



National Assembly for **Wales**  
Cynulliad Cenedlaethol **Cymru**

**Better Governance for Wales – key material:  
Statements and Debates,  
September 2005 – November 2005**

**Abstract**

This paper draws together the key statements and debates relating to the White Paper 'Better Governance for Wales' from September to November 2005. It includes transcripts of proceedings from the Assembly and Westminster. The paper will be updated regularly by the Members' Research Service.

December 2005



# Better Governance for Wales – key material

## Statements and debates, September 2005 – November 2005

Members' Research Service

December 2005

Paper number: 05/0040/mrs

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## Better Governance for Wales – Key Material:

### September 2005 – December 2005

#### 1 Statement by the Rt Hon Rhodri Morgan AM, First Minister on the White Paper, 'Better Governance for Wales' during Questions to the First Minister, 20 September 2005

##### National Assembly for Wales, Record of Proceedings, 20 September 2005

**Eleanor Burnham:** Will you make a statement on the 'Better Governance for Wales' White Paper? OAQ0721(FM)

**The First Minister:** The Secretary of State for Wales published the 'Better Governance for Wales' White Paper on 15 June 2005. The deadline for receipt of comments on the White Paper by the Wales Office was 16 September.

**Eleanor Burnham:** We have all read this week what Tony Blair apparently thinks of the Welsh. Is that why he does not trust us to write our own Standing Orders? What actions have you taken to ensure that the Assembly can write its own operating rules?

**The First Minister:** You might want to pick away at old scabs by referring to the weekend newspaper story; I certainly do not. The last-resort power, which the Secretary of State, practically speaking, needs to have in case we cannot come to an agreement on writing our own Standing Orders, is a good incentive for us to come together and agree our Standing Orders on a cross-party basis. I believe that we will be able to do that, in which case the last-resort power will not be required.

**The Leader of the Welsh Conservatives (Nick Bourne):** In light of the response that the First Minister has just given, is he stating that the Secretary of State simply has a reserve power in the event of our not being able to agree our Standing Orders? Is it the case that we are able to go forward and agree our Standing Orders and that this is only a reserve power? That is not as I understood it.

**The First Minister:** The Secretary of State has no wish to set our Standing Orders. He wants us to do it, I want us to do it, and I am sure that every Assembly Member wants us to do it.

**Nick Bourne:** Was that a 'yes', then? It is being left to us and he will only come in if we cannot agree on it?

**The First Minister:** That is roughly the understanding that I have, yes.

**Nick Bourne:** If we could cross out 'roughly' and say that that is the case, I think that everybody would be happy, but that is not the way that it has been reported. It was reported that he was taking the power and that it was not coming to the Assembly. That is the way in which it is written in the White Paper. Is the First Minister saying that that is now not the intention and that he is only there as a longstop if we cannot agree our Standing Orders?

**The First Minister:** That is correct.



**The Leader of the Welsh Liberal Democrat Group (Michael German):** I will look at another aspect of 'Better Governance for Wales'. The Welsh people were used as the guinea pig for council tax rebanding and your colleagues in London have clearly decided that the experiment did not lead to better governance, or even lower bills, for Wales. It is a case of better governance for Wales, but better not for England. I also notice that they are hoping to improve police governance by reducing the number of police forces in Wales. Do you think that having a single police force for an area from Haverfordwest to Hawarden in the north will improve accountability for the people of Wales?

**The First Minister:** If you want to resist Kirsty Williams's leadership challenge, the fewer references to guinea pigs that you make the better, Mike. As regards the point about police forces, there are many ways in which you could improve the efficiency of the police force in Wales. There are shared service centres for dealing with pay and rations and paying suppliers. There are interoperable control centres with fire and ambulance services, similar to that in Carmarthen and possibly going even further. There are issues about joint operations, such as Operation Tarian, which includes three of the forces, although not north Wales for operational reasons, to combat organised crime and, in particular, drug gangs. There are many different ways in which you can do this. One option is to have a single police force, but, given the sharp differences between rural and urban Wales, that would have to take into account how you achieve the right level of democratic accountability to cover the different circumstances of urban and rural Wales. I am pretty sure that we are in for a period of some kind of instability. I do not think that no change is an option, but there are lots of possibilities here. That is why Edwina Hart has written to Janice Gregory, as the Chair of the Social Justice and Regeneration Committee, to ask her to initiate a study on all these different factors that I have just illustrated. However, I think that this issue will run and run for a considerable time in England and Wales.

**Michael German:** This is obviously important for us in Wales, given that the Assembly and the council tax payers in Wales pay half of the bills for our police service. Nowhere in the reports that have been going to the Home Secretary have I heard mention that the National Assembly will be a consultee and will be informed and involved in decisions about Welsh police forces. Can you give me two assurances: that the National Assembly will have a full debate on this matter and a discussion about the future of our police forces, and that those views will be taken to any discussion about the future of our services in Wales, and that you will ensure that we have a debate with you about the issues around the future governance of Wales in the new Bill that the Government is proposing, and whether or not powers over police funding and interests should be transferred to the National Assembly?

**The First Minister:** You are right that police funding substantially comes from us. Sometimes it is a one-off, as was the case with Operation Tarian; sometimes it is through the revenue support grant and the precepting system. Of course, the threat of capping, in terms of police authorities, is a matter for Sue Essex and not for John Prescott, David Miliband or the Home Secretary. I can assure you that there has been consultation. We are only at the early stages. The report was presented and said that you do not want a force with less than 4,000 officers in the middle of the week. On the day that it was published, Charles Clarke spoke to Edwina Hart to lay out what was coming. Therefore, there is consultation at this early stage, and that is why Edwina has set the ball rolling for the Assembly to be democratically involved through the Social Justice and Regeneration Committee.



I would be amazed if we did not have a debate on this in the Chamber. I do not set Assembly business, as you know, so it is not for me to give you guarantees. However, I would be amazed if we did not have such a debate. I am sure that the matter will also arise and be discussed among Welsh MPs in the House of Commons. They will have views on issues such as how you get local control, efficiency, career structures and the new specialisms that you need to combat new threats such as organised crime, drug gangs, terrorism and so forth, in small, relatively rural forces that have only 15,000 officers, such as the three in Wales other than South Wales Police.

**Michael German:** We now have an ideal opportunity with the Better Governance of Wales Bill, and we have responsibility for other blue-light services, namely the ambulance and fire services. Surely this would be an ideal opportunity for us to bring all three together and to seek devolution of those powers within the Bill. The time is right, but the issue must be dealt with quite swiftly. Do you believe that this is the right time to do that?

**The First Minister:** I have mentioned already that we have, in a way, a half-way house in terms of having joint control rooms for the three 999 services, at least in Carmarthen where they are under one roof, although still separate. Two of the services are devolved and one is not, as you said, but they can work together and are doing so already. There is also the question of Airwave and other interoperable radio communication technology systems, which is an enormously important issue in terms of the three services working together.

Finally, there is the issue of how many separate constabularies you need. If the service is not devolved and the Home Office makes a decision across England and Wales to a fairly common pattern, then I would imagine that you would finish up with one police force in Wales. However, that might not be terribly popular, and it would perhaps not have involved all the different aspects that I have been talking about now such as control rooms, shared corporate service centres and so on, which may be used to get around the problems regarding the sharp divides in terms of policing needs between rural, urban and metropolitan areas.

## 2 Debate on the Report of the Committee on the Better Governance for Wales White Paper in the Assembly, 21 September 2005

National Assembly for Wales, Record of Proceedings, 21 September 2005

**The Presiding Officer:** I propose that

*the National Assembly for Wales notes the report of the Committee on the Better Governance for Wales White Paper, which was laid in the Table Office on 13 September 2005. (NDM2561)*

In formally proposing this motion, I thank my fellow committee members for their co-operation during our meetings. I thank our witnesses for their evidence, and I thank in particular those in the Assembly Parliamentary Service who served us: our Clerk, Paul Silk, and his assistants in APS, John Grimes, Siân Wilkins and Meriel Singleton. With that, I formally propose the motion and I will attempt to respond to what is said in the debate.

**Ieuan Wyn Jones:** I welcome the opportunity to speak in this debate because it is fitting and appropriate that we congratulate the committee established to consider the White Paper, and, specifically, the Assembly's procedures and how they will be affected by the White Paper proposals. I therefore pay tribute to the Presiding Officer and to the members of the committee for their detailed and thorough work. I am aware that they had to prepare a report in a very short period of time during the summer, and I appreciate the work that that entailed for the committee members and the staff. They are to be congratulated on preparing such a comprehensive report.

I reiterate my belief and the belief of Plaid Cymru and the Plaid Cymru group in the Assembly that the White Paper, and the Act when it comes, should move towards establishing a parliament with full legislative powers from the beginning. We should debate the case for that throughout the run-up to the Bill's publication, and, naturally, when the Bill goes through the House of Commons and the House of Lords, we will have the opportunity to discuss the content.

I will reiterate as often as necessary the two main reasons why we feel that we need to move to full legislative powers at once. First, we need clarity on the Assembly's powers, and if we had full legislative powers over every devolved area, there would be no question of the nature of the Assembly's powers and rights. The second reason—and I said this in my evidence to the committee and in my response to the White Paper—is that having full legislative powers means that you can move straight from policy development to legislation without any restrictions, provided that the Government here has a majority. It is not only us who says this. It was significant, in the public debate emanating from the establishment of the Richard commission, that the commission came to the same conclusion as we did. After 18 months of evidence taking and £1 million of public money, the commission came to the same conclusion as we did. Therefore, we welcomed the opportunity to give evidence to the committee and to respond to the report.

One of the things that I think is important in considering the nature of the proposals in the White Paper set against the proposals for a full law-making parliament is that, because the proposal is for the Orders in Council, there are two key tests. The first is that it has to be approved by the Secretary of State, who must not turn it down for trivial reasons, we are told, but there is no definition of what is meant by 'trivial'. If a Secretary of State, for whatever reason, decided to turn it down for 'trivial reasons', it seems to me that the



National Assembly has no right of appeal against that. Once that decision is made, that is the end of the matter.

