have to take a deep breath and decide when they want to do this again.

Q228 Mrs Moon: We have had a number of concerns expressed to us about the extra size of the Assembly and whether or not there will be enough Members with increased legislative powers to perform effective scrutiny as well as government ministers. It is a question, first of all, for the Secretary of State: why was a decision not made to increase the number of Assembly Members or, indeed, to give the Assembly powers at some point in the future to decide on its own increase in numbers?

Rhodri Morgan: I think there is zero public support for increasing the number of MPs, councillors, MEPs, Assembly Members, any kind of elected politicians. Because elected politicians are paid, the idea of having more politicians is a very, very sensitive issue with the public so it would have to be very clearly justified. My belief, very strongly, was that by reorganising the work of the Assembly so that you did not spend as much time on the minutiae of certain types of secondary legislation such as the Sheep and Goat Identification Order (Wales) 2002, the Llama Trekking Order 2003! They would have less time spent on them and the bigger issue of possible Orders in Council would have more time spent on them. You do not need more Assembly Members, you simply need the existing number of Assembly Members dealing with more important issues which they do not have the ability to do now but they would have the ability to do under the provisions of the White Paper.

Mr Hain: I would just add to that, if I may, Chairman—very much endorsing what Rhodri said—and say that I did look at giving a power under the Bill to increase the numbers of Assembly Members, but it is quite complex. Obviously at the moment if there is a change in the number of Welsh MPs there would be a read-across immediately under this Bill, as it is under the Act, to the change in the number of Assembly Members because that is the way the legislation is framed. But if you provide for an ability, which is the only way you can sensibly do it, to increase the number of list members, you change the immediate political configurations and balance within the Assembly between 20 list and 40 directly elected—which in itself is quite an important decision—but you also change the party balance, potentially. Even if—and initially I was inclined to, as my officials will confirm, I will be absolutely frank,—you want to feel that you have this power and flexibility so you do not have to come back with another bit of primary legislation at some distant year in the future. If you do need to increase the number for some reason, as the Richard Commission, indeed, recommended, you get into this immediate problem and therefore it becomes a wider issue than just more people in the Bill working on it. It becomes a much wider political and constitutional matter.

Q229 David Davies: I was going to ask a couple of questions anyway, and this will fit in. First of all, I was pleased to hear you imply at least that you did not want to see more Assembly Members, until you let slip that your reason is it would change the political configuration in a way that would not suit the Labour Party, which of course raises all sorts of issues.

Mr Hain: No, not that.

Q230 David Davies: That was what you were saying.

Mr Hain: No, you are putting words into my mouth, if I may say so, David. I said that would be an issue you cannot predict. Let me finish this point. It is very important and this is an important constitutional point, it is not a partisan point. Who knows how it will turn out in the future, just because the current balance is more Labour first past the post and more Opposition in the list? I am saying that a decision to change the number has a much wider impact on the constitutional balance, the constitutional balance between constituency members and list members as well as potentially the political balance, and therefore you cannot do that lightly.

Q231 David Davies: Indeed, and the first part of that about the relationship between the constituency and list members is a perfectly valid concern, but to take into account the potential for causing the ruling party to change.

Mr Hain: I did not take that into account.

Q232 David Davies: Let me just finish, if I may say so. It was clearly in the forefront of your thinking. You raised the issue, you said it would have an impact on which party was running the Assembly,

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that was what you said, or you said words to that effect. That is not something which should be a consideration when you, as Secretary of State for Wales, consider changing a method of voting and a method of electioning. It is not something that should be taken into account whatsoever in my opinion. Anyway—

Mr Hain: Not just “anyway”, if I may say so, Chairman.

Chairman: Order! Order! Mr Davies, could you come to your question, please, briefly.

Q233 David Davies: Building on this, we have heard a criticism that there are not enough Assembly Members to man the committees, so if it is not your preferred solution to create more Assembly Members, would you consider either increasing the hours that are worked, or reducing the number of committees or finding some other way of ensuring that adequate scrutiny takes place?

Mr Hain: This is a matter for Rhodri. I am sorry, Chairman, I cannot allow this charge to be made. If you make a decision on numbers, you have got to be aware of the consequences of doing it. You cannot just treat it as a question of arithmetic, that was the point I was making. Actually, David, you could conceive of a situation of the next Assembly elections if the results followed this year’s Westminster elections, where there are more Labour list members and there are fewer Labour constituency members, and that would be the logical read-out. A policy is not the party balance point. You cannot, as it were, close your eyes on the arithmetical point without being aware of the constitutional balance and potentially the political balance however that went.

Q234 David Davies: Under a 40:40 split it is virtually impossible for Labour to have an overall majority, even under the current electoral arrangements. It is very difficult for any one party to get an overall majority because the closer they get to it the more difficult it becomes to win those extra list seats. If you have a 40:40 split I could virtually stake my mortgage on the fact that no party—

Mr Hain: Are you advocating more Assembly Members then? Are you advocating 20 more Assembly Members?

Q235 David Davies: No, because I say from a position of principle that even though it will probably benefit my own political party I would not want to see any further Assembly Members.

Mr Hain: So we are agreed?

David Davies: We are, yes. We have different motives but we are fully agreed on that.

Chairman: Is there a question?

Q236 David Davies: Yes. Fewer committees is something that I might suggest or longer working hours.

Rhodri Morgan: Work has to be done and how we do it is a matter for the Assembly, to be honest. Using the powers that are envisaged by the White Paper that will appear in the Bill, the Bill becomes an

Act, then the election takes place and on the basis of those new powers the new Assembly, as elected, will adapt to the potential that it has to use the enhanced legislative powers. The exact question about hours and numbers of committees I think is a matter to be left to the 2007 Assembly.

Q237 Nia Griffith: If we can return to the role of Secretary of State. Obviously by creating an Executive in the Wales Assembly Government in the way the White Paper proposes, you are effectively saying that in respect of devolved issues that it is the Executive which has the powers currently vested in the Secretary of State. Therefore, I wonder, perhaps, if the Secretary of State could look into explaining the new role of the Secretary of State (a) in respect of devolved issues and (b) non-devolved, and obviously then when they interlink which I know you have touched on a bit already?

Mr Hain: In respect of devolved matters, the responsibility would be much as it is at the present time. This Bill does not change the fundamental devolution. It does not envisage any additional functions. It does not propose any additional functions to the Assembly covering a wider policy area, for example. The non-reserved, that is to say Assembly powers, and the reserved powers to Westminster remain the same. In that sense, my function would remain the same at one level. I suppose what the Secretary of State would have to be careful of is that the Assembly, in making an Order in Council request, a request for enhanced legislative competence order, would stay within its functions and not encroach on reserved matters. Hence I gave the example of a desire for social justice, an admirable policy if it spilled over into tax and benefits policy, the Secretary of State would need to spot that and resolve the matter. That is no different from now. For example, when we were negotiating over the powers for the Older People’s Commissioner, the issue arose there, much as it had under the Children’s Commissioner, as to what were the limits of the Assembly’s powers in respect of perhaps, say, a Welsh citizen in an old person’s home just across the border from Wales. You have that kind of role just to check that the respect of interests is maintained.

Q238 Mark Williams: I think the First Minister touched on this a few minutes ago. Should the National Assembly have the capacity to determine its own committee structure? What role do you see for the regional committees in the future?

Rhodri Morgan: It does have the power to determine its own committee structure, save for that one point, as I recall, whereby it is obliged to have a regional committee for North Wales and other regional committees, but they are not specified. To be honest, I am unsighted and will have to write to you, Chairman, to answer the other questions in terms of the committee structure. As far as I am aware, there is no other lack of power to change the committee structure, in terms of a standing committee equivalent to consider the scrutiny of proposed Orders in Council. It is very clear that there has to be

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proper scrutiny in the Assembly of an Order in Council partly, as in the answer to David Davies” question earlier, because the political balance under the 40:20 first past the post list system is so delicate. There is no way you are not going to get committees vigorously scrutinising every single proposal that comes forward from whoever has formed the Executive and bringing forward Orders in Councils saying “We would like to do six this year or whatever” and me saying “Well, there will be six standing committees which will vigorously scrutinise all of those”. It is inconceivable there would be any other procedure.

Mr Hain: In general, in respect of the committee structure the Bill is less prescriptive than the existing legislation. For example, it does not specify that the Assembly has to have subject committees. The only specification, I think I am right in saying, Chairman, is that it needs to have an audit committee, that would be in the Bill. Otherwise the Assembly is free to establish regional committees if it wishes or not, and establish what subject committees it wishes or other forms of committees.

Q239 Mark Williams: On the capacity of those committees to demand government ministers and Assembly ministers attendance, you would welcome that?

Rhodri Morgan: I think in the light of the Secretary of State’s answer, it is not prescribing today as to whether you would have select committees and standing committees or whether, because of the small numbers, you would have merged select and standing committees. That is something we have got to consider whoever is elected as members of the 2007 committee. Are they going to be committees primarily for the purpose of looking at Orders in Council, in the way standing committees do here, or are they primarily there to scrutinise other Executive decisions or policies of the Executive or even to carry out studies off their own bat, as select committees do here as well? Assembly subject committees are much more similar to select committees at the moment because there is not enough legislative material for you to give them a kind of standing committee role, but there will be after 2007. How the Assembly copes with that need for more legislative scrutiny is a matter for the 2007 body elected.

Q240 Mr Jones: Secretary of State, I would like to turn to the White Paper proposals for electoral reforms, specifically the Government’s proposals to outlaw dual candidacy. The Electoral Commission have pointed out that this would render Wales unique and said that “...if you are going to operate outside international democratic norms, then you have to have particularly compelling reasons to do so”. In fact they were wrong. It would not make Wales unique because we were told by two other witnesses, Dr Wyn Jones and Dr Scully, that after extensive investigations they had discovered one system where this did apply and this was in Ukraine prior to the 2002 parliamentary elections. They pointed out this change was introduced by the same party who more recently attempted to fix the result

of the presidential election and poison the main opposition candidate. Can you explain to the Committee why you consider that the most appropriate model for Wales is that of pre-Orange revolution Ukraine?

Mr Hain: It is not, and indeed the two academics are wrong because I researched this very carefully. The issue of dual candidacy is one that has proved controversial in many other jurisdictions that have introduced additional member systems, and there are not many that have. This is a fairly unusual system. For example, it was considered by New Zealand’s independent commission on electoral systems and two Canadian Provinces that are planning to introduce the additional member systems and are committed to banning dual candidacy. I draw from that that in those British-type parliamentary systems, New Zealand and specifically in Canada, they are committed to doing this. The somewhat gratuitous reference to Ukraine is wrong, and I suggest the academics get better researchers in the future, similar to the ones I have got.

Q241 David Davies: I was enjoying this, Chairman. Since the Secretary of State for Wales has done a great deal of research into this himself, perhaps he could tell us in the examples cited in the two states in Canada where the voting system is being changed, is it the case that the governing party who are behind the changes are likely to benefit from the changes as the governing party behind the changes in Wales are going to benefit from those changes?

Mr Hain: These changes are recommended by an independent commission so that knocks that one on the head. The idea that this is a party-biased proposal is simply flatly wrong. There are six Labour Assembly Members, currently, including three ministers, who are in directly elected constituency seats who are vulnerable to losing those seats on swings of less than 3%. Now you could say that as a Government and Welsh Labour as the party and the author of that policy, we are effectively discriminating against at least six of our own members but we do not have the ability to give them the lifebelt of standing in both categories. If I can say this as well, Chairman, I was one of the ministers who introduced this system in the 1998 Act. I had absolutely not the faintest idea that it would be subject to the kind of systematic abuse for party advantage by Opposition parties in this instance and, secondly, abuse of taxpayers’ money as evidenced by the fact that in the case of 15 of the 20 list members—15 of the 20 list members so this is not an isolated accident—they have set up constituency offices in the target seats that their party, and in some cases they, want to contest next time, mostly in the seats that they lost last time. What they are doing there is abusing their position as list members, establishing themselves in the light of the local electorate, using taxpayers’ money, quite a lot of it, to fund constituency offices and effectively campaign offices against the sitting constituency member they were defeated by in many instances. That is the abuse, that I never anticipated, as a Welsh Minister

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back in 1997-98 introducing this system, which we have got to stop. We propose in this Bill to do that in two ways. First of all, by banning the ability of candidates to stand in both categories, you make a choice. If it discriminates against anyone, it discriminates against Labour members as much as any other party. Secondly, you will not be able any more to call yourself the constituency member for a particular constituency if you are a list member for the region.