Another point that needs to be clarified, as it has not been clarified in the White Paper, relates to what is referred to as 'the appropriateness test'—it is mentioned in paragraph 3.21, I believe. If the proposal, when it is considered by the committees of the House of Commons and House of Lords, even before the Secretary of State has approved it, fails the appropriateness test, the House of Commons and House of Lords could reject it. It seems that that negates the mandate of the National Assembly's elected Government. If the Assembly has a Government elected on a mandate to introduce legislation, and that legislation then fails the triviality and appropriateness tests in London, what is then the value of that Government's mandate? It is important for us to establish that point.

I realise that my time is running out, but there are many points that I wish to welcome, which I am pleased that the committee has also welcomed. First, I welcome the recommendation that Ministers should not become committee members. That is extremely important in terms of scrutinising legislation. Secondly, I am pleased that the committee is unanimous regarding the idea that this body should be responsible for forming its own Standing Orders. I sincerely hope that it will be possible for us, as I am sure it will be possible across all parties, to agree on that.

I fundamentally oppose the recommendation that two-thirds of the Assembly must be in favour before we can hold a referendum. I cannot see any reason for this, as the Assembly should be the only body to take this decision, which should be based upon a simple vote. We cannot find any precedent for that.

To close, we have reservations regarding how the Government sets out its legislation. We agree with many other points, and we hope that the committee's report will be a firm foundation for the debate that we will have before this Bill is enacted, hopefully during the summer of 2006.

**Gwenda Thomas:** I will focus my remarks on the committee's recommendations regarding statutory obligations, with reference to section 34 of the committee's report. I am disappointed with its conclusions regarding the statutory duties proposed in terms of equality of opportunity. However, this is not to say that I question the personal commitment of any committee member to the principle of equality of opportunity.

In June 2003, the Committee on Equality of Opportunity decided to undertake a review of how equality can be mainstreamed into the Assembly's work. The committee adopted the following definition of mainstreaming:

'Mainstreaming equality is about the integration of equality of opportunity principles, strategies and practices into the every day work of the Assembly and other public bodies.'

An obligation in terms of equality of opportunity is unique to the National Assembly for Wales as a legislature. No other legislative body in the world, as far as I am aware, is obliged in the same way to consider the principle of equality of opportunity in all its work and proceedings.

In my evidence to the committee on the White Paper, I categorically stated my personal wish, and that of my committee, for sections 48 and 120 to remain part of the revised Government of Wales Act, and that section 120 should continue to apply to the legislature. These sections, after all, were included in the original Act due to the pressure from within Wales to include them.



I also offered the opinion that the Committee on Equality of Opportunity should remain in place to scrutinise the Executive's policies and legislation passed by the Assembly as a legislature after separation occurs. I feel that these views have not been reflected in the submission that the Assembly has sent to the Secretary of State for Wales.

The report departs from the requirements of the Government of Wales Act 1998 by separating the duties in respect of business and functions. It justifies this decision by suggesting that the obligation regarding the legislature's conduct of business is a curious one. I take particular exception to this. I agree with the description of the respective requirements of sections 48 and 120 of the Government of Wales Act 1998 as 'innovative, groundbreaking and progressive', but the word 'curious' does a disservice to all of us who are concerned to see equality of opportunity being mainstreamed. The duty as set out in the 1998 Act represented a beacon for international approaches to promote equality.

Any diminution of the requirements of this Act before they are given the opportunity to show the full benefits of making the concerns and experiences of disadvantaged groups an integral part of the design, implementation, monitoring and evaluation of all policies and programmes would be a retrograde step. By placing a statutory duty in respect of the business as well as the functions of the National Assembly, the Government of Wales Act 1998 gave a clear indication to all that the Government in Wales was prepared to pay more than lip service to the principles of equality for all. By embedding it in its constitution, it signals that in Wales, at least, discrimination and intolerance were not to be countenanced. For whatever reason, that commitment is being diminished by the White Paper proposals. The focus on equality is reduced and the message transmitted is a negative one.

I do not accept that my expectations are contrary to the principles of devolution, but rather, as far as equality of opportunity is concerned, I believe that the National Assembly should demand that the UK Government includes a statutory obligation within the amended Government of Wales Act and that we encourage other legislative bodies in the UK to follow Wales's example.

**Nick Bourne:** I thank the Presiding Officer and the committee for their hard work and the considerable volume of work that they produced, which made interesting reading.

It seems to me that the Government of Wales is desperately trying to tip-toe around major constitutional questions and is creating a huge muddle. On the one hand, the Government White Paper grandly states that it is now time to rebalance legislative authority towards the Assembly, yet, on the other hand, it is playing down the changes that are proposed, arguing that the enhanced powers are only adaptations of the current settlement and, therefore, do not require a referendum.

As expected, the committee found the White Paper to be woolly on the possible content of Orders in Council. It would be possible to have wide and extensive Orders in Council or they could be restricted by how retentive Whitehall departments are, as I think the First Minister acknowledged in evidence to the committee. The committee was concerned that there may be a reluctance to allow the Assembly too wide a scope and it is not clear how a disagreement between the Secretary of State and the Assembly might be resolved.

The Government states that transferring primary legislative powers over all devolved areas would represent a fundamental change to the Welsh settlement; so it would, and I agree that it would have to be endorsed in a referendum. Yet, even though Orders in



Council could amend, repeal or extend the provisions of Acts of Parliament, the proposals are not to be subject to a public vote.

Most people agree that the current settlement is not effective in the long term—not sustainable anyway. So, why will the Government not allow the people of Wales to determine the way forward? In June, the Secretary of State for Wales said that one of the reasons why the transition to devolved Government in Wales had been so smooth was because we had moved at a pace determined by the people of Wales. However, he has a marked reluctance to allow the people of Wales to vote on these proposals. He is determining what the people of Wales think—who is he to judge that?

What is more, as has already been mentioned, a simple majority is required in the House of Commons to trigger a referendum, but for some mysterious reason, the Assembly will have to endorse the motion by a two-thirds majority. I say mysterious, but I think it is only seemingly mysterious. The truth is that the Labour Party feels—quite correctly, because this afternoon's evidence would tend to bear that out—that they cannot be certain of having a majority themselves. Therefore, they are trying to entrench legislation, which runs fundamentally against the British constitution. The parliamentary way has always been a simple majority and this is the first and only instance where there has been an attempt to alter that balance. It does not bode well for parties when they try to entrench themselves in power in this way even when they have lost the majority. I find it quite extraordinary and that deserves closer scrutiny. I look forward to hearing from the governing party on how that can possibly be justified.

The major nightmare for the Secretary of State and for the Labour Party—the Secretary of State referred to it as a nightmare—is the reduction in the number of MPs in Scotland. Of course we want full representation for Wales in Westminster, but we have to recognise that it has to be equitable within the settlement for the United Kingdom. If we have a similar settlement to Scotland we can expect a similar result; we cannot expect to be treated any differently from Scotland in that regard.

**Leighton Andrews:** As I recall, your party's policy at the last election was to reduce the number of MPs in Wales and to further reduce them if the Assembly got further powers. Is that not the case?

**Nick Bourne:** You will be aware, if you are being fair—and the memory is usually fair—that it was a reduction across the whole of the United Kingdom; it was not just a pro tanto reduction in Wales. You are right about that, but it was not a more significant reduction in Wales than it would have been elsewhere in the United Kingdom.

We need to revisit the two-thirds majority required for a referendum. There is no substance for that other than the Labour Party trying to build itself into power even when it has lost the majority. I cannot see any other justification for that. I would like that point answered when the Government responds in this debate. More than that, there is a muddle in the White Paper, which is illustrated in the very good report that we have received from the committee. I would like, once again, to reiterate the thanks of my party for the hard work of the committee. I hope to have some of these points addressed in the response from the other side.

**Leighton Andrews:** Unlike the leader of the Welsh Conservatives, I will speak about the committee's report. It specifically recognises that the White Paper is taking this institution in the direction of a legislative body and in the direction of a body with parliamentary responsibilities. The committee's report faces up to some of the challenges that the Assembly needs to address if it is going to head in the direction of a more legislative role.



In the committee's report, I see that only around 9 per cent of Plenary time and around 3 per cent of committee time is currently spent on legislative matters. That bears out something that I have said here before: giving stronger powers to the Assembly will make for a better Assembly. It will mean that the debates in which we engage will be focused on specific items of legislation—more often, not wholly, as there are roles for a body like this other than simply passing legislation. As I have said before, our debates often have more of the character of party conference debates than they do of an engagement with the detail of legislation, and I welcome that. I also welcome some of the proposals that the committee makes in respect of legislation.

There will be changes to Plenary and committees. I have said before that one of the reasons that I enjoy the Audit Committee more than most committees is that there are no Ministers on it. That is not in any way a reflection of my colleagues who are Ministers, but it is a reflection of something that is explicitly stated in the report: that it would change the character and nature of those committees. It would make them less adversarial, and would enable them to perform a role that, in certain circumstances—for example, in respect of policy development—would be more like a Commons select committee and would enable them to take on a more of a standing committee role in terms of legislation. There are still many issues to be worked out regarding how the legislative end of the committee structure might work.

It is inevitable that there will need to be changes to the committees. There will have to be a review of the remits, and there may need to be a change in the size of the committees. The committee report sets out the reasons for those issues to be further debated. It is also clear that we will have to sit longer; probably longer in Plenary, though it is open as to what that might mean for committees, depending on a number of judgements that would have to be made about their remit.

I also support what is said by the committee regarding Orders in Council. I think that the committee uses the phrase that they should be 'broadly framed' in future. There is evidence of them resembling the long title of a parliamentary Bill rather than going into explicit detail, which I welcome and support. I also noticed an interesting suggestion that the achievement of Orders in Council should not be seen as a virility test on behalf of a Minister, nor should failure in that regard be seen as a reason for criticism by the opposition. I wonder whether we will arrive at a situation in which either of those will be realised in practice.

Finally, I agree with Elin Jones on the issue of the Welsh language. Elin has said that the Assembly must take responsibility for the Welsh language, and I agree.

**Michael German:** I also thank the Presiding Officer, not only for the speedy task that he undertook but for the weight of the task that he and the committee undertook. I also link with that those officials who serviced that committee, who must have been very fast readers. I know that they took a lot of work home with them to read overnight. It was a job that needed doing swiftly and it was done very well. We must commend the committee for that work.

The results and the recommendations contained in the report are clear and all supportable. In any document that has to represent all of the political persuasions in the National Assembly, it is clear that there are some issues mainly of a political content that have been left out. I want to remember that political implication at the beginning. I believe that we have missed an opportunity to take forward the work of the Richard commission. It struck me that we had a comprehensive report from the Richard commission, not only



on a route map for the future, but a clear destination laid out with a timetable. I believe that this Bill, when it appears, and this White Paper have missed that opportunity.

I agree with Leighton Andrews that the White Paper takes us down a pathway towards more legislative powers. I described it to Peter Hain, when he was here, as an ingenious proposal. It takes us down a pathway that assuages the problems that Peter Hain finds within his own party in Parliament and the needs of taking forward legislative powers, in which I think that he also believes. Having found that balance, it is an ingenious solution. However, so far, he has provided us with an incomplete document because, essentially, the White Paper as we see it is a document on how the Government should be organised in Wales and does not tell us about how the legislative side in Wales should be organised to match it.

There are also key issues about scrutiny that were alluded to in this document, which need to be brought clearly into a Bill, enabling those changes to take place.

However, if all of these were put together, it is clear that the key issue is Orders in Council and how they operate—both within the National Assembly for Wales and, when they arrive, the process by which they arrive, and the process by which they are dealt with in Westminster. The report is accurate that Orders in Council should be written as broadly as possible, because that means that powers will accrue over time.

Will the Presiding Officer, and whoever may respond on behalf of the Government, comment upon the evidence of Professor Patchett concerning what happens to an Order in Council in Parliament. Professor Patchett suggests that there may be obstacles to face, concerning, for example, the amendment and repeal of existing Acts when you have accrued power, and also concerns expressed within the Regulatory Delegated Powers and Regulatory Reform Committee about Henry VIII clauses and so forth. If there is resistance to broadly based powers in the context of parliamentary procedure at present, how will we be reassured that the National Assembly will be able to conduct and transfer those Orders in Council in a proper and appropriate manner? That is another fundamental weakness that has been highlighted not only by academics, but by politicians. I await an answer on that matter.

The last issue that I want to raise is that of the Secretary of State's discretion when those Orders arrive. One of the hidden gems of the White Paper, brought forward by the Secretary of State, is the power that it creates for him as gatekeeper of what the Assembly does. Is there a compelling reason for the Secretary of State to have discretion over whether an Order in Council, properly debated and finalised by the National Assembly, should be laid before Parliament? I know that it is unusual for non-Members of the Houses of Parliament to insist that Orders be made, but there are precedents, including boundary commissioners and parliamentary and local government. The affirmative resolution model already has the threshold of requiring approval from both Houses, so to require the tacit approval of the Secretary of State as well seems an unnecessary, high threshold.

In conclusion, the White Paper has chosen to go down routes that we, as Liberal Democrats, would not have chosen as the way ahead. There are problems and inherent weaknesses, but an enormous amount of work needs to be done to put this legislation in such a place so that we can exercise the powers that we need for effective scrutiny. I do not think that this White Paper offers the solutions to the problems outlined.

**Peter Law:** I commend the Llywydd and his committee on their hard work. I find myself in general agreement with most of the report's contents. It contains many common-sense



proposals to which other Members have referred, and it is in the interests of this, our central democratic institution in Wales, for which we waited 600 years. Therefore I am pleased to support it.

I was concerned that our Standing Orders could be drafted by the Secretary of State, and I was glad that the First Minister clarified this yesterday, saying that the Secretary of State did not want to draft Standing Orders. Had that been the case, we would, once again, have been relegated to having less power than a community council, which can draft its own standing orders. Of course, we cannot have any fund-raising powers, so it is important to make the point that we do not want people trying to work us with their foot and second-guess us.

I noticed a reference to section 47 of the Scotland Act 1998 being considered for Wales, which I would support, and also the recommendation about the statutory basis for Deputy Ministers. Most Members will know that I do not believe much in Deputy Ministers. In this institution, they are the worst example of political patronage that I have ever come across. The leader of Forward Wales, in the last debate, referred to how this post can be used—and I have seen it used very well by the First Minister in the Labour group. One has to question the worth of Deputy Ministers, because I have always seen them as window dressing. I am still waiting for someone to tell me what they do and where they go. A report in the Assembly telling us what each Deputy Minister does would be in the interests of democracy and openness. I think that committee Chairs do far more valuable work than Deputy Ministers, and I certainly would not support the principle of their being paid as I do not believe that they justify payment. I would not support that and record my views on that now.

Generally, however, I think that what has been done in the White Paper is in the interests of Wales and this institution in terms of moving forward; I hope that I will be able to help in another place with other people when we try to move forward as far as this institution is concerned.

**Jenny Randerson:** I make my remarks as Chair of the Business Committee. One issue that has been of great concern, to which Peter has just referred, relates to the idea that the UK Government might draft our Standing Orders for us. I am pleased that the First Minister has indicated that they may be rowing back from that position.

As many of you will be aware, the Business Committee deals with Standing Orders, and proposes Standing Orders that come to the Assembly when they need to be changed. In the more than two years that I have been Chair of that committee, we have seen numerous revisions of Standing Orders, ranging from the routine to fundamental changes to how something operates. For example, we spent many months considering and discussing the Standing Order No. 31 legislation on private Bills in order to get something that worked politically and hung together in terms of a Standing Order.

Drafting Standing Orders that will be respected and workable requires not just drafting expertise, but political discussion as well. The original proposal that the UK Government would draft Standing Orders for us was not just patronising, but unworkable. We must have what will work here. We have the expertise among our officials, and we have not only the experience but the common sense among our Members. The UK Government should be used only as a backstop or a fall-back position if we do not manage to agree among ourselves. However, it would be highly unlikely that we would be in that position.

I therefore welcome the strong support for this view in the report. However, it is important that we get an answer on this issue as soon as possible from the UK Government,



because we need to get on with the job if we are to be ready for 2007. The review of Standing Orders will be fundamental. That does not mean that we will throw out everything that we have, but we must consider the separation of the Assembly from the Government, the need for a different and more rigorous role for committees in terms of legislation—or the need for separate select committees for legislation—and the need for new legislative processes in the Assembly. All those will require changes to Standing Orders.

We have big decisions to make on the future committee structure. I say that hopeful that the Government will be permissive in the way that it writes the new legislation, and that we will not be prescribed in the number of committees that we have, and so on. I welcome the committee's report on this issue.

The Business Committee visited the Scottish Parliament earlier this summer. We saw how its committee system works, with weekly meetings—sometimes more often—with a heavy committee workload. We must find a good, practical way forward that provides the scrutiny of legislation and of Ministers—I personally hope that policy development will still be a part of their role. All those things must be made to work for a body of only 60 Members. Now that we are looking at taking the Ministers out of the committee structure as part of that separation, even fewer Members will be working in a tough situation.

We will have to ensure that we also have an effective system for dealing with private Bills. I agree with this report that the new Act should be drafted as widely as possible, but the fundamental issues that I have raised, such as the committee system and how we consider legislation here, need an early decision by the UK Government. We need an early indication so that we can get on with the work.

Finally, as a post script, I welcome the proposal that we should be allowed to change our name. I believe that we should call this a senedd. The word 'senedd' is beautifully understandable in both languages and is also distinctively Welsh.

**Jocelyn Davies:** We know that the Assembly's current legislative position is unacceptable, and it is now accepted wisdom that the powers transferred to us in 1999 were devoid of any logical pattern and were inadequate for national governance.

However, that did not prevent the wholesale overselling of the last White Paper, and many in the Chamber, including me, were guilty of that. Here we are again. This White Paper has been produced by a most skilled and experienced operator, and, no doubt, is the result of hard negotiations. I would go as far as to say that it is ingenious, as Mike German described it earlier, because it manages to reconcile the pro-devolutionists with the anti-devolutionists. However, we will find, over time, that you cannot please all the people all the time, and although Orders in Council manage to preserve parliamentary sovereignty while holding up a promise of enhanced powers, the White Paper is a little vague for my liking. I have the feeling that we have been here before, and, this time, we have hindsight. That vagueness, deliberate, perhaps, so as not to offend, was reflected in the evidence that we gathered as a committee, where quite different interpretations were made of the White Paper.

Those who were enthusiastic about the proposals claimed that stage 2 could be an enduring and stable position, while the more cynical argued that its obvious flaws would bring about its demise in little more than the blink of an eye. We shall see, and the evidence shall be easy to see because the White Paper, issued in June, says that, from now on, the Assembly shall be granted wide and permissive powers in all new Westminster Acts. Bills being written now will demonstrate the truth or otherwise of that



statement, but I remain a little sceptical. This prospect has been raised several times since 1999, and we have been disappointed every time. Individual UK Government departments have resisted devolution, and it will be a big task to change those attitudes.

That brings us to the important question of what principles will underpin this new phase. Will we need to justify the use of the powers that we request in Orders in Council? Will we be asked why we want certain powers, and only granted them if the implementation meets with approval, or will Westminster want to ensure that the Assembly is empowered to properly serve and govern the Welsh nation? The White Paper is strangely silent on that point. It is also ironic that, post-devolution, we are considering proposals that place such great power in the hands of the Secretary of State for Wales. The Secretary of State's role will be pivotal and his or her goodwill vital. That is not an acceptable situation. We should not be pursuing a route that relies on goodwill and personalities. How sustainable is that? It will be unstable and undesirable in the longer term.

Another irony, perhaps, is the use of Orders in Council as the main tool for empowering the Assembly. Orders in Council are based on the royal prerogative. Can you believe that we are seriously considering governing a nation with a legislative system based on the royal prerogative? Orders in Council will not be the only source of legal powers, because these proposals further complicate an already complex situation. I would not be attracted to it even if it amounted to primary powers, which I very much want. I do not want them through the back door. I find it objectionable that this could amount to primary powers, but you will not find that in the White Paper, because we must not let the public in on the deal. However, even if you overlook the sleight of hand, you must admit that the Secretary of State has the only key to that back door. This is not the way forward for us. Plaid Cymru will not make the mistake of overselling this White Paper, as we did with the last one.