Q242 David Davies: I think the second point you make is far less controversial because there needs to be clarity about where people represent, and personally I have no problem with that second part. To say that people are systematically abusing the system for party political advantage is surely nonsense. People are using the system as it is. I understood the system with no constitutional background after about an afternoon of reading the White Paper, I could see people who were clearly doing this. To say the that taxpayers' money should not be used to put an office in a constituency because it gives an opposing candidate an advantage is also unfair because clearly the candidate who has won that constituency can also use taxpayers' money to set up an office in the constituency and arguably to campaign against.

Mr Hain: They are the elected member for that constituency, like you are the elected member in Westminster.

Q243 David Davies: They are the elected Member for that constituency who should submit themselves to election against a candidate from another party who does not have the advantage of having a taxpayer funded office in the constituency.

Mr Hain: I am sorry, Chairman, either as an Assembly Member or a Westminster Member you win an election or you do not.

David Davies: It is very important that the same rules apply to everybody.

Chairman: Order! Order! Mr Davis, you are taking advantage of the Chair. You must bring your conclusions to a comment. Somehow or another you must pose a question briefly, pose that question now.

David Davies: I want to make a point of order to you, Chairman. The Secretary of State for Wales was out of order to say that any political party has abused the electoral system, that is a very serious charge, when all political parties have followed the rules as far as the current system of voting is concerned.

Chairman: If you wish to raise a point of order you should have done so at that time. Please proceed and ask a question.

David Davies: I am raising a point of order with you, Chairman. My point of order is that no political party has abused the electoral system and the only abuse of the electoral system is going on by the Labour Party at the moment.

Chairman: I have heard the point of order and I am ruling it out of order.

Q244 Mr Jones: Secretary of State, to return to the point you made about never having foreseen the consequences of people setting up their own operations in the first past the post constituencies. This was a point raised again with the academics who appeared before this Committee on 18 October. Dr Scully in response to that, said this: "There has been a long tradition in countries that have mixed member systems that people who are going on the list do some element of shadowing of certain constituencies". He went on to say: "Frankly if the Government did not realise when it brought in this White Paper that it would happen, they should have done, they were negligent in not realising that". Did you never not foresee this would happen?

Mr Hain: What I never foresaw—at the danger of repeating myself—was this absolutely consistent and systematic abuse of the system, and I stand by that statement. The evidence is plain for anybody to see as an active politician in Wales. It was provided graphically in the memorandum from the Assembly Member Leanne Wood, the Plaid Cymru Member, who explained that this was the very purpose of it all, and I am happy to provide a copy of that memorandum to the Committee, if you wish. I do not agree with the academics who made that point. I think that what is quite evident—and it is interesting that Canadian Provinces have anticipated the problem on recommendation of the independent commission—is not just in Wales but in Scotland, where the former presiding officer, the former Presiding Officer, Lord Steel, made it absolutely crystal clear in, again, a quote I am happy to provide the Committee with, that he saw the practice of list Members in Scotland, even though there was a code of practice in the Scottish Parliament, where there is not one in the Welsh Assembly, as just absolutely flagrant abuse of the system. I agree with him and the Arbuthnott Commission has taken quite a lot of evidence itself to that effect.

Rhodri Morgan: If I could add something to that. The key sentence which I think sums this up best comes from the independent Province of New Brunswick Commission on Legislative Democracy. It says: "The Commission is of the view that if a candidate chooses to run in a single-member constituency the voters in that constituency should determine whether that candidate is elected and that there should be no back door to the legislature." That is the key to all of this, and I think there is widespread support across all parties, and across non-political people in Wales, for that proposition.

Q245 Hywel Williams: I do not raise this for any really partisan reasons, but I hope the Secretary of State will also confirm that the judgment in the Leanne Wood case confirmed that no illegality had happened? Can the Secretary of State confirm that in respect of his earlier statements?

Mr Hain: I never said that there was any illegality in it. I said an abuse of the system was clearly laid out, a route map was laid out in that memorandum which, as I recall, Chairman, Plaid Cymru disowned and distanced itself from, and I am not surprised given its content. There is an elementary principle

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here—and we all know that as people who have been elected by our constituents—we have been elected by our constituents and we are accountable to them. If they do not like us, they can get rid of us as directly elected Members. We have a protocol in the House which I think might be borne in mind that Members from outside the constituency cannot interfere in constituency matters because otherwise the whole system would break down. I fear that has not happened and I am afraid, I might have been misguided in this, we did not anticipate that that would happen when we brought the legislation in.

Chairman: Mr Jones, Mr Hywel Williams wants finally to make another supplementary.

Q246 Hywel Williams: I am concerned about something that the Secretary of State said earlier on and I wrote it down so I could be sure what he said. He said the constituency offices were being effectively used as campaign offices. Now I am very careful in my own constituency office to separate those matters which are party related from my Parliament duties and I should imagine that would be the case for every hon Member here and, also for Assembly Members. Does he have evidence for what I understand to be illegally happening in Wales and has he put that evidence before the proper authorities?

Mr Hain: I think it is significant that in the case of 15 of the 20 list Members, it just so happens by an absolutely remarkably astounding coincidence that their constituency offices are in their party's target seats, often the ones that they lost in last time and in some cases are on the record as wanting to contest again in the constituency seats next time.

Rhodri Morgan: The next time is the principle involved.

Q247 Hywel Williams: That sounds like no evidence to me.

Mr Hain: I have just given evidence.

Q248 Mr Jones: Secretary of State, in your ministerial foreword in the White Paper you say that voters are confused and concerned about the way the Assembly's electoral system and its candidates who lose first past the post still become Assembly Members representing the same area. You have just cited the Arbuthnott Commission. Is it not the case that the Arbuthnott Commission concluded that while the current voting system has "... the potential to add to existing cynicism ... current disengagement was not the result of voting systems"?

Mr Hain: I do think it encourages cynicism. It is very hard to be absolutely, as it were, scientifically certain about a particular reason for a lower turnout. I do think it encourages cynicism, indeed, and lots of people have said this to me.

Q249 Mr Jones: Do you not think these proposals are deemed to be partisan?

Mr Hain: No, I have given an example of six Labour Assembly Members who will lose out by the system because they will not have the option of a safety belt,

a lifebelt, of standing in both categories. They will have to make a choice and I think they have all decided to re-stand in their constituencies, so I do not think it is partisan at all. I agree it is in the interests of Opposition parties in the Assembly to present it as partisan because it is a bit of a smokescreen for what has really been going on here.

Q250 Mr Jones: Forgive me, I would be uncharitable, would I, if I was to suggest that these proposals are nothing more than a disreputable attempt to gerrymander the system to the electoral advantage of the Labour Party?

Mr Hain: But how can you gerrymander a system when the people have the ultimate verdict here? They either decide to elect a Conservative Assembly Member in David's case or they decide to elect a different Assembly Member, that is their verdict. All I think people do not understand, as has happened in Clwyd West, as it happens, where Members lose, Members they have kicked out stop winning and then set themselves up as rival constituency Members, people do not understand that. Losers become winners by the back door.

Q251 Mr Jones: You mentioned Clwyd West and it is rapidly becoming known as the "Clwyd West question".

Mr Hain: Indeed.

Rhodri Morgan: That is because it is.

Q252 Mr Jones: Again, this was put to the Electoral Commission witnesses who appeared before this Committee a couple of weeks ago. We were told by Miss Kay Jenkins, one of the witnesses that "There is no evidence that the Clwyd West so-called problem has had any impact on voter participation".

Mr Hain: I think it is has had an impact. As I said, there are lots of different reasons for voter participation and a lot of them are quite complex, probably to do with macro and political factors. It is quite clear people do not understand how people who lost can suddenly have won, they do not understand that.

Rhodri Morgan: I think this is not the Electoral Commission's finest hour, and as regards the academics you quoted it was not their finest hour as well. We have had some poor unsupported claims made by the Electoral Commission. I accept the Electoral Commission is an independent body, but I do not think it was their finest hour in accumulating evidence. Likewise in terms of international evidence from the academics, this business about being only the Ukraine when in fact it is Ukraine, Thailand, Mexico and, to a lesser degree, Japan as well. In terms of devolved parliaments they did not look at it all, they were completely unaware of the evidence from Prince Edward Island and New Brunswick's independent commissions and I do not think that is really geared up to that.

Q253 Mrs James: I am going to talk about this confusion a little bit and then I have a particular question I want to ask about it. The public are very confused when they hear quotes like "Each regional

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AM has an office budget and a staff budget of some considerable size. Consideration should be given to the location of their office. Where is the best place in the region. Is this a target area". When the public hears comments like that they are confused, they are puzzled about why people are placing offices in various places. Lord Richards himself, when we took evidence from him, said there was a deep sense of unfairness. What are we going to do about this confusion? Do we need a code of conduct at the Assembly, regulating the relationship between the list and constituency AMs? Would this be a simpler way of engaging the problem?

Rhodri Morgan: Yes, sort of; that is one of the areas where we hope there will be a protocol in the Assembly and we hope that will be part of the Bill, to have some sort of regulation of the relationship to avoid confusion so that there is the obligation to do the same amount of constituency work in all parts of a regional list, shall we say, to make sure you cannot cherry-pick issues, to make sure you cannot use your office for partisan purposes in the way described in Leanne Wood's memoranda almost blaming her predecessor who was a constituency AM for doing too much casework and so forth. Something along the Scottish lines which does not seem to regulate, it is not the last word on these matters and you can never just take something from Scotland and put it in Wales, it is not as easy as that, but they do have a protocol, so something workable along those lines saying what you have to do and what you must not do in terms of avoiding the potential conflict and confusion for casework and representational work as an AM. I think we should be going down the Scottish road and one of the proposals is to have such a thing.

Mr Hain: Except, Chairman, if may I add to what Rhodri said in agreeing with him, when you are aware of what Sir David Steel, the former Presiding Officer of the Scottish Parliament said, where they did have a code, he said—and I think it is as well to get it on the record—"The system as operated had led to a confusing and expensive proliferation of parliamentary offices throughout the country; in at least one town there are four. They have become a thinly disguised subsidy from the taxpayer for local party machines. In my view they are a serious waste of public money". He added: "Quite the most distasteful and irritating part of my job as Presiding Officer was dealing with complaints against list Members" behaviour from a constituency, Members of the Scottish Parliament, Westminster MPs and local authorities. I could not understand at first why we had such problems until it dawned on me that what some were determined to do was misuse their position to run a permanent four-year campaign as candidate for a particular constituency". That is coming from Lord Steel, as it happens a Liberal Democrat not a Labour functionary.

Mrs James: One of the things we should be looking at is a report that has recently come out into constitutional law at the University of Wales, Swansea, looking at the work of Scottish MPs and MSPs which was published in May 2005 which says that there is a strong and extensive focus on a single

constituency within a regional framework. This is something that is clearly happening in Scotland and is causing some concern.

Q254 Mr Crabb: In a previous answer the First Minister sounded like he was trying to trash the evidence provided to us by the Electoral Commission. Perhaps I can put it to you, First Minister, the Electoral Commission said to us that they are "...worried that in the run up to the elections if there are accusations about partisanship, which we think is very likely, that could have an adverse impact on voter participation at the next election". Do you regard that claim as poor and unsupported?

Rhodri Morgan: I cannot see how it would work in that way because, as I think I said earlier and Peter has said as well, there is a wide range of cross-party support for this separating out of people who are standing on the list and who are standing in the single-member constituency, including your own predecessor, Lord Crickhowell, not your own predecessor but three—

Q255 Mr Crabb: Different seat.

Rhodri Morgan:—four, whatever, up to 1987, who said the present arrangements are unsupportable. Lord Carlile said the same thing and David Steel from his own particular perspective as first Speaker of the Scottish Parliament. I think people see this as clarifying in the first place how you stand and having clarified how you stand then clarifying the roles. I think that is for everybody's benefit. Sometimes we even have difficulties between Members of Parliament and Assembly Members, not in David's case because he is both, but in other circumstances you can get "That is a case for me, now it is a case for you". Sometimes you want to pass all the cases over, particularly the difficult ones. Sometimes you want to grab all the cases because you think that might be good for your reputation. That is between MPs and AMs without any complication from the list. It is very important to have the clearest possible view, at the point of election and after election, when it comes to the question of to whom do you go for somebody to help you when you have a difficulty with Executive decisions.