David Melding: The Conservative group set out its concerns and reservations in the amendments listed in annex D of the report, and I will not trouble the Assembly by repeating them here, but I will emphasise some things. I am grateful to my colleagues on the committee and all the officials who helped us. I also note the constructive way in which we focused upon those issues on which we may get agreement. Other issues were pretty much left out of the picture, although I will refer to them in my general remarks about the White Paper. The things that are, rightly, welcomed, are, for example, the executive/legislative split, which will make the form of government in Wales much more akin to the Westminster or British model.

On the wider powers in secondary legislation, I can see no problem with that. It is clearly not a constitutional innovation, but an extension of existing practice. Also, greater co-operation with Westminster has not been mentioned yet, but in terms of scrutiny and even joint working on Bills in draft, that seems to me to be a proper way to develop the National Assembly.

However, some of the logical bridges have not been crossed. I believe that we should move immediately to a referendum on the issue of primary powers and settle the question once and for all. The Labour Party's lack of confidence is rather curious and probably demonstrates the divisions within its own ranks rather than a lack of confidence in the people of Wales.

**Jeff Cuthbert:** Will you satisfy us by saying that, in any proposed referendum, your party's proposal that there be an option of abolishing the Assembly would not be included?



**David Melding:** As I am not the leader of my party, I could not possibly give that assurance, but in any referendum that is held on primary powers, I will campaign in favour of primary powers and will vote for them.

The Orders in Council route is potentially confusing; its chief attraction for the Labour Party is that, in its view, it avoids the necessity of calling a referendum. Yet if the Orders in Council process works, it will amount to primary powers. Indeed, the only way that it can work is if the Secretary of State more or less agrees to all the requests for Orders in Council. This was certainly the view of most of the witnesses that gave evidence. We have an odd structure in the Orders in Council proposal; it is a curious case of lamb masquerading as mutton, which is a very un-Welsh thing to do.

The role of the Secretary of State is profoundly confused. On what grounds could he decline a request for an Order in Council? This will be a critical constitutional question. If he is not removed from the process in terms of denying requests on policy grounds, and still has the power to deny a request on the grounds of policy, then sooner or later Cardiff and Westminster will be at loggerheads, and this will be deeply damaging for the devolution project.

Then there is the great silence on the question of regional candidates not being able to contest constituencies. I know why we did not address that in the committee, and I agree that we should not have looked at it, but I will not be so polite in this debate. This is designed to be highly disruptive to the opposition parties. The influential Institute of Welsh Affairs has only been able to identify one other country that uses the additional member system and has attempted this exclusion—Ukraine. Not content with this nobbling policy, the Ukrainian Government then proceeded to poison the leader of the opposition.

**Jeff Cuthbert** *rose—*

**David Melding:** I am not taking another intervention. As Chairman of the catering sub-committee I assure my colleagues in the opposition parties that the canteen has been put on a strychnine alert. The dark rumour going around that Rhodri visited the kitchens yesterday is being investigated. [*Laughter.*] I was going to call for a formal inquiry, but we do not have the mechanism to do that until the Government gets a motion through this place.

However, is not stopping candidates having the right to election by the means that they choose a mean and meagre thing to do? It is designed to hurt the democratic process, and it demonstrates the Labour Party's fury that devolution has given Wales a more competitive political system. That is what has caused this policy from Labour, and it encapsulates Rhodri Morgan's leadership. We would not have had this miserable policy proposed by the likes of Ron Davies—he had far too much generosity of heart not to see what is needed to foster stable institutions. When I look at the First Minister, I am reminded of Goethe's devastating judgement: this great epoch meets a petty generation.

**Kirsty Williams:** I also express my thanks to the Chair of the committee and the officials who were responsible for supporting our work over the summer. As has previously been stated, the Labour Party deserves full marks for its ingenuity in the White Paper. We will have to wait for the marks for sustainability. Rather than the blink of an eye, Jocelyn, I think that it will be a change of administration in either place that will truly judge whether what is proposed in the White Paper is sustainable for Wales. However, the committee had to work with what it had to work with, and I welcome the way in which we tried to achieve consensus on what will be fundamental changes to how this institution works. Mike has already touched on some of the key problems in regard to scrutiny and the

Secretary of State. I will pick up on some of the issues that, from our experience of the Scottish system, we will need to look at as we move forward.

For some, Sewel motions, as they are referred to in Scotland, have been a source of contention. However, it is apparent that we will need a similar mechanism here in the National Assembly when the appropriate time comes. We also have the challenge of 'policing the border'. In Scotland, the Advocate General, whose role it is to judge where the devolution line falls between the responsibilities of the Scottish and UK legislatures, has a very powerful and clear role. Given the clarity of the settlement in the Scottish context, he is able to do that. In Wales, as we move along this route, our settlement will have many grey areas; indeed, I suspect, more grey areas than are to be found in many Conservative AMs' wardrobes. To address that problem, we will need a strong advocate general.

We also need to ensure that, as in Scotland, individual Members and committees will have the ability to propose Orders in Council. It cannot be right that it is the prerogative of only the Government to put forward requests for Orders in Council. We need to develop mechanisms to enshrine the rights of individual Members and committees to contribute to the law of Wales.

I welcome the approach that the committee took in general with regard to trying to ensure that, in many ways, the Bill that will result from the White Paper will say as little as possible. It is only right that the majority of decisions mentioned in the White Paper—including perhaps decisions on some of Gwenda's issues of concern, such as equality of opportunity, duties of sustainability and so on—should be made here and enshrined in our Standing Orders. It would demonstrate to the world that decisions are not being imposed upon us by another place, but that our Members are taking positive decisions here to protect the way in which we operate.

I am, always have been, and always will be, an absolute enthusiast for devolution. It must be so; the *Western Mail* tells me that I am. However, let us not be lulled into a false sense of security that the new powers outlined in the Bill, or even a clear-cut parliament, are the answer. The answer does not lie solely in the structure of any Government of Wales. It lies with the Members of that institution and the political parties of Wales. We must remember that it is not simply the ability to pass laws that will solve the problems of the health service or the problems of the jobless and the deprived. Nor can it be an excuse, for the next 18 months as we move to this system, to do nothing. It is not an excuse to say that we will have to wait until the powers come.

Sometimes I think that we need to ask the question, 'Have we been good enough?'. If you asked the question outside the Chamber and outside the chattering classes of Pontcanna and Llandaff, the answer from many of our constituents would be that no, we have not; we have not been good enough. Whatever set of powers we have, we must up our game, collectively. That is the real challenge of devolution.

**Glyn Davies:** I, too, would like to associate myself with the remarks made congratulating the committee on the report. The report raises a huge number of questions, but I want to concentrate on just three points. They all concern the principle of holding the Executive to account. Although I am the Chair of the Legislation Committee, I am speaking in an entirely personal capacity.

One question that I must face is whether a Legislation Committee is necessary. It seems to me that there is a job to be done, which the Legislation Committee is now doing. That seems to be as good a way of doing it as any. What concerns me more is a job that, in



my view, is not being done properly, because there is a need to establish some sort of mechanism in the Assembly to decide what constitutes a significant statutory instrument.

There is some work going on, in that statutory instruments are presented to committees and those committees decide what they want to look at in detail. However, that process seems to be rather too random to be effective. This issue has clearly focused minds at Westminster, and the House of Lords has established a Select Committee on the Merits of Statutory Instruments. The purpose of that committee is to look thoroughly at all the statutory instruments that come before the House of Lords and to decide which ones are significant. It then makes reports, which are made public. Those reports are quite often picked up by Members, who are made aware of what is important.

I do not think that our current arrangements are acceptable, and they are simply not doing the job of examining statutory instruments under the powers that are currently devolved. I am pleased that the Legislation Committee has agreed to visit the merits of statutory instruments committee at the House of Lords, and I hope that we can build on that here.

The second point that I want to make is perhaps rather more fundamental and it relates to paragraph 64 of the report, which says that

'the Government intends immediately, in drafting primary legislation relating to Wales, to delegate to the Assembly maximum discretion in making its own provisions, using its secondary legislative powers'.

Clearly, that does not happen. In the 18 Bills that we have before us, that simply will not happen, and if it did, it would lead to such a dramatic change to the way in which we function that we would probably not be able to cope with it. It does not happen in Scotland because the Sewel principles, which Kirsty Williams mentioned earlier, are quite often used to enable some of that decision making to be referred back to Westminster. That is a sensible mechanism.

We need to have a non-governmental mechanism to establish what maximum devolution using framework powers is. It is no good leaving that to the Government, either here or in Westminster; it has to be done by some sort of non-governmental body, which would probably involve the parliamentary staff, the Members' Research Service and the legal team in preparing a judgement. That judgement should be put alongside what is currently presented to committees and it should be made public so that we know where the Government is not maximising in the way that it promised under the White Paper.

Some of this framework power would have to be referred back to Westminster because of the difficulties related to the sheer workload. Where that happens, the work should not be done just by a Minister, in conjunction with Westminster, without any input by the Assembly. When a Minister decides that he or she wants to refer back to Westminster powers that should fall to us under framework legislation, that should be made public and it should be referred to the Assembly. If the Government can carry it through the Assembly, that would be fine, but there should be an opportunity in the Chamber for us to disagree with it.

Thirdly, on Deputy Ministers, I disagree with the report. I agree with the point that Peter Law made, not for exactly the same reasons, but I disagree fundamentally with the suggestion that the payroll vote should be any bigger than it is now. If any institution is to function properly, it has to be held to account and it has to be held to account in part by its own side. If you have a majority of Members who are effectively on the payroll of the First Minister and the Government, you will simply not get that. You will have the bulldozing



that we sometimes see here and it will bring the whole devolution process into disrepute. I have no objection if Deputy Ministers take the place of Ministers, if the number of Ministers is reduced. There may be scope for increasing the total number if, at some stage in the future, there were an extra 20 Members. I could accept that, but there is no case at present for formalising the status of Deputy Ministers. On that point, and that point alone, I disagree with the recommendations of the report.

**Elin Jones:** I will restrict my comments to paragraph 76 of the report, and I thank Leighton Andrews for his supportive comments with regard to that paragraph.

When I first saw the White Paper, I was not happy to see that it would not be possible to transfer powers to legislate in whole areas through a single Order in Council to the Assembly. Therefore, I gave evidence to the committee outlining how the Welsh language should be exempted as a whole from that clause, and I am pleased today to see that the committee has agreed that special provision will be needed within the Bill with regard to legislation concerned with the Welsh language, and that it is the Assembly that should be considered the most appropriate institution to legislate on the Welsh language.

I know that the First Minister, during the summer, made the odd remark that the subject of legislation on the Welsh language is 'boring', but it is not so for me, and I may be a bit of an anorak in this regard. I hope that giving legislative powers over the Welsh language to the Assembly would be a means to make the subject more exciting and dynamic, but, most of all, more effective with regard to safeguarding the future of the language. I hope that every Member agrees—the committee agreed on this point—that the Assembly is the most appropriate institution to legislate on the Welsh language.

At Westminster, the time allocated to Welsh-language issues, and interest in them, is scarce, and that is reflected in the fact that there have only been two Acts of Parliament relating to the language in the past century, and it is almost impossible to expect that one Act every 20 years or so can cover everything required with regard to the Welsh language. It would be much better to see an Order in Council transferring to the Assembly all aspects of Welsh-language legislation, thereby giving it the flexibility to respond to the political will of the Assembly to draft Bills on the Welsh language, be they to establish the post of dyfarnydd, on the use of the language in the field of planning and education, or on any other matter. That would create a far more sensible legislative system to deal with a subject that can only be of specific interest to Wales. It would also change the protest mindset that views a new language Act every now and then as a panacea.

Legislation is needed to strengthen the status of the Welsh language, and I am in no doubt about that, but equally important is the fact that it is the political will of Wales in the Assembly that should lead to a decision on when to legislate, and on which aspects, to safeguard the future of the Welsh language.

**The Business Minister (Jane Hutt):** I think that we all acknowledge that the 'Better Governance for Wales' White Paper, published by the Secretary of State in June, represents a significant step forward for devolution in Wales. It allows and enables the executive and legislative branches of the Assembly to deliver for the people of Wales. As the First Minister said, it is about having the tools for the job of taking devolution forward. The importance of the White Paper to the Assembly, and the interest that the parties have in it, was reflected, as has been said this afternoon, in the speed with which the ad hoc committee was established, the series of detailed evidence sessions held, and the report produced. That was no small achievement, and I join the Presiding Officer and other speakers in thanking the witnesses, who gave evidence at short notice, and the staff of the Assembly Parliamentary Service who supported the committee in its work. I also

thank my fellow committee members, who attended many meetings during the Assembly term and the summer recess.

We faced quite a challenge as an ad hoc committee. It is important to note that, as is normal with any White Paper, the Government's proposals are set out in broad terms. The points of detail relating to how the proposals will operate in practice will, of course, be dealt with during parliamentary scrutiny. Members rightly raised questions about that detail and the new routes when they gave evidence, to tease out how this will be taken forward. The report recommended that, as regards Orders in Council, they should be broadly framed, with the Secretary of State and Parliament deciding on the appropriateness of devolution to Cardiff, and not on the detail of what the Assembly, or Welsh Assembly Government, will do, and we fully support this view.

We must not forget the opportunities that the White Paper provides. Do not mock them, Jocelyn; you and Mike said that it was an ingenious route—let us make the most of it. That is what we explored very effectively in the White Paper report.

Kirsty, with regard to your point, it provides an opportunity for us and the Secretary of State for Wales to consider the views about whether Assembly Members and committees should be able to propose Orders in Council. It was important that that was expressed and aired, and that evidence was given to the committee, for us to consider these points.

We have a very helpful document that will, most importantly, map out areas of agreement. We must welcome those areas of agreement. It also marks out the issues for further detailed discussion.

I wish to focus on the point raised by Gwenda Thomas. Gwenda, you made a very pertinent contribution, because you brought your unique experience as Chair of the Committee on Equality of Opportunity to bear on one aspect of the report, as you did in giving evidence to the committee. I am grateful that you have raised your concerns, as it enables me to raise the issue with the Secretary of State for Wales. You rightly draw attention to the groundbreaking commitment to promoting and safeguarding equality of opportunity in the current Government of Wales Act 1998. These existing duties have served the Assembly well—sections 48 and 120—*[Interruption.]*

**The Deputy Presiding Officer:** Order.

**Jane Hutt:** We must work towards ensuring that the new arrangements provide a no less powerful platform than we have at present for promoting equality of opportunity by the executive and legislative sides through the proposed National Assembly commission. It will be equally important that the pioneering work currently undertaken by the Committee on Equality of Opportunity is taken forward. I am sure that colleagues across the Assembly would agree with that.

Elin, I am glad that you welcome the reassurances that the committee received in clarifying points that emerged as a result of the White Paper in relation to the Welsh language. It was key that we could clarify, take this forward and come to an agreement about our interpretation and how we would like to see it reflected. So, the committee and the report provides a very useful contribution to the considerations of the Wales Office during the development of the Wales Bill.

I want to point quickly to other issues raised. Leighton and Jenny talked about the flexibility that will be offered in terms of our committees, and this relates to structures, membership and the role of Ministers, and to ensuring that we can regulate our



committees via Standing Orders. The evidence given by Christine Gwyther to the committee was very important and reflected the views of the Panel of Chairs. This is key to taking things forward.

I will respond to the issue raised by Jenny, Peter and Ieuan about Standing Orders. This was raised by Nick yesterday, and the reassurance and the response that came from the First Minister clarified the point. The First Minister stated during his evidence that the

'Secretary of State has been quite clear that he does not want the job of drawing up the Assembly's Standing Orders, but he may need to be involved in resolving any stalemate which may arise'.

This is the position that the First Minister restated in answering Assembly questions yesterday. Jenny, it is, of course, up to us to demonstrate that we can embrace the challenge that has been offered to us, and I am sure that that is what we will do.

I end by thanking everyone who has contributed to the White Paper committee report. This is another opportunity for the Welsh Assembly Government to welcome the important contribution. As the First Minister said in his statement on the White Paper, when it first came to us in June, as far as devolution is concerned, we do not think of it, we implement it.

**The Deputy Presiding Officer:** I call on the Presiding Officer as Chair of the committee to reply.

**The Presiding Officer:** I am grateful to the Minister for her comments and her response to a number of you. I do not intend to respond to the Minister's speech. The Minister and I have a history of collaboration on equality issues going back quite a few decades, and it is my hope that that continues.

Some speeches went beyond our report as a committee, and I do not intend today to go further along those lines.

My intention, in chairing the committee, was to produce a report based on evidence. I frequently listen to what Ministers say in this place and I have heard a number of Ministers say that such and such was evidence based, so I hope that this report is of a similar nature.

We sought consensus where possible but we also sought a critique of the more woolly elements—as the leader of the opposition referred to them—in the White Paper. That was the intention of what we produced. We produced and published it all in-house, as it were—to praise ourselves once again as the Assembly Parliamentary Service—and I hope that our tying the report to the evidence will mean that our fellow parliamentarians, be they Members of Parliament or members of the House of Lords, will read this report. As we know, we have produced a report long before the House of Commons, in the Welsh Affairs Select Committee, starts working on this—to praise ourselves once again. I hope that this report will influence the mind of the Secretary of State and the officials of our Government in Wales as the Bill is prepared.

The leader of the opposition and several others referred to the attitude of the Westminster Parliament, namely the House of Lords and the House of Commons, towards any prospective Orders in Council. I am not sure whether it is appropriate for me to say this, but, as I have a foot on the other side of Paddington station, as it were, as well as on this



side, I believe that the attitude of colleagues, in the House of Lords in particular, will be more constructive towards devolution rather than obstructive.

Mike German referred to the Delegated Powers and Regulatory Reform Committee. As Mike German knows, that Committee is chaired by Lord Dahrendorf, who is a great supporter of devolution. He understands the principle of the distinction between a piece of legislation, such as an Order in Council, being discussed in the House of Commons and House of Lords and the details being prepared by an elected body, and Orders in Council that confer powers upon Ministers. That distinction has already been understood in the House of Lords, and I hope that that principle will operate as Orders in Council are prepared. Therefore, I agree with the leader of the Conservatives, who emphasised that these Orders must be broad and that they must have adequate scope.

The Minister has answered the point made by Gwenda Thomas about including the obligations of sections 48 and 110 of the Government of Wales Act 1998 on the face of the Bill. There is correspondence between Gwenda and me on this matter, namely a letter from Gwenda dated 13 September and a reply from me. I am willing for that correspondence to be shared with other Assembly Members. The disagreement between us, as Kirsty Williams said, is about where that responsibility lies, rather than about an awareness of our responsibility for equality. Gwenda said that no other legislative body is obliged to consider equality issues, but my argument is that there is no need to set obligations on us here; our work as elected Members is to implement equality. I would argue, perhaps even more controversially, that that is true of obligations to operate bilingually. I do not believe that a legal obligation needs to be placed on the National Assembly to be bilingual; we have proven in our procedures over the past six years that we can do that. Perhaps that should also be a matter for our Standing Orders, but that is a more controversial topic. I will not go down that path, because it was a personal view.

I am grateful to Leighton Andrews for his praise for the beauty of committees without Ministers, or at least for committees to which Ministers are invited for discussions and to give evidence.

I think that we will look back on this period when we had some sort of inclusive politics as some kind of democratic misunderstanding. I think that inclusivity and collaboration in politics happen after a substantial debate on an issue as been held. Therefore, a committee that tries to be inclusive should not take the place of real politicking; it should be something that follows the political process.

I also accept what he says about having more frequent sittings, and I noted that the Secretary of State said that we do not work hard enough; given that the House of Commons and the House of Lords are still on their summer recess, it could be said that they do not work hard either. [*Laughter.*] I thought that that would go down well with some of you.