Q256 Mr Crabb: I would like the Secretary of State to comment as well. You do not think it is irresponsible in a way for the Government to press ahead—ignoring the Electoral Commission's concerns—with a measure which many people will regard as self-interested?

Rhodri Morgan: How can it be self-interested when it is supported by your predecessor, a former Conservative secretary of state; by Alex Carlile, a former Liberal Democrat MP; by Lord David Steel, a former Liberal Democrat leader and then Speaker of the Scottish Parliament. Other Members from the Conservative Party who I will not quote here because that would not be fair, I have not asked their permission, very prominent, have said the present arrangements are unsupportable.

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Q257 Mr Crabb: I am asking about the evidence the Electoral Commission has given this inquiry.

Mr Hain: I am happy to respond directly to that. I think the Electoral Commission plays a very valuable role but it can get things wrong, and I think it has got this wrong. Some of the evidence that it gave to this Committee and elsewhere is almost politically unworldly, and does not really take account of what is going on on the ground. I think the Electoral Commission should continue to perform its important role but take account of political reality from time to time; in this instance clearly it has not.

Q258 Mr Jones: Do you not think it is important to gain a consensus over electoral reform so that this charge of partisanship can be properly refuted?

Rhodri Morgan: I cannot see how anybody can make a charge of partisanship in the light of the support that has been given to this clarification of the roles of list and constituency MPs by a former Conservative Secretary of State, by a former very senior Liberal Democrat MP, by a former Liberal Democrat Leader and Scottish Parliament Speaker. It is absolutely clear that there is widespread support from senior figures from across all departments which shoots down your charge of partisanship.

Mr Hain: And I think by, if I am not wrong, Preseli Pembrokeshire Conservative Association which has also criticised this policy. Is that not right?

Mr Crabb: I think they favour abolition.

Q259 Mr Jones: There is clearly no consensus. Respected commentators think it is partisan and frankly you do not care.

Rhodri Morgan: There is no consensus for the present system.

Q260 Mr Jones: There is no consensus for the proposal.

Mr Hain: I am sorry, to put it in that provocative way I think is unacceptable. We fought a General Election on a particular manifesto which explicitly had this provision in for banning candidates from having the best of both worlds and standing in both listed constituency sections. We won that election, and we have a mandate from the people, and that is why this Bill will take that mandate through.

Q261 Hywel Williams: We have heard of alternative ways of vesting these problems, for example a single national list or perhaps a candidate standing in a constituency in one region and standing on a list in another region, or alternatively all candidates being required to stand on both the list and in the constituency, as I understand the proposal in Quebec. Have you given consideration to those alternatives and why do you think that your preferred solution is superior?

Mr Hain: We have looked at the whole electoral system, both when considering the policies as a Government and also in drawing up the Bill. In a variety of different electoral systems on offer, the one proposed by the Richard Commission a single transferable vote system, which is another difference

in that this Bill is not proposing that, multi-member constituencies, increasing the number of members and different alternative arrangements, we thought we would have a system with all its imperfections. If you took a partisan Welsh Labour view today you would probably have an entirely different electoral system but that would involve departing from a settlement endorsed in 1997 and it is very difficult to justify doing that.

Rhodri Morgan: Keeping the number of changes to the minimum necessary I think was a big driving force in this. It is a small change which solves a substantial problem. The national list has got a huge objection to it and unless you set quite a high threshold, obviously as in Germany, where we and the Americans wrote the constitution for them back in the post-war ruins of Hitler's Germany—and that has stood the test of time although it is going through a pretty testing moment at the present time—where you have to have 5% support in order to prevent a new Nazi party coming into being on the back of getting a minimum of 5%, a national list would tend to lead to a proliferation of minor parties getting in which is not in the interests of workability of the Assembly elections. You could set a threshold and have a national list, but then you are into all sorts of other problems: how do you decide what the threshold ought to be?

Mr Hain: On this point, Chairman, we did some modelling on the 1999 and 2003 Assembly elections, and the Committee may want to have a look at what it showed. Basically it does not alter the fundamental balance in terms of the list system between the parties. In the case of the 2003 Assembly elections if you had no threshold, Labour would be the same; Conservatives would lose one seat to UKIP; Plaid Cymru would lose one seat to the Liberal Democrats and one seat to the Greens. In the 1999 Assembly elections, Labour would have lost under the national list one seat to the Greens, other parties would have remained the same. In the 2003 Assembly elections with a 5% threshold, you get basically a seat switch of one seat between Plaid Cymru and the Liberal Democrats, the Liberals gaining. In the 1999 Assembly elections with a 5% threshold Labour loses one seat, Liberal Democrats gain one seat, the other parties remain the same. It does not change the overall party balance at least on those two elections, but there are other important disadvantages, I think.

Q262 Hywel Williams: I do not want to go down the road of discussing the alleged partisan nature of this, but are you confident you will be able to persuade the Welsh public, who certainly I want to be supporters for changes, and that they will not see the proposals as being in some way partisan, whether they are or not?

Mr Hain: I am because there have been lots of complaints to me from individuals across Wales about this system where losers become winners. People do not understand.

10 November 2005 Rt Hon Peter Hain MP and Rt Hon Rhodri Morgan AM

Q263 David Davies: You have spent quite a lot of time, obviously, looking at what political results you will end up with under different electoral systems. Why was this necessary if it was not a consideration in deciding what electoral system to use?

Mr Hain: Simply because if there was some big benefit from it, if you wanted to go to a national list system as opposed to a regional list system, the votes being accumulated in a different way, you want to know the consequences of doing that or what is the case for it. I do not know the case for it except if you are a small party and you want a fragmentation of representation in the Assembly, and more difficulty forming a government as a result, then maybe that would be a motive. The way I would go into it, Chairman, is with my eyes wide open, you would like to know the consequences, and this was a bit of research I had done to check that out. Nobody has made a strong case for going to a national list system in any event, but it is of interest.

Rhodri Morgan: I think it would be fairly badly perceived in North Wales if you did not have a North Wales region and you had an all-Wales region.

Q264 Mark Williams: From the competing mandates that we have heard about, would that not have been alleviated by having a closer analysis of the single transferable vote system to retain that important regional dimension plus a constituency element as well? It was, as you say, suggested by Lord Richard and it seems to have been dismissed out of hand very abruptly in the White Paper.

Mr Hain: We did not dismiss it out of hand, we do not dismiss anything out of hand abruptly or non-abruptly. For the reason I explained earlier this was an electoral system endorsed in 1997 and I think it needs a powerful argument to depart from it. I do not think the people in Wales would understand losing their ability to dismiss Assembly Members that they did not want to re-elect in the individual constituencies. Once you move to a single transferable system you lose the individual relationship between the constituency and the elected member, that is what you do. It may produce a more proportional result but it breaks that link which I think is a terribly important feature of parliamentary democracy and, as it happens, of the emerging Assembly democracy of being able to vote in or vote out the Assembly Member or the party as you choose. You would lose that under a multi-member STV system.

Q265 Mark Williams: Can I just place on the record the logical link after lots of quotes from David Steel and Alex Carlile. The next logical step from what

they have said about the competing mandates, region versus constituency, was a uniform system of a single transferable vote across Wales?

Rhodri Morgan: That means, in being give a choice between a good clear system of representation and a bad one with a bit of confusion, you completely go for 100% confusion instead of 100% clarity. There would be no clarity about who you should go to. Presuming you would have therefore multi-party representation in all areas, the salutary experience of having Conservative supporters going to take their constituency cases to Labour AMs or MPs, in my own past history, and Labour supporters going to Conservative AMs would be completely lost. I think that would be quite unhealthy really. I know that it works extremely well in Ireland and I do not want to take anything away from an extremely successful Irish political history over the last 75 years, but I have exactly the same opposition to it as Peter does if you break the constituency link.

Q266 Chairman: May I thank you both for your evidence and thank you, also, for your memorandum. Secretary of State, you mentioned other documentation; we would be very pleased to receive whatever else you wish to give us. As I said at the beginning, we have submitted some written questions to you and I hope you will be able to respond fairly soon to us.

Mr Hain: Chairman, I am very grateful and I have enjoyed the experience of being grilled by the Committee. May I say I would be very grateful, especially, if the Committee was inclined to look at the pre-scrutiny of Orders in Council because I do think there is an interest, if not a demand, from members of the House of Commons, given that in some respects this is a more compressed process of legislation, to look at pre-scrutiny. It may be this Committee, which has performed a valuable pre-legislative scrutiny role in the past, could look at its role extending to Orders in Council in the future very well, and perhaps working with the relevant Assembly Committee as this Committee has done in the past on Welsh primary legislation so the same role could be applied to the Orders in Council with great benefit.

Rhodri Morgan: May I add a final word, just simply to thank you for your courtesy today and to say it is very nice to be back, but now I know what it is like to be on this side rather than where you are sitting on your side. Thank you very much for your courtesy. I think there are a couple of points which we will pick up in writing also.

Chairman: Thank you both for your observations. We will take those matters seriously certainly. Can I thank my Committee for their robust questioning and I look forward to the next session. It has been suggested that the Welsh Affairs Committee perhaps is not as lively as other committees. I think this session has been very, very lively and at least we have a consensus on that.

**Supplementary memorandum submitted by Rt Hon Peter Hain MP, Secretary of State for Wales,
Wales Office**

BETTER GOVERNANCE FOR WALES

Thank you for your letter of 10 November. Rhodri and I very much enjoyed the session with your Committee; as you rightly said, it was nothing if not lively! In terms of the questions to which you requested a written response:

STAFFING

How will the Bill ensure that the National Assembly will have both the powers and resources to fund any necessary increase in staff?

As to powers, the Bill will establish a National Assembly for Wales Commission (comprising a limited number of Assembly Members) which will be the corporate body with powers to provide or secure that the Assembly is provided with the staff, services and property required for the Assembly's purposes.

The resources required by the Assembly Commission will be payable out of the Welsh Consolidated Fund. This fund will be broadly analogous to the current "Welsh Block": that is, it will represent the resources which will be available to fund the Commission and Ministers, consisting principally of the grant from the Secretary of State for Wales but also including other sources of income. Bodies whose needs will have to be met out of the Welsh Consolidated Fund will be the Welsh Assembly Government itself; the Wales Audit Office and the office of the Public Services Ombudsman for Wales.

Will the National Assembly for Wales have explicit powers to scrutinise and authorise a Welsh Consolidated Fund?

The size of the Welsh Consolidated Fund will be determined in essentially the same way as the Welsh Block is currently, and will be accounted for transparently to enable scrutiny. However payments out of the Welsh Consolidated Fund will only be made if authorised by a Budget Resolution passed by the Assembly. The only exceptions to this will be the distribution of National Non-Domestic Rates and the costs of the Auditor General for Wales and Public Services Ombudsman for Wales. The independence of these office-holders from the Welsh Assembly Government will be assured through arrangements whereby their costs will be charged directly on the Welsh Consolidated Fund (and therefore not subject to a vote in the Assembly), though these will be transparent arrangements to ensure that both bodies account publicly for their funding requirements.

What proportion of the staff from the current ASPBs (to be incorporated into the WAG) will be working for the WAG, and for the NAW respectively?

Those bodies which merge before the "Better Governance for Wales" proposals are implemented will in legal terms be merging with the existing corporate body which is the National Assembly for Wales. However all the functions carried out by staff from the ASPBs which are merging with the Welsh Assembly Government will become functions of the Welsh Assembly Government, so in effect the staff carrying out those functions will be Welsh Assembly Government staff. The permanent staff of the National Assembly for Wales will not be civil servants once the Welsh Assembly Government and the National Assembly for Wales are legally separated. Thereafter, as with all Welsh Assembly Government staff, individual staff will be free to make career choices. There will be a policy, after that separation takes place, of facilitating secondments between the Welsh Assembly Government and National Assembly for Wales (and indeed other public bodies).

MEMORANDUM OF UNDERSTANDING?

The Memoranda of Understanding between Wales and Whitehall will be revised in the event of the formal separation of the executive and the legislature. What changes would you like to see in the Memoranda of Understanding?

Once the position in Wales changes as a result of legislation implementing "Better Governance for Wales", the agreements and guidance on the conduct of business between the Welsh Assembly Government and Whitehall Departments will clearly need to be revised. The revised documents will have to correctly reflect structure, terminology and accountabilities; and to fully support the processes required to ensure that the new arrangements established under the legislation work effectively.

MINISTERS

Do you see any problems with having provisions to the Bill to limit the number of Ministers and deputy Ministers?

Will we see such provision when the Bill is published?

The First Minister and I agree that this would be a good idea and there will be provision in the Bill when it is published.

Please do not hesitate to let me know if I can be of further assistance. As I said at the end of the evidence session, I think that your Committee has done tremendous work scrutinising Wales Bills, and I very much hope your Report considers how the pre-legislative scrutiny of future Orders in Council might best be undertaken.

Notional results for a National List

Note on methodology: The figures below provide notional results for the 2003 and 1999 Assembly elections. The model assumes that the five regional lists are replaced by a single national list. The figures have been produced by aggregating the results from the five regions.

The purpose of this modelling is to assess the extent to which the introduction of a single national list would lead to fragmentation in the Assembly by enabling fringe parties to achieve representation. It also assesses the effect of applying a 5% threshold to a notional list.

2003 Assembly elections—no threshold

<i>Party</i>	<i>Lab</i>	<i>Con</i>	<i>PC</i>	<i>LD</i>	<i>Green</i>	<i>Marek</i>	<i>UKIP</i>
Seats	30	10	10	7	1	1	1
Difference	0	-1	-2	+1	+1	0	+1

1999 Assembly elections—no threshold

<i>Party</i>	<i>Lab</i>	<i>Con</i>	<i>PC</i>	<i>LD</i>	<i>Green</i>
Seats	27	9	17	6	1
Difference	-1	0	0	0	+1

2003 Assembly elections—with 5% threshold

<i>Party</i>	<i>Lab</i>	<i>Con</i>	<i>PC</i>	<i>LD</i>	<i>Marek</i>
Seats	30	11	11	7	1
Difference	0	0	-1	+1	0

1999 Assembly elections—with 5% threshold

<i>Party</i>	<i>Lab</i>	<i>Con</i>	<i>PC</i>	<i>LD</i>
Seats	27	9	17	7
Difference	-1	0	0	+1

Written evidence from Wales Council for Voluntary Action

EVIDENCE TO THE WELSH AFFAIRS COMMITTEE ON THE BETTER GOVERNANCE FOR WALES WHITE PAPER

INTRODUCTION

1. Wales Council for Voluntary Action (WCVA) promotes the interests of voluntary organisations, community groups and volunteering in Wales. It has over 1,500 organisations in direct membership and is in contact with thousands more through national and regional voluntary sector networks. There are at least 30,000 voluntary organisations in Wales, with a combined income of over £1.02 billion, a workforce of 30,000 employees and over 1.27 million people volunteer either through voluntary organisations or informally.

2. WCVA has been actively engaged in debates around the role of the National Assembly for Wales and its relationship with the voluntary sector since 1998. Throughout the first term of the National Assembly we worked closely with the voluntary sector, the National Assembly and the Welsh Assembly Government in developing the Voluntary Sector Scheme and facilitating the Voluntary Sector Partnership Council and bi-annual meetings between each Minister and relevant voluntary sector networks.

3. This close working relationship has continued into the National Assembly's second term. In addition to continuing in a facilitating role for Ministerial and Partnership Council meetings, WCVA engaged with the Independent Commission to review the Voluntary Sector Scheme. Following the publication of the Commission's report, WCVA is working in partnership with the Assembly and other voluntary sector organisations to implement the Report's recommendations.

4. Following publication of the White Paper, WCVA held a seminar with Cardiff Law School to inform the sector of the proposals and to gather feedback. A briefing paper was prepared which explained the White Paper's proposals, outlined the implications, opportunities and challenges that could face the voluntary sector, and invited responses. The briefing paper was published on WCVA's website and publicised through WCVA's ebriefing to members. It was also circulated to seminar attendees, Voluntary Sector Partnership Council members, voluntary organisations, including County Voluntary Councils, and the Assembly Liaison group, a network with over 30 voluntary organisations across Wales whose members work closely with the Assembly.

5. In preparing this response, WCVA has reflected the views gathered both during its post-White Paper activities, and during consultations previously undertaken in preparation for the Richard Commission. WCVA provided written and oral evidence to the Richard Commission regarding the scope of the Assembly's powers and in gathering its evidence, WCVA consulted with voluntary organisations including the Assembly Liaison Group and nearly 100 organisations across Wales at WCVA's regional policy events in January 2002. WCVA's evidence reflected the issues raised by voluntary organisations, which focused on the powers of the Assembly and its relationship with non-devolved government departments. WCVA did not receive any views about the electoral arrangements of the National Assembly for Wales, and therefore did not comment on this aspect of the Commission's work.

CHAPTER 2: THE NEW EXECUTIVE STRUCTURE

Executive Authority

6. The *Better Governance for Wales* White Paper describes the way forward for a formal separation between the Assembly and the Welsh Assembly Government to avoid confusion and improve effective scrutiny. WCVA supports the proposal for a legal separation between the executive and the legislature. WCVA believes this will provide clarity and increased understanding amongst the public and the voluntary sector of how Wales is governed.

7. Further clarity could result from the renaming of legislature and/or executive to clearly identify each body after separation. At present there are a variety of terms in common usage, including: "the National Assembly for Wales" "the Assembly", "the National Assembly", "Welsh Assembly Government", "Assembly officials" and "Assembly parliamentary service". Whilst all of these names can be accurately related to specific activities and employees of the corporate body, the similarities between them, and the lack of consistent application, can cause confusion and misunderstanding.

8. WCVA is content that a new post of Counsel General should be created to support the Assembly Government, and that the Civil Service will act exclusively in support of the Executive. More detail is needed however on the size and remit of the support for the legislature.

Ministerial Functions

9. The White Paper refers to, but does not identify “importance legislative functions” which will be retained by the Assembly legislature after separation. It also makes reference to “some important kinds of legislative orders”, which will be made, or approved, by the Assembly. Without further clarification on the types of functions or orders this relates to, WCVA cannot express a view on the appropriateness of these proposals.

10. WCVA supports the proposal that final approval for major strategic plans, including the Wales Spatial Plan, will remain with the Assembly. WCVA believes it is vital that such important and influential strategies have cross-party support and endorsement. This requirement should be extended to other major schemes (Sustainable Development, Equality of Opportunity, the Welsh Language, Environmental, Economic development, and others).

11. One current statutory duty of the Assembly is the requirement to make a Scheme setting out how it proposes, in the exercise of its functions, to promote the interests of relevant voluntary organisations. This has led to the National Assembly for Wales Voluntary Sector Scheme (“the Scheme”).

12. Through the Scheme, the Assembly maintains:

- a policy on working in partnership with the voluntary sector;
- arrangements for consulting the voluntary sector;
- a policy on volunteering;
- a policy on community development; and
- a Code of Practice for funding the voluntary sector which is published as a separate document.

13. The Scheme provides the following formal means of dialogue with the voluntary sector:

- The Voluntary Sector Partnership Council (VSPC), chaired by the Minister with responsibility for the voluntary sector, and whose membership comprises voluntary sector members whose appointment is facilitated by WCVA; and Assembly members, reflecting party balance, appointed by the Assembly; and
- six-monthly meetings between Ministers and relevant voluntary sector networks, reports of which should be provided to the appropriate Assembly subject committees.

14. The current arrangements have a number of distinctive benefits that it is hoped can be maintained, namely:

- the ownership of the Scheme by the full Assembly—through its adoption, plenary debate on the Scheme’s annual report, and review following each election;
- the membership of the VSPC—bringing together the Assembly Government, Assembly Members (all parties), and representatives of the voluntary sector;
- the respect for the sector’s independence, and its right to determine the membership of the VSPC and representation at Ministerial meetings and other partnerships and joint working groups;
- the role of subject committees in receiving, and debating if they so wish, reports of the ministerial meetings;
- the commitment of the Assembly Government, and its willingness to act positively on issues raised by the VSPC (for example, to address sector’s needs with regard to criminal records checks); and
- the role of the VSPC in scrutinising Assembly Government compliance with the Scheme.

15. The VSPC has strengthened its scrutiny role by the creation of the Funding and Compliance sub-committee. This reflects recommendations by the Independent Commission that reviewed the Scheme after the 2003 elections, which highlighted the need for more robust monitoring of the consistent application of the Scheme across all parts of the Assembly Government and its public bodies. The sub-committee has created a mechanism to monitor compliance with the Scheme by the Assembly Government, ASPBs or third party grant schemes, and to investigate cases of non-compliance. The involvement of both AMs and the sector’s representatives demonstrates the committee’s independence in undertaking its duties.

16. These benefits have contributed to the practical demonstration of an inclusive Assembly, and have demonstrated cross-party support for and interest in the work of the sector.

17. In order to maintain and build on these benefits, it is proposed that the changes to the Government of Wales Act include the following:

- Voluntary Sector Scheme

The current duty of the Assembly to make and maintain the Voluntary Sector Scheme should become a duty of the Welsh Assembly Government. The responsible Minister should have a duty to consult the voluntary sector, including through the Voluntary Sector Partnership Council, before making, remaking or revising the Scheme; and to seek the advice of the Voluntary Sector Partnership Council on the development, implementation and review of the Scheme. The scope of

the Scheme, arrangements for review and for an annual report for consideration by the legislature should remain as specified in section 114(4) of the Government of Wales Act, with the addition of the requirement for each minister to meet twice a year with the relevant voluntary sector networks.

— Voluntary Sector Partnership Council

The Voluntary Sector Partnership Council (VSPC) should be explicitly identified. The VSPC should be established by the legislature. Its membership and arrangement for appointing members should reflect the current arrangements—ie it should be chaired by the responsible minister, the legislature should appoint Assembly Members reflecting party balance, and WCVA should facilitate the selection of voluntary sector members. The VSPC would provide a forum for discussion between the Assembly Government, the legislature and the voluntary sector; it would advise the Assembly Government on the development, implementation and review of the Voluntary Sector Scheme; and provide a mechanism for scrutinising compliance with the Voluntary Sector Scheme.

Scrutinising Ministers

18. Voluntary Sector organisations have specific expertise in their areas of activity. They have a unique perspective on what is working and what is not working at a local and grassroots level, and can often provide solid evidence of need amongst groups or communities. The Assembly’s subject committees have played a welcome and important role in policy development and review, and this should continue under the new structures. Provision should be made for Assembly Committees, with advice from the VSPC, to co-opt or invite to meetings representatives of relevant voluntary organisations to advise and assist with their scrutiny and legislative functions.

CHAPTER 3: ENHANCING THE ASSEMBLY’S LEGISLATIVE POWERS

Developing the current settlement

19. WCVA supports a change to the drafting of Parliamentary Bills that will enable the Assembly to exercise “wider and more permissive powers”. Consistency in Parliament’s approach to making provisions for Wales is vital if clarity is to be brought to the legislative process. This will help civil society to understand and engage in the consultative and lobbying processes.

Enhancing the current settlement

20. If the proposals for the Orders in Council approach to enhancing the Assembly’s legislative powers are implemented, there will be scope for voluntary organisations to engage more actively in the legislative process. This will present opportunities for the sector to use its expertise and knowledge of need to inform and advise on the drafting of Orders in Council.

21. This opportunity brings with it a challenge for civil society and the voluntary sector to raise its game and develop the abilities and capacity to understand the implications and possibilities presented by the Orders in Council process. At present there is a lack of detailed knowledge amongst some organisations on the devolution settlement and legislative procedures. The sector will need to support and guidance as it develops its ability to research, propose and provide evidence to back-up proposals for Orders in Council, including presenting evidence to Parliament committees.

22. The development of skills and expertise amongst Assembly members and civil servants will be equally crucial for a successful transition, to meet the new challenges and opportunities the enhanced powers will bring.

23. Under the new proposals there will need to be structured opportunities to allow the voluntary sector and civil society to engage in the policy-making processes that will lead to the formulation of Orders in Council. The Assembly Government will need to provide an open, accessible mechanism for groups and individuals to present evidence and input into policy development. This will be especially crucial if the current Committee structure is lost, a scenario that reinforces the need for the existing provisions under the Voluntary Sector Scheme to remain.

19 September 2005

Written evidence from the Electoral Reform Society

MUCH BETTER GOVERNANCE FOR WALES

1. Although the Electoral Reform Society has an interest in all aspects of governance, its expertise is in the field of elections and our comments are therefore confined to Chapter 4 of the White Paper which is concerned with Electoral Issues.

2. The Additional Member System is undoubtedly a better system than First Past the Post and the use of AMS for the elections to the National Assembly has given Wales an Assembly which is much more representative, and more legitimate as a voice for Wales, than would have been the case if the Assembly had been elected by the First-Past-the-Post system.