I have already referred to the comments made by the leader of the Liberals on the delegated powers committee. I wish to refer also to what he said about the Secretary of State's discretion. That is why we emphasise that any reasons given for not accepting a request for an Order in Council should be put in writing to the holder of my post. That was included because I hope that we will be able to develop some kind of constitutional convention whereby a letter of apology from the Secretary of State will become another step in the process of devolutionary debate. In setting that in the public arena, it would be possible to discuss it fully, and the Secretary of State's reasons would become a matter of constitutional interest.



Peter Law and a number of others referred to the question of drafting Standing Orders. I am grateful to the First Minister for what he said in response to a question yesterday. I believe that we can find common ground between us and Westminster on this issue as long as we continue to work on the subject.

I am also grateful to Peter Law for tabling several parliamentary questions on the way in which Parliament deals with legislation. Glyn Davies also referred to this and the degree to which parliamentary Bills follow what is stated in paragraphs 3.9 and 3.12 of the White Paper, which are referred to in paragraph 64 of our report. I am sure that we will all in our committees keep a close eye on the way in which various Westminster Government departments currently draft legislation. I am certain that Peter Law, and any other Member who is also in the House of Commons, will keep an eye on this on our behalf.

I am also grateful to Jenny Randerson, as Chair of the Business Committee, for emphasising the way in which we have already completed substantial reviews on our procedures here. I wish to add a personal note here. I hope that all the effort made by my officials in drafting regulations to me so that I can give specific rulings from the Chair, and all the precedents set, are not swept aside. I do not want to see us forgetting everything that we have already established here in our procedures and Standing Orders. The third Assembly should be a development of the first and second under the new structure; we should not start with a clean slate, although we will be working among many clean slates in the new building.

I wish also to thank Jocelyn Davies for emphasising the various interpretations seen in the evidence on the White Paper. That points to the political dynamic of the whole process. Over the past six and a half years, our internal politics have changed the constitution of Wales. The partnership and the debates between us have led to the demand for the new constitution and Act. It is the political process here, of course, that will develop it all.

On Jocelyn's point, the UK Government has governed by royal prerogative throughout the centuries. It has done so in Northern Ireland, as we know, and consistently in Westminster. What is of great interest to me is that the royal prerogative will possibly be the means of strengthening devolution and will bring primary legislation to the Assembly.

David Melding emphasised that we are now moving to a final separation between the legislature and the executive, between the administration and the parliament, and that we are moving towards that by emphasising the possibility of collaborating with Westminster on draft Bills. I hope that that work, which has been started in such an excellent fashion by Members of various committees, will strengthen.

I also thank Kirsty Williams for agreeing to the principle that as little as possible should be on the face of the Bill. That is, there is a need for the Bill to be—

**The Deputy Presiding Officer:** Order.

**The Presiding Officer:** I have 15 minutes in which to speak.

**The Deputy Presiding Officer:** Order. I hesitate to interrupt the Presiding Officer, and I do so with great diffidence, but he is in danger of talking us out of business for the rest of the afternoon if he goes beyond 5.00 p.m.

**The Presiding Officer:** I have every intention of using my 15 minutes. If you would like me to sit down to allow a motion on the business, I will do so, but I wish to continue my remarks up to my 15 minute limit, which I believe is my right.



**The Deputy Presiding Officer:** You have a couple of minutes left.

**The Presiding Officer:** I am grateful to you, Deputy Presiding Officer.

As I said, the principle is that as little as possible should be placed on the face of the Bill so that our Standing Orders—which are ours—should be the way of running our business.

I have referred to what Glyn Davies said, so I will conclude therefore with the emphasis placed by Elin Jones on legislation pertaining to the Welsh language. This is an important principle regarding the Welsh language, but it is also important in terms of the difference between an entire subject and a policy area. If there is any fudge in the White Paper, I am afraid that this is where it is. If trying to get clarity in an Order in Council on the Welsh language will help to bring us to a position where we better understand a constitutional matter, then that will benefit us all.

I do not believe that it was our intention to increase the number of those on what is called the 'payroll vote' regarding the recommendation about Deputy Ministers, as suggested by Glyn Davies. The intention was to give the Government in Wales flexibility in choosing between Deputy Minister and full Ministers. It was not our intention to increase the number of people who work for the Government.

I thank everyone who contributed to the debate and hope that the discussion promotes the process of devolution.

### 3 Responses to Peter Law AM MP's Parliamentary Questions regarding The White Paper, Better Governance for Wales

*Peter Law AM MP tabled questions to a number of Government departments inquiring how they intended to implement Paragraph 3.12 of the White Paper, Better Governance for Wales, namely:*

The Government believes that there should be a more consistent approach to drafting legislation for Wales. It also recognises that legislation made by the Assembly is subject to scrutiny by Assembly Members using procedures at least as rigorous as those available to Members of Parliament. In the light of that, the Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales.

*The question posed to each department was as follows*

**Peter Law:** To ask the Minister of State / Secretary of State, for... how he/she intends to implement Paragraph 3.12 of the White Paper, "Better Governance for Wales" (Cm 6582), in respect of any Bill she introduces in the current session of Parliament.

*Responses are reproduced below.*

Department of Constitutional Affairs

**HC Deb 5 October 2005 c2791W**

**Ms Harman:** I intend to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better governance for Wales" Cm 6582. My Department is in discussion with the Assembly Government on the issues concerned.

Office of the Secretary of State for Wales

**HC Deb 25 October 2005 c253W**

**Jane Kennedy:** I have been asked to reply.

The Department intends to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better governance for Wales" Cm 6582. Officials from the Department are in discussion with their counterparts within the National Assembly for Wales on the issues concerned.

Department for Education and Skills

**HC Deb 12 September 2005 c2377W**

**Jacqui Smith:** I intend to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better Governance for Wales" Cm 6582. My Department is in discussion with the Assembly Government on the issues concerned.

Department for Transport

**HC Deb 5 October 2005 c2849W**

**Derek Twigg:** We intend to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better Governance for Wales" Cm 6582. We are in discussion with the Assembly Government on the issues concerned.

Home Office

**HC Deb 12 September 2005 c2633W**

**Andy Burnham:** The Home Office is in discussion with the Welsh Assembly Government on the issues relating to paragraph 3.12 of the White Paper "Better Governance for Wales".

Department of Trade and Industry

**HC Deb 10 October 2005 c45W**

**Barry Gardiner:** The DTI intends to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better Governance for Wales" Cm 6582. The Department is in discussion with the Assembly Government on the issues concerned.

Department of Culture, Media and Sport

**HC Deb 13 September 2005 c574W**

**Mr. Lammy:** I intend to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better Governance for Wales" Cm 6582. My Department is in discussion with the Assembly Government on the issue concerned.

Department of Environment, Food and Rural Affairs

**HC Deb 5 December 2005 c2809W**

**Mr. Greg Knight:** I intend to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better Governance for Wales" Cm 6582. The Department is in discussion with the Welsh Assembly on the issues concerned.

Treasury

**HC Deb 5 October 2005 c2844W**

**Jane Kennedy:** I have been asked to reply.

The Department intends to implement the Government's policy as stated in paragraph 3.12 of the White Paper "Better governance for Wales" Cm 6582. Officials from the

**Members' Research Service: Research Paper**  
**Gwasanaeth Ymchwil yr Aelodau: Papur Ymchwil**



Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales

Department are in discussion with their counterparts within the National Assembly for Wales on the issues concerned.

Office of the Secretary of State for Wales

**HC Deb 11 October 2005 c437W**

**Yvette Cooper:** I have been asked to reply.

The Office of the Deputy Prime Minister will be introducing a bill to defer council tax revaluation. This bill will apply only to England.

#### 4 Proceedings of the Welsh Affairs Committee, 18 October 2005: Government White Paper – Better Governance for Wales

Welsh Affairs Committee, *Better Governance for Wales*, 18 October 2005 HC 551-i

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

Mr Keith Bush, Legislative Counsel, the Directorate of Legal Services and Airbus UK, Welsh Assembly Government.

**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.

**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.

**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.

**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 contention.

**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?

**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.

**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.

**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.

**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.

**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.

**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 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.

**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.

**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 will be referred to on the face of the legislation.

**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, so that, 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 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 resolution, 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.

**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.

**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 Angel 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 the 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 capacity or 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.

**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 would 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.

**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.

**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 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.

**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.

**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.

**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.

**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. 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.

**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.

**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.

**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.

**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.

**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 timescales limits set. The effect of a "No" vote would be simply that the Assembly carried on as it was.

**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.

**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.

**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?

**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.

**Memoranda submitted by Institute of Welsh Politics, Professor David Miers and Professor Richard Rawlings**

Examination of Witnesses

**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.

**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.

**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 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 say 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 Sewell 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 is 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.

**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.

**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 so important that it should not be simply a matter for Ministers in Cardiff, it should be for all the representatives in the Assembly.

**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.

**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 he is 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 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.

**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 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 that because I did not quite follow if the answer that was given was that it is the current fields under the 1998 Act, but 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.



**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 co-terminus - 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.

**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.

**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 goes 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 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.

**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 are 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 me 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 on 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 of 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 those models and what the current thinking is about the choice of those 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.

**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 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 on the one hand 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.

**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 from 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 of 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, it 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.

**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 the 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 raising what I think is a fundamental issue that is being glossed over.

**Chairman:** Nia Griffiths.

**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?

**Q46 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 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".

**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 applies 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?

**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.

**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 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.

**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.

**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 a beneficial interest-partisan, cross-party basis. Therefore, to the extent that the public know and care about it, it is likely to be unpopular.

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

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

**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.

**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 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 currently 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.

**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 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.

**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 space 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.

**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?

**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 listing 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.

**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.

**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.

**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.

**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 related 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(2), to the National Assembly for Wales and personally I can perfectly well



understand that. That 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 view 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 it should not be very difficult for all colleagues around the table to agree on the label of either the Welsh legislative 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, one would 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 some colleagues would find that difficult to accept given this is an issue of devolution rather than another constitutional reform.