3. Nevertheless, AMS is far from a perfect electoral system. In our submission to the Richard Commission (copy attached) we listed our concerns over the disadvantages of AMS. Many of these concerns were noted by the Richard Commission in its Report (chapter 12, section 18). We are disappointed that the White Paper ignores the findings and recommendations of the Richard Commission and instead focuses on a relatively minor issue—whether constituency candidates should be able to be included in party lists.

4. *Should constituency candidates be allowed to be included on party lists?*

4.1 In our submission to the Richard Commission we drew attention to the situation whereby AMS allows candidates defeated in constituency contests to win seats as list members. Although we expressed concern that the electorate might find “winning losers” difficult to understand, we stated that this situation is “quite justifiable in terms of the system” and at no time have we suggested that AMS could be improved by requiring candidates to contest constituency seats or list seats but not both. Under AMS list Members are no less legitimate than constituency Members, irrespective of whether they stood and were defeated in constituency contests.

4.2 We support the Richard Commission’s view that:

“the proposal to prevent candidates from standing in both ballots is based on the premise that a candidate defeated in the constituency ballot has been rejected by the electorate—this is not necessarily the case, particularly where candidates come a close second; another view is that the winning candidate was simply preferred.”

The White Paper notes the Government’s view that the election of list Members who were defeated in constituency contests:

- “devalues the integrity of the electoral system in the eyes of the public”: in our view, if some who do not fully understand the system find it odd, a programme of voter education would be a better remedy than tinkering with the electoral rules; and
- “acts as a disincentive to vote in constituency elections”: we are not aware of any hard evidence that supports this view.

4.3 Rather than preventing list candidates from standing in constituencies, a case can be made for requiring list members to stand in constituencies. A criticism of AMS is that constituency candidates must face the electorate and be judged on their merits by the electorate, but list members owe their positions more to their party selectorates. It can be argued that all candidates should be required to face the voters in constituency campaigns, whether or not they are also on their party lists.

4.4 We do not, however, advocate requiring all candidates to stand in constituencies any more than we support the proposal of the White Paper. The problem arises from AMS’s creation of two categories of members and is best overcome by changing the system—a point to which we will return below.

4.5 We are nevertheless deeply concerned that the proposal of the White Paper is one that will do little if anything to improve the electoral system, is one that will have little impact on the Labour Party in Wales, but is one that will be of great disadvantage to the opposition parties in Wales which fight constituency seats but generally rely on list seats for their representation. Some might surmise that, given the very flimsy democratic reasons for the White Paper’s proposals, the real intention is to put obstacles in the way of the Government’s opponents. We would hope that any Government would be extremely cautious in proposing changes which are likely to be to its electoral advantage, but where the Government holds a majority on only 35% of the vote (and only 42.7% of the vote in Wales) we would be opposed to any change on which there was not a broad consensus.

5. Our main criticism of AMS is that it creates two categories of representative (constituency and list Assembly Members), a view shared by the Richard Commission which highlighted this problem in its summarised findings on the electoral system (chapter 12 of its Report). The Richard Commission, like the Electoral Reform Society, felt the problem should be overcome by a change to STV, a system under which all Assembly Members would be elected with the same democratic mandate and the “problem” of “winning losers” would not arise. (Although the Commission felt the change would only be justified if there were to be a change in the number of Assembly Members, we have argued that the change should be made regardless of the number of seats in the Assembly.)

6. The White Paper asserts that:

“The electoral system in the UK has historically attached great importance to the relationship between Members . . . and their constituents” (paragraph 1.28).

7. We believe in the importance of the relationship between Members and their constituents. That is why we are unhappy with an electoral system that leaves one third of Assembly Members without any effective constituency link—a situation which will not be changed by the proposals of the White Paper.

8. The further assertion that:

“It . . . causes considerable confusion among the electorate that list members can set up constituency offices and seek to deal with constituency casework as a ‘local member’ in competition with the constituency member” (para 1.29)

could result in some questioning whether the authors of the White Paper fully understand the nature of the present system. Members who are elected through party lists are Members for all of the constituencies in their electoral regions and there is no reason why they should not set up offices and deal with casework that arises in any of their region’s constituencies. The Member elected in a constituency does not have a monopoly of representation in that constituency and, should the Member find him- or herself exposed to “competition”, then that might well be in the interests of the electorate. However, we accept that there is legitimate concern over whether the competition is in all respects fair given the different mandates of constituency and list Members—which is a principal reason for us recommending a change to STV which would put all Members on the same footing.

9. We do, however, welcome the proposals (paragraph 4.8) to give the Assembly powers to promote participation in Assembly elections. We do not believe that the lack of public information is the only, or indeed the major, cause of low turnout, but surveys indicate that it is nevertheless a contributory factor.

10. Finally, we are disappointed that the White Paper dismisses the detailed analysis and argument of the Richard Commission on electoral arrangements (16 pages in its report) by simply saying “The Government does not believe that this would be the right way forward”.

12 October 2005

Written evidence from Barry K Winetrobe, Reader in Law, Napier University

**SUBMISSION TO WELSH AFFAIRS COMMITTEE’S BETTER GOVERNANCE
FOR WALES INQUIRY**

INTRODUCTION

1. I apologise for this very late submission, but I understand that your Committee is still willing to receive evidence at this stage. I am very grateful for the opportunity of making this submission to this important inquiry, especially from the perspective of a student of Scottish devolution.

2. For your convenience, I attach my submission of 26 July to the Wales Office’s consultation on the White Paper. Many of the points made there have now been examined in more depth in the Assembly Committee inquiry and report on the White Paper, and, doubtless, in the evidence to your inquiry. I wish to make two particular points, where a Scottish perspective may be helpful to your deliberations, and to suggest that, if you have not already done so, you should consider taking evidence from the Scottish Parliament itself and its related staff and Commissioners.

SEPARATION OF THE SINGLE NATIONAL ASSEMBLY ENTITY⁵⁹

3. I deal with this in my submission to the Wales Office (p 1). It seems that this fundamental and essential proposal has generated little controversy or discussion, its implementation being regarded as mainly a technical, administrative matter, other than in areas such as the relationship between the new “parliamentary” and “executive” bodies, and the degree of self-regulation accorded the former. Although clearly based on the House of Commons Commission model, and in many ways an improved version of that body, the use of a Scottish Parliamentary Corporate Body (SPCB) to be the legal face of the Parliament is not without its practical difficulties and complexities.⁶⁰ For example, in addition to the Presiding Officer, there are four “appointed members”, who are MSPs appointed (in practice, elected) by the Parliament. Although it is nowhere stated that these MSPs represent their parties on the SPCB—and a legal entity such as the SPCB would presume a collective responsibility and representation of members as individuals, rather than a partisan one—in practice, the idea of “party representation” seems to have taken root to some degree, assisted by the “coincidence” of there being four major parties in the 1999–2003 session. When designing the regulatory, especially the self-regulatory, arrangements for the new “parliamentary” Assembly, care should be taken in understanding the apparent analogies of the Holyrood and Westminster situations.

⁵⁹ It has become common—even in official documents, such as the White Paper—to use the term “corporate body” (s1(2) of the 1998 Act) to denote not (or not just) the legal personality and status of the Assembly, but the idea of a unified, single parliamentary/executive entity, on the lines of the traditional (now more uncommon) local government model. This double meaning of the term may cause difficulties if and when analogies with the Scottish Parliament situation are made, as the term is used clearly to denote the legal status of the SPCB (Scotland Act 1998 s21(1)), as the Parliament itself is not a body corporate (this is described succinctly in the Explanatory Notes: <http://www.opsi.gov.uk/acts/en1998/98en46-c.htm> £21). This is equivalent to the position of the House of Commons Commission under the House of Commons (Administration) Act 1978, sch 1 para 1.

⁶⁰ Scotland Act 1998 s21, and sch 2.

ASSEMBLY NOMINATION OF “OMBUDSMEN”/“COMMISSIONERS”

4. This (perhaps unexpected) proposal in the White Paper (para 2.19) is generally to be welcomed. Again however, the Holyrood situation should be examined carefully to assess the constitutional and practical implications of this apparently uncontroversial initiative. As noted in my submission to the Wales Office (p 2), it can create continuing burdens on the Assembly, ones which it may not be well-placed to cope with, especially as it develops its new independent role in the early days, with other demands on its limited Members and staff. It can also create new and complex webs of accountability, where independence from the executive can mean a situation of relative dependence on the Assembly. As the report of the Assembly Committee on the White Paper demonstrates,⁶¹ there will be a demand from existing (and proposed) public officials of the ombudsman/commissioner/inspector type to be constituted or re-constituted on the new basis, with anything different becoming regarded as somehow a “second-class” status or degree of independence. In addition to the scope for growth in such offices, there is the risk that the status will be accorded to ones which, being outside the area of constitutional oversight of core governmental activities, are not appropriate, but which are, in practice, politically difficult to oppose.

BKW

24 October 2005

ANNEX

SUBMISSION TO WALES OFFICE, JULY 2005

http://www.walesoffice.gov.uk/2005/bgfw/bgfw_winetrobe_barry_20050726.pdf

Better Governance for Wales: Comment on the White Paper, Cm 6582, June 2005, Barry K Winetrobe, Reader in Law, Napier University. Submitted to the Wales Office, 26 July 2005

Assembly/Parliament: The actual process of separation of the current corporate Assembly into its two constituent parts will be complex, and, for example, the detail of the rather brief proposal in para 2.20 will need to be worked out with the full co-operation of the staff concerned. More generally, it must be appreciated that the Holyrood and Westminster models of parliamentary self-regulation are not entirely equivalent for a number of reasons, including uni/bi-cameralism; legal status; parliamentary privilege and so on.⁶² The arrangements for the new Assembly, and its institutional organisation and staffing in particular, should reflect what is regarded as the best of both the Holyrood and Westminster model, but in ways which are appropriate to the uniqueness of the reformed Welsh devolution scheme.

It is interesting that no direct reference is made to the possible renaming of the Assembly after separation. While it may be thought that the concept of the “Assembly” has entered the Welsh constitutional consciousness, it is also the case that this term also exemplified the confusion that the White Paper claims as the justification for the proposed separation. In particular, it is noticeable how the word “parliament” is almost totally avoided in the White Paper in reference to the Assembly, other than indirectly. Is it thought that the notion of a “Welsh Parliament” is too controversial (perhaps in relation to Westminster and Holyrood, as well as domestically?), or is purely terminological, that parliaments in the UK are bodies with primary legislative powers?⁶³ If the latter, would the adoption of the longer-term post-referendum primary legislative power proposal prompt consideration of a name change, and will the forthcoming legislation make provision for that possibility? Certainly the new Assembly will be a “parliament” in its wider, generic sense⁶⁴ and it may wish to use that term informally or descriptively, as in, for example, the continuation of titles such as the “Assembly Parliamentary Service”. The new legislation should permit rather than proscribe the Assembly’s ability to so act, if it wishes.⁶⁵

Government terminology: On a related point, why is there a need to prescribe in statute the new government administration the “Welsh Assembly Government” (para 2.6)? If this term informally arose since 1999 principally to differentiate the “executive” from the “parliamentary”, why should future Welsh devolved ministers be prevented from devising what they may regard as a more suitable name, perhaps one that does not have the word “Assembly” in it to minimise any residual confusion? The obvious solution would be to adopt something like the Scottish and Northern Irish models, of a “Welsh Executive”. As in

⁶¹ See, for example, para 124, on the Auditor General (a proposal which is in the White Paper, para 2.19), and para 135 on the Children’s Commissioner (which is not).

⁶² The relevant provisions of the Scotland Act appear largely to be a “read-across” from the Westminster arrangements (much of which is not laid down in statute), and the drafters may not always have fully appreciated the distinctions underlying the two parliaments.

⁶³ The Northern Ireland Assembly is presumably so called, rather than the Northern Ireland Parliament, for obvious historical reasons.

⁶⁴ The formal separation will remove any practical difficulties the present Assembly may have had in joining fully the family of parliaments worldwide, and their activities and organisations.

⁶⁵ After all, the “informal” use of “Minister” and “Welsh Assembly Government” (created by devolved “ministers”) is to be given statutory recognition by the new legislation (para 2.6).

Scotland, this could be a title for everyday use, but with a statutory distinction, if required, between the “Executive” (the ministerial team)⁶⁶ and the “Administration” (the combined ministerial and official establishment).