**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 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.

## 5 Proceedings of the Welsh Affairs Committee, 25 October 2005: Government White Paper – Better Governance for Wales

Welsh Affairs Committee, *Better Governance for Wales*, 25 October 2005 HC 551-ii

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

### Memorandum submitted by Lord Richard QC

#### Examination of Witness

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

**Chairman:** Good morning. This is the Welsh Affairs Committee and welcome to it. 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.

**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 really. Three of us did the chief structural bridge, including a Professor from Cardiff University and myself. We got a vast number of 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 gather 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. I think it was 115 people who gave evidence 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 we 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 it 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, but the whole logic of the situation had been pushing us in that direction and that is really how we had approached it.

**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!

**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 have 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 understand (well, I do understand actually) as to 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, first of all, 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 get been passed by this Parliament. I think that is going to take a bit of swallowing by the House of Lords so 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 it to Parliament and expect Parliament then to pass the Order in Council. The extent to which consultation would take place before I do not know. One thing you know 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, you are 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 me to my rather naive political mind 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.

**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 to look at the position in England.

**David Davies:** You cannot separate the two.

**Lord Richard:** It is a serious point actually.

**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?

**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 was not confined to Newport. We found that 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.

**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.

**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 courts sitting in Cardiff - there is a commercial court sitting there, a court of appeal sitting 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 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 true, nevertheless the development of what has been called the Sewel procedure, which is an interesting device (and what happened here is 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, "Of course, if the Scottish Parliament were to request it, Westminster could legislate that England devolved it and grant their request. Nobody thought that this would happen very often and it is happening quite a great deal) 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 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.

**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 of it. 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.

**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 and 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 have looked in on and that was the general feeling of other members of the Commission that went down and looked at it.

**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 an Assembly with three million people as opposed to one with 50 or 60, 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.

**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. 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.

**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.

**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. I do not think anybody has yet envisaged the idea until this White Paper of using an Order in Council procedure in effect to grant legislative competence to a devolved Assembly because devolved Assemblies did not exist. 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 competence that the Assembly wanted. I do not know. Nor am I quite so sure, frankly, the idea that 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 it to ministers, I still do not see the purpose of doing it via this rather tortuous route of Orders in Council when if you give them the legislative competence you do it in a more open and obvious fashion.

**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 he said in his 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 screaming for 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 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.

**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 areas 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 complexity to Cardiff then, to put it at its lowest, the Westminster administration could act as a brake upon the Assemblies 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 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, 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.

**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 London question any more than I can deal with the West Lothian question.

**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 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.

**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.

**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.

**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.

**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.

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

**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?

**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 with 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?

**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.

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

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

**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?

**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?

**David Davies:** The abolition of the right 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 withdrawn, 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.

**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 thing first.

**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.

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

**Lord Richard: First past the post is what?**

**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.

**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.

**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 my 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 it 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.

**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.

**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.

**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.

**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 them 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.

**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 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.

**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?

**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.

**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?

**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.

**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 and 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 has 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.

**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 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 argument, 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? It is treated in exactly 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 coat.

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

## **Memorandum submitted by the Electoral Commission**

### **Examination of Witnesses**

Witnesses: **Mr Glyn Mathias**, Electoral Commissioner for Wales;

**Ms Kay Jenkins**, Head of Office, Wales, the Electoral Commission, examined.

**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.

**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.

**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 disadvantage 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?

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

**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.

**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.

**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.

**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 NAP 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.

**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.

**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.

**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 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.

**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.

**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.

**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?

**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.

**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.

**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.

**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 issues. So the straightforward answer to your question is this is not something we have considered and not something we have a view on.

**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.

**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.



**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.

**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.

**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 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.

**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.

**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.

**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 not 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.

**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.

**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.

**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.

**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 is there is a disproportionate number of people not returning their votes?

**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.

**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.



**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.

## 6 Proceedings of the Welsh Affairs Committee, 31 October 2005: Government White Paper – Better Governance for Wales

Welsh Affairs Committee, *Better Governance for Wales*, 31 October 2005 HC 551-iii

Oral Evidence Taken before the Welsh Affairs Committee on Monday 31 October 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  
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;

**Mr Paul Silk**, Clerk, National Assembly for Wales, examined.

**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.

**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.



**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.

**Chairman:** Does Mr Silk have anything to add on this?

**Mr Silk:** No, Chairman, I do not think I have anything to add to what the Presiding Officer has said.

**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.

**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.

**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, 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.

**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.

**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.

**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 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.

**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.

**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.

**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!

**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.



**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 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.

**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!

**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!

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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 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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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?

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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 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.

## 7 Proceedings of the Welsh Affairs Committee, 10 November 2005: Government White Paper – Better Governance for Wales

Welsh Affairs Committee, *Better Governance for Wales*, 10 November 2005 HC 551-iv

Oral Evidence Taken before the Welsh Affairs Committee on 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**, Member of the House of Commons, Secretary of State for Wales, Wales office;

**Rt Hon Rhodri Morgan**, Member of the Welsh Assembly, First Minister for Wales, the National Assembly for Wales.

**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.

**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.

**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.

**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.

**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.

**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 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.



**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.

**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."

**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.

**Mr Jones:** Have the people of Wales ever been consulted over the Order in Council procedure?

**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.

**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.

**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.

**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 of 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.

**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 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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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, and an easier accommodation between difficulties of politics, simply because you do not have this roadblock in the way of having to 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 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 .... 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 on, 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.

**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 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.

**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.

**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.

**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.

**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.

**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.

**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 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.

**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.

**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?

**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.

**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.

**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 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.

**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?

**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.

**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 a referendum,



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 "everendum" 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 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 ---

**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.

**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.

**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 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 Lama 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.

**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.

**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.

**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.

**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, 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.

**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.

**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?

**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?

**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.

**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.

**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 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.

**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.

**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.

**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 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.

**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 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.

**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.

**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.

**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 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.

**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.

**Hywel Williams:** That sounds like no evidence to me.

**Mr Hain:** I have just given evidence.

**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.

**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.

**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.

**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.

**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.

**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 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 hear 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.

**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 ---

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.

**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.



**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.

**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 that you break the constituency thing.

**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.

## **8 House of Lords Select Committee on Delegated Powers and Regulatory Reform: Sixth Report and Memorandum from the Department of Health on framework powers in the NHS Redress Bill [HL]**

House of Lords Select Committee on Delegated Powers, *Sixth Report*, 9 November 2005

### **NHS Redress Bill [HL]**

#### **Introduction**

2. This bill provides for the establishment of a scheme to enable the settlement (without court proceedings) of claims (typically negligence claims) arising in connection with the provision of NHS services.

3. The bill is essentially enabling. Clause 1 contains the main power (for England) enabling the Secretary of State to establish a scheme by regulations. Clauses 2, 3, 4, 6, 7, 8, 10 and 11(1) and (2) are about matters for which a scheme may or must provide. Clauses 1(7) and 5 contain associated regulation-making powers and clause 14 a regulation-making power about complaints relating to things done under a scheme. Clause 17 contains a power for the National Assembly for Wales (NAW) (described in the bill as a "framework power"). The Department of Health provided the Committee with a memorandum and a further memorandum explaining the delegated powers in the bill, which are printed at Appendix 1 to this Report.

4. The provisions for England are significantly different to those for Wales and so we deal with them separately.

#### **England - Clause 1**

5. The regulations which establish a new scheme (whether the first or a subsequent scheme) will be subject to affirmative procedure. Other regulations (amending an existing scheme) will be subject to negative procedure. This is explained at paragraph 54 of the original memorandum.

6. Clause 1 defines a number of key factors of the scheme. The bodies or other persons whose liability is covered are:

- the Secretary of State;
- Primary Care Trusts;
- Strategic Health Authorities (if designated by regulations);
- others (such as NHS Trusts or private hospitals) who provide services or have arranged with the Secretary of State, a Primary Care Trust or a Strategic Health Authority to provide services.

The liabilities are defined in subsection (4) and amount to liabilities for clinical negligence on the part of a health care professional. Only NHS hospital services (and not, for example, General Practitioner services) are covered.

7. The only Henry VIII element to the power is at clause 7, which enables the scheme to suspend the limitation period for bringing court proceedings. This is explained at paragraphs 37 and 38 of the original memorandum.



8. The National Health Service in England is already structured in a way which gives the Secretary of State a very large degree of flexibility. For example, section 17 of the National Health Service Act 1977 enables the Secretary of State, by an instrument in writing subject to no parliamentary procedure (or, if she chooses, by regulations), to direct Strategic Health Authorities, Special Health Authorities, Primary Care Trusts and NHS Trusts about the exercise of their functions.

9. The further memorandum helpfully explains that elements of what this bill provides for could be done under existing powers, but in a fragmented way and with no coherent degree of parliamentary scrutiny.

10. The bill is thus largely formalising arrangements some (but not all) of which could be made administratively, and subjecting those arrangements to parliamentary scrutiny and control. **In these circumstances, we are content that the degree of flexibility given to the Secretary of State is appropriate. Accordingly, our view is that the delegations relating to England are appropriate and subject to an appropriate level of scrutiny.**  
**Wales - Clause 17**

11. The bill makes different provision for Wales. Clause 17 enables the NAW by regulations to make provision for the purpose of enabling redress to be provided without recourse to civil proceedings where qualifying liability in tort arises in connection with the provision of NHS services. The regulations may also make provision for any purpose connected with that purpose.

12. The power conferred by clause 17 contains none of the following limitations which are to be found in relation to England in clauses 1 to 16:

- hospital services only (clause 1(2));
- liability in consequence of acts or omissions by health care professionals only (clause 1(4));
- liability of specified bodies only (clause 1(2) and (3)).

13. This of itself does not make the power inappropriately wide. But the power can also be used to override the common law and amend or repeal Acts of Parliament in their application to Wales: subject to a list of exclusions in subsection (4), the regulations may include "any provision that could be made by an Act of Parliament" (following the wording of the European Communities Act 1972). The list of exclusions appears to be based on that in Schedule 2 to the European Communities Act 1972 and includes among the excluded matters:

- increasing or imposing taxation;
- creating a new criminal offence;
- making the legislation retrospective.