“Ombudsman” appointments: The para 2.19 proposal for “Ombudsman”-type officials to be appointed by Her Majesty on the nomination of the Assembly is welcome, and appears to follow the developing practice of the appointment of “Commissioners” by/through the Scottish Parliament. However, as in Scotland, the “new” parliamentary Assembly will have to take care that this does not impose an increasing resource burden on itself, or create new, different and potentially confusing forms of accountability and independence issues for itself and for these constitutionally important public officials.⁶⁷

Standing Orders: The proposal in para 3.31 that creation of a set of Standing Orders for the new Assembly should be by the Secretary of State, with the assistance of an advisory committee, seems to be wholly unnecessary and inappropriate for an already functioning Assembly.⁶⁸ Whereas it may have been justifiable for initial SOs to be created by central government prior to establishment of the devolved parliament/assemblies, based on a perceived need for the new bodies to have a set of operating rules in place when they first met, this is not at all the case now in Wales. As the existing precedent in Scotland demonstrates, once an initial set of SOs is in place, future changes by the Parliament itself tend to build upon, rather than wholly replace, them, thereby entrenching, to some degree, the central government’s vision of the body in operation.⁶⁹ Surely the body best, and most appropriately, placed to write the Assembly’s new Standing Orders is the Assembly itself? The legislation could require it⁷⁰ to produce a new set before formal separation, and give it power (if it does not already have it) to appoint an advisory body (including those from outside its ranks) to assist it. Do Ministers fear that such an exercise could become a Welsh equivalent of the Scottish Constitutional Convention, potentially opening up a Pandora’s Box of wider constitutional questions/options? Rather, it should be viewed, and so designed by the Assembly, as a Welsh equivalent of the Consultative Steering Group (CSG), which is regarded generally as a largely successful, non-partisan and inclusive exercise in 1997–99, which incorporated a wide measure of public consultation and consensus in formulating its procedural proposals.

Law-making: The legislative proposals in the White Paper are complex, and require to be fleshed out in a number of crucial areas, especially in the scope of Assembly’s powers to act as a law-maker, rather than legislative scrutiniser.⁷¹ The main purpose of any changes should be in terms of empowerment of the new Assembly itself, especially in relation to relevant legislative developments and procedures operating at UK level in Whitehall and Westminster. One of the reasons for the limited success of the existing law-making arrangements is the status of the current Assembly in these processes, as it has ultimately no formal, official “privileged status” at the “Centre”, distinct from any other external lobbyist/petitioner. This is inappropriate for a representative democratic institution, and cannot be addressed solely by reliance on the good offices of intermediaries such as the Secretary of State or the relevant Westminster committees (or the future Welsh Government), or the (welcome) development of cross-parliamentary committee scrutiny procedures. As has been well-documented, Welsh devolution law-making is dependent to an excessive degree on goodwill and informality, generally at IGR levels, and so is reliant on governments of generally like mind in Cardiff and London. This is not a satisfactory or robust basis for arrangements for making the law of a country within the UK.

AMS: If the electoral system proposal is designed to prevent a candidate from standing in both a constituency and on a regional list anywhere, rather than simply where they overlap geographically,⁷² this is excessive, unnecessary and undemocratic. A person should be able to stand in Constituency X and in Region Y (which does not include Constituency X),⁷³ and leave it up to the voters in both electoral areas to decide whether they wish to elect him/her (taking into account, if they wish, the implications of that candidate’s dual candidature on his/her commitment to a particular locality).⁷⁴ Even if the proposal is simply to prevent unsuccessful constituency candidates being elected for the region comprising that constituency, this seems an unnecessary restriction on the democratic rights of potential candidates, parties and local

⁶⁶ Actually the Scottish position, under the Scotland Act 1998, is more complicated, as “Scottish Executive”, in its statutory sense, does not include “junior ministers” (s44) and so is not the whole ministerial team, but what loosely may be thought of as the senior/cabinet ministerial team. See further, the *Stair Memorial Encyclopaedia*, Constitutional Law volume 2002 Reissue, paras 391–3; and two early Scottish Parliament briefings: *The New Scottish Government*, May 1999, SM SP10, and *The Devolved Scottish Government: a Guide to the Terminology*, December 1999, RN 99–54.

⁶⁷ See O Gay and B Winetrobe, *Officers of Parliament: Transforming the Role*, Constitution Unit, UCL, 2003. These authors are currently undertaking further research in this area, looking at Westminster and the devolved parliaments/assemblies.

⁶⁸ That the SOs would contain the new legislative procedures does not justify the proposal.

⁶⁹ The position in Wales since 1999 is different because the Assembly’s revisions of SOs were, in large measure, attempts to work round the inflexibilities of the “corporate body” structure and other restrictive provisions of the 1998 Act.

⁷⁰ To foreshadow the formal separation, the Assembly, for this purpose, should not include Ministers as such, and the process should operate on a non-partisan, collegiate, rather than on a party, basis. This may include provisions for “special majorities” and other safeguards.

⁷¹ The notion of “Assembly-made” secondary legislation under the proposed regime appears to create a novel tier of legislation in the UK, which may have implications for judicial interpretation and review.

⁷² Paras 4.4–4.5 are not entirely clear on this point.

⁷³ Notwithstanding s5(5)(c) of the 1998 Act, which should be repealed.

⁷⁴ If successful in both, statutory procedures would ensure that they could only sit for one.

electors to have as unrestricted a choice as possible in an election.⁷⁵ Any alleged “abuses” by regional AMs in their parliamentary activities can be dealt with internally by the Assembly through Codes of Conduct and the like. If thought desirable, voters could be informed of any dual candidatures by a notice on the relevant ballot papers stating that a candidate is also a candidate on some other named ballot elsewhere. The idea that the public feel that their will is being thwarted by “losing” constituency candidates ultimately representing them through the regional list is more one for voter/citizen education rather than draconian legislative prohibition.

If Ministers are genuinely concerned with addressing democratically harmful public perceptions, then they should consider whether such legislation will not be seen by that same public as partisan, and not something which would worry the Government if the party distribution of constituency AMs and regional AMs was different. These proposals will be of continuing interest to devolved Scotland (and the current Arbuthnott review), because, notwithstanding the rather unconvincing initial comments of Ministers, if they are “right” for Wales, they must by definition be “right” for exactly the same electoral system in Scotland.

Scotland: More generally, from a Scottish devolved perspective, the forthcoming legislation will be of interest, especially where it proposes to follow relevant Scottish precedents and practice. The policy of the White Paper appears to be to legislate with a light touch in relation to the new Assembly’s structures, mechanisms, procedures and organisation. This echoes the July 1997 Scottish devolution White Paper.⁷⁶ The legislation should adhere to this approach, and Ministers should not be tempted to prescribe and proscribe unnecessarily.⁷⁷ As Ministers will know, even the apparently “flexible” Scottish legislation has given rise to some difficulties and restrictions, as in the number of deputy presiding officers; the legislative process; the powers of the SPCB; the legal basis of the Parliament; co-option of non-MSPs on Committees and other parliamentary bodies and so on. If the forthcoming legislation proves to be more flexible and permissive than the equivalent provisions of the Scotland Act, this will inevitably lead to demands for similar amendments there too.

24 October 2005

Written evidence from Dr Jonathan Bradbury, Department of Politics and International Relations, University of Wales Swansea and Dr Meg Russell, Constitution Unit, University College London

**Better Governance for Wales: the proposal to abolish dual candidacy in National Assembly elections—
Evidence to the Welsh Affairs Committee**

EXECUTIVE SUMMARY

This evidence assesses the proposal to abolish dual candidacy in National Assembly (NAW) elections. First, it looks at the NAW electoral system in comparative context. Secondly, it looks at the case for the reform. Thirdly, it looks at the case against it.

The discussion echoes the view expressed in evidence to the Arbuthnott Commission that abolishing dual candidacy is an option worthy of consideration for solving perceived problems of electoral representation in Britain’s mixed member electoral systems (Bradbury and Russell, 2005, 58).

1. *The National Assembly electoral system in comparative context*

1.1 Among mixed member (MM) electoral systems dual candidacy has only been abolished in the Ukraine. The research literature does not discuss the potential of abolishing dual candidacy more widely. That said, the comparative literature suggests that we should see the NAW electoral system as highly distinctive, and that in developing any MM system there is much scope for variation. From this basis abolition of dual candidacy emerges as a reasonable reform option for the NAW. These points need some explanation.

1.2 The mixed-member (MM) electoral system is a general type of which there are two principal sub-types: mixed member majoritarian (MMM) and mixed member proportional (MMP). The NAW is an example of the latter. What distinguishes MM systems is that in the MMM type there is no seat linkage between elections for constituency seats and list seats. Irrespective of results in constituency seats, parties receive list seats equal to the proportion of the list votes they have received. In MMP electoral systems, however, there is a seat linkage, meaning that the allocation of list seats is corrective of disproportional results in constituency seats.

⁷⁵ Any such prohibition may well be suspect under human rights legislation.

⁷⁶ *Scotland’s Parliament*, Cm 3658, para 9.1.

⁷⁷ The Secretary of State betrayed a worrying “something should be done about it” attitude when threatening provisions in the legislation to prevent “abuses” of AMs allowances during Welsh Questions in the Commons on 20 July. Such matters should normally be for the Assembly to determine through Codes of Conduct and the like.

1.3 Shugart and Wattenberg's survey of MM systems showed that the great majority are of the MMM type (Shugart & Wattenberg, 2001). They identified only four cases of MMP at the national level. The electoral reforms in Scotland and Wales were therefore of substantial interest in that they represented additions to the still very small band of MMP electoral systems. The Welsh case, however, is distinctive even among MMP electoral systems in that whilst it does clear a recognised 25% list seats threshold to call it an MMP system (Farrell, 2001) in having only 33% list seats it is much less explicitly aimed at proportionality than other MMP systems.

1.4 The Welsh system has most in common with the systems recently proposed in New Brunswick and Prince Edward Island in Canada. Both have considered reform in the context of a Westminster system, in which the simple plurality voting system has been used in single member districts. In New Brunswick the proposal has been for an almost identical 2/3 constituency 1/3 list seats split in an assembly of very similar size to the Welsh Assembly. The expectations are that reform would relax the dominance of a single party, guarantee the existence of an effective opposition, as well as allow a range of executive outcomes. It is precisely in this system that the proposal to disallow dual candidacy has also been made.

1.5 The lesson to draw from this discussion is that one should be very careful how one places the NAW into comparative perspective. Comparison with MM systems as a whole is problematic given the fact that the bulk are of the MMM type. Even within the family of MMP electoral systems the National Assembly system is quite distinctive and has relatively few close comparators.

1.6 Equally, it is important to recognise that the distinction between MMM and MMP types, and then within MMP types, is indicative of the fact that there is no body of "fixed" practice in the detailed operation of MM systems. Variation has been suggested or practiced on a wide range of issues, including seat linkage in the allocation of list seats; vote linkage in the allocation of list seats; whether voters have one or two votes; the formula used for allocating list seats; the operation of thresholds; district magnitude for constituency and list seats; and whether lists are open or closed. Changes on any of these issues have implications for both parties and individual candidates. MM electoral systems are generally defined by their openness to experimentation, and usage of mechanisms that take account of national contexts.

1.7 In this context, a proposal to abolish dual candidacy emerges as an idea that is legitimate for debate, given the parallel development of the same idea in another proposed MMP system most comparable to that of Wales, and the highly varied usage of other mechanisms in MM systems that have affected both candidates and parties.

2. *Abolishing dual candidacy: three problems it may address*

(a) *Public disquiet over defeated constituency candidates winning list seats*

2.1 This is the principal problem cited in the White Paper. However, it is the weakest part of the case given the lack of clear evidence to prove that there is a problem. The advocacy of disallowing dual candidacy in New Brunswick was based on a consensus in the electoral commission that both representatives and the electorate would consider it wrong that a candidate voted out in a constituency election should nevertheless still get elected. Again, though, this was not backed up by research.

2.2 Generally, it would appear that possible public disquiet about constituency losers winning list seats is intuitively a reasonable concern, suggesting the logic of abolishing dual candidacy. However, there is no evidence that there actually is public disquiet. Of course, there is also no evidence to clearly prove that there is not.