14. Even with these limitations, this is an exceptionally wide power. No specific justification for this is given in the memorandum; nor does the memorandum give any examples of Acts which might be overridden in the exercise of the power. The only limitations are the description of the purposes in clause 17(1) and (2) and the list of exclusions in clause 17(4).

15. Paragraph 42 of the Explanatory Notes to the bill and paragraph 64 of the memorandum explain that this is a "framework" power following the principles set out in the White Paper *Better Governance for Wales*. Paragraphs 7 and 8 of the memorandum explain the Government's plans to introduce a bill to give further powers to the NAW. Until

such a bill has been passed by Parliament, however, the Government of Wales Act 1998 sets out the constitutional position, which is that the NAW can make subordinate legislation and can have transferred to it powers which otherwise would be exercisable by Ministers: the NAW cannot make primary legislation. It is against this background that we must advise the House.

**16. We consider that the power in clause 17 is so wide that, if conferred on a Minister of the Crown in relation to England, it would be inappropriate even if subject to affirmative procedure. It is however for the House as a whole to decide whether to delegate powers to the National Assembly for Wales which this Committee would advise were not appropriate to be delegated, for England, to a Minister.**

### **Conclusion**

17. Other than the issue relating to the delegation to the National Assembly for Wales, there is no other aspect of the delegated powers in this bill which we wish to draw to the attention of the House.

## **APPENDIX 1: NHS REDRESS BILL [HL]**

### **Extract from Memorandum by the Department of Health**

#### Introduction

1. The NHS Redress Bill was introduced into the House of Lords on 12 October 2005. This memorandum summarises the main provisions of the bill and gives an overview of the delegated powers. It then identifies each power and describes its purpose; explains why the matter has been left to delegated legislation; and explains the degree of parliamentary control provided for.

#### Main Provisions of the bill

2. The bill contains 19 clauses.
3. The bill provides for the establishment of a scheme to enable the settlement, without the need to commence court proceedings, of certain claims which arise in connection with hospital services provided to patients as part of the health service in England, wherever those services are provided. The bill establishes the parameters of the cases to which such a scheme can apply and gives the Secretary of State powers to set out in regulations the detailed rules that govern the scheme. Those powers include the power to place new duties on any body or person to whose liability the scheme applies and the Commission for Healthcare Audit and Inspection (known as the Healthcare Commission) to consider whether cases or complaints fall within a scheme and, if they do, to take appropriate action.
4. The Explanatory Notes provide detailed information about the background to each of these provisions, their purpose and effect.

#### Territorial Coverage

5. The bill extends only to England and Wales.



6. Clause 17 of the bill gives regulation-making powers to the National Assembly for Wales. It is the first clause containing a framework power to be brought before Parliament following publication of the Better Governance for Wales White Paper. The broad framework power enables the National Assembly to make any provision, subject to Clause 17(4), that could be made by an Act of Parliament with regard to providing a mechanism in regulations for the out-of-court settlement of qualifying claims in tort arising out of services provided as part of the health service in Wales.

7. In addition, as set out in the White Paper, there are current plans to introduce in this session legislation that will enable the Assembly to apply to Parliament for power to modify existing legislation or make new legislation on specific matters or within defined areas of policy in fields where the Assembly currently exercises functions. Parliament would need to specifically authorise the giving of these powers to the Assembly and they would be conferred by Order in Council and be known as "enhanced legislative competence orders". The Assembly would exercise such powers by way of "Measure". It is envisaged that the same legislation will provide for the conversion of framework powers into enhanced legislative competence, so that, post 2007 Assembly elections, the Assembly will be able to legislate by Assembly Measure in that area of competence. The new legislative arrangements (post 2007 Assembly elections) will specifically allow the Assembly to sub-delegate the power to legislate, for example to Welsh Ministers. Therefore it is envisaged that when the framework power is converted the conversion power will be wide enough to ensure that the power of the Assembly to legislate in that area by Measure will include the power to sub-delegate the power to legislate. Therefore, the bar on sub-delegating the power to legislate in clause 17(4)(c) will be overridden when the conversion order is made. Similarly, the bars at 17(4)(d) and (f) are likely to be subject to change when the conversion order is made. The extent to which the Assembly, by way of Measure, may make provision applying in relation to England will be debated when the proposed legislation is introduced. It is proposed to highlight these necessary changes when the clause is being debated so that there is no suggestion that Parliament was misled about the scope of the framework clause.

8. If regulations were to be made under the framework power, i.e. prior to conversion (which is unlikely), they would be subject to the Assembly's subordinate legislation procedures that are more akin to (if not more rigorous than) affirmative rather than the negative resolution parliamentary process. Details of the Assembly's Subordinate Legislation making procedures are set out at paragraphs 55 to 64 below. If provision is made by Assembly Measure (which is more likely) the provisions that are being sought under the proposed legislation are comparable to those for bills of the Scottish Parliament (as set out in section 36 of the Scotland Act 1998). Essentially this means that it is envisaged that there will be provision for a general debate on an Assembly Measure with an opportunity for members to vote on its general principles; provision for members to consider and vote on the details of a Measure and provision for a final stage at which a Measure can be passed or rejected. The powers which the Assembly may then confer, for example on a Welsh Minister, to make subordinate legislation under the Measure, will be exercisable in the way the Assembly chooses, but will be on lines similar to those followed for English Ministers, i.e. either affirmative or negative type resolution procedures. Either way, the process of scrutiny by the Assembly will be thorough.

Rationale and overview of the delegated powers

9. The NHS Redress Bill provides for 5 powers (in clauses 1(1), 1(7), 5(1), 14(1) and 18(1)) to make regulations on the part of the Secretary of State. The National Assembly for Wales is given 1 power to make regulations (in clause 17(1)). The Secretary of State is also given 1 power to commence specified provisions of the bill by order, as is the National Assembly for Wales (in clauses 19(4) and 19(3) respectively). Paragraphs 10 to



16 of this memorandum set out the broad rationale for the conferral of delegated powers. The type of parliamentary scrutiny provided for is considered in paragraphs 17 and 18. Each of the delegated powers is then considered in detail in paragraphs 19 to 67.

10. In considering whether matters should be specified on the face of the bill or left to delegated legislation, the department has weighed the importance of the matter against the need to:

- avoid too much technical detail on the face of primary legislation,
- ensure flexibility in responding to changing circumstances, and a measure of ability to make changes in the light of experience without the need for primary legislation;
- allow detailed administrative arrangements to be set up and kept up to date within the basic structures and principles set out in primary legislation, subject to Parliament's right to challenge the inappropriate use of powers; and
- allow flexible timing to get legislation right, to consult, and change it when circumstances change.

11. The NHS Redress Bill has followed the traditional structure of National Health Service ("NHS") legislation in that while the overall framework is set out in the provisions of the Act, there is less prescription in primary legislation as to the detail of what the Secretary of State or NHS bodies must do or indeed how they must do it. In NHS legislation generally, such detail is left largely to secondary legislation to be made by the Secretary of State, which may be regulations or an instrument in writing (the latter not being subject to parliamentary scrutiny). This ensures that there is the necessary flexibility to adapt to cater for the way that NHS services are organised, avoids unnecessary constraints on the NHS, and limits the technical and administrative detail which appears in primary legislation, where it is appropriate to do so.

12. The NHS is a large and complex organisation, which provides services and performs other functions in a variety of different ways. The existing legislation governing the health service is sufficiently flexible to cope with a variety of different circumstances and the Government does not wish to restrict this flexibility unnecessarily in relation to the NHS Redress Scheme. It would not be possible to deal with every aspect of how the NHS operates, and provide for every eventuality in primary legislation, without producing legislation of great length, complexity and detail. In addition, such detailed provisions would inevitably require frequent changes to deal with changing circumstances.

13. It is with these considerations in mind that the department has approached the issue of delegated legislation in the bill.

14. For Wales, in its Better Governance for Wales White Paper, the Government specifically indicated that it "intends for the future to draft parliamentary bills in a way that gives the Assembly wider and more permissive powers to determine the detail of how provisions should be implemented in Wales". The Assembly is therefore seeking broad framework powers in this bill to enable it to specify itself the detail of the arrangements for NHS redress to be applied to Wales.

15. The reason for seeking framework powers now, rather than waiting to secure Assembly measure-making powers at a later date is that it gives a clear signal to Parliament of the Assembly's intentions in this regard. Since the publication of the Chief Medical Officer's recommendations for reforming clinical negligence (Making Amends, June 2003) the Assembly has liaised closely with the Department of Health on the development of its scheme. A key principle behind the scheme is that the NHS will be



supported to deliver a more proactive response when things go wrong, rather than placing the onus on the patient to pursue redress themselves. It will also facilitate learning across complaints, clinical negligence and redress. The Assembly fully endorses these principles and by seeking framework powers now, alongside England, is making clear its intention to ensure that arrangements in Wales are set up and that Welsh patients are not disadvantaged. Also if the Assembly were to wait until the legislation proposed in the White Paper is enacted and commenced it would be mid 2007 before an application for an enhanced legislative competence order could be made.

16. Taking the route of framework powers in this bill also means that the Assembly has been able to work closely from the outset with the Department of Health on cross-border arrangements.

#### Type of Parliamentary scrutiny

17. In considering what type of parliamentary procedure would be appropriate for each power, the department has sought to follow established practice. In the context of the NHS, affirmative resolution procedures are thought to be appropriate only in exceptional circumstances. Clause 16 therefore provides that regulations made under the powers in the bill are subject to the affirmative procedure whenever a scheme under the bill is established. This means that for the first regulations establishing a scheme, and for any subsequent regulations that establish an entirely new scheme, in order to allow full parliamentary scrutiny of the details of the new scheme, the affirmative procedure will apply. Where the scheme is merely amended in certain respects, regulations making such amendments would be subject to the negative procedure.

18. Powers to be exercised by the National Assembly for Wales will, in accordance with the usual practice, not be subject to any parliamentary procedure. Instead, the powers will be subject to the Assembly's own scrutiny procedures, as described in paragraphs 55-64 below.

October 2005