(b) *Labour constituency AMs' perceptions of inequality between candidates*

2.3 A stronger argument can be made that dual candidacy is unfair in the extra opportunities for election it provides individual candidates from the major opposition parties compared to those standing for Labour. This is not a universally held opinion. One view may be that many Labour constituency AMs have relatively "safe" seats and in comparison candidates for other parties face a struggle to get elected in the small number of constituency seats left or on the list. However, Labour candidates' defeats in "safe" seats such as the Rhondda, Llanelli and Islwyn in 1999, without hope of compensatory list election, provides a sharp corrective to this view. Labour candidates would argue that the important thing is that they *only* have prospects of being elected in constituency seats (with the possible exception of one seat in Mid and West Wales) compared to many opposition party candidates having genuine opportunities in *both* constituency and list elections

2.4 This emerges as a distinctive problem for Labour candidates in Wales if we compare with other MM systems. In MMM even a list candidate standing for a party which has won nearly all the constituency seats has a chance of being elected because the list seats are allocated entirely independently of constituency results. In the case of MMP, taking Germany as a key example, candidates from the major parties also have a chance of being elected by either means. This is for two reasons. First, 50% of the seats are list seats, meaning there are sufficient to go round. Second, party competition throughout Germany is based

predominantly on two major parties. Thus, most constituencies are won by a major party candidate, but the defeated major party candidate as long as (s)he is high up the party list is also able to get elected as well as many minor opposition party candidates on the list.

2.5 The limits to individual Labour candidates' prospects arise from the operation of the electoral system. Labour's success as the only major party in constituency seats is relatively very high and the proportion of list seats is relatively very low. Labour would have to lose a significant number of constituency seats before becoming eligible for many list seats. It could be plausibly argued that the abolition of dual candidacy would correct an inequality over the number of opportunities for election between individual candidates of different parties, which is fairly distinctive to Wales, by establishing that all candidates would have only one route to election.

(c) *Constituency AMs' critiques of equal status for List AMs*

2.6 A related argument is that, partly because of their feeling of vulnerability to competition, constituency AMs (predominantly Labour) have also developed critical views of sitting List AMs. These views arise largely from the perception that many List AMs engage in seat targeting, in which they focus local representation on a particular constituency to help them in a future election campaign when they will stand for that constituency as well as on the party list. Survey data, based on a 50% AM response rate, gives some support to the view that List AMs do significantly more local constituency work if they stand as dual candidates in elections than if they just stand as list candidates. Interview data also partly confirms that targeting has been engaged in by Conservative List AMs (Bradbury & Mitchell, *forth*, 2006).

2.7 The fact that List AMs play local representative roles and in some instances focus on targeted constituencies may not be a bad thing in itself. One may debate whether it creates unnecessary duplication and confuses the public or whether it inspires beneficial competition and gives constituents more choice. However, in the context of them facing the comparatively distinctive limitation of not having the same recourse to a compensatory form of election if they are subsequently defeated in a constituency contest, Labour constituency AMs view List AM constituency work negatively. It has led to the politicisation of the status of List AMs. In 2004, while List AMs overwhelmingly supported the current lack of guidance on member roles, 75% of constituency AMs disagreed or strongly disagreed. 70% of constituency AMs did not think that there should be equal status between constituency and List AMs, or that List AMs should have the same level of allowances. 65% of constituency AMs thought that list AMs should prove that they are working in more than two constituencies in their region, suggesting support for the introduction of something akin to the Scottish Parliament guidance. Only on the issue of having to call themselves by their "Constituency" or "List" title rather than referring to themselves as the "local member" was there agreement between them.ⁱ

2.8 Such attitudes have been corrosive in relationships between AMs and threaten some reform options that would poison relations further. The abolition of dual candidacy may be viewed as preferable in that as well as correcting perceived inequalities between candidates standing at election it might reduce tensions between members once elected. It is unlikely to be a panacea for all the ills perceived by constituency AMs. Even if sitting List AMs are not intending to be candidates in future constituency contests, one would still expect them to contribute to general party efforts in marginal seats. Where sitting List AMs wished to keep their options open one would expect their efforts to be even keener. In sustaining equal status between AMs this should be accepted as a normal competitive dimension of representative politics. Nevertheless, abolishing dual candidacy would probably have quite a big impact on the local roles adopted by many List AMs by reducing their incentives to compete in representing constituencies. Those who consider the current incentives for List AMs to play constituency roles to be excessive, undermining incentives to play other more strategic Assembly roles, would consider that a better balance may be struck. In such a way many of the heightened tensions that fuel criticisms of list members and advocacy of reforms of List AMs' rights might be lowered.

3. *Abolishing dual candidacy: two problems it may create*

(a) *Introduce reform that looks deeply partisan*

3.1 Wyn Jones and Scully (2005, 4.4) suggest "that electoral systems and arrangements in a representative democracy should be, as far as possible—neutral, and not matters of partisan dispute . . . Any changes that create the perception of partisanship . . . are therefore highly problematic by definition, and may well undermine public confidence. At the very least, such changes should have other compelling, overwhelming advantages if they are to be justifiable". They suggest that Better Governance for Wales does not offer any other reasons why dual candidacy should be abolished. Public disquiet is not proven and in that they accept that relationships between constituency and List AMs are problematic they suggest that this would be better solved by having a national list and Scottish Parliament Style guidance.

3.2 Answering the charge of perceived partisanship is a major challenge. In the case of Wales, MMP has been introduced in to a country where there has been a long standing one party dominance under a simple plurality electoral system. Labour can justifiably claim that MMP has diminished their prospects of a

guaranteed hold on power, and opened Wales up to a variety of options in executive formation. However, the MMP system is only a revision of simple plurality under which Labour are seen to have sustained much of their partisan advantage. It may well be that Labour have no consistent stake in list as well as constituency seats, which causes problems for constituency-list member relations. However, in a system, under which Labour can still generally be the largest party, any mechanism that seeks to overcome problems generally experienced only by Labour AMs, will also be open to being seen as partisan. It may be worth reminding Labour AMs that whilst they may feel *individual* resentments at “unfair” competition from List AMs, the current electoral arrangements were created with their party’s *overall aim* to remain the largest party in mind. They are in danger of being seen to want their cake as well as to eat it.

3.3 Nevertheless, if one regards *individual* Labour AMs’ perceptions of inequality between candidates and the criticism by predominantly Labour constituency AMs of the roles and rights of List AMs in the NAW as problems that should be addressed, then something needs to be done. The problem then is that *all* of the available options may be seen as partisan, although arguably none of them have any implications for party electoral fortunes. Let us consider four principal options and the likely problems of perceived partisanship.

3.4 First, a logical approach would be to explore giving Labour an interest in list seats by introducing vote linkage as well as seat linkage into the allocation of list seats. As Shugart and Wattenberg suggest (2001, 16) “parties that outperformed their list vote in a nominal tier district (constituency) would have the difference added to their list votes, thereby boosting large parties’ overall seat share while maintaining a fundamentally compensatory allocation of list-tier seats”. This would need exploration, and might require changes in the ratio of constituency-list seats to ensure that while Labour had the opportunity to win more list seats other parties had the opportunity to win more constituency seats. Nevertheless, almost certainly the introduction of any mechanism that artificially created extra list votes for Labour would be open to portrayal as gerrymandering.

3.5 Secondly, it may appear logical instead to have a debate about the purpose of list members other than to make the overall result more proportional. This could lead to formal resolutions that list members perform different roles. However, the allocation of different roles is highly problematic, and even if achieved could compromise the principle of equal status between members, and the allocation of equal allowances. Any such development which changed the roles and rights of List AMs against their wishes would be open immediately to the charge of partisanship.

3.6 Thirdly, it may equally be argued that list members should be elected from a national list or have their roles constrained by Scottish Parliament Style guidance. However, list members are opposed to being elected on a national basis, suggesting they might resist such a move as “partisan”, and a national list would be open to the accusation of under-representing North Wales, and/or opening the floodgates to Cardiff-centric lists. Guidance would also be open to the criticism that list members were being discriminated against. List member acquiescence to the guidance in the Scottish Parliament has only come with the realisation that it has little teeth (Bradbury & Mitchell, forth 2006). Indeed this casts much doubt on whether it would achieve what Labour AMs would expect, thereby leaving the original problem unresolved.

3.7 Abolishing dual candidacy presents itself as the fourth option. It has already been discussed as to how it might address the potential problems of public confusion, Labour constituency AM perceptions of unequal candidacy and critiques of equal status with List AMs. Conversely, the abolition of dual candidacy can be presented as partisan in the sense that it is suggested that it will create problems for the major opposition parties in deciding whether to place their best candidates in constituencies or on lists. This needs some further consideration (see below) but of all the possible reform options it is potentially the least open to the charge of partisanship. Whilst it may affect decisions over candidate selection, significantly it leaves well alone options which have definite consequences for the allocation of votes, and/or reforming the status and role of List AMs.

(b) *Make it difficult for opposition parties to get their major figures elected and thereby also reduce the quality of representation*

3.8 Wyn Jones and Scully (2005, 4.2 and 4.3) assert that a key problem in abolishing dual candidacy is that while “there is no reason why electoral arrangements should seek to make life *easy* for opposition parties” it may cause difficult choices for parties as to whether to stand their best candidates in constituencies or on lists. In that some may then lose, there may then be not only an adverse partisan effect but also problems for the “quality of representation”.

3.9 There are two objections to this argument. First, if it is accepted that on an individual basis “major figures” in opposition parties currently have more opportunities for election than “major figures” in the Labour party then the abolition of dual candidacy should be seen as correcting a previous advantage to opposition parties. Even so, while making such selection decisions harder than they were it would still leave opposition parties a reasonable level of choice as to where such candidates are best stood. Labour generally does not have such a choice, basically only having prospects in constituency seats, and would not do so until it lost a lot of constituency seats. Indeed the principal “major figure” to have been defeated so far is Labour’s Wayne David in the apparently “safe” seat of the Rhondda in 1999.

3.10 Secondly, the protection of the “best” candidates as perceived by the parties is a dubious criterion on which to base an electoral system, and one ought to view critically the claim that the defeat of such people will be “problematic for the quality of representation”. To turn the argument on its head, abolishing dual candidacy may help to widen the pool of recruitment by giving more effective chances of winnable candidacy. In contrast to the heady days of interest in candidacy before 1999 the reality in 2003 was that 17 of the 20 list members elected had also been constituency candidates. Labour and Plaid Cymru have both used positive discrimination procedures in list selection, involving a de facto subversion of dual candidacy, to improve the quality of representation. The greater availability of winnable candidacy positions and the maximisation of incentives to compete in constituencies, knowing that there is no safety net of a regional list seat, may create further improvements.

CONCLUSION

Reforming the NAW electoral system on a revised MMP basis is inherently difficult, given the distinctive nature of the system, the variety of reform options available, and likely perceptions of partisanship. The Richard Report (2004) advocated STV, and while it has not been discussed here, this alternative approach faces very similar difficulties. Despite this both sets of proposals have merit in trying to think through the problems of electoral representation, without necessarily impacting upon party interests. While STV may yet be a basis for renewed further consideration, reformed MMP on the basis outlined in the White Paper is at least a plausible basis for incrementally developing the current system to solve perceived problems without necessarily causing new ones.

November 2005

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ⁱ All of these findings are drawn from the project, “Multi Tier Politics and Its Impact on Local Representation in Scotland and Wales (ESRC L219252103), 2002-2005. This research was conducted by Dr J. Bradbury (UWS), Dr Meg Russell (UCL) and Professor James Mitchell (Strathclyde)

Written evidence from Citizens Advice Cymru

COMMENTS ON THE PROPOSALS INCLUDED IN THE “BETTER GOVERNANCE FOR WALES” WHITE PAPER

BETTER GOVERNANCE FOR WALES

A new Government of Wales Act coming out of the recommendations in the white paper “Better Governance for Wales” would presumably repeal all of the measures in the existing Government of Wales Act 1998. Some of these measures are of particular interest to charities such as us and we have particular comments to make in relation to these measures.

RELATIONSHIP WITH THE VOLUNTARY SECTOR

Section 114 of the Government of Wales Act currently includes the duty to “. . . make a scheme setting out how it propose, in the exercise of its functions, to promote the interests of relevant voluntary organisations” and has provided a formal framework of how it engages with the Voluntary Sector through the Voluntary Sector Partnership Council (VSPC) and biannual meetings between Ministers and relevant voluntary sector networks.

We would have concerns over how a new Act would affect the current relationship and dynamic of these arrangements. Firstly, we would hope that the formal relationship with Voluntary Sector Networks through the VSPC would still include the membership of Assembly Members from all parties and representatives of

the Voluntary Sector. This enables an open dialogue and an opportunity for scrutiny of WAG policies in relation to the Voluntary Sector. We have questions about the potential change in the role between Ministers, as part of the newly constituted Executive of the Assembly, with the Voluntary Sector.

We would like to ensure that the ownership of the Voluntary Sector Scheme and its development, particularly in relation to the funding relationship through the Code of Funding would remain with the Assembly in terms of adoption in plenary, resulting in an annual publication and a review following each election. We would also want to retain the role of the VSPC in scrutinising the WAG compliance with the Scheme and also the robust monitoring and review of its implementation and development.

We would strongly advocate maintaining the independence of the voluntary sector in terms of determining the membership of the VSPC and its formulation of networks and representatives to Ministerial meetings.

CONSULTATION

The WAG already consults widely about changes it proposes in secondary legislation. We would want this process to be retained and suggest that the new Act build in a requirement for this, ie those relevant interest groups/individuals should always be consulted.

S31 of the 1998 Act requires the Secretary of State to consult with the Assembly about the Westminster government's legislative programme. We would want this process to be retained, although under a new Act, the consultation will presumably be with the WAG rather than the Assembly. We suggest that charities such as ours be copied in on this consultation and be given an opportunity to feed in their own proposals to the WAG in an open and transparent manner.

EQUALITY OF OPPORTUNITY

S48 and s120 of the 1998 Act build in requirements for the Assembly to carry out its work and functions so as to facilitate equality of opportunity. We would want these provisions to be retained as a minimum and be revisited in terms of the requirements to address inequalities.

It should be remembered that that voluntary sector has a duty under charity law to its principles in the delivery of services, which tie into the aims for placing citizens at the centre of public services delivery and also in aspiring to equality and justice for all. Further, it needs to be acknowledged that the voluntary sector in many cases may go beyond current government agenda in terms of addressing inequalities and our input will be useful in this process to challenge and monitor the effectiveness of public services in Wales.

We would expect the new Act would make stronger provisions to reflect the principle of addressing inequalities, particularly given the new culture of placing the citizen at the centre of public service delivery plans, through the Making the Connections policy agenda.

COMMITTEES

The 1998 Act sets out in some detail what committees should be established and the membership of the committees, whereas the white paper is proposing that it should be left to the Assembly to decide on what committees it wants (see paragraphs 2.15 and 2.16).

We would strongly suggest the role of the regional committees is maintained and strengthened as it is a very effective means of having a direct dialogue with WAG Ministers and Assembly elected representatives on both the agenda subjects and on any matter raised in the open forum.

We would also strongly suggest that the current level of access to participate in committee proceedings eg a right to feed in written comments on any agenda item and to make presentations and representations to committees is at least maintained and even enhanced in any new committee structure. This is particularly important given the proposals to develop the culture of scrutiny "on traditional parliamentary lines" and to remove the provision in the Act requiring Ministers to be members of relevant subject committees. There will be a growing need within the voluntary sector, as part of the wider lobbying society, to be able to participate as far as possible in this scrutiny function.

OPENNESS

S70 of the 1998 Act requires that most proceedings, including those of the committees, should be open. This should be retained and we urge the greatest degree of openness that is compatible with government business.

PUBLICATIONS

The issue of handling publications by the Assembly as a legislature and from the Welsh Assembly Government is an issue of openness, ie making things publicly available. In this respect, s119 of the 1998 Act makes some requirements about publication and charging for them, but is silent about electronic publication. The times, and the internet, have moved on since 1998 and we have made representations about the deficiencies in the usability and the accessibility of information on the Assembly's website is.

It would be reasonable to require a new Assembly and WAG:

- (a) to maintain a website;
- (b) to ensure all documents are promptly published both in paper and in electronic form;
- (c) to publish all legislation and guidance in its draft as well as the final form; and
- (d) to ensure that the website is well-structured so as to enable documents to be readily located.

The requirement for prompt publication is particularly important in view of the dilatory way in which some things go onto the present site.

LEGISLATION

Citizens Advice across England and Wales has a mandate to change policy in order to improve the lives of our clients and population as a whole through policy change. There are many examples of how evidence from Citizens Advice has informed and formulated policy change and in turn, legislative change in Westminster and Cardiff which have an UK-wide impact or a Wales-wide impact eg statutory tenancy deposit scheme, minimum school uniform grant, changes to the prescription charges scheme, changes to credit licensing laws.

The new provisions proposed would need to be coupled with the guarantee that the Welsh Assembly Government and the National Assembly as a legislature, has the capacity to handle its new powers and that the right environment is created in order to cultivate positive legislative proposals that will bring real benefit to the people of Wales. This means that eg Orders in Council and subsequent legislation may need to be drafted in conjunction with organisations like ourselves and this requires additional capacity on both sides of the lobbying environment. We would hope that the office of the Council General will be given the sufficient resources to cope with the new demands that this environment will create so that the National Assembly can become more responsive to the needs of civil society in Wales. We would also hope that the National Assembly will also be given the sufficient level of resources to scrutinise this legislative role.

November 2005

Written evidence from Chris Ruane MP

I am writing about the issue of dual candidacy. I am aware that the Welsh Affairs Committee is holding an Inquiry into Better Governance for Wales. I understand that one of the issues you will be looking at is dual candidacy. This is an issue that concerns many MPs I believe that this is a cross-Party issue—and I would like to submit the following evidence to the Committee.

“I am sure that many in Wales will welcome the removal of the absurd dual candidacy opportunity”.

Lord Carlile of Berriew, Former Leader of the Welsh Liberal Democrats, *Hansard*, 15 June 2005.

“The present arrangements are really pretty indefensible”.

Lord Crickhowell, Former Secretary of State for Wales, *Hansard*, 15 June 2005.

“The proposed voting system quite correctly takes on board the Richard commission critique. There is no question that it is a “duff” system as regards first-pass-the-post and regional members.”

Lord Livsey, Liberal Democrat Spokesman on Welsh Affairs, *Hansard*, 15 June 2005.

“The system as operated . . . has led to a confusing and expensive proliferation of ‘parliamentary’ offices throughout the country. In at least one town there are four. . . They have become a thinly disguised subsidy from the taxpayer for the local party machines . . . In my view they are a serious waste of public money.”

Sir David Steel, Former Presiding Officer, Scottish Parliament,
Lecture, Edinburgh Book Festival, 18 August 2003.

“Quite the most distasteful and irritating part of my job as Presiding Officer was dealing with complaints against list Members’ behaviour from constituency MSPs, Westminster MPs and local authorities . . . I could not understand at first why we had such problems, until it dawned on me that what some were determined to do was misuse their position to run a permanent 4-year campaign as candidate for a particular constituency. In most parliaments you do not have Members sitting in the same chamber or in committees who are going to be election opponents, and it does not make for a good working atmosphere.”

Sir David Steel, Former Presiding Officer, Scottish Parliament,
Lecture, Edinburgh Book Festival, 18 August 2003.

“The list system creates two different kinds of member—constituency and list. The constituency members feel that they carry the burden of the work involved in helping individual constituents and local groups with their problems. They complain that the list members either swan around cherry-picking some local issues or camp in their constituency, posing as an alternative constituency member.”

Donald Gorrie, Liberal Democrat MSP, *Evidence to the Arbuthnott Commission*.

“Problems do arise especially where some list members promote themselves as ‘shadow members’ for individual constituencies, often those they fought unsuccessfully in the first-past-the-post section of the election. Voters are often surprised that candidates soundly beaten in the constituency votes are then elected on the list—a reward for failure.”

Dr Derek Barrie, Chief of Staff, Scottish Liberal Democrats, *Evidence to the Arbuthnott Commission*.

THE CASE AGAINST STV

“The more radical alternative of abandoning AMS seems unlikely to solve the perceived problems with the current system. In particular a move to STV for the Parliament, whilst putting all members on an equal footing, would almost certainly also greatly increase competition over local work. If a proportional system is to be maintained for the Parliament, AMS thus remains the least problematic option.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

“With respect to local work . . . the problems generated by STV seem greater than the problems that it might seek to solve.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

ACADEMIC SUPPORT FOR BANNING DUAL CANDIDACY

“A bar on members standing for list and constituency seats simultaneously in the Parliament is a . . . serious option and could be kept under review.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

“Disallowing dual candidacy should not be viewed per se as a bizarre idea. In New Zealand, it was considered in the early 1990s ahead of AMS being introduced. In New Brunswick in Canada, current electoral reform proposals do rule out dual candidacy for the reason that both fellow representatives and constituents will consider it unfair that a member judged unpopular and voted out by constituents might still be elected as a list member at the behest of party.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

“List MSP organisation of local representative work is frequently on a sub-region wide basis. This does sometimes involve a strong and extensive focus on a single constituency.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

“Particularly given the distribution of seats under AMS in Scotland, there are clearly political interests for list members in offering local representation, and in targeting particular parts of the region where electoral support is likely to be greatest.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

LIMITATIONS OF GUIDANCE

“The guidance could be viewed as an irritant, but where list members wanted to be particularly active at the local level and by no means all of them did it was easily met or ignored without constraining their intentions, particularly in the context of targeting a specific seat.”

Dr Jonathan Bradbury and Dr Meg Russell, University of Wales, Swansea/Constitution Unit,
Local Work of Scottish MPs and MSPs, May 2005.

QUOTES FROM THE LEANNE WOOD MEMO, AUGUST 2003

“Deciding against casework as the main priority for regional AMs could mean the freeing up of staff resources . . . Could the AM employ someone for 2–3 days a week with the remaining time used by the party (locally or centrally) or another elected representative”.

“Each regional AM has an office budget and a staff budget of some considerable size. Consideration should be given to the location of their office—where would it be best for the region? Are there any target seats . . . within the region? If so, the office could”.

“As a constituency AM for the Rhondda, Geraint Davies dealt with 2,500 cases over his four-year term. A very small proportion of those people indicated that they would be voting Plaid Cymru in telephone canvassing prior to the election. This begs the question”.

“We need to be thinking much more creatively as to how we better use staff budgets for furthering the aims of the party.”

“[Regional AMs] need not be constrained by constituency casework and events and can be more choosy about their engagements, only attending events which further the party’s cause.”

“On receipt of every invitation, ask ‘How can my attendance at this event further the aims of Plaid Cymru?’ If the answer is ‘very little’ or ‘not at all’, then a *pro forma* letter of decline should be in order.”

INTERNATIONAL QUOTES

“The Commission recommends that candidates not be able to present themselves in both a single member constituency and on a party list for the same election. The Commission heard that in some jurisdictions where candidates are able to run simultaneously on both ballots, voters are displeased with the case where a candidate is not successful in a single member constituency, but is elected anyway by virtue of being placed on the top of a party’s list. This is a particularly salient issue if a closed list is adopted. The Commission is of the view that if a candidate chooses to run in a single member constituency, the voters in that constituency should determine whether that candidate is elected, and that there should be no back door to the legislature.”

New Brunswick Commission on Legislative Democracy

“The majority . . . believed that candidates for Parliament should stand on either the list, or for an electorate, but not both. The principal reason for this was a sense of frustration amongst voters who, after voting out an unpopular electorate MP, saw that candidate returned to Parliament via. the list.”

New Zealand MMP Review Committee, 2003.

“There was considerable general suspicion apparent in the qualitative research about list MPs’ accountability and workload. Respondents during the qualitative research often described list MPs as ‘unelected’. One key criticism was that it was possible for MPs to be defeated in electorate contests but return to the House through their position on the list. 61% agreed and 15% disagreed that ‘list MPs are not as accountable to voters as electorate MPs’.”

“MMP: A Study of Public Attitudes”, New Zealand MMP Review Committee, 2003.

“New Zealand’s dual candidacy list MPs who lose their ridings [constituencies] but are elected anyway suffer particular disdain. Many New Zealanders continue to resent their presence in Parliament, still more so in cabinet.”

Howard Cody, *Electoral Reform Proposals in Quebec, Prince Edward Island and New Brunswick*, Canadian Parliamentary Review.

“Typically, party elites favour this form of double inclusion, since it maximizes the chances for election of ‘star’ candidates: if they fail to win in the constituency race, they can hedge their bets by securing a high ranking on the party’s regional or provincial list. Some observers have criticized this favourable treatment of candidates who fail to win a constituency seat, arguing that it allows second-rank candidates to gain entry to the legislature through the back door.”

“Voting Counts: Electoral Reform for Canada”, Law Commission of Canada, 2004.

31 October 2005